

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL CASE NO. 4 OF 2019

(From the decision of the District Land and Housing Tribunal of Mtwara District at Mtwara in Land Appeal No. 217 of 2019 and Original Ward Tribunal of Mcholi II Ward Application No. 18 of 2018.)

HAMZURUNI SWALEHE.....1ST APPELLANT

ADAM KHALID.....2ND APPELLANT

VERSUS

AMINA ALLY.....RESPONDENT

JUDGMENT

14 & 24 June, 2020

DYANSOBERA, J.:

This is a second appeal. The appellants Hamzuruni Swalehe and Adamu Khalid, hereinafter to be referred to as the 1st and 2nd appellants, in that order, are appealing against the judgment of the District Land and Housing Tribunal of Mtwara District at Mtwara in Land Appeal No. 217 of 2019. The respondent is Amina Ally.

The brief background of the matter is that the 1st appellant initiated a suit at Mcholi II Tribunal claiming that the respondent and Subira Namdanda “wananifanyia vurugu shambani kwangu ambalo niko kwa niaba ya Adam Khalid, the present 2nd respondent translated in English that “they are causing violence against me in my farm of which I am taking care on behalf of Adam Khalid”. According to the 1st appellant, there was distribution of pieces of land. The suit land which belongs to Adam Khalid was left in his hands for upkeep and was, therefore, using the land as a mere caretaker. The land is situated at Chikwedu valley or water course.

On her part, Subira Nandanda told the Ward Tribunal that she was not in agreement with the distribution and did not recognise the 1st appellant but knew the 2nd appellant who is a child in the clan. According to her, the owner, that is the respondent has been in possession of the suit land from 1992, having obtained the farm 26 years ago.

The evidence of the respondent established that their father died in 1992. All farms were then registered. At Chikwedu there were two farms but the third farm was not in the share (walikataza akina shangazi). One of the farms was distributed between her and her foster mother one Abiba Rashid. This farm had 25 cashewnuts. She (respondent) got 18 cashewnuts while Abiba Rashid got 7 cashewnuts.

When it came to the turn of the 2nd appellant (Adam Khalid), the record of the trial Tribunal indicates the following:-

It is on record also that Mchicha testified.

In its judgment, the trial Ward Tribunal indicated that the complaint was Adam Khalid while the person complained against was Amina Ally. The Tribunal found that the cause of the dispute was lack of meeting and discussion after the distribution. It also found that the distribution was just and legal. It held that Adam had the right to claim according to the distribution done on 27th June, 2018 and the evidence given by Asha Hassan Nampungu (aunt). It further held that the evidence proved that the farm belonged to him-Adam Khalid. He was ordered to pay back to Amina Ally Tshs. 600,000/=.

The respondent was aggrieved by the trial Tribunal's decision and filed her appeal to the District Land and Housing Tribunal on grounds that the respondents had no *locus standi* to prosecute the case before the Ward Tribunal, failure to consider that the respondent had been owning the farm for more than twelve years since 1992 peacefully and without interference and that the entire decision of the Ward Tribunal was a nullity for containing the different parties in its proceedings and judgment.

The Hon. Chairman heard the appeal and found for the respondent holding that she had established possession by the doctrine of adverse possession. The appellants felt that the decision flew into their faces and have appealed to this court on the following grounds of appeal.

1. That the trial Tribunal erred both in law and fact by failing to determine the really owner of the suit property because Amina Ally as no locus standi of late Ally Hassan
2. That the trial Tribunal erred both in law and fact by failure consider the evidences adduced by the appellants
3. That the trial Tribunal erred in law and in fact by rejecting one of the witness (Asha Hassan) who gave me the suit property

4. That by the trial District Land and Housing Tribunal erred both in law and fact when it failed to analyse properly the evidence on record as a result reached at a wrong decision.
5. That by the Trial District Land and Housing Tribunal erred both in law and fact to determine Amina Ally because Amina Ally determine Adam Khalid their really owner of the suit property.

On 8th June, 2020, the appeal was called for hearing. The two appellants were present in person whereas the respondent was represented by Ms Anisa Mziray, learned advocate.

Arguing in support of the appeal, the 1st appellant submitted that the dispute owes its origin in Land Dispute No. 217 of 2019. Before Mcholi II Ward Tribunal which was a dispute between the appellants and their sister Amina Ally. He said that farm is a family property and Asha Hassan is the 1st appellant's aunt. He pointed out that section 33 of the Probate and Administration of Estates Act is clear on what should be done on the deceased's estate where there is no will. He admitted that no letters of administration were sought and obtained. It was his further argument that their aunt allotted the farm to them and each had to use what he was given there being four families, that is of Hassan bin Hassan, Khalid Hassan, Asha Hassan and Ally Hassan.

As to the first ground, the 1st appellant argued that there was no evidence to prove that Amina Ally had lived there for more than 12 years. In the second ground of appeal, the 1st appellant maintained that the evidence of the appellant was not considered as the evidence of his aunt Asha Ally was cogent. He stressed that the decision reached by the Tribunal was wrong. According to the 2nd appellant, no probate case which was opened as the distribution was done customarily.

Responding, Ms Anisa Mziray joined hands with the lower courts' decisions which recognized the respondent as owner through the doctrine of adverse possession. She elaborated that the records of the lower Tribunal indicate that the respondent has been serving the disputed land from 1992, there were no any interruptions or complaint, and was owning it peacefully and uninterruptedly until 2018 when a land dispute on trespass was instituted. She insisted that the respondent has been using it for more than sixteen years and that under the 1st schedule item 22 of the Law of Limitation Act, Cap 89 which provides for the time limit is 12 years, the limitation period in this case period had elapsed and avouched that the ownership was established under S. 39 of the Law of Limitation Act and contended that the doctrine of adverse possession was applicable. Learned counsel relied on the case of **Nassoro Uhadi v. Mussa Karunge** [1982]

TLR page 302 in which the question of adverse was detailed and the appellant in that case was declared as owner. A further reference was made to the case of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 others**, Civil Appeal No. 193 of 2016 (unreported) on the factors entitling adverse possession. Learned counsel contended that these principles apply in the present case.

As to the complainant that he was denied opportunity to call witnesses learned counsel reminded the appellant that the at an appeal stage no witnesses are summoned to give evidence. She maintained that the respondent did not admit the suit land to belong to another person and prayed this appeal to be dismissed and the decisions of the lower Tribunals to be endorsed.

In a brief rejoinder, the 1st appellant reiterated that Amina Ally is his sister and the farms belonged to their grandfather and that no letters of administration were sought and obtained and there was, therefore, no distribution. He repeated that the farms were under their aunt and her evidence was clear on the ownership and the resolution was only to ask for letters of administration. It was the 1st appellant's further argument that the farm belongs to six people and sounded an advice that if at all the

respondent thinks she has any entitlement, she should apply for grant of letters of administration. The 1st appellant admitted that he could not tell the time the respondent had stayed in the land as, according to him, *aliomba kujishikiza* from their aunt and it was a long time ago.

Having considered the lower Tribunals' records, the grounds of appeal and the submissions, the pertinent issue for determination is whether there was a competent suit at the Mcholi II Ward Tribunal worthy consideration by both the District Land and Housing Tribunal and this court.

There is no dispute that the matter was initiated at the Mcholi Ward Tribunal by Hamzuruni Swalehe, the 1st appellant herein against Amina Ally (the respondent) and Subira Nandanda. The cause of action was the violence the 1st respondent and Subira Nandanda was, allegedly, causing to the 1st appellant in his piece of land. The 1st appellant's complaint read:

"Ninawalalamika Amina Ally pamoja na Subira Mandanda wananifanyia vurugu shambani kwangu"

In its undated judgment, the Ward Tribunal decreed in part as follows:

"Baraza la Kata Mcholi II lilikaa kuzikiliza mgogoro huu kutoka pande zote mbili, ni mgogoro wa ardhi dhidi ya Adam Khalid (Mdai) Amina Ally (Mdaiwa).....Baraza la Kata Mcholi II linammilikisha Ndugu Adam Khalidy kuwa mali yake halari. Ndugu Mdai na Mdaiwa endapo hamtalidhia na maamuzi ya Hukumu hii, mnaweza kukata Rufaa ndani ya siku therathini 30.

However, the record of the lower Tribunal showed that the Land Dispute No. 18 of 2018 was between the present 1st appellant and the respondent and Subira Mandanda as follows:

SHAURI NA. 18 LA MADAI YA ARDHI DHIDI YA

HAMZURUNI SWALEHE.....MDAI

NA

AMINA ALLY, SUBIRA MANDANDA

The said Adamu Kalidy who was adjudged the owner of the disputed land did not go to the Ward Tribunal to claim the land. He was just a witness; but even then, he was claiming not the land but something else as

the record clearly shows. According to the record, this is what he is recorded to have said:

JINA: ADAMU KHARIDI

KABILA. MMKONDE

DINI: MUISLAMU

KAZI: MKULIMA

MAKAO: MITUMBATI:

UMRI:-

MAELEZO YA MDAI ND. ADAM KHARID I NAMPUNGU.

NIA YANGU NDANI YA MWAKA KUNA SWALI LA KUMWULIZA DADA.

Mimi naitwa ADAMU KHARIDI NAPUNGU kilichonileta hapa ni kumwambia dada yangu kwa kuwa mgawo tumegawa kama familia sihitaji kuchukua vipande vya familia ya Mzee Kharidi yenye watoto kama ifuatavyo:

- 1. Zuwena Kharidi*
- 2. Salima Kharidi*
- 3. Hassani Kharidi*

4. *Zainabu Kharidi*

5. *Adamu Kharidi*

6. *Mohamedi Kharidi*

7. *Rehema Kharidi*

Hawa wote tulipewa mikoroshho kii mtoto 37. Huo ndio mgao wa watoto wote mbali ya mwenyekiti wa kijiji pamoja na katibu. Swali kwa dada, Eti dada nikikuachia 'kuokota mwaka huu je? Mwakani utaniachia mwenyewe? Jibu: ndiyo nitakuachia kwani nafahamu ya kuwa hii mikoroshho ni mali yako tu.

Maswaili ya mdaiwa kwa mdai:

Swaili: kaka kwa nini unanikataza kuokota koroshho mwaka huu?

Jibu:kila mtoto amepata mikoroshho yake."

Before the District Land and Housing Tribunal in Land Appeal No.217 of 2018, Amina Ally, the present respondent was the appellant whereas Hamzuruni Swalehe, the present 1st appellant was the 1st respondent while the 2nd appellant before this court one Adamu Khalidi was the 2nd respondent.

At that first appellate court (the District Land and Housing Tribunal), the respondent who featured as the appellant had three complaints, namely , the respondents had to no *lucus stand* to prosecute the case before the Ward Tribunal, failure on part of the Ward Tribunal to consider that the respondent has owning farm for more than 12 years since 1992 peacefully without interference and that the entire decision of Ward Tribunal was a nullity for entertaining different parties in its proceedings and judgment.

In his judgment, the learned Chairman of the first appellate Tribunal decided the appeal on the second ground only holding that the respondent, then appellant, legally possession the farm by the doctrine of adverse possession.

With respect, the District Land and Housing Tribunal was in error. The competence of the parties and the whole judgment of the Ward Tribunal had to be determined first before deciding whether or not the doctrine of adverse possession was applicable in this case. My reasoning is not without substance.

In the first place, the person who was decreed as the rightful owner of the suit premises one Adam Khalidy had not instituted a suit before the

said Ward Tribunal. As said before, the suit was between Hamzuruni Swalehe against Amina Ally and Subira Mandanda. The respondent's complaint at the first appellate court in her 3rd ground of appeal that the entire decision of the Ward Tribunal at Mcholi II was a nullity for containing different parties to the suit in its proceedings and judgment had merit but was, unfortunately, not canvassed.

Second, there was no complaint properly filed before the Mcholi II Ward Tribunal. The law is clear on how the proceedings before the Ward Tribunal are instituted. Such procedure is provided for under section of the Ward Tribunals Act [Cap. 2016 R.E. 2002]. It is provided under section 11(1) (2) (3) (4) as follows:

11. (1) Proceedings may be instituted by making of a complaint to the secretary of a Tribunal, the Secretary of an appropriate authority, the Chairman of a Village Council or a ten-cell leader.

(2) Any person who reasonably believes that any person has committed an offence may make a complaint about the matter to any of the persons specified in subsection (1).

(3) A complaint may be made orally or in writing, but if made orally shall be reduced in writing by the person to whom it is made and, in either case, shall be signed by the complainant and the person to whom it is made.

(4) When a complaint is made to any person, that person shall, if he is not the Secretary of the Tribunal, cause it to be submitted to the Secretary of the Tribunal who shall enter it in the records of the Tribunal and arrange for it to be heard and determined by the Tribunal in accordance with the procedure of the Tribunal for the hearing and determination of disputes submitted to it.

Section 11 of the Ward Tribunals Act should be read together with section 17 of the Land Disputes Courts Act [Cap. 216 R.E.2002].

As the law stands, the complaint must be in a written form and signed by the complainant and the person to whom it is made. That is the gist of sub-section (3) of section 11 of the Act.

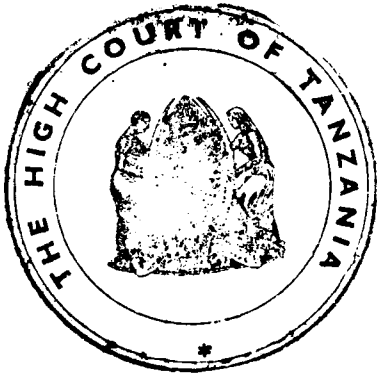
In the case under consideration, there was no written complaint signed by either the 1st appellant, 2nd appellant or both and also signed by the person to whom it was made. Indeed, no complaint was ever

registered before the Ward Tribunal. This means that there was no suit properly before the Ward Tribunal. This explains why the person who was decreed to be entitled to the suit property did not make any complaint nor did he feature as the complainant at the Ward Tribunal. The first appellate court, though invited to decide on that issue by the respondent, then appellant, closed its eyes. This court cannot brook such irregularity pass by. It has to intervene. Section 16 (1) of the Ward Tribunals Act enjoin the Ward Tribunal to seek to do justice between the parties in all their proceedings. This was not the case and I am satisfied that there has been an error material to the merits of the case involving injustice.

Invoking the provisions of paragraph (b) of sub-section (1) of section 43 of the Land Disputes Courts Act [Cap. 216 R.E.2002], I make an order revising the proceedings of both the District Land and Housing Tribunal for Mtwara in Land Appeal No. 217 of 2019 and the Mcholi II Ward Tribunal in Land Dispute No. 18 of 2018 by nullifying all proceedings, judgments and orders subsequent thereto.

I order each party to bear its own costs.

Order accordingly.



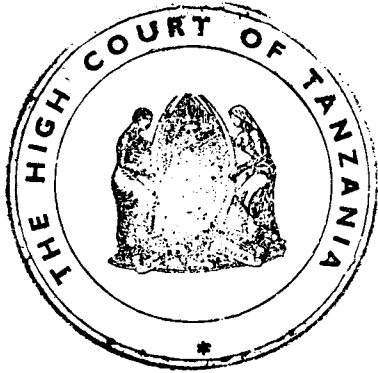
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W.P. Dyansobera

JUDGE

24.6.2020

This judgment is delivered under my hand and the seal of this Court on this 24th day of June, 2020 in the presence of Ms Anisa Mziray, learned counsel for the respondent but in the absence of the appellant.



A handwritten signature in black ink, appearing to read "W.P. Dyansobera".

W.P. Dyansobera

JUDGE