

TANZANIA / JUDGMENT

# batholomayo tluway vs john tluway dalei 2 others 2023 tzhc 22518 8 november 2023

COURT  
TZHCDECIDED  
8 November 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF  
MANYARA AT BABATI LAND APPEAL NO. 22 OF 2023 (Arising from the decision of the District  
Land and Housing Tribunal for Mbulu at Dongobesh in Land Application No. 10 of 2021)  
BARTHOLOMAYO TLUWAY..... APPELLANT VERSUS JOHN TLUWAY  
DALEI..... 1stRESPONDEN FAUSTINE STEPHANO  
DAMBAY.....2ndRESPONDEN LEVINA  
ZAKAYO..... 3rdRESPONDEN

## JUDGMENT

3(fh October & November, 2023 Kahyoza, J, Bartholomayo Tluway sued John Tluway Dalei (Bartholomayo Tluway's brother) and Fautine Stephano Dambay and Levina Zakayo (the respondents) praying for a declaration that he is the lawful owner of the suit land. The trial tribunal dismissed Bartholomayo Tluway's claim. Aggrieved, Bartholomayo Tluway appealed raising five grounds of complaint, which I paraphrase as follows-

1. That, the chairman erred in law and fact to declare John Tluway Dalei the lawful owner of the disputed land while i the appellant bought it from Alexander Massay in the year 2001, and occupied and used it from 10/01/2001 until 2014 about 13 years without any intervention. Hence the appellant acquired it by adverse possession.
2. That, the chairman erred in law, principle and facts to rely on forged documents dated 10/07/2014 adduced by 2nd and 3rd respondents.
3. That, the chairman erred in law, principle and facts to hold sale contracts between the first respondent and second respondent and between first respondent and the late third respondent's husband valid.
4. That, the chairman grossly erred in law, principle and facts for deliberately failing to admit the appellant's sale contract dated 28/11/2000 and for not providing conducive environment for the appellant's witnesses, having kept the appellant's witnesses eight hours outside the tribunal premises with no food or water to drink.

5. That, the appellant prays the High Court to allow the appeal. Brief facts are that; Bartholomayo Tluway, the appellant, and John Tluway Dalei are siblings. Indisputably, Elizabeth Quamuga, their mother sold the dispute land to Alexander Massay at the contract price of Tzs. 100,000/= in 2000. Later, the disputed land was redeemed. The issue central to the dispute is who redeemed it. Bartholomayo Tluway contended that he redeemed the disputed land, for that reason, he acquired title to the disputed land. John Tluway Dalei asserted that it was their mother, Elizabeth Quamuga who redeemed the disputed land and passed the title to him. Later, John Tluway Dalei sold two pieces of land from the disputed land to Faustine Stephano Dambay and Levina Zakayo's husband. The disputed land measures 1 acre, which is situated at Hayahaya Hamlet, Ayamaami Ward within Mbulu District. The appellant sought to be declared lawful owner of the suit land and to find the respondents as trespassers onto it. To substantiate his case, Bartholomayo Tluway (PW1) testified that, on 28/11/2000, the late Elizabeth Qamunga (his mother) sold 1 acre (100 x 49 paces) of land to one Alexander Massay for a consideration of Tzs. 100,000/=. Later, he redeemed the said piece of land paying Tzs. 125,000/= to Alexander Massay. Thereafter, he leased the same to one Julius Mohe (Pw4). Maria Batholomayo, (PW2), appellant's daughter, Rozalia Laurent, (Pw3) Julius Mohe (Pw4)'s wife and Julius Mohe (Pw4), supported the evidence of Bartholomayo Tluway (Pwl) that Bartholomayo Tluway (Pwl) redeemed the disputed land and leased it to Julius Mohe (Pw4) from 3 2001 to 2020. Bartholomayo Tluway (Pwl) tendered the lease agreement, which was admitted and marked as exhibit "M1" Bartholomayo Tluway (Pwl) asserted that in 2014, John Tluway Dalei (Dwl) his blood brother, trespassed onto the land. He complained against John Tluway Daley before the Ward Executive Officer who advised to refer the dispute to the clan elders. Before the dispute was resolved, Bartholomayo Tluway (Pwl) realized on 6/11/2020 that the disputed land had already been sold to Faustine Stephano Dambay and Levina Zakayo by John Tluway Dalei. Maria Batholomayo, (PW2), Rozalia Laurent, (Pw3) Julius Mohe (Pw4)'s wife and Julius Mohe (Pw4) deposed that in 2014 the first respondent invaded the disputed land. John Tluway, (Dwl), testified that he is the lawful owner of the disputed land, as he was given by his mother, one Elizabeth Kidhai in 1995. He left the disputed land in his mother's hand. In 2000 his mother got sick, and she sold 1 acre to Alexander Massay. Later, Elizabeth Kidhai redeemed it and left it in the hands of Hose Tluway, who was to hand it over to him on his return as he was not staying in the village. In 2009, Hose Tluway handed over 1 acre to John Tluway, (Dwl). In 2014 John Tluway, (Dwl), sold 0.5 acre of land to Faustine Stephano (Dw4) and the other 0.5 acre to Levina 4 Zakayo's husband. Faustina Stephano (Dw4) and Levina Zakayo (Dw5) confirmed in their evidence, that they purchased pieces of land from the first respondent and tendered sale agreements as exhibits. Israel Tluway @ Hose, (Dw2,) and Awe Tluway, (Dw3) testified that the disputed land belongs John Tluway as he was given by their mother, Elizabeth Kidhai. Elizabeth Kidhai sold it to Alexander Itambe, and redeemed it and handed it to Israel Tluway @ Hose, (Dw2,) to pass it to John Tluway, (Dwl). Awe Tluway, (Dw3) added that it was in the year 2001 when John Tluway, (Dwl) took over the suit land from Israel Tluway @ Hose, (Dw2,). Awe Tluway, (Dw3) testified further that Israel Tluway @ Hose, (Dw2,) occupied the disputed land from 2001 to 2014. John Israel built a house in it,

and the appellant encroached and stayed on the disputed land. Having formed an opinion that Mr. Alexander Massay, the best witness for both sides did not testify, the Court ordered an additional evidence be taken by calling Mr. Alexander Massay. On 03/10/2023, Mr. Alexander Massay appeared and told the Court on oath that it was true that he bought the suit land from the mother of the appellant and the first respondent. He paid the purchase price. Later, the seller requested him to redeem the suit 5 land. He accepted. Upon the seller refunding him, he surrendered the disputed land to her. He deposed that the appellant was involved in the process of redeeming the disputed land acting under instruction from his mother. He deposed that the appellant went to him with other people. This is the first appellate court with a duty to subject the evidence on record to scrutiny and if necessary arrive at a conclusion different from the trial tribunal. This was a position of the Court of Appeal in *Future Century Ltd v. TANESCO*, Civil Appeal No. 5 of 2009, where it held that- "It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision." It is an established principle of evidence as provided under section(s) 110, 111 and 112 of the Evidence Act, Cap 6 R.E 2022 that in civil cases he who alleges must prove and do so to the balance of probabilities. The same was reflected in *Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph* [2006] TLR. 419, that: - "It is an elementary principle that he who alleges is the one responsible to prove his allegations" 6 The standard of proof is well explained in *Paulina Samson Ndawanya vs. Theresia Thomas Madaha*, Civil Appeal No. 45 of 2017 (unreported), where the Court of Appeal stated: "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." Was the evidence of the appellant heavier than that of the first respondent? The appellant's first ground of appeal raised one basic issue whether the chairman of the DLHT erred to decide in the first respondent's favour. It is beyond dispute that the contested land was initially owned by one Elizabeth Qamunga @ Elizabeth Kidhai (Elizabeth) who happened to be the mother to Bartholomayo Tluway, John Tluway Dalei, Hose Tluway and Israel Tluway. In 2002 Elizabeth fell sick. She decided to dispose the suit land to Alexander Massay. Later, the suit land was redeemed from Alexander Massay. The issue central to the dispute is who redeemed the disputed land. The appellant deposed that he is the one who redeemed the disputed land from the purchaser, Alexander Massay. Hence, the disputed land became his 7 own property. He deposed that he refunded Tzs. 100,000/= and paid him Tzs.20,000/= as compensation for clearing the bush. The first respondent asserted that, the disputed land was redeemed by Elizabeth who passed title to the disputed land to him. The DLHT was convinced that the appellant failed to prove his case on the balance of probability. It found that the first respondent, John Tluway proved to be the rightful owner of the suit land and thus, he had a better title to pass to Faustine Stephano and Safari Hhoki Mar, Levina Zakayo's late husband. It is evident, that the trial chairperson discredited the testimony of the appellant and his witnesses for he neither produced a document to prove that there was an agreement executed between him and Alexander Massay or call Alexander Massay to prove his

contention. I considered and evaluated the evidence of both parties. The appellant summoned Maria Batholomayo, (PW2), his daughter, Rozalia Laurent, (Pw3) Julius Mohe (Pw4)'s wife and Julius Mohe (Pw4). The appellant and Maria Batholomayo, (PW2), the appellant's daughter testified that the appellant redeemed the disputed land. Rozalia Laurent, (Pw3) deposed that she did not know how the appellant acquired the disputed land whereas 8 Julius Mohe (Pw4) deposed that the appellant told him that he redeemed the suit land. To say the least, Rozalia Laurent, (Pw3) and Julius Mohe (Pw4) did not support the appellant's evidence that he redeemed the disputed land. It is on record that after the appellant redeemed the disputed land, Julius Mohe (Pw4) leased it from 2001 until 2020, before the first respondent invaded it in 2014. It was only Maria Batholomayo, (PW2), who supported the appellants evidence that it was the appellant who redeemed the land from Alexander Massay. The appellant did not summon Alexander Massay to support him that he was the one who redeemed the disputed land until when this Court summoned Alexander Massay as the additional witness. The first respondent, John Tluway, summoned two witnesses whom I consider vital witnesses, who were Israel Tluway @ Hose, (Dw2,) and Awe Tluway, (Dw3). The appellant, the first respondent, Israel Tluway @ Hose, (Dw2,) and Awe Tluway, (Dw3) are siblings. Israel Tluway @ Hose, (Dw2,) and Awe Tluway, (Dw3) testified that the disputed land to belongs^John Tluway as he was given by their mother, Elizabeth Kidhai. Elizabeth Kidhai sold the disputed land to Alexander Itambe, and redeemed 9 and handed it Israel Tluway @ Hose, (Dw2,) to pass it to John Tluway, (Dwl). Like the DLHT, I find it established that, Elizabeth Kidhai who was the original owner, sold the disputed land to Alexander Massay, redeemed and passed it as a gift intervivos to the first respondent. The evidence from Israel Tluway @ Hose, (Dw2,) and Awe Tluway, (Dw3) the siblings of the appellant and the first respondent was sufficient to prove that Elizabeth redeemed the disputed land and passed her title to the first respondent. Further, the Court summoned an additional witness, Alexandar Massay, who cemented the evidence and the findings of the DLHT that the appellant's mother redeemed the disputed land. Alexandar Massay was emphatic that the appellant's mother sent people to him requesting to redeem the disputed land. He added that the appellant was one of the envoys her mother sent to negotiate the deal. Did the appellant acquire land by adverse possession? The appellant alleged in the first ground of appeal that he occupied the land for 13 years uninterrupted from 2001 to 2014 when the first respondent acquired it. The evidence of Rozalia Laurent, (Pw3) Julius Mohe (Pw4)'s wife and Julius Mohe (Pw4) supported the appellant's evidence and io contention that the appellant had been in occupation from 2001 to 2014. Rozalia Laurent, (Pw3) Julius Mohe (Pw4)'s wife and Julius Mohe (Pw4) deposed that after the appellant redeemed the disputed land he leased it to Julius Mohe (Pw4) for period from 2001 to 2020 but the first respondent invaded it in 2014. The first respondent's evidence was that after Elizabeth redeemed the disputed land, she bestowed it to Israel Tluway @ Hose (Dw2,). He occupied the disputed land from 2001 to 2014. I am inclined to hold in favour of the first respondent for several reasons that he is not trespasser; one, it is beyond my imagination, that the appellant who was in occupation of the disputed land through the lease agreement between him and the Julius Mohe (Pw4) acquiesced to the first respondent's act of trespass from 2014

to 2021 when he instituted a suit in the DLHT. Had it been proper that the first respondent trespassed to the disputed land in 2014, the appellant ought to have taken action immediately. The appellant's failure to immediately take action against the intruder, connotes either, that the appellant was in actual occupation or that, the he had no title to defend until he gathered evidence. Two, it is settled law that the doctrine of adverse possession does not apply where the adverse possessor had a color of right to be there ii other than his entry and occupation. The appellant testified that he redeemed the suit land from Alexander Massay, for that reason, he acquired title. Thus, the appellant had a colour of right to the disputed land. He did therefore, not enter and occupy the disputed land against the owner. It is a settled principle of law that a person who occupies someone's land without permission, (adverse possessor) and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession. I wish to insist that if is true that the appellant was in occupation of the disputed land for 13 years, he did not acquire the status of the adverse possessor because he entered the land by redeeming it and not as an intruder. The circumstances under which a person seeking to acquire title to land under the doctrine of adverse possession were aptly explicated in the case of the Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016, CAT (unreported) which quoted with approval the Kenyan case of Mbira v. Gachuhi [2002] E.A. 137 (HCK) in which again, reliance was made on the cases of Moses v. Lovegrove [1952] 2 QB 533 and Hughes v. Griffin

[1969] 1 All ER 460. It was held that- 12 "[On] the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following:-

- (a) That there had been absence of possession by the true owner through abandonment;
- (b) that the adverse possessor had been in actual possession of the piece of land;
- (c) that the adverse possessor had no color of right to be there other than his entry and occupation;
- (d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it; (e) that there was a sufficient animus to dispossess and an animus possidendi; (I) that the statutory period, in this case twelve 12 years, had elapsed;
- (g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and
- (h) that the nature of the property was such that in the tight of the foregoing/ adverse possession would result." (Emphasis is added) 13 Three, it is also trite law a person cannot use the principle of staying over the land for a long time for illegal possession of land. See The Attorney General. V Mwahezi Mohamed (As Administrator of the Estate of the late Dolly Maria Eustace) and 3 Others Civil Appeal No. 391 of 2019 "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 cannot seek to justify his illegal possession of the suit land by the doctrine of adverse possession but he is entitled to apply the doctrine in his defence when sued. I am of the firm view that the appellant did not acquire the status of the adverse possessor so he cannot apply the doctrine of adverse possession in his favour. Consequently, I find no merit in the first ground of appeal. Did the DLHT err in admitting the sale agreements? The appellant complained that the DLHT erred to admit forged sale agreement between the first respondent and second respondent, one part and the sale agreement between the first respondent and third respondent's late husband. I am of the view that the complaint is unfounded. It has been ruled out that the appellant had no interest in the disputed land, thus, whether the sale contracts were forged, it is none of his business. The forged sale agreements between the first respondent and second respondent did not prejudice the appellant's interest anyhow. He has no reason to complain. In addition, the appellant's allegation of fraud is baseless as the appellant did not specifically plead, raise, and prove the allegation before the DLHT. The appellant raised the issue of fraud before this first appellate court. It is trite law that, allegation of fraud in civil proceedings is required to be specifically pleaded and proved on a higher degree of probability than what is required in ordinary civil cases. In the case of *Ratilal Gordhanbhai Patel v. Lalji Mankanji* [1957] E.A 314, the former Court of Appeal for East Africa stated that- "Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required." Yet in the Court of Appeal in *Omari Yusuph v. Rahma Ahmed Abdulkadr*

[1987] T.L.R. 169, held that- "When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases." I, therefore find no merit in the second and third grounds of appeal and dismiss them for want of merit. Did the DLHT fail to admit the appellant's sale contract? I had a cursory review of the DLHT's record and found nothing suggesting that the appellant had applied to tender a sale agreement and the tribunal rejected to admit it. There is also no evidence to prove that the appellant entered into any sale agreement in respect of the disputed land. It is unfortunate that the appellant did not elaborate his fourth ground of appeal. There is nothing to persuade me that the DLHT's record is improper. It is well settled that court's records are serious documents and they cannot be easily impeached. The same was observed in *Jumanne Shaban vrs. Adamu Igwe Nkungu*, (PC) Civil Appeal No. 14 of 2004 (unreported) where it was held:- "Court records are serious documents, and, impeaching them should be for the noblest cause." The fourth ground of complaint is baseless. It is dismissed for want of merit. 16 The fifth ground of appeal reflects the appellant's prayer. I will not bother to discuss it. In the end, I find the appeal meritless and dismiss it. I uphold the decision of the district land and housing tribunal save for the declaration that the first respondent is the lawful owner. For avoidance of doubts, I uphold the DLHT's decree that the appellant failed to establish his title to the disputed land. I award costs of this appeal to the

respondents. It is ordered. Dated at Babati this 8th day of November, 2023. J. R. Kahyoza  
Judge Court: Judgment delivered in the virtual presence of the parties. B/C Ms. Fatina  
Haymale (RMA) present. J. R. Kahyoza Judge 08/11/2023 17

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