IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CIVIL APPEAL NO. 101 OF 2018

MUSA HASSANI ..... APPELLANT

VERSUS

BARNABAS YOHANNA SHEDAFA (Legal Representative of

the late YOHANNA SHEDAFA) ..... RESPONDENT

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

(Mushi, J.)

dated the 15th day of June , 2011
in
Land Appeal No. 27 of 2007

.....

JUDGMENT OF THE COURT

17th & 27th February, 2020

MWAMBEGELE, J.A.:

The present appeal stems from the decision of the Ward Tribunal of Vugiri Ward in Korogwe District, Tanga Region in Land Case No. 85 of 2006 in which the appellant Mussa Hassan had filed an application seeking a declaration that he is a lawful owner of a parcel of land occupied by the respondent Yohana Shedafa in whose shoes Barnabas Yohana Shedafa, as administrator of his estates, has now stepped after his death. For easy

reference we shall simply refer to Yohana Shedafa or Barnabas Yohana Shedafa as the respondent. The appellant alleged that he was allocated the land including the piece occupied by the respondent in 1977 who he invited to occupy the said land as an invitee but later claimed to be his. The Ward Tribunal ruled that the respondent was an invitee and ordered him to vacate the land. The appellant was also ordered to compensate the respondent for the development made on the land. We shall hereinafter refer to that land in dispute as simply the disputed land.

Aggrieved, the respondent appealed to the District Land and Housing Tribunal for Tanga, at Tanga where, relying on the decision of **Shabani Nassoro v. Rajabu Simba** [1967] HCD n. 233, it was found that the respondent was an invitee to the disputed land but due to the long occupation of the disputed land, he was to continue to occupy the same.

The decision of the District Land and Housing Tribunal (henceforth the DLHT) on appeal irritated the appellant. He thus appealed to the High Court of Tanzania through Land Appeal No. 27 of 2007. The High Court (Mushi, J.), on the same authority, upheld the decision of the DLHT and maintained that despite the respondent being an invitee to the disputed

land, considering his long occupation of about thirty years, it would be unfair to disturb him.

Undaunted, the respondent, having obtained the requisite leave to appeal and a certificate on a points of law, now appeals to this Court on two grounds of grievance, namely:

> *"1. That the Honorable Judge misdirected himself for failure to find that not always the long stay of an invitee grants him ownership of land; and*
>
> *2. That, the High Court Judgment is in contradiction, as it said that the Appellant having occupied the land for more than thirty years, it will be unfair to disturb him but the High Court Judge instead of allowing the appellant's appeal he dismissed it."*

When the appeal was placed before us for hearing on 17.02. 2020, the appellant was represented by Mr. Obediodom Chanjarika, learned advocate. The respondent, appeared in person, unrepresented. The appellant had filed written submissions in support of the appeal and Mr. Chanjarika sought to adopt them as part of the oral submissions. Having so done, what Mr. Chanjarika did was to clarify them. He clarified that the

respondent was invited by the appellant to stay in the disputed land temporarily until later when he would find a plot of his own. He submitted that as such the respondent was an invitee who could not have become owner of the disputed plot in which he was invited. He submitted further that the High Court, having found that the respondent was an invitee, erred in holding that the long occupation warranted him to be undisturbed.

With regard to the second ground of appeal, the learned advocate, technically, abandoned it, for, he submitted that it was meant to clarify that the word "dismissed" appearing in the last part of the judgment was but a slip of the pen as the appellate High Court Judge had already said the appeal was meritorious. He added that, reading in context, the High Judge was minded to allow the appeal.

Basing on the first ground of appeal, the learned advocate prayed that the appeal be allowed by declaring that the responded who was an invitee, should vacate the disputed land.

Fending for himself, the respondent submitted generally by reiterating the defence fronted from the beginning of the dispute; the Ward Tribunal to the effect that he was not invited by the appellant but was allocated that

piece of land by the Village Council during the second phase of the Villagisation Programme in 1978; he was not an invitee as claimed by the appellant. He was emphatic that the two courts below decided in his favour.

In a short rejoinder, Mr. Chanjarika reiterated that the respondent was an invitee and that no evidence was brought to prove that the disputed land was allocated to him by the Village Council.

We have considered the rival arguments by the parties to this appeal. 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 - see: **Samson Mwambene v. Edson James Mwanyingili** [2001] TLR 1, **Makofia Merianangа v. Asha Ndisia** [1969] HCD n. 204 and **Swalehe v. Salim** [1972] HCD n. 142; recited in **John Livingstone Mwakipesile v. Daudi William & 6 Others**, Miscellaneous Land Appeal

No. 5 of 2012 (unreported), the decisions of the High Court. We are also fortified in this view by the decision of this Court in **Maigu E. M. Magenda v. Arbogast Mango Magenda**, Civil Appeal No. 218 of 2017 (unreported) in which we observed at p. 13 thereof:

> *"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."*

We subscribe to the decisions of the High Court above and are guided by the foregoing position of the Court in **Maigu E. M. Magenda** (supra) as articulating the correct position of the law in this jurisdiction. We wish to undeline that an invitee cannot own a land to which he was invited to the exclusion of his host whatever the length of his stay. It does not matter that the said invitee had even made unexhausted improvements on the land on which he was invited.

For the avoidance of doubt, we are alive to the principle of adverse possession that a person who does not have a legal title to land may become owner of that land based on continuous possession or occupation

of the said land. However, we hasten the remark that the principle cannot apply in circumstances where the possession roots from the owner's permission or agreement. We articulated this stance in **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 others**, Civil Appeal No. 193 of 2016 (unreported). In that case we observed at p. 24 where we subscribed to the position taken by the High Court of Kenya in **Mbira v. Gachuhi** [2002] 1 EA 137 (HCK) wherein it was held:

> *"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises; if the occupiers right to occupation was derived from the owner in the form of permission or agreement, it was not adverse".*

That being the position, adverting to the present case, the respondent's occupation of the disputed land cannot be said to be amounting to adverse possession as the same is derived from the appellant's permission. We are of the firm view that the High Court, having found that the respondent was an invitee, it erred in applying the doctrine of adverse possession in entitling him to own the disputed land.

But the foregoing does not resolve the foundation of the dispute here. The burning issue before us, and which we think the same should have been the kernel of contention in the three courts below is: was the respondent an invitee? This is the question to which we now turn to resolve.

The evidence on record shows clearly that the late Yohana Shedafa; father of the now respondent Barnabas Yohana Shedafa, stated from the outset; at the level of the Ward Tribunal, that he was not an invitee to the disputed land but that he was allocated the same; a plot of land measuring 60 x 100 metres, by the Village Council and made unexhausted improvements on it. We will let the relevant part of the proceedings on 06.11.2006 paint the picture:

> *"Mussa Hassan anasema kuwa anamdai Yohana Shedafa eneo la kiwanja ambacho kina ukubwa wa ft. 50 eneo ambalo alimpa kwa kumhifadhi tu ili aweze kutafuta eneo la kujenga haya ndiyo madai yake.*
>
> *Imesainiwa: Musa*
>
> *Yohana Shedafa baada ya kusomewa shtaka lake alikana shitaka lake na kusema anachosema Mussa*

Hassan si cha kweli. Ametoa maelezo yake kuwa; Yeye alihamia katika Kijiji cha Mgila mwaka 1978 mwezi wa 6 tarehe 12. Alipohamia hapo kwa kuwa alikuwa ni mgeni alipewa kiwanja na Serikali ya Kijiji akiwepo balozi Mussa Hassani. Eneo hilo lina ukubwa wa 60 x 100. Alijenga, alipanda miti minazi 4 mfenesi 1 michungwa 2 mchenza 1 mistafeli 3 mchongoma 1. Kwa maelezo Zaidi amesema ameishi miaka (28) amepata Watoto (5) hapo hapo hivyo haina sababu ya kuambiwa hapo si kwake.

Kweli alikuwa anaishi Korogwe akachukuliwa na huyo Mussa Hasani kwenda Mgila kwa kuwa yeye ni balozi basi angempa kiwanja na ndivyo alivyofanya. Wameishi hadi mwezi wa 6 mwaka huu 2006 alipelekwa ofisi ya Kijiji Mgila kudaiwa kiwanja hicho na ndipo alipomkatalia kuwa yeye hana kiwanja chake kwa kuwa alipewa na serikali ya Kijiji.

Walihoji hukumu itolewe na akaona mdai anapewa hukumu peke yake baraza likamwambia haki utaipatia mbele. Nakala ya hukumu hakupewa. Mdai alipoona hatendewi haki alifika PCCB huko walimwambia atoe nakala ya hukumu hivyo hivyo alinyimwa na baraza hilo la ardhi la Kijiji. Aliporudi aliambiwa afungue shauri. Mtendaji alipoitwa

aliulizwa nakala iko wapi? Alipeleka baada ya wiki 3.

Haya ndiyo maelezo yake.

Imesainiwa."

And basing on, *inter alia*, that evidence, the Ward Tribunal made the following decision on 08.01.2007:

"MAAMUZI YA BARAZA

Baraza limechunguza ushahidi wa mdai alioutoa na ushahidi wa kamati ya ugawaji viwanja aidha ushahidi uliotolewa na Rajabu Ismaili Shedafa ndugu wa Yohana Shedafa ambae yeye alilieza baraza kuwa kaka yake kutokana na tabia ya kutishia kuua akishirikiana na watoto wake wawili mmoja (1) Barnaba Shedafa na Enea Shedafa na mama yao mkewe Yohana Shedafa Perpetua Mshuza. Shahidi huyo alisema kuwa anaomba ili damu asimwagike baraza liangalie uwezekano wa kisheria jinsi itakavyokuwa. Baraza kwa kufuata ushahidi wa mdai na ushahidi uliotolewa na kamati ya ugawaji aidha ushahidi wa ndugu Rajabu Ismaili Shedafa, limetoa maamuzi kwamba Mussa Hassan anayo haki ya kumiliki eneo hilo kwa kuwa:-

Yeye alikuwa ndie mkazi wa kwanza na alikuwa wa kwanza kupewa kiwanja kama ushahidi ulivyotolewa (Eneo 60 x 100). Kwa kufuata sheria za ardhi Baraza limemaliza shauri hili la madai kwa kumpa Mussa Hassan haki ya kumiliki eneo lake hilo alilommegea Yohana Shedafa. Yohana Shedafa aondoke katika eneo hilo. Baraza limetoa muda wa kuondoka katika eneo hilo. Maoni ya muda wa kuondoka ni kwamba jengo lina ugumu wake hivyo baraza linampa muda wa miezi mitano (5) awe tayari ameishaondoka."

The DLHT; the first appellate court, made the following finding:

"The ward Tribunal found the appellant to be an invitee and ordered him to vacate the suit plot and ordered compensation for his developments made on the suit plot.

The honourable lay members who sat with me affirmed the decision of the ward Tribunal by taking into account the explosive nature of the relationship between two parties. From the evidence on record the appellant was an invitee. However, it is common ground that the appellant has been in occupation of the disputed plot for about 30 years. Be that as it may the appellant's long time

occupation of the suit plot cannot be disturbed. See, the case of ***Shabani Nassoro vs. Rajabu Simba*** *(1967) HCD 233."*

Likewise, the High Court, the second appellate court, made this finding:

"Having heard both parties on appeal, I am in agreement with the decision of the District Land and Housing Tribunal, that even if it was the appellant who had invited the respondent into the disputed piece of Land, that would not charge the ***status quo****. The fact the respondent (an invitee), has been in* ***continued occupation*** *for the past* ***thirty years*** *or so,* ***without disturbance****, that* ***long occupation*** *and development of the disputed piece of Land has granted him the title of* ***ownership****. Normally, it has been the position of the courts now, that* ***long and undisturbed possession of Land passes a title*** *to the occupier, and that courts would not disturb him. In the case of* ***Shabani s/o Nasoro v. Rajabu Simba*** *(1967) H.C.D. 233, it was held that (late said, J):-*

".... The court has been reluctant to disturb persons who have occupied land and

developed it over a long period.... The respondent and his father have been in occupation of the land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation ..."

We are alive to the fact that all the three courts below made a finding of fact that the respondent was an invitee. We are equally aware that on this third appeal, we should be very careful to meddle with the concurrent findings of fact of the lower courts – see: **Maulid Makame Ali v. Kesi Khamis Vuai**, Civil Appeal No, 100 of 2004 (unreported). We are also aware that it is on very rare and exceptional circumstances the Court will interfere with findings of fact of a lower courts. In **Amratlal Damodar and Another v. H. Jariwalla** [1980] TLR. 31, for instance, we held:

"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."

Flowing from the above, it is our considered view that the Court will only interfere with findings of fact of lower courts in situations where a trial

court had omitted to consider or had misconstrued some material evidence, or had acted on a wrong principle, or had erred in its approach in evaluation of the evidence. With unfeigned respect to the three courts below, we are of the well-considered view that the present situation falls with the scope and purview of those rare cases and exceptional circumstance warranting us to interfere with the concurrent findings of fact that of the three courts below that the respondent was an invitee to the disputed land. We shall demonstrate.

First, the respondent stated from the very outset that he was allocated the land by the Village Council. That evidence was not considered at all by the Ward Tribunal. As can be gleaned from the relevant part of record of the Ward Tribunal reproduced above, after the testimony of the respondent on how he came into possession of the disputed land, no mention at all was made by the Ward Tribunal regarding his defence. Having dispassionately read the record of the Ward Tribunal; between the lines, we are certain that it was moved to decide as it did because of the testimony of Rajabu Ismaili Shedafa who pleaded with it that it should decide in a manner that would avoid shedding of blood as the respondent was threatening to kill the appellant. We are positive that

had the trial tribunal considered the respondent's defence that he was not an invitee but allocated that parcel of land by the Village Council in the presence of the appellant who was a ten-cell leader, it would not have arrived at the verdict it did. The first and second appellate courts, we respectfully think, fell into the same error.

Secondly, the appellant alleged to have invited the respondent to build a house on an area of 50ft and there is evidence from one Seif Ngereza; a neighbour who was also allocated land in 1974 along with the appellant that they were allocated plots measuring 60x100 metres. On the other hand, the respondent testified that he was allocated by the Village Council a plot measuring 60x100ft. Juxtaposing these testimonies, one wonders whether the disputed plot is the one which was allocated to the appellant in 1974 or it is a different plot altogether. The sketch plan drawn by the Ward Tribunal when it visited the scene does not assist us either, for it shows the house of the appellant is on about a quarter of the plot and does not show who occupies the rest of the plot. This increasingly raises doubts if the disputed land is the one which was allocated to the appellant in 1974.

Thirdly, it is evident from the record that the appellant was a ten cell leader at the material time. When the Ward Tribunal visited the scene, Paulo Ntulwe; member of the Allocation Committee/the Village Council was there and testified that the disputed land was allocated to the appellant. Likewise, Seif Ngereza; a neighbour referred to above, also testified that in 1978 the appellant gave the respondent an area on which to build a house. Both were not specific that the area given to the respondent was part of the appellant's plot in which he lives.

Fourthly, as the appellant was a ten-cell leader of the area, and as Paulo Ntulwe; member of the Allocation Committee/the Village Council, was also there at the time the respondent was allocated the disputed plot, we think, if the appellant and respondent speak their respective minds, here was no meeting of the minds between them; that is, the appellant and respondent. While the appellant thought he was giving his plot, or part of it, to his brother thereby inviting him to occupy it, the respondent thought he was being allocated the disputed plot by the Village Council. We seriously think there was no *consensus ad idem* between them, more especially the fact that the appellant was a ten-cell leader and the plot was

being allocated to the respondent by the said ten-cell in the presence of Paulo Ntulwe; member of the Allocation Committee/the Village Council.

The above discussion culminates into a finding that the finding of fact by the Ward Tribunal that the respondent was an invitee was founded on a misapprehension of evidence hence unacceptable. The first and second appellate courts fell into the same error; of relying on the finding of the trial tribunal. Having discussed as above, we find and hold that the three courts below fell into an error. We are of a considered view that, on a preponderance of probabilities, there was ample evidence to show that the respondent was not an invitee to the disputed land but that he was allocated that plot of land; the dispute land, by the Village Council. That being the case, it was wrong to make him vacate. It was also wrong to hold that he was an invitee but should occupy the disputed land by virtue of his long occupation in it. That land, as we have alluded to above, was allocated to him and should occupy it as of right.

For the avoidance of doubt, **Shabani s/o Nasoro v. Rajabu Simba** (supra); the case relied upon by the two appellate courts below was, in our considered view, cited out of context. In that case, unlike in the present as

claimed by the courts below, no party was an invitee. That case is an authority for the point that the court has been reluctant to disturb persons who have occupied land and developed it over a long period of time. The case would not apply as an authority in a situation where the host-invitee relationship exists.

With regard to the second ground of appeal, we are at one with the learned counsel for the appellant that the holding that the second appellate court indicated that the appeal was dismissed was but an *elapsus calami*. The second appellate court was quite explicit in its judgment that the appeal had merits and it should therefore had allowed it. Thus dismissing it was an inadvertent mistake which can be cured by simply saying it was a keyboard mistake.

In the upshot of the foregoing, the appeal is partly allowed to the extent shown above. For the reasons stated, we find and hold that the respondent was legally allocated the disputed plot by the Allocation Committee/Village Council and should remain undisturbed. This appeal is dismissed.

As for costs, we are aware that the dispute involves two blood brothers. We think that justice will smile if we order that each party should bear its own costs and we so order

Order accordingly.

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 27th day of February, 2020 in the presence of Mr. Obediodom S. Chanjarika, learned counsel for the Appellant and Mr. Barnaba Yohana Shedafa, Respondent in person is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL