IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 358 OF 2019

LAURENT MWANG'OMBE ..... APPELLANT

VERSUS

TATU HAJI MWAMBISHILE ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mbeya)

(Karua, J.)

dated the 19th day of August, 2013

in

Land Appeal No. 45 of 2013

.....

JUDGMENT OF THE COURT

30th November, 2021 & 1st September, 2022

MASHAKA, J.A.:

It all started when the respondent Tatu Haji Mwambishile successfully sued Laurent Mwang'ombe, the appellant in Land Case No. 02 of 2012 at the Chimala Ward Tribunal over Plot 22 Hectare 3 (the suit land) which was initially owned by Kapunga Small Holders Irrigators Co-operative Society Limited (the KSHICSL) and allocated to her late father in 1992. Being aggrieved, the appellant successfully appealed in Land Appeal No. 42 of 2012 at the District Land and Housing Tribunal (the DLHT) at Mbeya which reversed the decision of the Ward Tribunal and declared the suit land to be

the property of Pius Mlimwa, an invitee. Dissatisfied, the respondent appealed in Misc. Land Appeal No. 45 of 2012 to the High Court. After scrutiny of the evidence, it quashed the decision of the DLHT and restored the decision of the Ward Tribunal declaring the respondent as the rightful owner of the suit land.

Briefly, to understand the crux of this appeal, what transpired in the lower courts is as follows. In 2011 the respondent and her relatives came across a note book in their late father's house. In one of the pages of the said book it stated that on 2nd April, 1995 the respondent's deceased father Haji Mwambishile wrote "*mimi Haji Mwambishile nimemwazima shamba Pius Mlimwa ambalo liko maeneo ya Kapunga Small holder ploti namba /22/ hekta/ 3. 2- 4- 1995*", The unofficial English translation goes : "I have lent the land to Pius Mlimwa located at Kapunga Small holder plot number/22/ hectare/3. 2 – 4 – 1995". The note book was tendered in evidence before the Ward Tribunal. Upon the discovery, a search was made by the respondent and it came to her knowledge that the said Pius Mlimwa was deceased and the land was being cultivated by the appellant. The respondent sought for clarification from the management of KSHICSL on who was cultivating the suit land. their response was that the appellant

was cultivating the suit land and paying for it. The evidence of Eliud Yohana Ngoda (PW2) and Yahaya Hassan Nzogo (PW3) before the Ward Tribunal supported the assertion of the respondent that the suit land in question was allocated to the respondent's father by the KSHICSL in 1992 and were among those who were also allocated plots by the chairman of the project at that time; the appellant.

On his part, the appellant stated that, in 1992 he was the Chairman of the Chimala Village and the Secretary of KSHICSL. He conceded to the fact that the suit land was initially allocated to the respondent's father who failed to comply with the terms of the society to develop and pay the necessary dues and contributions and he decided to hand back the suit land to the KSHICSL at the time the appellant was the Secretary of the KSHICSL. Later on, the suit land was allocated to one Pius Mlimwa, his son - in - law. He further asserted that upon the death of the said Pius Mlimwa, the land passed over to her daughter who cultivated it for a year and when she died the appellant took possession of the land until the height of the present dispute. The two witnesses namely; Farija Ngole (DW1) and Evelina Aron Chanimbaga (DW2) supporting the appellant could not remember in which year the respondent's father returned the suit land

back to the KSHICSL nor remember when the suit land was allocated to Pius Mlimwa. Given the above facts, the Ward Tribunal entered judgment for the respondent in that there was no evidence demonstrating that the appellant lawfully acquired the suit land.

On appeal before the DLHT, the appellant successfully challenged the decision of the Ward Tribunal. The DLHT held that the suit by the respondent was time barred as it was filed after the lapse of 16 years contrary to the provisions of the Law of Limitation Act and declared the suit land to be the property of Pius Mlimwa as the respondent's claims based on the note left by her father was of no help to the case. Further, the Tribunal held that the suit land had been used by different people from 1995 to 2012 and the respondent cannot claim the same. Upon reversing the decision of the Ward Tribunal, it declared ownership of the suit land as alluded to earlier.

The decision aggrieved the respondent hence the appeal to the High Court of Tanzania at Mbeya. Upon scrutiny of the parties' contending submissions and evidence on record, the High Court held that the appellant could not produce evidence proving that the respondent's father had indeed returned the suit land as alleged, the note (exhibit P3) that brought

about the whole saga was credible evidence sufficient to prove that the respondent's father lent the suit land to Pius Mlimwa as an invitee, while remaining the true owner regardless of the time limit he used it.

Regarding the issue that the suit land was abandoned, the High Court dismissed the claim that the requirements envisaged under section 45 of the Village land Act, [Cap 114 R.E 2002] were not met; for instance, the Village Council Committee failed to issue a 30 days public notice inviting any objection from the occupier or any member of the public. It thus allowed the appeal by quashing the decision of the DLHT and restoring the findings of the Ward Tribunal.

The appellant lodged this appeal after obtaining the requisite certificate on points of law for determination by the Court. The High Court (Makaramba, J) certified the following points of law:

> *"1. Whether the respondent's father and the respondent herself were affected by the law of abandonment.*
>
> *2. Whether the respondent's father estate was affected by the law of limitation".*

Though the High Court certified the points as stated above, the appellant advanced three grounds in his memorandum of appeal as follows: -

1. *That, the father of the respondent one Haji Mwambishile having died on 1996 and the respondent having instituted this case before the Ward Tribunal in 2012 this case was time barred in terms of sections 9 and 35 of the Law of Limitation Act, Cap 89 R.E 2002 or the Customary Law of Limitation of Proceedings, GN. 311 of 1964.*
2. *That, the respondent and her late father were caught up by the law of abandonment in so far, they purported to own or possess the suit land.*
3. *That, there was no legal basis for the father of the respondent to purport to invite Pius Mgimwa into the suit land against the legal rights of the appellant.*

When the appeal was called on for hearing, Messrs. Justinian Mushokorwa and Victor Mkumbe, learned advocates entered appearance representing the appellant and the respondent respectively. At the outset, Mr. Mushokorwa abandoned ground three and argued ground one and two.

Mr. Mushokorwa argued ground one that in terms of sections 9 (1) and 35 of the Law of Limitation Act, when the respondent filed the suit before the Ward Tribunal, it was time barred. He argued that notwithstanding the respondent being an administrator of the estate of her

late father, the suit was filed after the expiry of 12 years hence her claims were time barred when instituted in the year 2012 before the Ward Tribunal.

On ground two, it was Mr. Mushokorwa's submission that the High Court erred in law to hold that there was violation of section 45 of the Village Land Act. He argued that since the suit land was allocated to the respondent's deceased father, who failed to implement the conditions set by the KSHICSL that the suit land had to be cultivated within three years, the deceased father never used the suit land and hence the respondent had no right to claim repossession. In 1999, the KSHICSL allocated it to the deceased Pius Mgimwa who was the son - in - law of the appellant, that a right of possession passed to his wife (daughter of the appellant) and upon her death passed to the appellant. He concluded that the respondent and her deceased father were caught by the law of abandonment to the suit land and implored the Court to allow the appeal with costs.

In reply, Mr. Mkumbe opposed the submissions by Mr. Mushokorwa on ground one that Pius Mlimwa was an invitee to the suit land and he cannot claim ownership of the suit land of the host. He argued that there

was no limitation of time on the part of the owner to claim the suit land as it was done by the respondent. He contended further that the appellant used false claims against the respondent by handing over the suit land to others; his son-in-law Pius Mlimwa, his deceased daughter and himself. He concluded that the appellant has no right of claim to the suit land.

On ground two, Mr. Mkumbe contended that the suit land was never abandoned for the reason that Pius Mlimwa was invited by the respondent's father to cultivate the land and later when he passed away, his wife continued to cultivate as an invitee. The appellant being the father-in-law of Pius Mlimwa, upon the passing away of his daughter continued to use the suit land as an invitee. He further claimed that the appellant was the chairman of the Village Council and allegedly used his position to dispossess the respondent the rightful owner who was young when her father passed away. On the issue of the respondent being time barred to file her suit, Mr. Mkumbe argued that, where a third party like the appellant invaded the suit land, section 7 of the Law of Limitation Act was not applicable to this case. He implored the Court to dismiss the appeal and uphold the High Court decision.

Having considered the rival submissions of the parties, we now turn our attention to determination of the grounds on the points of law as certified by the High Court.

On ground one, the law on limitation of claims on land matters is well established and it does not need interpolations. According to section 9(2) and Item 22 of Part I of the Law of Limitation Act, the right of action is deemed to accrue on the date of the dispossession of the land in question. The law prescribes twelve years limitation period within which to institute actions to claim back the land reckoned from the date the claimant was dispossessed the land. That stance was also stressed in the case of **Barelia Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (unreported).

Both parties agree that the suit land was allocated to the respondent's father in 1992. The appellant does not know when Pius Mlimwa was allowed to use the suit land. The only available evidence concerning the suit land is exhibit P3 under which the respondent's deceased father allowed Pius Mlimwa to use the land but not to own it. In the case of **Musa Hassani vs. Barnabas Yohanna Shedafa**, Civil Appeal

No. 101 of 2018 (unreported), the Court stated the following about the invitee's claim of possession:

> *"We should state at the outset of our determination that we agree with the appellant that the High Court, after making a finding that the respondent was an invitee, erred in holding that his long occupation in the disputed land entitled him to own that land. As far as we are aware no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited."*

Since there is no evidence demonstrating that the respondent's father was dispossessed the suit land, the alleged passing over to Pius Mlimwa, then to the appellant's daughter and finally to the appellant himself is untenable. It is trite law that no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made on the land on which he was invited. We are further fortified in this view by our decision in **Maigu E. M. Magenda vs. Arbogast Mango Magenda**, Civil Appeal No. 218 of 2017 (unreported) where we had this to say:-

"We do not think continuous use of land as an invitee or by building a permanent house on another person's land or even paying land rent to the City Council of Mwanza in his own name would amount to assumption of ownership of the disputed plot of land by the appellant".

Guided by the foregoing position of the Court in **Musa Hassani vs. Barnabas Yohanna Shedafa** (supra) and **Maigu E. M. Magenda vs. Arbogast Mango Magenda** (supra) articulating the position of the law in this jurisdiction, we wish to underscore that an invitee cannot own land to which he was invited to the exclusion of his host whatever the length of his stay. It does not matter even if he paid the land rent in his own name, he was invited to the land. The permission of the respondent's father allowed Pius Mlimwa to use the suit land as an invitee. In the circumstances, the deceased Pius Mlimwa as an invitee had no right to transfer the suit land to anyone. See also, **Yeriko Mgege vs. Joseph Amos Mhiche**, Civil Appeal No. 137 of 2017 (unreported).

On account to the above position and the evidence adduced at the Ward tribunal, it is evident that the law of limitation cannot be applicable where there was an invitation to use land. In the present appeal, the evidence proves that Pius Mlimwa was an invitee. We totally agree with the

finding of the second appellate court that, "*the plaintiff's father had a right of possession of the piece of that land without time limit. This is on account that Pius Mlimwa was an invitee to the piece of land. As demonstrated in a number of cases, no invitee can exclude his host whatever the length of his occupancy on the piece of land*".

The forgoing demonstrates that there was a host – invitee relationship in which the law of time limitation could not be invoked. The respondent's father estate was not affected by the law of limitation and thus ground one stands dismissed for lack of merit.

In ground two, the issue is whether the estate of the respondent's father was affected by the law of abandonment. The determination of this issue lies in the proper interpretation of section 45 of the Village Land Act, (the VLA) on which the learned advocates had opposing submissions.

Guided by the import of section 45 of the VLA, the High Court was mindful on the law of abandonment that any party who wishes to invoke the doctrine of abandonment must establish that the land held under customary right of occupancy must be abandoned for a minimum of not less than 5 years. It was also the observation of the High Court that the Kapunga Small Holder Land Allocation Committee which was acting on

behalf of Chimala Village Council failed to publish a 30 days public notice inviting any objection from the occupier (the respondent's deceased father) or any member of the public.

After perusing the evidence on record, it appears that neither the appellant nor his witnesses adduced evidence proving compliance with the conditions set out under section 45 of the VLA warranting the KSHICSL to declare the suit land as abandoned land. In terms of section 45 (1), the appellant was required to prove one or more of the three factors to establish that a customary right of occupancy by the respondent's father was abandoned. Given the evidence on exhibit P3 that the respondent's father invited Pius Mlimwa in 1995 to the suit land, we are satisfied that there is no point in time the land was left unoccupied. At all times, the suit land was cultivated and used by Pius Mlimwa. The appellant came into occupation of the suit land after the demise of Pius Mlimwa whose daughter was the wife of Pius Mlimwa; the invitee. Regarding the claim that the respondent was dispossessed because he failed to pay rent and tax, it is trite that an invitee cannot dispossess the host who permitted him to use the suit land, even if he paid the land rent or dues in his own name as we so held in **Maigu E. M. Magenda vs. Arbogast Mango Magenda**

(supra). Under the circumstances, it is clear that the suit land was never abandoned merely because it was used by the appellant. This ground also lacks merit and we dismiss it.

The upshot of the foregoing, is that the appeal is lacking in merit and is dismissed in its entirety with costs.

DATED at **DAR ES SALAAM** this 15th day of August, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The judgment delivered this 1st day of September, 2022 in the presence of Mr. Victor Mkumbe, learned counsel for the Applicant, Mr. Victor Mkumbe, holding brief Mr. Mushokorwa learned counsel for the Respondent both connected via Video Conference facility from Mbeya High Court is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL