

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB – REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO 26609 OF 2023

*(Originating from Application No 29 of 2023 of the District Land and Housing Tribunal for
Mbulu District at Dongobesh)*

SAFARI AMMA NERAY APPELLANT

VERSUS

GUYANI SLAA MATLE RESPONDENT

JUDGMENT

29th February and 12th April 2024

MIRINDO J.:

In an action before Mbulu District Land and Housing Tribunal, Safari Amma Neray, the appellant, sought to recover from his neighbour, Guyani Slaa Matle, the respondent, a half-acre of land. In his pleading, he claimed acquiring the disputed land in 1973 through adverse possession but his testimony and that of his witnesses was that he inherited the disputed land from his father who died in 2012 and on 20th April 2023, the respondent invaded the disputed land by setting new boundaries and cultivating beans. At the conclusion of the trial, the Tribunal held that since there was variation between pleading and evidence, the case was not proved on the balance of probabilities and dismissed the action.

In his five grounds of appeal to this Court, Safari Amma Neray, the appellant, complains in essence that the decision of the Mbulu District Land and Housing Tribunal is against the weight of evidence. I will first address his second ground of appeal in which he complains that the Tribunal erred in not considering the principle of adverse possession. At the hearing of the appeal, the appellant appeared in person and restated that the disputed land was owned by his father since 1976 and he inherited it in 2012. The respondent who also appeared in person opposed the appeal and argued that there was sufficient evidence to support the decision of the trial tribunal.

Certainly, the appellant was referring to paragraph 6 (a) (i) of his pleading before the Tribunal which is in Kiswahili and whose contents are as follows:

Kwamba eneo hilo lenye mgogoro ni mali halali ya Mleta Maombi eneo hilo ambalo alilipata kwa njia ya kujikatia (adverse possession) mwaka 1973 na baadaye kufanyiwa maboresho na operation Kijiji cha Isale mwaka 1976 na aliweza kutumia eneo hilo ikiwa mali yake halali ambalo akilitumia kama mali ya familia kwa ajili ya kujikimu kimaisha.

As alluded at the beginning of this judgment, without reference to adverse possession in 1973, the appellant's case during the trial was that he inherited the disputed land in 2012.

Like the trial tribunal, I am of the view that there was variation between pleading and evidence. The general rule is that parties are bound by their pleadings and no evidence is relevant that is in contradiction of what has not been pleaded. Not every variation between pleading and proof is bad for a party's



case as was reaffirmed by Sarkar S and Manohar VR, (eds), *Sarkar Code of Civil Procedure*, 11th edn, Vol 1, Haryana: Lexis Nexis, 2006 at Page 1031

.... The ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea...The rule is based mainly on the principle that no party should be prejudiced by the change in the case introduced...Evidence has to be tailored strictly according to the pleadings and cannot be a probing adventure in the dark giving surprise to the opposite party... Relief may be granted even on a ground not specifically pleaded provided there is no surprise or prejudice to the other party...Every variance between pleading and proof is not necessarily fatal to the suit or defence and the rule of *secundum allegat et probata* will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby...

Where the evidence has some foundation in the pleading, it is relevant if the opposite party is not prejudiced in that the opposite party had the opportunity. In the present case Safari Amma Neray claimed his title to the disputed land through adverse possession since 1973 and that he was subsequently allocated the disputed land through operation of Isale Village in 1976. At the trial, his case was that he claimed his title to the disputed land through inheritance from his father who died in 2012 and that the dispute was a result of the 2023 invasion by Guyani Slaa Matle.

In his defence, Guyani Slaa Matle, claimed title to the disputed land through inheritance from his late father, Slaa Matle Baran. The exact date in which he inherited the disputed land is unclear. He testified that either his father gave him the suit land in 1974 when he was four years old or he obtained the



disputed land in 1987 when it was divided among his children. His second witness stated that Matle acquired suit land in 1982.

In the circumstances of this case, the respondent's evidence is uncontroverted and the new case introduced by the appellant is unsubstantiated. There is no evidence how the appellant's father acquired the disputed land before 1974. It is clear that the respondent's case sought to dispute appellant's claim of adverse possession, of which, the appellant, unwittingly abandoned at the trial. It follows that the second ground of appeal is untenable.

In his first ground of appeal, he argued that the decision of the trial tribunal was unjust because it was based on the conflicting testimony of the respondent's witnesses. I agree that there is some uncertainty regarding the exact date when the respondent, Guyani Slaa Matle inherited the disputed land. In a civil case, like the present one, the applicant or plaintiff, bears the overall responsibility to prove his or her case. In the words of Thompson JA in *Arthur v Bezuidenhout and Mieny* (1962 2 SA 566 (A) at 574B, the question at the end of the trial is: "has the plaintiff, having regard to all the evidence in the case, discharged the onus of proving, on a balance of probabilities...[his claim] against the defendant?"

As demonstrated above, all the dates mentioned in the respondent's case predate those of the appellant and there is no proof of adverse possession. There is no evidence of how the appellant's father acquired the disputed land and this is



so because the appellant set up a new case at the trial and left the respondent's evidence unchallenged.

In view of the above conclusion, it becomes unnecessary to consider the remaining grounds of appeal. I find no merit in this appeal which I dismiss with costs.

DATED at BABATI this 23rd day of March 2024



F.M. MIRINDO

JUDGE

Court: Delivered in the presence of both parties. B/C: William Makori present.



F.M. MIRINDO

JUDGE

12/4/2024

