IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CIVIL APPEAL NO. 391 OF 2019

THE HON. ATTORNEY GENERAL..... APPELLANT

VERSUS

MWAHEZI MOHAMED *(As Administrator of the Estate of the late Dolly Maria Eustace)* **.....1ST RESPONDENT**
DESPINA NTEPI SPYRATOS.....2ND RESPONDENT
MELINA MARIA EUSTACE.....3RD RESPONDENT
ENOCK MAJERE SIMWANZA.....4TH RESPONDENT

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

(Masoud, J)

dated the 30th day of August, 2018
in
Land Case No. 18 of 2016

JUDGMENT OF THE COURT

21th & 26th February, 2020.

KEREFU, J.A.:

The main issue of controversy between the parties to this appeal is the ownership of a parcel of land described as Plot No. 77 Block KB XVI situated at Raskazone area in Tanga Region comprised in a Certificate of Title No. 130526/18 (the suit property). The material background and essential facts of the matter as obtained from the record of appeal indicate that, the original registered owner of the suit property was Anverala Hassanali Esmailjee Jivanjee who acquired and occupied it from 1953 to

1963 when it was transferred to Dolly Maria Eustace who was the wife of the Commissioner of Cyprus. It is on record that the said Dolly Maria Eustace died on 7th January, 2008 and probate was granted to Mwahezi Mohamed (the first respondent) to administer her estate. It was alleged that prior to her death, in 1971 the late Dolly Maria Eustace donated her right of occupancy over the suit property as a gift to the Republic of Cyprus. It was further alleged that, from that time the suit property was abandoned until such time when the Government of the United Republic through the Tanzania Building Agency (TBA) took possession and used the land for public interest and residence of Cuban and local doctors who worked at Bombo Hospital. It was also alleged that the Government had since occupied the suit property for a period of about forty (40) years without disturbance or interference. The Government renovated and rehabilitated the suit property and in 1998 rented it to the International School of Tanga. In 2011, the respondents allegedly invaded the suit property and claimed ownership over the same. Consequently, the appellant filed a Land Case No. 18 of 2016 in the High Court against the respondents praying, among others for a declaration that the Government through TBA is the lawful owner of the suit property.

The respondents disputed the appellant's claim and filed a counter claim alleging that, the suit property belonged to the late Dolly Maria Eustace since 1963 until 2008 when it was inherited by her two children Despina Ntepi Spyratos (second respondent) and Melina Maria Eustace (third respondent) who were dully registered as the lawful owners of the suit property. The respondents further alleged that when the late Dolly Maria Eustace left the country she handed over the suit property to her advocate one Tahir Ali (deceased) and one Abajoli as a caretaker and there was also a guard employed to look after the suit property.

The suit went into a full trial where the appellant summoned four (4) witnesses and the respondents summoned two (2) witnesses. At the closure of the parties' evidence, the court summoned Nicolaus Stephen Mbwambo, the Assistant Registrar of Titles Northen Zone from the Moshi Office, who testified as CW1. After consideration of evidence adduced before it, the High Court (Masoud, J.) decided the suit in the favour of the respondents. Aggrieved, the appellant decided to lodge this appeal. In the Memorandum of Appeal, the appellant raised nine (9) grounds of appeal which for reasons that will shortly come to light, we need not recite them herein.

When the appeal was placed before us for hearing, both parties were represented. The appellant was represented by Mr. Ponziano Lukosi, learned Principal Attorney assisted by Mr. Peter Musetti and Ms. Alice Mtulo, both learned State Attorneys. The respondents were represented by Mr. Mustapha Akunaay, learned counsel. The said learned counsel had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing to form part of their oral submissions.

Upon taking the floor to expound on the grounds of appeal, Mr. Musetti sought leave, which we granted for him to consolidate the grounds of appeal into two grounds, namely:-

(a) *That the trial Judge erred in law and fact for failure to evaluate the evidence and hold that the appellant failed to prove the fact that they have acquired the suit property in dispute under adverse possession; and*

(b) *That the trial Judge erred in law and fact for failure to properly evaluate the evidence and consider the gaps in the respondents' evidence hence relying on uncorroborated oral evidence.*

Submitting in support of the first ground of appeal, Mr. Musetti faulted the learned trial Judge for failure to properly evaluate the evidence on record and declaring the second and third respondents lawful owner of the suit property without considering the fact that the appellant had acquired the same under adverse possession. He argued that the appellant had proved and established all factors related to adverse possession as decided in the case of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others,** Civil Appeal No. 193 of 2016 (unreported).

Mr. Musetti further argued that during the trial PW1 and PW3 clearly testified that the suit property was abandoned by the Government of Cyprus and occupied by the Government of Tanzania since 1971. He said, in 1975 and 1998 the suit property was leased to Cuban and Tanzanian doctors and then later rented to the International School of Tanga. He further argued that the appellants' witnesses also testified that, the Government had occupied the suit property for about forty (40) years and had renovated and rehabilitated it to a greater extent. He then argued that, it is a principle of the law that when one occupies a deserted land for a long time, his occupation should not be disturbed. To substantiate his position he cited **Nassoro Uhadi v. Musa Karunge** [1982] TLR 302 and

urged us to find that the appellant had occupied the suit property for a long time and is the lawful owner under adverse possession.

Upon being probed by the Court, as whether the appellant has followed the procedure of claiming ownership under adverse possession as discussed by the learned trial Judge at page 363 to 364 of the record of appeal, Mr. Musetti conceded that the appellant has not complied with that legal procedure. Again, upon being asked as whether the appellant was at any point in time from 1971 registered as the lawful owner of the suit property, Mr. Musetti responded that the appellant has never been registered as such.

Amplifying on the second ground of appeal, Mr. Musetti argued that, it was not proper for the learned trial Judge to conclude that the second and the third respondents are the lawful owners of the suit property without taking into account that the late Dolly Maria Eustace had already donated the said property to the Government of Cyprus who then deserted it and appellant entered into possession for about forty (40) years. He further faulted the trial Judge for failure to take into account that though the respondent claimed that the suit property was under the care of advocate Tahir Ali and Abogali, those people were not summoned as witnesses to prove that fact. He said, the trial Judge was supposed to

question as why Tahir Ali and Abogali did not stop the Government from entering into possession of the suit land. In conclusion, Mr. Musetti prayed the Court to allow the appeal with costs.

In response, Mr. Akunaay resisted the appeal. He submitted that there was no substance in any of the grounds of appeal as the learned trial Judge properly evaluated the evidence adduced by the parties and arrived at a correct conclusion. Mr. Akunaay challenged the appellant for claiming to have acquired the land under the principle of adverse possession without following the procedure prescribed under section 37 of the Law of Limitation Act, Cap. 89 R.E 2002 (the Limitation Act). It was the strong argument by Mr. Akunaay that, since the suit property is on the registered land, there is no way the appellant could have acquired it through adverse possession without following that procedure. He challenged the case of **Nassoro Uhadi** (surpa) cited by Mr. Musetti by arguing that the same is distinguishable and cannot be applied in this case, because the suit property in that case was on an unregistered land, while in the case at hand is on the registered land.

Mr. Akunaay further challenged the appellant's claim that the suit property was abandoned. He argued that, if at all the said claim is true, why then the appellant did not follow the procedures of revocation of the

right of occupancy under sections 44 – 50 of the Land Act, Cap. 113 R.E 2002 (the Land Act), or even acquiring the said abandoned land under section 51 of the same Act? Mr. Akunaay also contended that, before the trial court the appellant though claimed that the suit property was given to the Cyprus Government as a gift he never produced the deed of gift to prove that fact or a transfer deed to prove that the same was transferred to the Government of Tanzania. As such, Mr. Akunaay prayed for the entire appeal to be dismissed with costs for lack of merit.

In a brief rejoinder, Mr. Lukosi reiterated what was submitted in chief. Upon being probed by the Court as whether the appellant had followed the procedures of acquiring an abandoned land under sections 51 of the Land Act cited by Mr. Akunaay, Mr. Lukosi also conceded that those procedures were not complied with. Finally, Mr. Lukosi invited us to re-evaluate the evidence adduced on record and allow the appeal with costs.

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

In the premises, we wish to note that this being the first court of appeal 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 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).

Starting with the first ground of appeal where the appellant is faulting the trial Judge for failure to evaluate the evidence adduced during the trial, there is no doubt that, the main issue which reigned the day at the trial was on the ownership of the suit property. We have scanned the entire record of appeal and it is obvious that, though the appellant claimed to have acquired possession over the suit property for a long time since 1970s through a grant given to the Government of Cyprus and later transferred to the Government of Tanzania, had failed completely to adduce material evidence (oral or documentary) to prove those facts. There was no deed of gift or transfer deed availed before the trial court to

that effect. The appellant's witnesses PW1, PW2, PW3 and PW4 ended up producing communication letters which at any rate cannot manage to prove ownership over a registered land.

In addition, though the appellant also claimed to have acquired the suit property by an adverse possession, but he again failed to prove if he has complied with the procedures laid down under section 37 of the Limitation Act. The trial Judge had adequately considered the applicability of the doctrine of adverse possession on a registered land at pages 363 – 364 of the record of appeal and observed that:-

> *"...application of the doctrine of adverse possession in a registered land is not automatic. One has first to apply to the High Court for an order that he be registered under the relevant law as the holder of the right of occupancy in place of the person then registered as such holder. The same must be against the person then registered as the holder and the Commissioner for Lands."*

In our considered opinion, the trial Judge correctly applied the doctrine of adverse possession, because unlike in an unregistered land, the adverse possession over the registered land is not automatic. We have as

well observed that the appellant claimed adverse possession only by asserting that he had been in occupation of the suit land over forty (40) years. This assertion is incorrect as we have decided in the case of **Registered Trustees of Holy Spirit Sisters Tanzania** (supra) cited to us by Mr. Musetti at page 24 that:-

> *"In our well-considered opinion, neither can it be lawfully claimed that the respondents' occupation of the suit land amounted to adverse possession.* ***Possession and occupation of land for a considerable period do not, in themselves, automatically give rise to a claim of adverse possession.***"[Emphasis added].

Similarly, in the case at hand, the appellant cannot claim ownership over the suit property by an adverse possession without following the legal procedure entailed under section 37 of the Limitation Act. It is important to note that, in their submissions before this Court, both Messrs. Lukosi and Musetti had since conceded that the appellant has not complied with the prescribed procedures and has not even followed procedures stipulated

under sections 44 – 51 of the Land Act for revoking or acquiring an abandoned land.

We even find the appellant's case to be a misconception of both facts and law, as in law one cannot claim to have acquired ownership over the land simultaneously through a transfer and adverse possession. It has to be understood that the principle of an adverse possession cannot be used as a weapon but a shield when one is sued for illegal possession of the land. The appellant is not entitled to use adverse possession as a weapon to sue the respondent. In **Origenes Kasharo Uiso v. Jacquelin Chiza Ndirachuza**, Civil Appeal No. 259 of 2017 (unreported) this Court faced a similar situation. In that case the appellant claimed to be in an uninterrupted occupation of the disputed plot for fifteen consecutive years. The appellant also claimed to have developed the disputed parcel of land by building on it a dog house, a servant's quarter, a foundation for a three-storey building as well as fencing it. He argued further that the uninterrupted occupation entitled him to ownership by an adverse possession. This Court at page 24 of its decision stated that:-

> *"No declaration can be sought on the basis of adverse possession in as much as* ***adverse possession can be used as a shield and not as***

> ***a sword****...The appellant cannot rely on the principle of adverse possession in a case which he is a plaintiff."[Emphasis added].*

Similarly, in the case at hand it is our considered opinion that the appellant has wrongly invoked the principle of an adverse possession. We thus endorse the analysis and conclusion made by the trial Judge as a correct exposition of the law. The first ground of appeal is devoid of merit.

As regards the second ground of appeal, after going through the evidence adduced by the respondents' side, we hasten the remark that the appellant has no justification to fault the trial Judge for the evaluation and analysis made. It is on record that DW1 and DW2 ably narrated how the suit property was transferred to them. They tendered the Grant of Probate, the Deed of Transfer (exhibit D4) and the results of the official search (exhibit D5) conducted in 2013 which proved that they are registered owners of the suit property. The testimonies of DW1 and DW2 were corroborated by CW1, the Registrar of Titles who confirmed that according to the land register entries DW1 and DW2 are the duly registered owners of the suit property. The respondents have proved their case on the balance of probability; a standard required in civil cases. As such, we are

satisfied that the trial Judge properly analyzed the evidence availed before him and reached to an appropriate conclusion hence there is no justification to interfere with his decision.

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

DATED at **TANGA** this 25th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2020 in the presence of Mr. Abubakar Mrisha, learned Senior State Attorney assisted by Ms. Vivian Method, learned State Attorney for the Appellant and Mr. Waherema Kibaha, learned counsel holding brief for Mustapha Akunaay, learned counsel for the Respondents is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL