

27 September 2018



Court of Appeal clarifies adverse possession doctrine

- **Overturms High Court decision**
- **Holds that oral and unapproved agreements are inoperative in disposition of registered lands**
- **Possession and occupation of land for a long time does not automatically give rise to an adverse possession claim**
- **Permissive or consensual occupation is not adverse possession**

The Court of Appeal of Tanzania in Civil Appeal No. 193 of 2016, has recently delivered yet another landmark decision enunciating the prerequisites for one to raise a claim of ownership of land under the doctrine of adverse possession.

The appeal originated from the decision of the High Court of Tanzania at Moshi Registry in Land Case No. 11 of 2012 between the Registered Trustees of the Holy Spirit Sisters Tanzania versus January Kamili Shayo and 136 others, as Plaintiff and Defendants respectively. The judgement at the High Court was in favour of the Defendants, with the Plaintiff preferring an appeal, subject of this milestone judgement.

His Lordship Kipenka Mussa, J.A. authored the judgement on behalf of two other Justices of Appeal, Mwarija, J.A. and Mwangesi, J.A. The Bench allowed the appeal with costs to the Appellant.

At the High Court, the Plaintiff sued in a bid to evict the Defendants whom they reckoned to be trespassers from its land dubbed Farm 336/2 (the disputed land) and for an order that it was a rightful owner under the Right of Occupancy. On the other hand, the Defendants objected the allegation with a view that they were rightful occupiers by virtue of long time occupation as they inherited the same from their forefathers who got it as grant from their former employer as compensation for their unpaid terminal benefits.

The trial Judge at the High Court decided that the Defendants were not trespassers as they acquired ownership of the disputed farmland on account of the doctrine of adverse possession.

The Justices of Appeal faulted the decision of the High Court from two angles: 1. that it was not operative for a land held under the Right of Occupancy to be granted without any written document from the guarantor and, most importantly, without authorisation of the superior landlord, the President; and 2. that the judge erred to decide that possession and occupation of land for a considerable period, in itself, automatically gives rise to a claim of adverse possession.

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E: info@fbattorneys.co.tz

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FB Attorneys

8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

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LEGAL UPDATE

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Echoing from the decision in *Nitin Coffee Estates Ltd vs United Engineering Works Ltd* [1988], TLR 203 (CA) and *Abualy Alibhai Azizi vs Bhatia Brothers Ltd* [2000] TLR 288 the Justices of Appeal observed that the Right of Occupancy is something in the nature of a lease and a holder of a Right of Occupancy occupies the position of a sort of a leasee vis-à-vis the superior landlord and that it is paramount that no disposition of the Right of Occupancy can be made without the consent of the superior landlord, given that there is no freehold tenure in Tanzania for all the land is vested in the Republic. The Court of Appeal concluded that disposition of the Right of Occupancy is necessarily a tripartite transaction involving not only the holder of the Right of Occupancy and the purchaser or donee, but also involving the superior landlord.

The Court of Appeal, so to say, faulted the trial Judge to conclude that there was a proper transfer of title from the alleged employer to the forefathers of the Respondents without having evidence in record that the superior landlord was involved and that there was at least a written document to support the transfer, given that the land was held under the Right of Occupancy.

On the doctrine of adverse possession, the Court of Appeal basing on other decisions within the Commonwealth, observed 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 the agreement for sale or lease or otherwise. They so observed because at the trial Court, the Appellant adduced evidence showing that the forefathers of the Respondents had an agreement with the Appellant barring them from building permanent houses, growing perennials and selling their dwelling houses (labourers quarters) or bequeathing the same to their successors.

The Court has put criteria that on the whole, a person seeking to acquire title to land by adverse possession has to cumulatively prove that: there was abandonment; the adverse possessor had been in actual possession of the piece of land and had no colour of right to be there other than his entry and occupation; the adverse possessor had openly and without consent of the true owner done acts which were inconsistent with the enjoyment by the true owner for purposes for which he intended to use it; there was sufficient intention to dispossess; the statutory period of limitation of twelve years have lapsed without interruption in between; and the nature of property was such that adverse possession would result.

In upholding the appeal the Justices of Appeal held that *"In the situation at hand, the respondents sought to establish that their right to adverse possession is derived from the original owner in the form of permission or agreement or grant. Such is, so to speak, not adverse possession. Possession could not be adverse if it could be referred to lawful title, such as the present situation which was based on alleged grant. It has always been the law that permissive or consensual occupation is not adverse possession. Adverse possession is occupation inconsistent with and in denial of the true owner of the premises."*

In the last 18 months, the Court of Appeal has been spearheading determination of backlog cases efficiently and speedily. More landmark decisions are to be expected as the Court moves away from technicalities and focuses on the merits of appeals. This is a welcome decision.

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