

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPEAL NO. 3 OF 2022

(C/F District Land and Housing Tribunal Arusha Appeal No. 6 of 2021, Originating from Sombetini Ward Tribunal Application No. 5 of 2020)

HASSAN MUHAMEDI KONDO APPELLANT

VERSUS

**AISHA PATRICK MBWANA
(Legal Administrator of the estate of
the late FATUMA MTAGWA HUSSEIN) RESPONDENT**

JUDGMENT

16/05/2022 & 25/07/2022

KAMUZORA, J.

Fatuma Mtagwa Hussein, sued the Appellant Hassan Muhammedi Kondo who was her son in law before Sombetini Ward Tribunal in Application No. 5/2020 claiming for the house. It was alleged that, the Appellant married the daughter of Fatuma and Fatuma gave them the house to live in. That, upon the death of the Appellant's wife, the Appellant decided to register the said house in his own name. The trial Tribunal after hearing the evidence from both parties made decision in favour of Fatuma Mtagwa Hussein and ordered the Appellant to give a

vacant possession to the said house. The claimant Fatuma demised and in the subsequent proceedings one Aisha Patrick Mbwana was impleaded as her legal representative/administratrix of the estate.

Being aggrieved by the decision of the Ward Tribunal the Appellant preferred an appeal to the District Land and Housing Tribunal (DLHT) at Arusha in Appeal No. 6 of 2021. The DLHT did not find merit in the appeal and dismissed it thus leading to the current appeal based on the following grounds: -

- 1) That, the 1st Appellate Tribunal Misdirected itself and failed to hold that the trial Tribunal's proceedings are tainted with gross incurable procedural irregularities which rendered the whole decision thereof null and void.*
- 2) That, the 1st Appellate Tribunal Misdirected itself and failed to hold that the trial Tribunal erred in law and in fact when entertained the Land Application No. 5 of 2020 while it has no jurisdiction to entertain the said case.*
- 3) That, the 1st Appellate Tribunal misdirected itself and failed to hold that the trial Tribunal grossly erred in law and fact in failing to properly evaluate the evidence adduced during the trial and such failure uphold the erroneous decision of the trial Tribunal.*

When the matter was scheduled for hearing, both parties appeared in person with no legal representation and they opted to argued the appeal by way of written submissions.

In his written submission in support of the first ground that the trial Tribunal's proceedings are tainted with gross incurable procedural irregularities, the Appellant submitted that, the Ward Tribunal to which the present appeal emanated is un-existed Tribunal under sections 3 of the Ward Tribunal Act Cap 206 R.E 2002 and section 10(1) & (2) of the Land Disputes Courts Act, (Cap 216 R.E 2002). He argued that, the so called "Baraza la Usuluhishi Kata ya Sombetini" is not a Tribunal responsible for land disputes as stipulated under the law hence, its decision is null and void.

Submitting for the 2nd ground of appeal based on jurisdiction the Appellant argued that, jurisdiction is a creature of law. That, the dispute was decided on 24/12/2020 where at that time the governing law was the Land Disputes Courts Act, Cap 216 R.E 2002 before the enactment of the Written Laws Amendments) (No. 3) Act, 2021. That, section 15 of Cap 216 R.E 2002 limits the jurisdiction of the Ward Tribunal to the disputed land or property valued at three Million Shillings. That, under page 12 of the typed proceedings the Tribunal noted that the disputes land was erected residential house made by sand bricks comprised of three bedrooms, living room, kitchen and master bedroom thus as for matter of logic and reasoning, the trial Tribunal and the appellate

Tribunal ought to know that they were acting in a matter which was not into their domain. He was of the view that, the value of the subject matter exceeds three million Tanzanian Shillings hence the Ward Tribunal lacked jurisdiction to entertain the same.

On the third ground the Appellant submitted that, the Respondent claimed ownership of the suit land alleging that she bought it on 2001 and left it to the Appellant and later on year 2020 she claimed it back because her daughter passed away. That, the Respondent tried to convince the Ward Tribunal and tendered the sales agreement of the plot instead of the suit house to show that she had a claim after 19 years. That, reading page 21 to 24 of the typed proceedings the Respondent admitted that the Appellant stayed at the suit land for about 15 years. He argued that, the limitation within which a person can claim right over the land is twelve years.

The Appellant further submitted that, the ownership of land which is subject of dispute cannot only be established through sale agreement such as it has been a long-established principle of law that long possession of land can also prove ownership over land. He cemented his argument with the case of **Munyaga Wagogyo Vs. Muling Kataman** [1968] HCD 7, **Selemani Daud Vs. Lata Alli** [1968] HCD 23. The

Appellant thus prays for the appeal to be allowed and the proceedings and decision of the lower Tribunal to be quashed and set aside with costs.

The Respondent started by challenging the competency of the appeal that the appeal was brought by way of a Memorandum of Appeal as opposed to a Petition of Appeal contrary to section 38(2) of the Courts (Land Dispute Settlements) Act, 2002. She urged this court to consider that the appeal is incurably defective for failure to comply with the mandatory requirement hence the same be struck out.

In responding to the 1st ground of appeal, the Respondent argued that, what was held by the appellate Tribunal is totally correct and no incurable procedural irregularities were tainted to render the whole decision of the trial Tribunal null and void. She explained that, such argument was ignored by the first appellate Tribunal for it was not raised as ground of appeal but only argued during hearing of the appeal. She supported her argument with the case of **Remigious Muganga vs. Barrick Bulyanhulu Gold Mine**, Civil Appeal No 47 of 2017 CAT (Unreported).

The Respondent added that, the Appellant did not question the name of the Tribunal or its existence during the hearing before the Ward

Tribunal the proceedings of the Ward Tribunal. She was of the view that even if there was error in that name, the same did not lead to injustice to the parties and such error can be cured under section 45 Of the Land Disputes Courts Act, Cap 216 R.E. 2019. She added that, even the first appellate Tribunal discovered that there was typing errors by writing Baraza la Usuluhishi, Kata ya Sombetini as even the stamp that was inserted indicate the name Baraza la Kata ya Sombetini. The Respondent insisted that, Sombetini Ward is in existence and it has the same jurisdiction over land matters as stipulated under section 10 (1) of the Courts (Land Disputes Settlements) Act, 2002. She was of the view that, the proceedings at Sombetini Ward Tribunal were proper and prayed for this court to dismiss the first ground of appeal.

On the 2nd ground of appeal, the Respondent submitted that, no valuation report that was produced by the Appellant at the trial Tribunal to establish the value of the disputed property thus the same cannot be brought on appeal. She insisted that, the trial Tribunal had jurisdiction to entertain the matter between the parties as per section 13 (1) of the Courts (Land Dispute Settlements) Act 2002. She pointed out that, such a ground was dealt with by the first appellate Tribunal which gave the reasoning that the value of the property was not proved. She was of the

view that, the court cannot base on assumed facts over the costs of the disputed property.

On the 3rd ground, the Respondent submitted that, the Appellant alleges to have stayed in the disputed land for about 15 years and further alleges that he had been occupying the suit land for more than 20 years. She submitted that, evidence by the Appellant is contradictory. That, it is evident that the Appellant was trying to grab the Respondent's suit property and it was the reasons that the Appellant failed to prove how he obtained the said land and even does not seem to understand well the suit land. That, the act of occupying someone else's land for 15 years due to problems does not make a person to be the owner unless there are agreement to do so. She explained that, the Appellant was welcomed by the mother-in-law to stay at the suit property after he married her daughter. That, the dispute arose after the Appellant was forced to leave from the disputed property as he wanted to unlawful register himself as the new owner of the suit property. She insisted that, as the dispute arose in the year 2019 when the Appellant was forced to leave the disputed property, the same was within time frame.

Regarding the cases of **Muyanga Wagogyo** (supra) and **Selemani Daudi** (supra) cited by the Appellant, the Respondent

submitted that, the same are irrelevant to the matter at hand as the Appellant did not occupy the suit land but rather, he just stayed there to keep himself due to his life status. She insisted that, the two lower trial Tribunals were correct to conclude that the suit was filed within time frame.

The Respondent submitted further that, the trial Tribunal considered the evidence adduced by the witnesses of both parties in reaching its decision. That, the Appellant failed to prove its case and failed to convince the Tribunal that he is the lawful owner of the suit land as he had no sale or certificate of title to prove that he is the owner as opposed to the Respondent who had proof including documentation and witnesses. In support of the submission, she cited the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 page 114. The Respondent prays therefore that, the appeal be dismissed with costs for being baseless, weightless and wastage of time.

In a brief rejoinder the Appellant responded to the argument that a memorandum of appeal was filed instead of a petition of appeal and submitted that, both are terminologies with similar meaning and its common intention is to appeal against the decision of the lower court. He supported his submission with the case of **African Banking**

Corporation Vs. William Douglas Hume Claxton & 3 others, HC at Dar es Salaam, Commercial Case No 61/2010, **Kiriisa Vs. Attorney General and another** (1990-1994) EA 258.

The Appellant added that, the issue of court jurisdiction can be raised at any stage whenever appropriate. He referred the case of **Ally Ponda Vs. Kherry Kissinger Hassan** (1983) TLR 223. That, as the trial Tribunal visited the suit land and saw a building erected in it ought to have considered that the subject matter exceeds its jurisdiction of three million. Reference was made to the case of **Nizar M. H Ladak Vs. Gulama Fazal Janmohamed** (1980) TLR 29. The Appellant reiterated his prayer that, the appeal be allowed.

I have considered the records of the case and the submissions by the parties. Before indulging to the grounds of appeal, I will first address the issue raised by the Respondent regarding the competency of this appeal. It is the contention by the Respondent that the Appellant ought to have filed a petition of appeal as opposed to a memorandum of appeal. The law governing appeals emanating from the Ward Tribunal is Section 38 of the The Land Disputes Courts Act [CAP. 216 R.E. 2019] which states that: -

*"38. -(1) Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise **of its appellate** or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court:*

Provided that, the High Court may for good and sufficient cause extend the time for filing an appeal either before or after such period of sixty days has expired.

*(2) Every appeal to the High Court shall be by way of **petition** and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought." Emphasis mine.*

I therefore agree with the Respondent that the law requires a petition of appeal to be filed and not a memorandum of appeal. It is in record that the Appellant filed before this court a memorandum of appeal as opposed to a petition of appeal stipulated under the law. The requirement to file a petition of appeal is couched in mandatory terms but I still find that it does not go to the merit of the appeal hence can be cured under overriding objective principle. I say so because both memorandum of appeal and petition of appeal contains grounds of appeal and the intended purpose is the same to raise points upon which the aggrieved party need the court to determine. In other words, the two documents essentially aim at serving the objective of challenging the decision of the lower court to the superior court as it was rightly submitted by the Appellant. The Respondent has not submitted on how

the citing of the name did cause injustice to her. Hence, I find that the defect is not prejudicial to the Respondent and it does not go to the root of the case.

Now turning to the grounds of appeal, the Appellant argued on the first ground that the trial Tribunal was un-existing Tribunal as the title of the Tribunal was written "Baraza la Usuluhishi Kata ya Sombetini" while the proper Tribunal to entertain the matter was the Ward Tribunal. This ground that it will not detain me much as the original records show the correct title of the Ward Tribunal that tried the matter. It is written,

*"JAMUHURI YA MUUNGANO WA TANZANIA
BARAZA LA ARDHI NA NYUMBA KATA YA SOMBETINI
ARUSHA-TANZANIA
S.L.P 3013"*

The above title reveals correct citation of the Ward Tribunal that determined the dispute at hand. The typed copy contains errors as it is written BARAZA LA USULUHISHI. That being the case, such typo error does not vitiate the proceedings I therefore find no merit I the first ground of appeal.

Regarding the ground 2 of appeal based on pecuniary jurisdiction of the trial Tribunal, it is in record that, at the trial Tribunal neither of the

parties raised the issue of jurisdiction of the Tribunal. The same was raised on appeal before the first appellate Tribunal and it was well adjudicated. While I agree with the Appellant submission that matter of jurisdiction can be raised at any stage and even on appeal, I do not agree with the contention that the trial Tribunal lacked jurisdiction to entertain the matter at hand. In this matter I shake hands with the first appellate Tribunal that the claim that the Ward Tribunal lacked jurisdiction was unsupported. It is true that on 20/03/2020 members of the trial Tribunal and parties visited the land in dispute but the value of the land was not an issue hence it was not discussed. The Appellant brought the same at the Appellant stage but did not even try to raise the reasonable value of the said property. He only insisted that, as the land contained a block house, the value was more than three million thus beyond the jurisdiction of the Ward Tribunal. That was an assumption which this court cannot rely upon to make a conclusion that the trial Tribunal lacked jurisdiction to entertain the matter. I therefore find no merit in the second ground of appeal.

Regarding the third ground, the issue for consideration is whether there was proper evaluation of evidence at the trial Tribunal. It is the claim by the Appellant that the trial Tribunal failed to properly analyse

the evidence and consider that the Appellant stayed in the suit land for 15 years uninterrupted hence a proof of ownership of land.

Starting with the analysis of evidence, I have gone through the trial court proceedings and the judgement there to. It is clear that the trial Tribunal analysed the evidence by the parties and made a clear consideration of the same before reaching to a conclusion in favour of the plaintiff (the Respondent herein). It is in record that after the trial Tribunal had analyse the evidence, it reasoned that the complainant proved her case as she was able to tender the purchase document and the witness who witness the purchase was able to verify such fact as opposed to the defendant (the Appellant herein) whose evidence was not supported by any documentary evidence. The trial Tribunal also pointed out that the Appellant's witnesses were unable to prove that the Appellant purchased the said land as they never witnessed anything. The trial Tribunal also considered the Appellant defence that the purchase document was missing and there was loss report for the same. It however disagreed with such evidence on account that the Appellant alleged to know of the missing document since 2014 but did nothing until 2020 after the case was filed in court is when the report was made to the police station. The trial Tribunal then made a finding that the

evidence by the complainant proved the case that the complainant was the rightful owner of the disputed land. From the above analysis, it is my settled view that, there was proper analysis of the evidence before the trial Tribunal.

On the argument that the trial Tribunal did not consider that the Appellant stayed in the suit property for more than 12 years, it is my considered view that, the Appellant claim to acquire title over the disputed property is under the principle of adverse possession. He contended that, as he had been in possession of the said property for more than 12 years stipulated under the law, he is rightful owner of the same.

Adverse possession was well explained by the Court of Appeal of Tanzania in different decisions. In the case of **Bhoke Kitan'gita Vs. Makuru Mahembe**, Civil Appeal No. 222 of 2017, CAT at Mwanza (Unreported) cited its decision in the case of **Registered Trustees of Holy Spirit Sisters Tanzania Vs. January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016, CAT (unreported) which cited with approval a Kenyan case of **Mbira v. Gachuhui** [2002] E.A. 137 (HCK) which relied on the cases of **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All ER 460. It was held that: -

"On the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following: -

- (a) That, there had been absence of possession by the true owner through abandonment;*
- (b) That, the adverse possessor had been in actual possession of the piece of land;*
- (c) That, the adverse possessor had no colour of right to be there other than his entry and occupation;*
- (d) That, the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
- (e) That, there was a sufficient animus to dispossess and an animo possidendi;*
- (f) That, the statutory period, in this case twelve 12 years, had elapsed;*
- (g) That, there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
- (h) That, the nature of the property was such that in the light of the foregoing/ adverse possession would result."*

Adopting the conditions set in the above decisions, it is clear that the principle will stand and a person will acquire an adverse possession of the land only if that person occupies someone's land without permission and the property owner does not exercise his right to recover it within the time prescribed by the law. Lack of permission of the owner

and possession period are among crucial facts to be proved for a person claiming adverse possession of the land.

The circumstance of this case does not support the claim of adverse possession. I say so because the Appellant has failed to cumulatively prove the requirement listed above. While there is evidence proving that the house in dispute belongs to the deceased Fatuma Mtagwa Hussein, there is no evidence showing that the owner abandoned the disputed house. It is in record that the deceased Fatuma proved that she purchased the land from Meori Merita and she tendered the purchase agreement as exhibit before the trial Tribunal. She also proved that she allowed the Appellant to stay in her house as he was married to her daughter. The fact that there was permission for the Appellant to live in that house shows that there is no proof that the alleged adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which she intended to use it. In that regard, the circumstances of this case do not meet the listed condition for the doctrine of adverse possession to stand. I therefore find no merit in the third ground of appeal.

In the final analysis, the appeal is devoid of merit and its hereby dismissed with costs.

DATED at **ARUSHA** this 25th day of July, 2022.



A handwritten signature in black ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA

JUDGE

