IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT MBEYA

MISC. LAND APPEAL NO. 32 OF 2013

ANYIGULILE MWAILOMO ..... APPELLANT

VERSUS

OSIA MWAMBULUMA ..... RESPONDENT

JUDGMENT

Date of last Order: 23/07/2015
Date of Judgment: 11/08/2015

A.F. NGWALA, J:

At Lufilyo Ward Land Tribunal vide Civil Case No. 2 of 2012, the appellant, Anyigulile s/o Mwailomo lost his claims for recovery of a piece of land from the respondent. Dissatisfied with the decision of that Ward Tribunal, he appealed to the District Land and Housing Tribunal for Rungwe which upheld the trial tribunal's decision and order. Still undaunted, the appellant has made his way to this court for a second appeal.

It is common ground that in both tribunals, the appellant lost the suit on the ground of limitation. That is the suit was time barred because he instituted his claims after a period of fifteen (15) years had elapsed since the time that respondent

took possession of the suit land. The trial tribunal reasoned that since the appellant had been silent since 1997 to 2012 without claiming the suit land, then he had acquiesced in the possession of the land by the respondent by way of adverse possession.

Before this court, the appellant has preferred two grounds of appeal as follows:-

1. That both Tribunals below erred in point of law and fact when they failed to balance the weight of evidence adduced before them and reached at wrong conclusion.
2. That the District Land and Housing Tribunal (DLHT) erred in law and fact when it failed to take into consideration that after the death of the late father of the appellant, in 2004, the respondent invaded the land in dispute without claim of right.

Mr. Owegi, the learned counsel who represented the appellant submitted that the two tribunals below did not do justice to the case. He argued that the Ward Tribunal occasioned several procedural irregularities at the hearing of the suit and ultimately deciding in favour of the respondent. The respondent's evidence that he was given the suit land in 1977 was uncorroborated and infact was contradicted by his witnesses. It was submitted that at the trial, it is the

appellant who proved the case on the balance of probabilities and not the respondent.

Mr. Owegi further submitted that it was not proper for one Mwambola to ask Mwakwenda to show the borders of land with Mwankisi, while he was not concerned with the land that was to be shown to the respondent. Mr. Owegi insisted that, Mwambola played around with the evidence in the ward tribunal to take away Mwakwenda's land instead of his father's land. The learned counsel averred further that there is another contradicting evidence from one Mwambona Mwandosya who featured as PW1; when he admitted that they took the land by force from the appellant's father. The other witnesses said the land was given to the respondent and not taken by force. Mr. Owegi was of the view that if at all the land was taken by force then, the respondent cannot benefit from such illegality.

Mr. Owegi, also criticized the ward tribunal's decision saying that the respondent did not even show how big the suit premise was. No evidence as to who were neighbours or people bordering the four corners of the suit land. He alleged that some of the witnesses did not speak the truth, though he gave a mere swee ping statement that had no proof evidence that effect.

The learned counsel contended that, it is apparent according to the facts that by the time the appellant's father was dying, he did not know that the respondent had taken part of his land. Mr. owegi did not end there, he submitted further that there are irregularities in the Ward Tribunal's proceedings which goes to the root of the matter. One is that, there is no Coram indicated, the fact which gives doubt whether the tribunal was properly constituted or not or whether there was proper composition of gender or not.

Another irregularity pointed out was in respect of age of witnesses who testified. The proceedings do not indicate the age of the witnesses. Indicate the age of the witnesses which is contrary to Section 5 (1) (e) of the Ward Tribunals Act, No. 7 of 1985.

He also averred that the committee members did not indicate their individual opinion before judgment was given. Lastly it was the learned counsel's submission that the appellant was not given a chance to cross-examine his own witnesses.

In response to the oral submission by Mr, Owegi, learned counsel for appellant, Ms Zakiah had the following arguments:-

In respect to the first ground, it was her submission that the tribunal properly evaluated the evidence on record and reached a just decision. That the evidence is not

contradictory as pointed by the counsel for the appellant as the respondent and his witnesses consistently and unequivocally testified that the respondent is a lawful owner of the land in dispute.

The learned counsel averred that, the respondent was given the suit premises by Mwankisi, the son of Kajisi. It was contended by Ms. Zakiah that because Mwankisi was blind we requested one Mwambola to go and show the bounderies the testimony which was corroborated by Mwambona Mwandosya.

The learned counsel further submitted that before the death of the appellant's father, there was no dispute over the suit premises, and even before the death of the appellant's father, the appellant never claimed the suit premises. Ms. Zakiah stated the appellant's assertion that he is the administrator of the estate of his late father is without proof as there are no letters of administration of the estate to prove so.

On the issue of proper authority to allocate the land, the learned counsel submitted that, there was proper authority from Mr. Mwankisi who agreed to allocate his land to the Respondent.

On the issue of Coram, Ms. Zakiah stated that the Coram appears on the last page of the Ward Tribunal's judgment and that the Coram is duly constituted as required by the law. At

page 8 of the Ward Tribunal's proceedings, it is also apparent that the appellant was given a right to cross examine his witnesses. Ms. Zakiah advanced that age is not a requirement under the Court's Land Disputes Act, No. 2 of 2002. The learned counsel contended that, the respondent used the Land for more than 12 years, the fact which he the appellant had admitted at page 2 of the Ward Tribunal's Proceedings. So the tribunal properly considered the matter in accordance with item 22 part I of the schedule to the Law of Limitation Act, Cap. 89 R.E. 2002, and Section 39 of the sameLaw of Limitation Act, Cap. 89 R.E. 2002. Thus the appellant's rights over the suit premises have been extinguished for being time barred.

It was Ms. Zakia's submission that in respect of the second ground of appeal, there were no compelling circumstances in the District Land and Housing Tribunal that could warrant the chairman to summon additional witnesses as per the law.

In his rejoinder, Mr. Owegi for the appellant argued that the appellant was not living in the village, thus he was not aware that the respondent had taken his father's land. He insisted that even though the appellant has not filed letters of administration but the evidence shows that he is the son of Mwankwenda and hence a proper heir of Mwankwenda.

With regard to the Coram in the Ward Tribunal, the learned counsel averred that, in all the days that the case proceeded no Coram is indicated. That includes the way the tribunal visited the suit land. As such he was of the view that the irregularities go to the root of the case right from the Ward tribunal to the DLHT. He requested this court to order trial denovo.

Submitting in respect of age of the witnesses, it was the learned counsel's rejoinder that, the mere fact that the land laws do not stipulate on the age of witnesses, we cannot ignore what is provided in the Evidence Act, Cap. 6 R.E.2002.

I had an opportunity to revisit the records of both tribunals as well as the grounds of appeal filed by the appellant. One fact which is not disputed is that both tribunals disposed the case basing on the principle of adverse possession and limitation period.

At the trial, the appellant's evidence was to the effect that, after the death of his father, the respondent was allocated the suit land by the village leadership. His evidence is however contradicting, in the sense that, he is quoted saying that:-

> *"- - - - -Pia kabla hajafa mzazi wangu mwaka 2004 ndipo huyu Mwambuluma akawa anavamia ardhi hiyo na baada ya kuvamia ardhi hiyo mzazi wangu akawa anakufa".*

This means, that the respondent one, Osea Mwambuluma has been in possession of the suit premises even before 2004 when, the appellant's father passed away. The question to be asked here is when did the respondent start to use the land and to be found in the disputed shamba. In the records of the proceedings of the trial tribunal, the respondent clearly stated that he was given the land by Mwankisi in 1977. Since there is no other evidence which provides to the effect that there was another allocation after that year, the obvious conclusion is that, the Respondent came into possession of the suit land in 1977.

In its decision, the Ward Tribunal, took into consideration, the years, the respondent has been in possession of the suit land. Having been satisfied that it was more than twelve years, it ruled in favour of the Respondent, that the land had been adversely passed to the respondent due to limitation period.

The Ward Tribunal in its judgment, inter alia stated:-

> *"---- hivyo basi toka mwaka alioutaj ndugu Adamu hadi sasa ni miaka 14. Hivyo basi mdaiwa amekaa kwenye mji huo miaka ambayo ni zaidi ya miaka iliyopangwa kisheria hivyo Baraza limeona kuwa ni mmiliki halali wa Ardhi ile".*

The Tribunal went further stating:-

> *"----hivyo sheria inakataa kumwondoa mtu aliyemiliki ardhi zaidi ya miaka 12. Hata kama aliingia kumiliki ardhi bila uhalali".*

In the first ground of appeal, the appellant averred that, both tribunals below erred in law and fact, when failed to balance the weight of evidence adduced before them and as as result reached a wrong conclusion.

I have attempted, though briefly to analyse the evidence upon which the tribunals below reached their decisions. As, the issue of limitation and adverse possession are issues of law which have the effect of disposing of the suit, I find it pertinent to examine whether the said principles were properly invoked by the tribunals.

Item 22 of part I of the schedule to the Law of limitation Act, Cap 89 R.E. 2002, provides expressly that suits for recovery of land, the limitation period is 12 years. As for determination of accused of right of action and computation of period of limitation for this suit, the relevant provisions are **Sections 9 (1) and 35 of the Law of Limitation Act, Section 9 (1)** reads:-

> *"Where a person institutes a suit to recover land of a deceased person whether under a will or intestacy of and*

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".

And Section 35 says:-

"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 administration or, as the case may be, of the probate".

Applying these provisions to the present case, the appellant's right of action accrued from 2004 when the deceased died. However in the instant case, the evidence on record shows that the suit land or premises have been in the possession of the respondent since 1998. This envisages that the Respondent had been in possession of the suit land six years before the deceased passed away and he never took any initiatives to claim the suit land.

The import of Section 9 (1) of the Law of Limitation Act, is that time starts to run against the one who institutes a suit to recover land of the deceased from the time of death of the deceased where at the time of death the said land was under his possession. The situation in this case appears different. The respondent has been in possession of the suit land even

before the death of the deceased. With due respect to the learned counsel for the appellant, the suit land was not given to the respondent in 2004 as he alleges, but in 1998 according to the evidence on record. It follows therefore that the right of action to recover the suit premises accrued since 1998 and not 2004 when the appellant's father passed away.

The provisions of Section 9(1) and Section 35 of the Law of Limitation Act, cannot be invoked under these circumstances instead, the proper provision of the law to be applied is item 22 of Part I of the schedule to the Law of Limitation Act, which provides that a suit to recover an immovable property is 12 years. That being the case, it goes without saying that the appellant instituted this suit at the Ward Tribunal when he was already time barred for almost 4 years. This is so when, the computation of the limitation period starts from 1998.

I wish at this juncture to point out that, even if the appellant's father had been in possession of the suit premises at the time of his death, yet the appellant appears not to have locus stand to use the suit premises. In his testimony before the trial Ward Tribunal he asserted that, he is an administrator of the estate of the late Mwankwenda (his father). However no letters of appointment to that effect have been tendered by the appellant. More so he was not the only son and only relative of the deceased who could be the administrator and heir of

the deceased. How can the Court or Tribunal believe mere words that he was appointed to be an administrator of the estate of his father with being declared so customarily of by the competent Court?. It must be understood that in these moderm days and or contemporarily days, and under the settings of the parties who operate within the Nyakyusa Customary Land Tenure and Social change there is no way, the appellant could institute these claims without being supported by the other heirs.

In **JOHN CORNEL Vs. A. GREVO (T) Ltd**, Civil Case No. 70 of 1998 (Unreported); Kalegeya, J. inter alia observed:-

> "However unfortunate it may be for the plaintiff, the law of limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web".

It surfices to say that, the appellant as observed by his lordship in John *Cornel's case (supra),* is caught in the merciless sword of the Law of Limitation which has no sympathy at all. Since this is a legal requirement that needs to be adhered to, I find my hands tight to do anything or decide otherwise except to abide by the law. The appellant filed the suit out of time, He is time barred by the law. Whence, be it that, the land in dispute belonged to his late father or not, as correctly opined by the tribunals below, the

appellant's right of ownership in the suit premises is automatically extinguished. The respondent acquired the ownership of the land in dispute under the principle of adverse possession or long uninterrupted possession of the land under which he is protected by the principle of Prescription. Or Prescription Rule.

That said, I find it unnecessary to take the remaining issue, as that would be a mere academic exercise which is not intended here. Thus, the decisions of the Ward and District Land and Housing Tribunals are hereby upheld. The Appeal is dismissed. In the circumstances of this case I make no orders as to costs.

A.F. NGWALA
JUDGE
11/08/2015.

Date: 11/08/2015

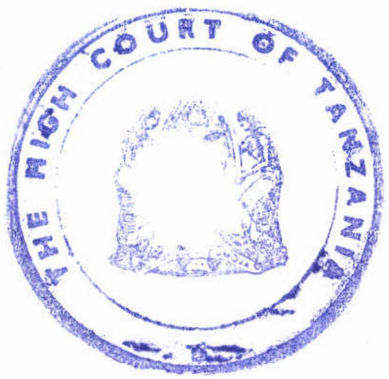
Coram: A. F. Ngwala, J.

Appellant: Present

Respondent: Present

Court: Judgment delivered in court in the presence of the parties.

Court: Right of Appeal to Court of Appeal of Tanzania explained.



A.F. NGWALA
JUDGE
11/08/2015.