**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: NDIKA, J.A., LEVIRA, J.A., And KENTE, J.A.)**

**CIVIL APPEAL NO. 494 OF 2020**

**MAKORI KITEGE ..... APPELLANT**

**VERSUS**

**AGNES KICHERE MWITA ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)**

**(Mgeyekwa, J.)**

**dated the 11th day of April, 2019**

**in**

**Land Appeal No. 97 of 2018**

.....

## JUDGMENT OF THE COURT

3rd & 7th May, 2024

**NDIKA, J.A.:**

The respondent, Agnes Kichere Mwita, filed a claim for ownership of farmland against the appellant, Makori Kitege, in the District Land and Housing Tribunal for Mara at Musoma ("the tribunal"). The appellant was unsuccessful in this litigation. He is now appealing to this Court after the High Court of Tanzania at Mwanza ("the High Court") dismissed his first appeal.

The context in which this appeal originates is presented first. A three-acre parcel of unsurveyed and untitled farmland situated in

Buchanchari village, Serengeti District, Mara Region, is the focal point of this dispute.

The respondent (PW1), in her testimony, asserted ownership of the property based on a 2004 *inter vivos* gift by her father, Kichere Mwita, as evidenced by a series of documents she presented during the trial, and which were consolidated as exhibit P1. The contested property was initially assigned to her father by village officials during the infamous *Operation Vijiji*, which was implemented between 1973 and 1974 as a nationwide forced resettlement programme in designated villages. During the relevant period, she was a standard six student, approximately fourteen years old, and was therefore aware of the events. She stated that her father had perpetual possession of the land and that sisal plants had been planted along its entire perimeter. Nevertheless, she recalled that in 1982, her father granted permission for the appellant's father and his family to temporarily occupy the farmland. The appellant's father moved out of the property approximately two years later. Additionally, the witness stated that she had been utilising and cultivating the agricultural land since its donation to her in 2004 by her father, who had since died in 2006. She let the farmland lie fallow in 2008. As per her assertion, the appellant exploited the situation as in 2011, he intervened and

encroached, claiming that his father had been the rightful owner of the land and that he gave it to him subsequently.

PW2 Elias Machage, whose father also owned a parcel of land adjacent to the contested farmland allocated to him during the same viliagisation scheme, confirmed the allocation of the farmland to the father of the respondent. Additionally, he asserted that the appellant's father (calling him Gitege) utilised the land for a brief period in 1981 or 1982 to conduct traditional healing services under an invitation or licence. His testimony also corroborated that of the respondent regarding the way she obtained the land in 2004 and the appellant's encroachment on the land in 2011.

The nephew of the respondent, PW3 Bernard Mwita, also provided support for the respondent's case. He claimed that he had been raising cattle on the contested farmland since he was nine years old, after his grandfather, Kichere Mwita, had permitted it to be used as pasture. Considering that he was forty-one years old when he testified in 2018, that the timeline he was referring to was from 1986. The appellant was declared a trespasser by PW3 on the grounds that he unlawfully encroached upon the property in 2011 without justification.

As DW1, the appellant assumed the witness stand. According to him, the land was cleared by his father, Kitege Mhoni, in 1982, and he was born there the following year, in 1983. He claimed that the land was bestowed upon him by his father in 1994, and that he and his parents had resided there continuously for more than thirty-three years, beginning in 1982. In addition to asserting that he established the demarcation of the contested land by planting sisal plants in 1994, he provided testimony that his mother was interred on the said land in 2015, devoid of any opposition, complaint, or other individual concern from the respondent. Regarding the documents submitted by the respondent (exhibit P1), he asserted that they were all forged and urged their disregard.

Mhoni Kitege (DW2), the appellant's half-brother, substantiated his junior sibling's assertion regarding the way he obtained, occupied, and maintained the contested land between 1994 and the present dispute's inception in 2011. It was stated that the appellant and the Kitege family had continuously occupied the land for more than thirty-three years. The fact that the appellant's mother, who was also his stepmother, was interred on the contested property held great importance for him.

Also testifying in support of the appellant's case was Nyamhanga Kitege (DW3). He essentially attested to the claim that the appellant's father acquired the contested property in 1982 by clearing an unspoiled land and to the appellant's ownership of the land beginning in 1994, when his father donated it to him.

The tribunal reached the conclusion that the farmland in question was acquired by the respondent's father during the *Operation Vijiji*, and that he transferred ownership of the land to the respondent in 2004. The tribunal rejected the claim that appellant's father obtained the land in 1982 through clearance of an unspoiled area, reasoning that the land in question had previously belonged to the father of the respondent. To exemplify the rationale of the tribunal, the following is taken from its judgment, which is unveiled on pages 82 to 83 of the record of appeal:

> *"The respondent [the appellant herein] stated in his testimony that his father acquired the disputed land in the year 1982.* ***Born in the year 1983 the respondent cannot tell us with certainty that his father acquired the disputed land in the year 1982 because the respondent was not yet born.*** *There is this testimony of DW2 who stated also that the respondent's father acquired*

*the disputed land in the year 1982. However, I find this testimony also unreliable because* ***DW2 and DW3 who also supported that claim were not present when the respondent's father allegedly acquired the disputed land."***
[Emphasis added]

The respondent's testimony that the appellant never resided on the contested land, but encroached upon it in 2011, was accepted by the tribunal. Based on a letter dated 13th December, 2011 (exhibit P1) from the Village Executive Officer instructing the appellant to suspend construction activities on the contested land pending the resolution of the respondent's complaint, the tribunal deduced the following, as evidenced on page 84 of the record of appeal:

*"[T]he respondent [the appellant herein] had no house on the disputed land in the year 2011. It cannot be true, therefore, that the respondent [had] lived in the disputed land since 1983 the year he was born because the house in which he now lives was built in the year 2011."*

The tribunal deemed the appellant's testimony regarding the interment of his mother's remains on the contested land in 2015 to be inconsequential. It determined that this fact did not establish or validate

the appellant's self-proclaimed title to the land. For, her interment occurred amidst the ongoing dispute over land ownership. The assertion that there were no grievances from the respondent regarding the burial was, thus, irrelevant.

As previously mentioned, the High Court affirmed the tribunal's conclusions in their entirety and denied the appellant's appeal. We have been petitioned by the appellant to reverse the High Court's decision on the following four grounds of complaint:

1. *The respondent's claim of title to the land in dispute was time-barred in view of the appellant's continuous and undisturbed possession of the land from 1982.*
2. *Erroneously, the judgments rendered in favour of the respondent were based on exhibit P1, which was comprised of forged documents.*
3. *The High Court erroneously determined that the appellant's case was weaker than the respondent's.*
4. *The High Court inadequately assessed the presented evidence.*

At the hearing of the appeal, the parties, who were self-represented, spoke generally regarding the grounds of appeal.

We had the understanding, based on the first ground of appeal, that the appellant was invoking the doctrine of adverse possession to assert

title to the land in dispute. That the respondent's title to the contested land was extinguished on the ground that the appellant maintained uninterrupted and continuous possession of the property for more than thirty-three years reckoned from 1982.

As a matter of law, it is recognised as an established principle that an adverse possessor obtains title by adverse possession if the owner of the land fails to exercise his right to reclaim it within the twelve-year period specified by the law after unlawfully occupying the property. In **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016 [2018] TZCA 32 [6th August 2018; TanzLII], the Court, citing the Kenyan case of **Mbira v. Gachuhi** [2002] E.A. 137 (HCK) and placing further reliance on the cases of **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All ER 460, explicated the circumstances under which title may be acquired pursuant to that legal principle. A person seeking to acquire land title through adverse possession, the court ruled, must cumulatively establish 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 sufficient* ***animus*** *to dispossess and* ***an animo possidendi;***

*(f) that the statutory period, in this case, twelve years, had elapsed;*

*(g) that there had to be no interruption to the adverse possession throughout the aforesaid period; and*

*(h) that the nature of the property was such that, in the light of the foregoing, adverse possession would result."*

See also **Bhoke Kitang'ita v. Makuru Mahemba,** Civil Appeal No. 222 of 2017 [2020] TZCA 66 [20th March, 2020; TanzLII]; and **Depson Balyagati v. Veronica J. Kibwana,** (Civil Appeal No. 21 of 2021) [2023] TZCA 17772 [23rd October, 2023; TanzLII].

Pertinent to the instant case is the third condition above – that the person alleging title upon adverse possession must show that he had no colour of right to be on the land in dispute other than his entry and occupation. Apart from the appellant in this case claiming to have occupied the land in question since 1982, when he was not yet born, which is obviously false, he maintained that his father, who was allegedly the previous owner of the property, had given him the property as a gift in 1994, from which he allegedly derived his alleged title. While he did raise a preliminary objection in his reply to the respondent's statement of claim that the claim was time-barred, he did not present any evidence or construct his case to suggest or assert that he unlawfully obtained the land and occupied it continuously for at least twelve years without the respondent's consent for his claim to transform into title by adverse possession. Therefore, the adverse possession contention was not raised by the parties involved, nor was it interrogated and determined by the lower courts.

It is pertinent to recall that in a previous case, **Depson Balyagati** (*supra*), we dismissed a comparable claim that was allegedly based on adverse possession and advanced by a party who claimed to have

obtained title to the contested property through a third-party purchase. Consequently, we reaffirmed that:

> *"For, adverse possession occurs when someone occupies land belonging to someone else without permission. In that sense, a trespasser cannot make a successful adverse possession claim unless, among other things, it is shown that the trespass has been done in a way that infringes upon the owner's rights without permission. Put in other words, the occupation must be hostile and adverse to the interests of the true owner and take place without their consent."*

Without demur, we maintain that the appellant's claim that the alleged 1994 gift from his father was the source of his title does not constitute adverse possession for the purpose of invoking the doctrine of adverse possession. Thus, the first appeal ground is rejected.

The argument pertaining to the second ground of appeal, which questions the credibility and reliability of the documents tendered by the respondent and admitted as exhibit P1, is obviously beside the point. Initially, the appellant's reply to the statement of claim contained a general, non-specific allegation that the documents had been forged. Furthermore, the said allegation was not substantiated in the evidence as

the appellant led no evidence on that aspect. Given that most of the documents originated from the Village Office, it begs the question as to why the appellant did not call any village official to testify before the tribunal regarding the documents' authenticity.

The Court stated the following in **City Coffee Ltd v. Registered Trustees of Ilolo Coffee Group,** Civil Appeal No. 94 of 2018 [2019] TZCA 645 [1st November, 2019; TanzLII], after a review of several authorities on allegations of fraud or forgery in civil cases in general, that:

> *"... it is clear that regarding aliegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases, of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities applied in civil cases."*

As a result, we have determined that the allegation that exhibit P1 contained forged documents was not proven. The second ground of appeal fails.

Finally, we proceed to consider and determine the third and fourth grounds of appeal in concert. In this case, the appellant argues that the lower courts improperly evaluated the evidence in hand and, as a result,

reached concurrent conclusions that were contrary to the preponderance of the evidence.

We have thoroughly examined the evidence presented, keeping in mind that while it is established that the concurrent findings of fact of the lower courts are legally binding, we retain the authority to intervene if they indicate a misapprehension of the evidence, misdirection, omission, or breach of a principle of law or practice.

It is our knowledge that the respondent sought to establish her ownership claim to the property based on a gift made *inter vivos* by her father in 2004, which is substantiated by a collection of documents (exhibit P1). Regarding the provenance of her father's title, she provided testimony that it was bestowed upon him by village officials during the *Operation Vijiji*. This testimony was predicated on her recollection of the events, considering she was of age to comprehend the situation at the time. Her testimony was substantially supported by two individuals: PW2, whose father was granted adjacent land as part of the same villagisation initiative, and PW3, who had been tending cattle on the contested land since 1986.

On the contrary, it goes without saying that the appellant's account is exceedingly improbable. Justly, the tribunal rejected his claim that his father obtained the land in 1982 after the clearance of a pristine area. The appellant, who was born in 1983, was not qualified to provide testimony regarding an event that transpired prior to his birth. In addition, both of his witnesses had no direct knowledge of the purported acquisition of the land by the appellant's father, which would have served to bolster his title claim. Moreover, for the reason ascribed by the tribunal, there was no evidence that the appellant ever inhabited the contested land; rather, he encroached upon it in 2011, following a period of its fallowness. Furthermore, we concur with the lower courts that the appellant's mother's 2015 interment on the contested land did not indicate or validate the appellant's claim to the land's title, given that it took place during the dispute.

In conclusion, we affirm the concurrent factual conclusions reached by the lower courts in favour of the respondent. We do so because we are confident that they were founded upon appropriately assessed evidence. We share the lower courts' view that the farmland in question was acquired by the respondent's father during the *Operation Vijiji*, and that he transferred ownership to the respondent in 2004. Hence, the

appellant was a trespasser on the property given that he lacked legal ownership over it. Accordingly, we reject the third and fourth grounds of appeal.

Ultimately, we dismiss the appeal and award full costs to the respondent.

**DATED** at **MWANZA** this 6th day of May, 2024.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Judgment delivered this 7th day of May, 2024 in the presence of the appellant in person and in the absence of the respondent who reported sick by her daughter named Happines Mwita Makori, is hereby certified as a true copy of the original.


W. A. HAMZA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**