IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 78 OF 2019

MAKUBI DOGANI..... APPELLANT

VERSUS

NGODONGO MAGANGA..... RESPONDENT

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

(Makani, J.)

dated the 12th day of October, 2018
in
Land Case No. 1 of 2015

JUDGMENT OF THE COURT

14th & 21st August, 2020.

KEREFU, J.A.:

This appeal arises from the judgement and decree of the High Court of Tanzania at Shinyanga (Makani, J.) dated 12th October, 2018 in Land Case No. 01 of 2015. In that case, the respondent sued the appellant claiming that he trespassed into his land located at Kisesa Hamlet, Chambala Village, Meatu District in Simiyu Region comprising of 405 acres with estimated value of TZS 81,000,000.00 (the suit land). The respondent prayed to be declared the lawful owner of the suit land and a permanent

injunction against the appellant, his agents, servants or workmen from trespassing into the suit land.

The material facts of the matter obtained from the record of appeal indicate that, in 1984 the respondent, Ngodongo Maganga (PW1) purchased the suit land from one Manangu Jitija at a consideration of three head of cattle and five goats. PW1 said, the sale transaction was witnessed by Hangalu Lusana (PW2), Kisinza Kija, Lungulija Bolohelo and Sili Jimogele. PW1 testified further that, from that time he took possession of the disputed land and had stayed peacefully until 1994 when the appellant encroached into the suit land. PW1 reported the matter to the Ward Executive Officers (WEOs) for Bukundi and Mwanjoro Wards who together with other elders resolved the dispute in favour of the respondent. The letter from WEO of Bukundi dated 8th May, 1997 explaining how the dispute was settled was admitted in evidence as Exhibit P1.

PW1 testified further that, in 2013 the appellant, again trespassed into the suit land and started grazing his cattle therein claiming that the suit land is part of his clan land. This time, PW1 reported the matter to the District Commissioner of Meatu who instructed the WEOs to solve the dispute. The DC's letter dated 17th June, 2013 was admitted in evidence as

Exhibit P2. PW1 said, the WEOs involved the neighbours of the area and once again the matter was decided in his favour and the appellant was ordered to pay the respondent compensation for the destroyed crops. PW1 testified that, after that incident the appellant stopped for a while but later, he continued to enter into the disputed land, thus PW1 instituted a case against him, the subject of this appeal.

PW2 supported the testimony of PW1 that he was one of the elders who witnessed the sale transaction and he said, he was the one who took the cows from the buyer to the seller. Kamuga Jisinza (PW3) also supported PW1's testimony that his father Jisinza Kija witnessed the sale transaction because his land was adjacent to the suit land.

On the other side, the appellant (DW1) denied that the suit land belongs to the respondent. He testified that the suit land which is situated at Bukundi Village, Mwashigela hamlet, Meatu District in Simiyu Region belonged to his late grandfather Gwisu Ng'wandu. He said that his late grandfather acquired it in 1950's and after his death his son Dogani Gwisu continued to use the suit land till 1989 when he inherited it. DW1 went on to state that their land is measuring 1,475 acres with estimated value of TZS 81,000,000.00. He also disputed to have been involved in any meeting

by the WEOs to resolve their land dispute, as he said, the WEOs have no legal powers to determine land matters.

Ntegi Dogani (DW2) and Lunili Dogani (DW3) who are siblings of DW1 supported the testimony of DW1. John Shisho (DW4) and Peter Kuzenza (DW5) among other things, testified on how they knew the land dispute between the parties. Specifically, DW5 explained on how he was involved in the reconciliation meetings convened by WEOs under the instructions of the DC to solve the dispute.

At the closure of the parties' case the learned trial Judge invited Salu Neema (CW1) who is the WEO of Bukundi, Masanja Abel (CW2), the WEO of Mwanjelwa and Ally Omary (CW3), the Village Executive Officer of Chambala village to ascertain the location of the suit land. The three court witnesses testified that the suit land is situated at Bukundi Ward. In addition, CW1 and CW2 stated that they were instructed by the DC to resolve the dispute between the parties which, they said, was resolved in favour of the respondent and the appellant was ordered to pay compensation at the tune of TZS 200,000.00 to the respondent for the crops which were destroyed by the appellant when grazing on the suit land.

After consideration of evidence adduced before it, the High Court decided the case in the favour of the respondent as indicated above. Aggrieved, the appellant decided to lodge this appeal on the following grounds, that: -

1. *The respondent's plaint having been filed in the High Court of Tanzania at Tabora on 04/09/2015 the trial High Court of Tanzania at Shinyanga lacked jurisdiction to hear and determine the Land Case No. I of 2015;*
2. *The learned trial Judge erred both in law and fact in holding that the respondent purchased the suit land in 1984 orally for three cows and five goats from one Manangu Jitija;*
3. *The learned trial Judge erred both in law and fact in holding that the respondent acquired a title over the suit land by adverse possession;*
4. *The learned trial Judge erred both in law and fact in holding that the appellant trespassed on the suit land in 1997 and 2013 and paid compensation to the respondent as evidence by Exhibits P1 and P2 respectively; and*
5. *The learned trial Judge erred both in law and fact in holding that the appellant is a trespasser on the suit land.*

When the appeal was placed before us for hearing, the appellant was represented by Mr. Robert Masige, learned counsel whereas the respondent was represented by Mr. Frank Samwel, also learned counsel. It

is noteworthy that, Mr. Masige had earlier on lodged his written submission in terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). On the other side, Mr. Samwel did not file any reply written submission and he thus addressed us under Rule 106 (10) (b) of the Rules.

Upon taking the floor to expound on the grounds of appeal, Mr. Masige fully adopted his written submission to form part of his oral submission and clarified on the second, fourth and fifth grounds of appeal.

On the first ground of appeal, Mr. Masige argued that, the High Court of Tanzania at Shinyanga did not have jurisdiction to entertain the case because the respondent's plaint was filed at the Tabora High Court Registry on 4th September, 2015 and later, un-procedurally, it was transferred to Shinyanga High Court Registry where it was heard and determined. He clarified that, Shinyanga High Court Registry was established by the High Court Registries (Amendment) Rules, 2014 vide Government Notice No. 206 published on 4th July, 2014. So, by the time the respondent's plaint was filed, the Shinyanga High Court Registry was already established, he said. On that basis, he implored us to find that, the High Court of Tanzania at Shinyanga did not have the requisite jurisdiction to entertain the matter.

On the second ground, Mr. Masige faulted the learned trial Judge for failure to observe that though, the respondent claimed to have purchased the suit land from his son Manangu Jitija in 1984, he did not disclose the source of the suit land. That, since the respondent and PW2 were related they were not reliable witnesses as they had an interest to serve. To buttress his proposition, he referred us to the case of **Abdul-Karim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] T.L.R 419.

Mr. Masige argued further that, though the respondent alleged that the disputes between him and the appellant over the suit land were handled by the WEOs and decided in his favour, the said officers were not summoned to testify before the trial court to prove that fact. He cited sections 110, 111 and 115 of the Evidence Act [Cap. 6 R.E 2019] and the cases of **Hemedi Said v. Mohamed Mbilu** [1984] T.L.R. 113 and **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161. He then argued that failure to call those material witnesses entitled the learned trial Judge to draw an adverse inference against the respondent as, according to him, has completely failed to prove his case to the required standard.

Submitting on the third ground Mr. Masige faulted the learned trial Judge for holding that the respondent acquired a title over the suit land by

adverse possession. He strongly argued that acquiring a title to land by sale cannot in law co-exist with acquiring it by adverse possession. He supported his proposition with the case of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others,** Civil Appeal No. 193 of 2016 (unreported).

As regards the fourth ground, Mr. Masige launched a scathing attack on the learned trial Judge to rely upon Exhibits P1 and P2 as he said, the said Exhibits have no any evidential value. Amplifying on this point, the learned counsel argued that, the said exhibits, though submitted as a proof on the resolved land dispute between the parties, did not reveal the subject matter, the size of the land which was the subject of the dispute purportedly referred to the WEOs in 1997 and 2013. It was his strong argument that since the said Exhibits lack all those particulars, it cannot be vouched safely that the land involved therein is the same suit land in this appeal.

On the last ground, Mr. Masige contended that, since the respondent failed to prove his ownership over the suit land, it was improper for the learned trial Judge to find that the appellant was a trespasser on the same. He said that the appellant could be held a trespasser on the suit land if the respondent could have discharged his duty of proving his case to the

required standard. Based on his submissions, Mr. Masige prayed for the appeal to be allowed and the decision of the High Court be quashed and set aside with costs.

In response, Mr. Samwel resisted the appeal. He submitted that there is no substance in any of the grounds of appeal because according to him, the learned trial Judge properly evaluated the evidence adduced by the parties and arrived at a correct conclusion.

As for the first ground, Mr. Samwel contended that the same has no merit because it is common knowledge that prior to the establishment of Shinyanga High Court Registry all cases for Shinyanga Region were handled by Tabora High Court Registry. He said that due to that fact and taking into account that parties were not aware that the Shinyanga High Court Registry has been established and operating at Tabora High Court Registry, the respondent's plaint inadvertently indicated on the title the name of Tabora High Court Registry though the case was properly registered in the Shinyanga High Court Register as Land Case No. 1 of 2015. He said, that fact can be verified from the Shinyanga High Court Register. As such, Mr. Samwel urged us to ignore the pointed-out irregularity as he said, it was only a minor clerical error which is not fatal and parties were not prejudiced.

On the second ground, the learned counsel challenged the appellant's claim that the respondent did not prove the source of the suit land. He referred us to paragraphs 3, 4 and 5 of the respondent's plaint where the respondent clearly explained the particulars of the suit land and how he bought it in 1984 from one Manangu Jitija. Mr. Samwel also disputed the submission by Mr. Masige that the respondent bought the land from his son and that PW1 and PW2 were close relatives who had an interest to serve. He specifically referred us to page 77 of the record of appeal where PW2 testified that he was related to the seller and not to PW1. He spiritedly argued that PW1 and PW2 had nothing in common and were not related.

On the applicability of the principle of adverse possession, Mr. Samwel vehemently argued that the impugned decision was not based on that principle. He referred us to pages 120 – 122 of the record of appeal and argued that the said principle was mentioned by the trial Judge in passing as an *obiter dictum* but was not the basis of the trial court's decision.

Responding to the fourth ground on the claim that Exhibits P1 and P2 are irrelevant in this case and have no evidential value, Mr. Samwel argued

that the said Exhibits are relevant to the case because they proved the long existed dispute between the parties over the suit land and how the said disputes were resolved. Finally, Mr. Samwel prayed for the entire appeal to be dismissed with costs for lack of merit.

In a brief rejoinder, Mr. Masige reiterated what he submitted in chief and prayed for the appeal to be allowed with costs.

On our part, having carefully considered the rival arguments advanced by the counsel for the parties and after having examined the record of appeal before us, the main issue to be considered is whether the appeal by the appellant is meritorious.

We wish to note that this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision. This task is bestowed upon us by the provisions of Rule 36 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). See also the cases of **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing**

and Urban Development & Another, Civil Appeal No. 57 of 2017 (both unreported).

The first ground is straight-forward and should not detain us, because upon our research, we found that, though the plaint suggests that it was filed at the Tabora High Court Registry but the same was properly registered in the Shinyanga High Court Register as Civil Case No. 1 of 2015. We are therefore in agreement with Mr. Samwel that given the factual historical background on the establishment of Shinyanga High Court in Shinyanga Region which was previously under the jurisdiction of Tabora High Court, the error of indicating on the title of the plaint '*In the High Court of Tanzania at Tabora*' instead of '*In the High Court of Tanzania at Shinyanga*' is a minor clerical error which is not fatal and has not caused any miscarriage of justice to the parties. Thus, we find the first ground of appeal devoid of merit.

As regards the second ground on the failure by the respondent to disclose the source of the suit land, we have perused the respondent's plaint found at page 7 of the record of appeal and noted that, under paragraph 5 of the said plaint, the respondent had categorically stated that, he bought the suit land in 1984 from one Manangu Jitija.

Furthermore, during the trial at page 71 of the record of appeal the respondent testified in chief that he bought the suit land at a consideration of three cows and five goats. He further testified that the sale transaction was witnessed by PW2, Kisinza Kija, Lungulija Bolohelo and Sili Jimogele. PW2 supported the evidence of PW1 at page 78 of the record of appeal by stating that PW1 bought the land that belonged to his relative and he (PW2) witnessed the sale transaction and he was the one who took the cows from the buyer to the seller.

Regarding the alleged relationship between PW1 and PW2, we let the record of the appeal speak for itself. At page 71 of the record of appeal, PW1 testified that, *"I bought it from my son Manangu Kitija...Manangu Jitija is now deceased. When I bought the land there was one relative Hangalu Lusana..."* Then, PW2 at page 77 of the same record testified that, *"The Plaintiff bought the land of my relatives."*

From the testimonies of these two witnesses, it is clear that, PW1 bought the suit land from the relative of PW2. Thus, PW2 is related to the seller but not to PW1. In our considered view, the act of PW1 addressing PW2 as *'my son Manangu Jitija',* was only a polite, respectful and a friendly way of addressing him. We are thus in agreement with the submission of

Mr. Samwel that the two were not blood relatives and we even find the case of **Abdul-Karim Haji** (supra) cited to us by Mr. Masige distinguishable and not applicable in this appeal. We wish also to note that since this complaint was not raised by the appellant during the trial, raising it at this stage is, in our considered view, an afterthought.

We equally find that, the claim by Mr. Masige that the WEOs who handled the dispute between the parties were not called to testify before the court is unfounded. It is on record that CW1, CW2 and CW3 all testified that they were instructed by the DC to handle the dispute and that they resolved it in favour of the respondent. This was evidenced by Exhibits P1 and P2 which contained relevant information on how the land dispute between the parties was resolved by those officers in collaboration with the elders of that area. This evidence was also supported by DW5, a witness summoned by the appellant, who explained that he was a former Chairperson of Bukundi Village and that he was involved in the reconciliation meetings convened by the WEOs under the instructions of the DC to settle the land dispute between the parties herein.

It is our further considered view that, even the claim by Mr. Masige under the fourth ground of appeal that the said exhibits are irrelevant in

this case is misconceived. It is apparent, at pages 72 to 74 of the record of appeal that during the trial, the appellant did not object to the admissibility of the said exhibits. It is a settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. Therefore, since the appellant did not utilize that opportunity, challenging the said exhibits at this stage is nothing but an afterthought. That said, we also find the second and fourth grounds of appeal to be devoid of merit.

As regards the third ground of appeal, after going through the trial court's judgment, we hasten the remark that the appellant has no justification to fault the learned trial Judge that she based her decision on the principle of adverse possession. It is on record, and as eloquently submitted by Mr. Samwel that the trial court did not use that principle as the basis of deciding the matter, but the same was only mentioned by the learned trial Judge in passing as an *obiter dictum*. For the sake of clarity, we find it apposite to reproduce the decision of the trial Judge found at pages 120 to 122 of the record of appeal, where she stated that: -

> *"In the present case, the sale of land between the plaintiff and one Manangu Jitija was oral; and there was evidence from the plaintiff himself and confirmation from PW2 that the sale of the*

land existed and consideration was by way of three cows and five goats. The claim that the burden raised by the plaintiff was not proved is a misconception.

The defendant in their case claimed that the plaintiff invaded their family land and cut out 405 acres and used it for himself. However, the defendant did not show what action they took to inform the authorities of the invasion by the plaintiff. Common sense warrants that if one is invaded in his suit land, he has to take action. Failure by the defendant to follow known channels to recover their so-called suit land creates doubt that they were the true owners of the suit land.

Another notable thing is that the plaintiff was on the suit land since 1984. Evidence shows that problems between the plaintiff and the defendant started in 1997. This means the plaintiff was on the suit land for 13 years without interruption from the defendant. It is the law that where a person moves into a land, occupies it and develops it for 12 years or more with no interference whatsoever from the true owner of that plot, then that person who has occupied it for the 12 years or more acquires adverse possession."

Following the above extracted portion of the trial court's judgment, with respect, we find the line of argument by Mr. Masige on this aspect, unfounded and even the case of **Registered Trustees of Holy Spirit**

Sisters Tanzania (supra) he cited to us does not, in the circumstances of this appeal, apply.

As such, we are satisfied that the trial Judge properly analyzed the evidence availed before her and reached to an appropriate conclusion hence there is no justification to interfere with her decision.

In view of the aforesaid, we find the entire appeal to be devoid of merit. It is hereby dismissed with costs.

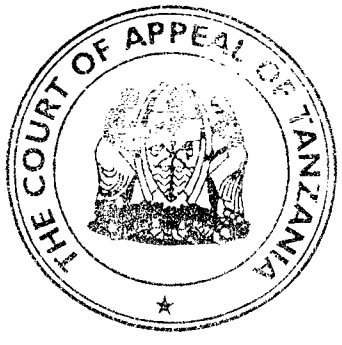
DATED at **SHINYANGA** this day of August, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 23rd day of August, 2020 in the presence of Mr. Frank Samwel, holding brief Mr. Robert Masige for the Appellant and Mr. Frank Samwel, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL