IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 1 OF 2023

(C/F Land Appeal No. 12 of 2019 at the District Land and Housing Tribunal for Karatu at Karatu)

BETWEEN

PENDO MATIKU..... APPELLANT

VERSUS

MWANAHAMISI ISSA.....1ST RESPONDENT

MUSA GAVANA.....2ND RESPONDENT

ABDI GAVANA.....3RD RESPONDENT

HASSAN GAVANA.....4TH RESPONDENT

SALAHO AWAKI BARAVE.....5TH RESPONDENT

JUDGMENT

26/9/2023 & 29/01/2024

MWASEBA, J.

The present matter was initially filed in the District Land and Housing Tribunal for Arusha at Arusha (the DLHT) by the appellant, Pendo Matiku, against Mwanahamisi Issa, Musa Gavana, Abdi Gavanna,

Hassan Gavana, and Salaho Awaki Barave to be respectively referred to as the 1st, 2nd, 3rd, 4th, and 5th respondents.

The appellant claimed to be the lawful owner of the piece of land measuring four (4) acres located at Slahhamo hamlet, Khusmay Village in Endamarariek ward in the District of Karatu in Arusha. She claimed to have acquired the suit land from the late Bariye Shoha, who gave it as a gift to the appellant and her late husband, Issa Gavana Bariye. On the other hand, the 1st and 2nd respondents averred that the suit land is the property of the 1st respondent, who was given as a share after the death of her father-in-law, the late Bariye Shoha. The 5th respondent supported that the suit land belongs to the 1st respondent herein and not the appellant.

The trial tribunal heard the parties and gave its verdict that the appellant failed to prove her claim on the balance of probabilities and dismissed the application with costs. It further ordered the appellant to pay the 5th respondent Tshs. 1,500,000/= as the costs for joining him as one of the parties while he was not part of their dispute. The trial tribunal's decision aggrieved the appellant, who preferred to challenge the same to this court by way of an appeal armed with four (4) grounds of appeal to wit; -

1. *That, the trial tribunal erred in law and fact when opined that the Appellant herein to pay sum Tshs. 1,500,000/= to the 5th Respondent while there was no any application for bill of costs and award thereof hence an erroneous decision was pronounced.*

2. That, the trial Chairperson erred in law and fact when he invoked the doctrine of adverse possession in the suit land while there was no any person/witness brought such a defence hence a shoddy decision was given.

3. That, the trial tribunal erred in law and fact by entering the judgment in favour of respondents without taking into consideration that, the Appellant is the lawful owner of the disputed land based on the evidence adduced by the appellant and her witnesses hence a bad decision was given.

4. That, the trial tribunal erred in law and facts when it failed to account any weight of the evidence before it by the Appellant, solemnly relied on the evidence adduced by the 1st respondent hence a shoddy decision was given.

Before this court, Mr. Richard Evance Manyota and Felichismi Baraka, both learned counsels, appeared representing the appellant and respondents, respectively. The appeal was consensually disposed of by way of written submission.

Submitting in support of the appeal, on the 1st ground, Mr. Manyota complained that it was wrong for the DLHT to order the appellant to pay the 5th respondent Tshs. 1,500,000/= as a cost of the case, while there is procedural law governing the costs. He argued further that the said procedure is governed by the **Advocates Remuneration Order,** GN No. 263 of 2015. It was his further submission that the issue of granting a certain amount should be left to a proper procedure as per the **Advocates Remuneration Order**.

Expounding on the second ground of appeal, Mr. Manyota was of the view that it was wrong for the DLHT to invoke the doctrine of adverse possession, while it was never pleaded by any witness as a defence. He argued further that the 1st respondent alleged to have been given the disputed land by the late Bariye Shoha, and the only evidence was a written contract, which was never brought before the court as documentary evidence. It was his submission that the 1st respondent never proved her ownership through adverse possession. His arguments

were supported by the case of **The Registered Trustee of the Holy Spirit Sisters Tanzania v. January Kamili Silayo and Others**, Civil Appeal No. 193 of 2016 (Unreported).

It was Mr. Manyota's submission on the 3rd and 4th grounds of appeal that, the appellant herein proved her ownership over the disputed land, but the trial tribunal never took into consideration her evidence. Her evidence was supported by the evidence of AW3 and AW4 who are the children of the late Bariye Shoha, and they were also present during the distribution of the suit land. He added that it was fatal for the trial tribunal not to analyse the evidence properly before it. He cited the case of **Malaki Mmari and 5 Others v. Moshi Municipal Council**, Civil Appeal No. 200 of 2020 (CAT at Moshi, Unreported) to support his arguments. He prayed for the appeal to be allowed and the decision of the DLHT in land Application No. 12 of 2019 to be quashed and set aside.

On the other hand, Mr. Baraka submitted on the 1st ground that the DLHT awarded the costs of Tshs. 1,500,000/= to the 5th respondent as general damages following his prayer that he incurred costs by engaging an advocate and the disturbances caused for instituting the suit against the 5th respondent without justifiable reason. Thus, as

general damages are awarded at the discretion of the court, it was correct for the DLHT to award the 5th respondent such an amount. He prayed for this ground to be dismissed with costs.

Replying to the 2nd ground of appeal, Mr. Baraka submitted that the 1st respondent did not claim ownership of the suit land by way of adverse possession but rather, she said, she became the owner after the land was distributed to her from the estate of Bariye Shoha in 1992 and for being in long occupation and use. He supported his arguments with the book **Theoretical Foundation of Land Law in Tanzania, law Africa Publishing (T) Ltd**, 2015 on page 266 where the author expounded the above concept that long and undisturbed possession of land be protected.

Responding to the 3rd and 4th grounds of appeal, Mr. Baraka argued that the conclusion as to who is the owner of the disputed land cannot be determined based on a piece of evidence but on the whole evidence. It was his further submission that the appellant failed to prove that she was given the disputed land by the late Bariye Shoha, and her evidence was full of contradictions. He asserted that the appellant is not clear as to when she started using the suit land, hence it is not only that she failed to prove ownership but also, she failed to prove for how long

she had been using it. Further, the appellant failed to connect the 5th respondent with the case. His argument was supported by the case of **Edward Ntinkule v. Evarist Ntafato**, Misc. Land Appeal No. 11 of 2022 (unreported). Finally, he prayed for the appeal to be dismissed with costs.

Having carefully considered the rival arguments advanced by the learned counsels for the parties and after having examined the record of appeal before this court, the main issue to be considered is whether the appeal by the appellant is meritorious.

Starting with the 1st ground of appeal, Mr. Manyota complained that it was wrong for the trial tribunal to order the appellant to pay the 5th respondent Tshs. 1,500,000/= as a cost of the case while it was the duty of the taxing officer. On his side, Mr. Baraka was of the view that since that was general damage for the costs incurred by the 5th respondent, the trial tribunal was correct to order the appellant to pay him such an amount.

This ground will not take much of my time. I have glanced at the pleadings, the 5th respondent did not pray for general damages as alleged by the counsel for the respondents but rather any relief, which in my view, relates to the costs of the case, if any. There is no way the

tribunal could order a relief that has not been specifically prayed by the parties. See the case of **Chama Cha Msingi cha Mazao Mabunda v. Abel Baguma,** Land Case No. 32 of 2017 (CAT Unreported). Therefore, I agree with the counsel for the appellant that the trial tribunal had no power to order the appellant to pay Tshs. 1,500,000/= as a cost of the case as the same is governed by the **Advocates Remuneration Order** (Supra), and the taxing officer is mandated to determine bill of costs matters. Thus, this court finds merit on this ground of appeal.

Regarding the 2nd ground of appeal, Mr. Manyota complained that it was wrong for the trial tribunal to invoke the principle of adverse possession while the 1st respondent did not plead the same in her written statement of defence. On the other hand, Mr. Baraka argued that the 1st respondent never relied on the principle of adverse possession, but she claimed the disputed land to be her own property.

Having revisited the records of the trial tribunal, it was rightly submitted by both learned counsels for the parties that the 1st respondent never pleaded the principle of adverse possession, and she did not rely on the same to claim the ownership of the suit land. Upon

my perusal of the record, I have observed on page 6 of the trial tribunal's judgment where the Hon. Chairman was of the view that:

> *"Pia Hakuna ubishi kwamba ardhi ya mgogoro imekuwepo katika umiliki na utumiaji wa mdaiwa Na. 1 kwa miaka mingi kuanzia 1992, hivyo ni Dhahiri sheria ya The Law of imitation Act, Cap 89 RE 2019, 1st schedule item 22,*
>
> *'The prescribed time limit to redeem the land is 12 years.'*
>
> *Hivyo mdaiwa No. 1 analindwa na sheria hapo juu."*

With due respect, I wish to differ with the Hon. chairperson as the record does not suggest that the 1st respondent relied on the principle of adverse possession to claim her ownership of the purported suit land. However, she claimed ownership of the said land by being given her share after the death of her father-in-law. By virtue of that kind of ownership, the principle of adverse possession is misplaced in this case. It is the trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. This was well stated by the Court of Appeal in the case of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili** (Civil Appeal 193 of 2016) [2018] TZCA 32 (6 August 2018) as follows:

> *"In the foregoing remark, the High court of Kenya had referred and followed two English decisions-* ***viz- Moses v. Loregrove [*** *1952] 2 QB 533; and* ***Hughes v. Griffin [*** *1969] 1 All ER 460. In those cases, it was held that* ***it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise****. (Emphasis added)*

That being the legal position, the principle of adverse possession was misplaced, and thus the 2nd ground of appeal is found to have merit.

Coming to the 3rd and 4th grounds of appeal, Mr. Manyota complained that the evidence was not properly analysed by the trial tribunal and that the doctrine of adverse possession was wrongly applied. On his side, Mr. Baraka submitted that the evidence was properly evaluated, and the appellant failed to prove her ownership as her evidence was full of contradiction.

It is worth noting 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 critical scrutiny. See the case of **Makubi Dogani v. Ngodongo Maganga** (Civil Appeal 78 of 2019) [2020] TZCA 1741 (21 August 2020).

The same position was observed by the Court of Appeal of Tanzania in the case **Philipo Joseph Lukonde v. Faraji Ally Saidi** (Civil Appeal 74 of 2019) [2020] TZCA 1779 (21 September 2020), where it was held that:

> "*This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions.*"

In our present case, the appellant filed an application at the DLHT of Karatu, claiming that the respondents herein trespassed on her land measuring 4 acres. For that reason, it was the duty of the appellant to prove her ownership over the disputed land. This position was well expounded in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019) that:

> "*It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.*"

See also the case of **Miller v. Minister of Pensions** [1937] 2 All. ER 372

It was the appellant's evidence at the trial tribunal that the disputed land was given to her and her late husband (Issa Gavana) in 1991 by the late grandfather of her husband. She alleged further that when they were given the disputed land, it was under the care of AW2 (Michael Hayshi), who alleged that he was given the land in dispute by the late Bariye Shoha for momentary use following the debt of Tshs. 70,000/= that the late Bariye Shoha owed him. She testified further that from 1999 to 2005, she had been using the land together with AW2, and thereafter, she used it without any intrusion until 2019, when the respondents invaded the suit land. Her evidence was supported by the evidence of AW2, AW3 and AW4. She further stated that the 1st respondent was her mother-in-law, and the late Bariye Shoha was the grandfather of her late husband.

On their side, the 1st respondent, who is the appellant's mother-in-law, testified that she and her late husband acquired the disputed land (four acres) from her late father-in-law, Bariye Shoha. She clarified that after the death of the late Bariye, his properties were divided among them, whereas she was given a disputed land. After the death of

the appellant's husband, they decided to give her (the appellant) one acre in order to help her and the children. They are astonished she is claiming that all four acres belong to her. The 1st respondent's evidence was supported by the evidence of DW1, DW2, and DW3, who stated that the disputed land belongs to their mother (1st respondent) and the appellant was only given one acre to use with her children after the death of her husband, who is also their brother, Issa Gavana Bariye.

Based on the evidence of both sides as submitted herein, there is no dispute that the land in dispute was originally owned by Bariye Shoha. When the appellant was given the land in 1991, the handover was witnessed by Michael Hayshi (AW2), Hari Bariye (AW3), and Kwaslema Bariye (AW4). AW3 and AW4 are the deceased's children. Further to that, AW4 is bordered by the Suitland. On the other side, it was alleged that the family meeting was convened after the death of the late Bariye, and the properties were divided among the children. However, no witness who attended the said meeting came to testify on their side. DW3 mentioned Kwaslema (AW4) to be present during the said meeting and that he was a family leader. However, Kwaslema testified on the appellant's side, and he clarified that his late father distributed his land to his children in 1991 prior to his death. He denied

having conducted the family meeting for distributing the properties of his late father after his death in 1992.

With the above evidence, it goes without saying that the appellant proved her claim on the balance of probabilities as required in civil cases. See the case of **Lamshore Limited and J. S. Kinyanjui v. Bazanje K. U. D. K** [1999] TLR 330. For the aforementioned reasons, this court finds that there is merit on the 3rd and 4th grounds of appeal.

In the upshot, and for the foregoing reasons, the appeal has merit, and it is hereby allowed. The trial tribunal decision is quashed and set aside. Considering the relationship of the parties who are relatives, each party will bear his/her own costs of this appeal and the costs incurred at the trial tribunal.

It is so ordered.

DATED at **ARUSHA** this 29th day of January, 2024.

N.R. MWASEBA

JUDGE