

TANZANIA / JUDGMENT

Sadock Samwel vs Thelessphory Emmanuel

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (BUKOB A SUB-REGISTRY) AT
BUKOB A LAND APPEAL NO. 3265 OF 2024 (Arising from Application No. 4 of 2022 District Land
and Housing Tribunal for Ngara) SADOCK SAMWEL BITUNGWA.....
APPELLANT VERSUS THELESPHORY EMMANUEL GWANGOYE..... RESPONDENT

JUDGMENT

29th October and 8th November, 2024 BANZI, J.: This appeal emanates from Application No. 4 of 2022 before the District Land and Housing Tribunal for Ngara (the trial tribunal) where, Sadock Samwel Bitungwa instituted a land suit claiming that, Thelesphory Emmanuel Gwangoye, the respondent had trespassed into his land measuring 23 x 23 metres located at Ruganzo B village, within Ngara District (the suit land) which he acquired in 2006 by way of purchase from Emmanuel Gwangoye (the respondent's father, now deceased) for consideration of Tshs.80,000/=. Among other things, he prayed to be declared as the lawful owner of the suit land. The respondent vehemently opposed the application contending that, the appellant had never been in possession of the suit land at any time, rather in 2008, he rented the same from the deceased for planting seasonal Page 1 of 18 crops and when the deceased met his death, the clan members asked him to stop using the suit land. He complied with that request. Thereafter, the respondent started using it for his personal use and he has been harvesting trees from that land but he disputed to have been harvesting those trees unlawfully. In his testimony before the trial tribunal, the appellant claimed that, in 2006, the deceased fell sick whereby, he approached and requested him to purchase the suit land in order to get money for treatment after he had failed to get assistance from his family. They entered into sale agreement which was concluded orally and witnessed by Sophia, the vendor's wife, Aurelia Gwangoye (SM2), the vendor's sister, and Jesca Sadock Bitungwa, his wife. The vendor died in 2008 and he continued using that land peacefully until 2020 when the vendor's wife died. After the death of the deceased's wife, the respondent started trespassing into the suit land by planting maize and groundnuts. He requested him to stop but later, the respondent trespassed it again and uprooted the stumps to disrupt the boundaries. He consulted other people so as to end the dispute amicably but his efforts proved futile. His evidence was supported by Aurelia Gwangoye (SM2) who stated that, the appellant is the lawful owner of the suit land after he had purchased it for Tshs.80,000/= from the deceased. As she was

close to the deceased, Page 2 of 18 the deceased called her from Ngara town where she is residing to go to witness the sale. According to her, the deceased sold his land because he was sick and he needed money for his treatment. She further stated that, at the time of sale, the respondent was not around. She complained for the respondent to trespass into that land which is legally owned by the appellant. SM3, Jesca Sadock Bitungwa, the wife of the appellant contended that, the appellant acquired the suit land by way of purchase from the deceased and she witnessed the sale Which was concluded in the presence of the deceased's wife and his sister (SM2). Since they acquired that land, there never emerged any problem until 2020 when the respondent trespassed into that land. They called him for reconciliation, however, the encroachment continued and thus, amicable solution proved failure. In his defence, the respondent (SU1) disputed the claim about the appellant to have purchased the suit land from his father. He claimed that, the suit land is part of his land measuring ten (10) acres. He went on stating that, after the death of his father, they convened a clan meeting and asked who was owed by the deceased. Two people showed up, Ludovick Lucian (SU5) and the appellant. Ludovick gave them a document but the appellant had no document and hence, his claims could not be dealt with without any documentary evidence. Upon failure to produce evidence, the suit land was Page 3 of 18 handed over to him by the clan members and since then, he kept on using it. He further claimed that, the evidence of SM2 was concocted because she was not in good terms with their father and they have already expelled her from the clan. It was also his evidence that, the deceased had never sold the suit land to the appellant, rather, he gave him that land for cultivation. According to him, it was Ludovick only whom the deceased had sold the land, which they later redeemed. His evidence was supported by SU2, Anastazia Emmanuel Gwangoye, his sister who stated that, in 2007 the appellant approached their father seeking for land for cultivation and their father gave him the suit land for cultivation only. However, after the death of their father, the appellant claimed to have bought it from the deceased. She further stated that, she has no knowledge of the sale of the suit land to the appellant. According to her, it was Ludovick who was known to have bought the land from their father and she was among the persons who appended signature in that sale agreement as she was living with her father. On their part, Faustine Yugaza Kanyishamba (SU3), Bahati Faustine Gwasa (SU4) and Ludovick Lucian (SU5) supported the evidence of SU1 and SU2 by claiming that, there was no proof if the appellant bought that land because he failed to tender any sale agreement between him and the deceased. SU5 added that, he was the neighbour of the deceased and the appellant as in Page 4 of 18 2006, the deceased sold him a piece of land and their sale was concluded in writing. In 2014, the respondent redeemed their land after paying him Tshs. 1,760,000/=. According to him, had the appellant bought the suit land from the deceased, he could have witnessed the sale because he was their neighbour. After receiving the evidence from both sides, in its final verdict, the trial tribunal concluded that, there is no proof that the appellant purchased the suit land for want of written sale agreement. Consequently, the application was dismissed with costs. Aggrieved with that decision, the appellant lodged this appeal containing six grounds, thus:

1. THAT the application was determined by trial tribunal prematurely for want of being first mediated at the ward tribunal in compliance with the law;

2. THAT the learned chairman misdirected himself when he held that the appellant has no proof of purchase in writing whereas the said oral contract was property witnessed by the third party as is one of the ways of purchasing the land under customary law;
3. THAT the opinions of the assessors were not recorded in the proceedings thus the judgment and decree arising therefrom are nullity;
4. THAT the trial tribunal did not consider the doctrine of adverse possession when the appellant has occupied Page 5 of 18 the suit land since 2006 without any interruption from the respondent;
5. THA T the learned chairman did not give out reasons for not believing the evidence of his witness especially neutral one, that is SM2, Aulelia Gwangoye;
6. THAT even the decree therefrom cannot be executed for want of description of the suit land in terms of location, boundaries and the like. When the appeal was called for hearing, Mr. Al-Muswadiku Chamani, learned Advocate appeared for the appellant whereas, the respondent appeared in person, unrepresented. By consent, the appeal was argued by way of written submissions. Mr. Chamani began his submission by dropping the first and third grounds remaining with the second, fourth, fifth and sixth grounds. Submitting on the second ground, he contended that, the learned chairman misdirected himself to dismiss the claim for want of written sale agreement because even oral agreement suffices to prove sale transaction in respect of immovable property. He insisted that, the oral agreement in this case was witnessed by the third party, that is SM2 and SM3 as required by law. In his view, it was not proper for the trial tribunal to dismiss the case for want of written contract because, according to SM2, oral agreement was something normal in their locality. Besides, oral contract is also recognised by law. He Page 6 of 18 cited the case of Gozibert Lwamuzigu v. Vedson Lwamuzigu, Misc. Land Case Appeal No. 45 of 2011 HC at Bukoba (unreported) to support his argument that, normally, the sale of land is not necessary to be in writing, it can be even orally. He also cited the case of Abdulahim Rugaenda v. Odetha T. Rugambwa, (PC Civil Appeal No. 45 of 2022) [2023] TZHC 15986 TanzLII to buttress his point that, for oral contract to be valid, it must be proved by witnesses who were present during the formation of that contract. Submitting on the fourth ground, he argued that, the appellant has been in occupation of the suit land since 2008 without interruption. In his view, although in 2008 after the death of the deceased, the appellant was required by the clan members to vacate from the suit land, he continued to occupy it for over 13 years, hence, he has a good title through adverse possession. To support his argument, he cited the case of Bhoke Kitang'ita v. Makuru Mahemba (Civil Appeal No. 222 of 2017) [2020] TZCA 66 TanzLII. Arguing in support of the fifth ground, Mr. Chamani stated that, SM3 ought to be believed because she was a neutral person who was there to tell the truth in respect of the disposition of the suit land. In that regard, he supported his argument with the case of Godluck Kyando v. Republic

[2006] TLR 363. Finally, Mr. Chamani concluded his submission with a prayer Page 7 of 18 for the appeal to be allowed in favour of the appellant by reversing the judgment and decree of the trial tribunal. In response, the respondent contended that, the appellant had a duty to prove his claim but when he was given a chance to prove the same, he failed to do so, hence it was proper for the tribunal to decide in favour of the respondent. He went further stating that, there were other people who had purchased the land from the deceased and their sale agreements were reduced into writing, therefore, according to him, it leaves a lot of doubts why the sale between the appellant and the deceased was made orally while it was witnessed by people who knew to read and write. In respect of adverse possession, the respondent argued that, after the appellant had failed to prove the sale at the clan meeting, he was issued with a letter prohibiting him from using the suit land until he proves how he bought the said land. However, after he had failed to prove his claim, the appellant stopped to use that land and it was being used by the respondent until 2020 when the appellant started again to accuse the respondent for trespassing. According to him, the doctrine of adverse possession does not apply in this case because the appellant has no proof of using that land for more than 13 years as he claimed. He concluded his submission with a prayer for the appeal to be dismissed with costs. Page 8 of 18 Having thoroughly examined the evidence of the parties before the trial tribunal and their submissions before this Court, the issue for determination is whether the appeal has merit. It is prudent to note that, this being the first appellate court, it has a duty to re-evaluate the entire evidence and where possible, to come out with its own findings. See the case of Domina Kagaruki v. Farida F. Mbarak and Others [2017] TZCA 160 TanzLII. Notably, it is a principle of law that, whoever alleges, must prove that allegation. This principle is provided under section 110 (1) of the Evidence Act [Cap. 6 R.E. 2022] which states that: "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" The same principle was underscored in the cases of Abdul-Karim Haji v. Raymond Nchimbi Aloyce and Another [2006] TLR 419 and Paulina Samson Ndawavya v. Theresia Thomasi Madaha (Civil Appeal No. 45 of 2017) [2019] TZCA 453 TanzLII. In the latter case, it was stated that: "It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of Evidence Act, Cap 6 R.E 2002. It is equally elementary that since the Page 9 of 18 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." Basing on the principles stated above, it is now pertinent to determine whether the appellant had managed to prove his claim of purchasing the suit land from the deceased, Emmanuel Gwangoye. In his evidence which was supported by SM2 and SM3, the appellant contended that, he purchased the suit land in 2006 for consideration of Tshs.80,000/= in which the sale agreement was concluded orally. Thereafter, he continued to use that land with no interruption until 2020 when the wife of the deceased died. It was in the same year when the respondent started to trespass into that land. Disputing that allegation, the respondent contended that, after the death of their father, the appellant and SU5 emerged claiming to

have bought pieces of land from their father. The clan required them to prove that allegation. It was SU5 who produced the written sale agreement. However, the appellant failed to submit any document to prove his allegation. Upon failure to prove his allegation, he was ordered to stop using the suit land and the appellant complied. Nevertheless, in 2020 when their mother died, the appellant re-emerged claiming that land. Page 10 of 18 What can be gathered from the appellant's evidence is that, he purchased the suit land orally whereby, among the witnesses were SM2, the wife of the deceased and SM3. As correctly submitted by Mr. Chamani and as it was stated in the case of *Abdulahim Rugaenda v. Odetha T. Rugambwa* {supra}, a contract can be concluded orally or in writing and that when the contract is made orally, there must be witnesses to prove that contract. However, in order to be in a safe side as it was stated in the case of *Aziz S. Masasi vs Emmanuel T. Makene* (Civil Appeal No.35 of 2021)

- [2023] TZCA 17553 TanzLII, for the sale of land to be enforceable, it should be reduced into writing form. Nevertheless, according to the situation in this case, even if the appellant would have purchased that land through oral agreement, he had a duty to prove if that sale was conducted and those who witnessed the sale. What is depicted from his evidence is that, when the appellant was required to prove the sale in the clan meeting, the record is silent if he told them who were the witnesses in that sale. It is also not stated if he told them that the sale was witnessed by the deceased's wife or any other person. It seems, he claimed to have bought that land with no more explanations. In my view, the respondent and his clan were proper to reject his allegation. Page 11 of 18 Under these circumstances, the cited case of *Abdulahim Rugaenda*
- v. *Odetha T. Rugambwa* {supra} cannot be applied in the matter at hand considering that, those who are contended to have witnessed the sale, were never mentioned from 2008 until 2022, almost 14 years later when they were called to testify before the trial tribunal. The situation would be different if it would be stated that, in 2008 when he was required to produce the written sale agreement, he would have informed them that, the sale was witnessed by *Aulelia Gwangoye* and *Sophia Emmanuel* as witnesses of *Emmanuel Gwangoye*. Considering that the wife of the deceased was alive in 2008, it is clear that, had he told them that she was among the witnesses, the matter would be resolved instantly because *Sophia* would put it clear that the land was sold to the appellant and she would confirm about the manner the agreement was concluded. That was not done. The appellant kept quiet and revealed the alleged witnesses 14 years later after filing the complaint at the trial tribunal and after the death of *Sophia*. This in itself indicates that, the appellant's claim is nothing but an afterthought. Apart from that, another thing that creates doubt on the purported transaction is the participation of SM2 who was residing at Ngara town and at the time when the sale is alleged to have been concluded, she claimed to have gone there from Ngara town. It is strange for the deceased to call for Page 12 of 18 someone like SM2 who is living in town and alleged to be in bad terms with clan members to come and witness the alleged sale while his daughter (SU2) was right there. It can be recalled that, SU2 in her evidence claimed that, by that time when the alleged transaction was conducted, she was residing with her parents but

she had no information of the sale of that land. It was also her evidence that, in 2007 the appellant requested the land for agricultural activities. He was given the suit land which he used for one season only but after the death of their father, that is when the appellant emerged claiming to have bought it. Furthermore, even if the clan would have disagreed with his allegation, it is clear that, the appellant would take action promptly to claim his right over that land from relevant authorities but obviously, the appellant took no action to fight for his right over the suit land. Besides, it defies logic for the deceased to document the sale of his land between himself and SU5 and not to do the same when he sold the suit land to the appellant. Had oral agreement been his style of disposing of his land, the deceased wouldn't have documented the sale transaction between himself and SU5. All these creates doubt on whether the appellant actually bought the suit land from the deceased. Reverting to the issue of adverse possession, Mr. Chamani contended that, the chairman failed to consider that as the appellant had been using Page 13 of 18 that land since 2006 uninterruptedly, the doctrine of adverse possession was established. It has been stated in various cases including the case of Bhoke Kitang'ita v. Makuru Mahemba {supra} that, in order to establish the doctrine of adverse possession, it must be proved that, after possessing that land illegally, there has been no interruption to the adverse possessor throughout the aforesaid statutory period, that is twelve years. In that case, the Court of Appeal cited with approval the cases of Moses v. Lovegrove

[1952] 2 QB and Hughes v. Griffin [1969] 1 All ER. 460 which laid down the following criteria for adverse possession to be established: "On the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the foiiowing:-

- (a) That there has 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 colour 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 amino possidendi Page 14 of 18
- (f) 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 light of the foregoing/adverse possession would result." In line of the conditions stated in above-named cases, it is undisputed that, since 2006 when the appellant alleges to have bought that land to 2022 when the claim was filed to the trial tribunal, there was lapse of more than twelve years

which is a statutory period to claim the land. However, I am reluctantly to agree with Mr. Chamani that, the criteria set in the above- named cases were met because, first, for the requirement of the doctrine to arise, there must be abandonment of that land and it should be proved that the possessor possessed that land after he had found it abandoned by the rightful owner. However, in this case, there is no proof if the suit land was abandoned by the respondent or his father. The respondent stated that, after the appellant had failed to prove the purchase, that land was handed over to him and he continued using it until the matter was filed before the trial tribunal. Despite such evidence, the appellant did not demonstrate how he occupied that land for all that period. He did not state how he was using that Page 15 of 18 land. Therefore, it can be said that, it is the appellant who abandoned the suit land after he had failed to prove the sale between him and the deceased. Secondly, for adverse possession to be established, the possessor must establish that, he occupied that land without any colour of right and he continued using that land throughout the statutory period. That is different from our case because the appellant and his witnesses contended that, he bought that land from Emmanuel Gwangoye in 2006 which means, according to him, he legally acquired the suit land by way of purchase. Hence, the appellant cannot claim adverse possession because in his claim, he contended to have bought that land from the deceased for Tshs.80,000/=. Therefore, even if he would have been using that land for all that period, still the doctrine of adverse possession cannot be established. It is an established principle of the law that, claims for sale and adverse possession cannot co-exist. One cannot claim ownership by purchase and by adverse possession at the same time. In that regard, had the appellant claimed to purchase the suit land from Emmanuel Gwangoye, it was improper for him to claim adverse possession over the same land. Besides, the appellant has not proved if he has been using the suit land for 13 years without any incumbrances because, after death of Emmanuel Gwangoye, the clan members required him to produce evidence Page 16 of 18 to prove that he bought that land. Apart from that, SU2 stated that, the appellant asked for the land and used it for only one season, since then, he had never used it until 2020 after the death of their mother when he emerged claiming to have bought it from their father. This goes without saying that from 2008, there has been misunderstanding between the parties over that land. Hence, it cannot be said that the appellant has been enjoying the use of that land uninterruptedly. For those reasons, it is the finding of this Court that, the appellant has failed to prove his claim in respect of the suit land. Consequently, I find that the trial tribunal reached into a proper decision that the appellant failed to prove that he bought the suit land in 2006 from Emmanuel Gwangoye. Hence, the appeal is with no merit and the same is hereby dismissed. However, since parties are neighbours and in order to maintain harmony, each party shall bear its own costs. It is so orders. I. K. BANZI JUDGE 08/11/2024 Page 17 of 18 Delivered this 8th day of November, 2024 in the presence of Mr. Al- Muswadiku Chamani, learned Advocate for the appellant who is also present, the respondent and Ms. Elizabeth Kobelo, RMA. Right of appeal duly explained. / I. K. BANZI JUDGE 08/11/2024 Page 18 of 18

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