IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND APPEAL NO. 23 OF 2020

(*Arising from the District Land and Housing Tribunal for Kagera at Bukoba in land application No. 152/2014*)

ALOYSIUS BENEDICTO RUTAIHWA.....APPELLANT

VERSUS

EMMANUEL BAKUNDUKIZE KENDURUMO.....1ST RESPONDENT
MUGANYIZI EMMANUEL.....2ND RESPONDENT
STANSILAUS MUTAHYABARWA.....3RD RESPONDENT
HASSAN IBRAHIM KAMILI.....4TH RESPONDENT
JUSTINIAN KINYAMWEZI.....5TH RESPONDENT
WINSTON CORNELIUS.....6TH RESPONDENT
HAMIDU RWEZAULA.....7TH RESPONDENT
TRYPHON RWEZAULA.....8TH RESPONDENT
EVODIUS BONIFACE.....9TH RESPONDENT
HILDEFONSI REVELIAN.....10TH RESPONDENT

JUDGMENT

14th July & 27th August 2021

Kilekamajenga, J.

In this case, the appellant as an executor of the will of the late Benedicto Joseph Rutaihwa, sued the respondents in 2014 at the District Land and Housing Tribunat at Bukoba seeking an order to declare the respondents as trespassers. It is alleged that, the late Benedictor Joseph Rutaihwa died in 1978 and the appellant was appointed the administrator of estate in 2014. The appellant alleged that the respondents, at different times have trespassed and occupied portions of the deceased's land. During the execution of the will of the deceased,

the appellant discovered encroachment into the deceased's land. He further alleged that the 1st respondent who was given part of the land to cultivate seasonal crops later sold portions of the land to the 5th respondents who also sold it to the 3rd respondent. In 1981, the 1st respondent sold another piece of land to the 6th respondent. In 1992, the 1st respondent sold another piece of land to the 4th respondent. The appellant further alleged that, the other respondents unlawfully encroached into the land.

After the trial, the District Land and Housing Tribunal declared the respondents as mere trespassers though ordered compensation to be done after before the respondent could vacate from the suit land. The appellant was not happy with the decision of the trial tribunal hence this appeal. He moved this Court with a memorandum of appeal containing four grounds of appeal coached thus:

1. *That the Hon. Chairman grossly erred in law and fact for ordering compensation of the respondents for their buildings after a valuation from a qualified valuer while the respondents have been declared as mere trespassers into the suit land;*
2. *That, the Hon. Chairman grossly erred in law and fact for the failure to order demolition and removal at their own costs and expenses of the houses illegally built by the respondents on the suit land being mere trespassers;*
3. *That, the Hon. Chairman grossly erred in law and fact for declaring that the respondents as mere trespassers without considering the appellant's prayer for payment of mesne profits which would have accrued to the*

applicant from the use of the suit land but for the illegal occupation of the same; and

4. *That, the Hon. Chairman grossly erred in law and facts for allowing the respondents to harvest their plants and their fully grown trees without specifying a time limit within which to do so.*

When the case came for hearing, the appellant was present and enjoyed the legal services of the learned advocate, Mr. Bernard Mbakileki. The 3rd, 4th and 5th were absent but represented by the learned advocate, Mr. Abel Rugambwa. The 6th, 8th, and 10th respondents were present in person and without representation. The other respondents were absent. The court proceeded for hearing because even the respondents who were absent were aware of this case.

During the oral submission, Mr. Mbakileki argued that it was wrong for the trial tribunal to order compensation to the respondents because they were declared trespassers. A trespasser has not right to compensation and the land owner of the land has no any obligation towards the trespasser. He argued that the respondents knew that the land belonged to Benedicto Joseph Rutaihwa. He cemented his argument with the case of **Avit Thadeus v. Isdory Asenga, Civil Appeal No. 06 of 2017**, CAT at Arusha (unreported); **Jenerali Ulimwengu and two others v. Robert Elisante Ngowo, Land Case No. 250 of 2016** (unreported); and **Rodha Sobe v. James Fredy Sagaria, Land**

Appeal No. 69 of 2019 (unreported). On the second ground, the counsel argued that the trial tribunal failed to grant time for the respondents to demolish their houses after they were declared trespassers. It is unfortunate that the appellant prayed for the payment of mesne profits but the tribunal ended-up ordering the appellant to pay compensation. On the point of payment of mesne profits, the counsel referred the Court to the cases of **Eligius Kazimbaya v. Pilli Prisca Mutani and another, Civil Appeal No. 163 of 2019**, CAT at Dar es salaam (unreported) and **Avit Thadeus** (*supra*). On the fourth ground, Mr. Mbakileki argued that the trial chairman erred in allowing the respondents to harvest the trees planted in the disputed land without setting time for limitation. He urged the Court to allow the appeal and grant the prayers stated in the memorandum of appeal.

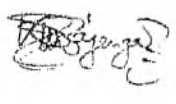
In response, Mr. Rugambwa for the 3rd, 4th and 5th respondents argued that the matter before the trial tribunal was time barred according to the Law of Limitation Act, Cap. 89 RE 2019. Under section 9 of the same Act, the time began to run in 1978 when the appellant's father died. The instant case was filed in 2014 which was after the expiry of 36 years. Therefore, section 35 must be read together with section 9 of the Law of Limitation Act as it was interpreted in the case of **Yusuf Same and another v. Hadija Yusuf [1996] TLR 347**. The same stance was re-enforced in the case of **Haji Shomari v. Zainabu Rajabu,**

Civil Appeal No. 91 of 2001. He further argued that mesne profit must be proved something which was not done in this case. He summed-up by arguing that the reliefs claimed by the appellant are baseless and he prayed to dismiss the appeal.

The 10th respondent submitted that his land is different from the disputed land and he wondered why he was included in this case. The 8th respondent submitted that his land was owned by his grandfather and he did not know whether he encroached into the land of the appellant's father. The 6th respondent claimed to have bought the land in 1987.

When rejoining, Mr. Mbakileki insisted that the time begins to run after the grant of the letters of administration as per section 35 of the Law of Limitation Act.

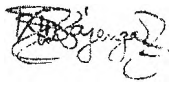
After going through the grounds of appeal and oral submissions given by the parties before this Court, I noted an irregularity in the proceedings of the trial tribunal. I therefore invited the parties to address me on whether or not the assessors gave their opinion. The parties appeared to address me on this anomaly. On this point, Mr. Mbakileki for the appellant urged the Court to confine its discussion on the issues raised by the parties. In his view, the issue of assessors was not among those issues. Mr. JS Rweyemamu for the 3rd, 4th and



5th respondents was of the view that a point of law may be raised any point and he invite the parties to address the Court on that point. He argued that, in the proceedings of the trial tribunal, the record does not show whether assessors gave their opinions something which is a fatal irregularity. The presence of the assessors' opinions in the judgment which are not reflected in the proceedings is a fatal irregularity that goes into the root of justice of the case.

When rejoining on this point, Mr. Mbakileki for the appellant insisted that, this was a point of fact and not law. He was hesitant to conclude whether the irregularity was fatal or not.

Now having considered the submissions grounds of appeal, I should make it clear that, this case is one among the cases filed by the appellant. For a consistence disposal, five cases concerning the appellant were assigned to me. In consultation with the counsels for the parties, we consolidated some of the cases and some were determined separately. This is one of the cases determined separately though it contained the same grounds of appeal to the other cases. Therefore, the reasoning leading to the disposal of the case are similar to other cases.



I wish to begin with the issue of assessors which was raised by the Court in this case. I perused the records of the trial proceedings and discovered an irregularity connected with the participation of assessors especially at the stage of giving opinion before the chairman could compose the judgment. It is a mandatory requirement of the law that tribunal shall be fully composed when seated with the chairman and not less than two assessors. For clarity, I take the discretion to cite the relevant provision on this point. **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019** provide thus:

> *"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and*
> *(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment".*

The emphasis is also provided under **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** that:

> *"19 (1) The tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;*
> *(2) Notwithstanding sub – regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of*

the hearing to give his opinion in writing and the assessor may give opinion in Kiswahili".

The presence of assessor is not a ceremonial procedure but their participation must be reflected at all levels of the trial which include giving opinion before delivering the judgment. Also, the chairman is duty bound to take into account the assessors' opinion in the judgment. Where the chairman finds good reasons to depart from the assessors' opinions, he/she may do so by giving reasons. On this point, **section 24 of the Land Disputes Courts** clearly provides that:

"24. In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bond by it, except that the chairman shall in the judgment give reasons for differing with such opinion".

As a matter of procedure, it is not sufficient for the assessors' opinions to appear in the judgment without being reflected in the proceedings. Such opinion must be read in the presence of the parties and the chairman must record such opinion in the proceedings. Failure to do so renders the whole proceedings a nullity because, if the record does not show the assessors' opinions, it is as good as the case was heard without assessors. The Court of Appeal of Tanzania was confronted with a similar irregularity in the case of **Sikuzani Saidi Magambo**

and Kirioni Richard v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported) where Hon. Kerefu, JA. observed *inter alia* that:

> *"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence* of the parties before the said judgment was composed".

Furthermore, a similar situation occurred in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** and the Court of Appeal of Tanzania had the following to say:

> *"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."*

Similarly, in the land mark case of **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported).** The

Court of Appeal of Tanzania reiterated the above stance of the law. In that case Hon. Mugasha, JA further insisted that:

> *"...Such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict."*

The Court of Appeal further stated that:

> *"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such,* ***their opinion must be on record."*** (emphasis added).

See also, the cases **of Edina Adam Kibona v. Absolom Swebe (Sheli), Civil appeal No. 286 of 2017,** CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa, Civil Appeal No. 13 of 2012**; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali, Civil Appeal No. 70 of 2017.**

In the instant case, the proceedings of the trial tribunal shows that, on 28th August 2019, the tribunal ordered assessors' opinions to be given on 19th September 2019. When that date came, the record shows that the assessors' opinions were read on 29th October 2019. However, this date does not feature in

the proceedings and there is nothing to indicate that such opinions were ever read in the presence of the parties.

On the issue of time limitation, in the oral submission, Mr. Mbakileki argued that the time accrued from 2014 when the appellant received the letters of administration. He leaned on Section 35 of the Law of Limitation Act, Cap. 89 RE 2019. On the other hand, Mr. Rugambwa for the 3rd, 4th and 5th respondents insisted that the suit was time barred according to section 9 of the Law of Limitation Act. Having all the competing arguments at hand, I was obliged to revisit the provisions of the law cited by the learned counsels. For clarity and reference, I wish to reproduce the two sections. **Section 9 of the Law of Limitation Act, Cap. 89 RE 2019** provides that:

> *9. (1) Where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land,* ***the right of action shall be deemed to have accrued on the date of death****.*
>
> *(2) Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession of and has, while entitled to the land,* ***been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance****.*
>
> *(3) Where a person institutes a suit to recover land, being an estate or interest in possession and assured otherwise than by will, to him, or to*

some person from whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

There are two points gleaned from the above provisions of the law. **First**, if the deceased possessed the land before his death, in calculating the time for recovery of that land, time accrues from the death of the deceased. Therefore, in terms of the instant case, and in-line with the above provisions of the law, time accrued from 1978 when the deceased died. By the time when the appellant applied for the administration of estate in 2013, by virtue of the above provision, he was already time barred.

Second, according to the above provision of the law, where a person is disposed from the use of the land, time accrues from the date when such dispossession started. **Section 33(1) of the Law of Limitation Act**, clarifies further the implication of the above provisions of the law thus:

33.*-(1) A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the right of action to recover any land accrues and no person is in adverse possession of the land, a right of*

action shall not accrue unless and until some person takes adverse possession of the land.

By applying this principle in the instant case, when the respondents occupied the suit land, time accrued from the date of occupation.

However, the counsel for the appellant argued that **section 35 of the Law of Limitation Act** provides something different from **section 9 of the same Act**. I wish to reproduce the section for the purpose of quick reference thus:

35. For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration or, as the case may be, of the probate.

The section allows an administrator who wants to claim land to do so as if there was no interval between the death of the deceased and grant of the letters of administration. The two sections within the same Act prompted my search for the proper interpretation of the law. For instance, Hon. Judge Levira (as she then was) when dealing with a similar situation in the case of **Helena Mwaipasi v. Philip Mwambungu and two others, Land Case No. 10 of 2012**, HC at Mbeya (unreported), she had the following to say:

'The plaintiff is unfortunately caught in the web of limitation. It is uncontroverted fact that by the time the plaintiff was granted the letters of administration in 2012, she was already time barred. I am bold and hold therefore that, the suit at had wad filed while time barred as per section 35 of the Law of Limitation Act, Cap. 89 RE 2002.'

Also, in the case of **Mshamu Saidi (Administrator of the estate of Saidi Mbwana v. Kisarawe District Council and four others, Land Appeal No. 177 of 2019**, HC Dar es salaam (unreported), Hon. Judge Maige (as he then was) observed that:

'Armed with the above authorities, I have no hesitation to hold that, in terms of section 35 of LLA reads together with section 9(1) of the same, the period between the death of the deceased and the appointment of an administrator is not excluded in counting the period of limitation.'

In the instant case, the appellant applied for the administration of estate after the expiry of more than 36 years. This long period of time has a lot to suggest. In the words of Mwangesi, J. (as he then was), the appointment of an administrator of estate after the expiry of such a long period of time may be a gate to unfounded claims because a land cannot remain un-possessed for such a long period. The deceased's heirs immediately occupied the land and might have been in continued use for all that time. Precisely, he observed in the case of **Julius Fundi and Modesta Kamakarwe v. Ernest Pancras, Probate and Administration Appeal No. 03 of 2013**, HC at Bukoba (unreported) thus:

'...the Primary Court did misdirect itself to administer the matter at hand and proceed to appoint an administrator, who in the actual sense would have nothing to administer other than creating some unfounded claims in respect of the estate of the deceased, which as already indicated above, already have owners.'

Now, back to the discussion on time limit, the Court of Appeal of Tanzania in the case of **Haji Shomari** (*supra*) further cemented that, in terms of **section 9(1) of the Law of Limitation Act**, time to recover land begins to run after the death of the deceased. Furthermore, the decision of this Court, authored by Hon. Mgeyekwa, J., in the case of **Rodha Sobi** (*supra*) analysed the two sections that:

'Guided by the above provision of the law, a suit to recover landed property must be filed within 12 years. Moreover, in cases related to recovering of land an administrator of the estate can file a claim in court as if no interval of time between the death of the deceased person as stated under section 35 of the Law of Limitation Act Cap. 89 [RE 2019]. According to section 35 of the Law of Limitation Act Cap. 89 [RE 2019], the time taken to apply for the administration of the estate of the late Sobi is exluded. Thus time started to run against the appellant after obtaining letters of administration. Therefore, in computing time, the days started to run from the date when the administrator of the estate was appointed that is 2016, thus, the application falls within time.'

Applying the above principle would mean that, the recovery of the deceased's land will have no actual time limit as time accrues as soon as the administrator receives letters of administration. In other words, persons who have stayed and possessed land for over hundred years will now be liable for eviction after the administrator acquires letters of administration. In my view, this position of law seems to contravene the period allowed for recovery of land according to the Law of Limitation Act. Also, the doctrine on adverse possession may be redundant when apply the above interpretation.

In analysing this issue, Hon. Judge Maige (as he then was) had the following observation in the case of **Shomari Omari Shomari (as administrator of the late Seleman Ibrahim Maichila) v. Mohamed Kikoko, Land Appeal No. 171 of 2018**:

> *'...exclusion of time for the purpose of limitation is a question of law. It is specifically provided for in Part IV of the LLA which is entitled 'Computation of period of limitation.' Section 35 is not in it.'*

Moreover, Hon. Msumi J, (as he then was), after citing the two provisions of the Law of Limitation Act in the case of **Yusuf Same and another v. Hadija Yusuf [1996] TLR 347** decided that:

> *'Applying these provisions to the present case respondent's right of action accrued from 14th January 1979 when the deceased died. The computation*

of this period still begins from that date despite the fact that respondent was granted letters of administration on 25th February 1992, that is about 12 years after the death of the deceased. In fact what actually happened is that by the time when respondent was granted the letters of administration her cause of action had already been time barred. And at the time when she filed the suit on 08th July 1993 respondent was late by over two years. The arguments of Mr. Raithatha on the issue of limitation are valid hence it is held that the suit against the appellants was incompetent as it was time barred.'

In the instant case, as already stated, the appellant's father died in 1978 but the appellant applied for the letters of administration in 2013. He was granted letters of administration in 2014 and he immediately filed this case. In my view, he possibly applied for administration not for reason of administration of estate but to fight the respondents. By the time when the appellant was granted letters of administration in 2014, he was already time barred because it was after the expiry of 36 years. The suit was time barred regardless whether the letters of administration were granted in 2014. Therefore, in terms of **section 3 (1) of the Law of Limitation Act, Cap. 89, RE 2019**, read together with Part I item 22 of the schedule of the same Act, the case before the trial tribunal was incompetent for the good reason that it was brought after the period of 12 years.

I understand, during the trial, the suit was objected but the trial chairman decided that the time accrued from 04th February 2014. Even if the objection could not be raised during the trial, this is a point of law which may be raised at any stage. In the case of **B.9532 CPL Edward Malima v. the Republic, Criminal Appeal No. 15 of 1989**, CAT at Mwanza (unreported), the Court of Appeal decided that:

> *'...we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of parties.'*

Furthermore, under the doctrine of adverse possession, the appellant have no right to recover the land that the respondents have occupied without interruptions for over 36 years. This principle of the law was stated in the case of **Bhoke Kitang'ita v. Makuru Mahemba, Civil Appeal No. 222 of 2017 CAT at Mwanza (unreported),** where the Court of Appeal of Tanzania stated that:

> *"It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise hi right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."*

In the above case, the Court of Appeal adopted the approach and stance of law developed in a number of cases including the cases of **Moses v. Lovegrove [1952] 2 QB 533** and **Hughes v. Griffin [1969] 1 All E R 460**, where it was stated that:

> *"[ON] the whole, a person seeking to acquire title to the 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 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.*

Now, based on the above position of the law, even if the respondents were mere adverse possessors, the appellant have lost right of claim over the land as the respondents have occupied and possessed the land for over 36 years without

interruption. In conclusion, apart from the fact that the assessors were not invited to give their opinion according to the law something that renders the proceedings of the trial tribunal a nullity. Also, as stated above, the suit was time barred. I hereby quash the proceedings and set aside the decision of the trial tribunal. I have no reason to order retrial of the case because the suit was time barred. It is so ordered.

DATED at **BUKOBA** this 27th day of August, 2021.

Ntemi N. Kilekamajenga.
JUDGE
27/08/2021

Court:

Judgement delivered this 27th August 2021 in the presence of the appellant and his counsel, Mr. Bernard Mbakileki (Adv), the learned advocate, Mr. JS Rweyemamu for the 3rd, 4th and 5th respondents. The 8th and 10th respondents were present in person and without representation while the other respondents were absent. Right of appeal explained.

Ntemi N. Kilekamajenga.
JUDGE
27/08/2021