

IN THE HIGH COURT OF TANZANIA

(BUKOKA DISTRICT REGISTRY)

AT BUKOKA.

LAND CASE APPEAL NO. 64 OF 2016

(Arising from Application No. 278 of 2010 of the District Land and Housing Tribunal for Kagera at Bukoba)

JACOB MARTIN APPELLANT

VERSUS

KASHEKYA VILLAGE COUNCIL 1ST RESPONDENT

PONSIAH JOHN 2ND RESPONDENT

Date of Last Hearing: 22/10/2018.

Date of Judgment: 26/10/2018.

JUDGMENT

I. ARUFANI, J

This appeal is arising from the decision made in Application No. 278 of 2010 of the District Land and Housing Tribunal for Kagera at Bukoba (Hereinafter referred to as the tribunal) dated 11th November, 2016. The said application was filed in the tribunal by the appellant against the respondents in the instant appeal. The claim of the appellant before the tribunal was the parcel of land he averred to have inherited from his late father namely Martin Nyamwihura located at Kashekya Village within Missenyi District in Kagera Region. The second respondent is

stating the land in dispute which its size is two and half acres was allocated to him by the first respondent.

The appellant Jacob Martin testified himself before the tribunal and called two witnesses to support his claim and Archard Marcel, the chairman of the first respondent and the second respondent, Ponsian John testified on the respondents' side. After hearing the evidence from both sides and visited the land in dispute the Chairman of the tribunal disallowed the application and ordered the costs to follow the event. The appellant was dissatisfied by the decision of the tribunal and lodged in this court a memorandum of appeal containing five grounds of appeal. After reading the said grounds of appeal carefully the court find all of them can merged into one ground that:-

1. The tribunal chairman erred in law and fact to decide the matter against the weight of evidence of the appellant when compared with the evidence of the respondents.

During hearing of the appeal the appellant and the second respondent appeared in court in person and the first respondent was represented by Archard Marcel and Sulaiti Yusuph, who respectively are Chairman and Village Executive officer for the

first respondent. Being lay persons the above mentioned parties confined themselves in explaining to the court how each of the disputant acquired ownership of the land in dispute instead of showing how the tribunal erred or did not error in determine the matter the appellant is appealing against.

This being the first appeal the court has found it has a duty of re-evaluating the evidence adduced before the tribunal for the purpose of being able to determine the grounds of appeal paraphrased hereinabove. The power of the court to do so was stated in the cases of **Yasin Ramadhani Chang'a V. R** [1999] TLR 481 and **Deemay Daat & 2 Others V. R**, [2005] TLR 132 where it was held that, an appellate court is entitled to look into the evidence adduced before the trial court and make its own finding where there is misdirection and non-direction or the lower court misapprehended the substance, nature and quality of the evidence.

The appellant testified before the tribunal as AW-1 and after describing the location and mentioned the neighbours of the land in dispute he stated that, he sued the respondents before the tribunal after seeing the first respondent had allocated his land to the second respondent without his consent. He said to have inherited the land in dispute from his late father, namely Martin

Nyamwihura. He said is an administrator of estate of his late father who passed away in 1995 and his letters of administration was admitted in the case as exhibit AB1.

The appellant said his father inherited the land in dispute from his grandfather namely Paulo Ichokanizi and his grandfather was given the land by the Chief of Kashekya area namely Omwani Ishengoma who was the friend of Paulo Ichokanizi. He said he don't know when he inherited the land from his father but is around 2002. He prayed the tribunal to declare him the lawful owner of the land in dispute and order the second respondent to be evicted from the land in dispute. He also prayed to be compensated by the respondents and be awarded costs of the case.

When he was cross examined by the first respondent he said he didn't attend the village meeting which decided to allocate the land in dispute to the second respondent and he didn't sign any minutes of allocating the land to the second respondent. When he was cross examined by the second respondent he said he don't have any proof to show he inherited the land from his father but his relatives were present when he inherited that land in dispute.

When he was cross examination further he said the land in dispute is just a portion of the land of his late father and said other part of it was given to the church. He said to have planted trees in the land in dispute in 2004 and said there are also natural trees, pine and eucalyptus on the land in dispute. The appellant said that there is a time the village council allocated portion of his land to Faustine Ishengoma mistakenly but later on they settled the matter amicably. He said is claiming for the land in dispute on his own behalf and on behalf of his family. He said the land in dispute borders PARTAGE and said he has sold a portion of the land to PARTAGE.

Badwin Ishengoma was the appellant's witness and he testified as AW-2 and told the court that, he is the neighbour of the appellant and said the land in dispute belonged to the family of the late Martin Ichokanizi who inherited the same from Paulo Ichokanizi. He said there is a time his father was given the land of Paulo Ichokanizi by the leader of Kashekya area and as his father was a friend of Paulo Ichokanizi he gave him another land. He said the appellant has a right in the land in dispute. He said further that, although he was not present when the appellant inherited the land but he don't know if the village council has ever

own a land. AW-2 said that, he don't know the land of the second respondent or the boundaries of his land.

Benaldina Mathias was another appellant's witness and she testified as AW-3 and told the tribunal that, from 2000 up to 2005 she was Acting Chairman of Kashekya village and from 2005 up to 2008 she was the Village Chairman. She said she know the appellant and the second respondent. She said they received a complaint from the second respondent that his trees which were in a farm he had bought had been uprooted and they held a village meeting to determine that complaint. AW-3 said that, they made a follow up and find the land belonged to the father of the appellant and now the land is owned by the appellant.

She said the Village land had already been sold to Seperatus and the area left is the property of the appellant. She said she don't know anything in relation to the allocation of land made to the second respondent and said she has never allocated land to the second respondent. She said in further cross examination that, the land allocated to the second respondent was by mistake and were supposed to re-allocate him another land when Seperatus was allocated the land.

Archard Marcel represented the first respondent and testified as RW-1 and told the tribunal that, he was a leader in Kashekya village Government and said they received an application for allocation of land from the second respondent, Ponsian John and Seperatus Tegamaisho. He said they arranged and went to show them the land and put boundaries on the land allocated to them. Thereafter he went to his home but later on he heard the appellant had said the land belonged to him.

When cross examined by the counsel for the appellant he said he was the village chairman from June, 2005 but he don't remember when the village meeting was conducted. He said the land was allocated to the second respondent on January, 2005 but when the dispute arose he was not present. He said when the land was allocated to the second respondent the village Chairman was Bernaldna. RW-1 said they do not know village land and they have no village land certificate. He said the second respondent is the member of their village and he got the land hence the land belonged to the second respondent.

On his side the second respondent, Ponsian John testified as RW-1 and told the tribunal that, he applied for land from Kashekya Village Council and allocated two and half acres of the land and the remaining portion was allocated to Faustin

Tegamaisho. The second respondent said to have planted pine trees on the land. He tendered to the tribunal a receipt dated 23rd September, 2005 of paying the first respondent for the land allocated to him and was admitted in the case as exhibit DW1.

He said the appellant sold the land allocated to him by the village council and he took the case to the Ward tribunal where it was heard and determined in his favour. He said the appellant appealed through appeal No. 113 of 2008 and No. 194 of 2010 but both of them were dismissed and later on he opened the case at hand. When cross examined by the counsel for the appellant he said the minutes to allocate him the land is dated 28th January, 2008 and the receipt for payment of the land allocated to him was issued on 23rd September, 2005. He said he don't have letter of being allocated the land and said Faustine Tegamaisho is the one who was sold the land.

That is the evidence adduced by the parties before the tribunal which was supposed to be used by the Chairman of the tribunal to determine five issues framed for determination in the matter. The said issues read as follows:-

- 1. Whether the applicant is administrator and heir of the estate of the late Martin Nyamwihura.*
- 2. Whether the first respondent lawfully allocated the applicant the suit land.*
- 3. Whether the second respondent unlawfully encroached upon the suit land.*
- 4. Whether the land claimed by the applicant is distinct from what was allocated to the second respondent.*
- 5. Reliefs.*

In the course of determining the above issues the Chairman of the tribunal found the first and second issues were supposed to be answered in affirmative and third and fourth issues in negative. Now the duty of this court is to determine whether basin on the weight of evidence adduced before the tribunal the decision of the tribunal was right or wrong. As the first issue has no problem I will go straight to the second issue which the tribunal Chairman found was supposed to be answered in affirmative that the first respondent lawfully allocated the suit land to the second respondent and the third issue which was answered in negative that the second respondent did not encroached the suit land unlawfully.

The analysis done by this court to the evidence adduced before the tribunal as summarized hereinabove shows clearly that, despite the fact that both Archard Marcel and the second respondent told the tribunal the land was lawfully allocated to the second respondent by the first respondent but the evidence adduced before the tribunal to establish what was said by the said witness was weak compared to that of the appellant side which states the land was not lawfully allocated to the second respondent. The court has arrived to the above finding after seeing that, while Archard Marcel told the tribunal the land in dispute was lawfully allocated to the second respondent by the first respondent, Bernaldina Mathias (AW-3) who by the time when is stated the land in dispute was allocated to the second respondent was the village Chairman told the tribunal that, the village has never allocated the land to the second respondent.

Another doubt appearing in the evidence of the respondents in relation to the allocation of the land to the second respondent is on the date of allocation of the land to the second respondent and the date of making payment to the village for being allocated the land. As stated in the evidence adduced before the tribunal while is stated the meeting for allocating the land in dispute to

the second respondent was held on 28th January, 2008 but the receipt for payment of the land allocated to him was issued on 23rd September, 2005. This raises some doubt as it was not put clear how the payment for allocation of the land would have been made three years before the meeting of allocating land to him being held.

In addition to that the court has found the evidence of the appellant that he is the owner of the land in dispute and he inherited the same from his father, the late Martin Nyamwihura was supported by evidence of Badwin Ishengoma (AW-2) who said is the neighbour of the appellant and said the appellant is the owner of the land in dispute and he inherited the same from his late father Martin Ichokanizi. To the view of this court the above stated evidence was enough to tilt the balance of probability to the side of the appellant when compared to the evidence on the side of the respondents that the land in dispute is the property of the appellant.

That being the case it is the finding of this court that the second issue that the first respondent lawfully allocated the land to the second respondent was supposed to be answered in negative that, if the land in dispute was allocated to the second respondent the allocation was not lawful. The reason being that,

there was no evidence to establish the land in dispute was under the ownership of the first respondent so that the first respondent could have lawfully allocated the same to the second respondent. The evidence to show the land was under the ownership of the first respondent was given by the appellant himself and supported by Badwin Ishengoma, AW-2 and Bernaldina Mathias, AW-3. Therefore allocation of the land in dispute to the second respondent was not lawful.

Coming to the fourth issue where the Chairman of the tribunal find the land the appellant was claiming is distinct from the land allocated to the second respondent the court has found the reason given by the Chairman for arriving to the above view is because after visiting the land in dispute he found the appellant had another land on the far side of the adjacent hill and the land in dispute is not neighbour to the land in dispute. To the view of this court that would have not been sufficient reason to find the appellant cannot be the owner of the land in dispute because there is no law or any principle restricting a person to own two pieces of land which are far from each other or are not neighbour to each other.

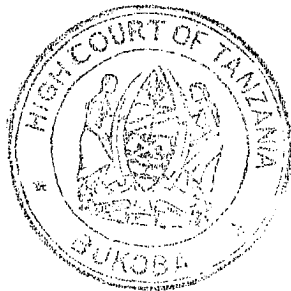
The court has found the appellant has explained to this court clearly that, his late father owned a big land and there is a time the church entered into a portion of the land and after having a case which went up to the High Court his late father decided to leave the portion taken by the church to the church and remained with unoccupied portions which one of them is the land in dispute. Therefore there is a plausible explanation as to why the land in dispute is not neighbour to the land which currently is under the ownership of the appellant.

In the strength of all what has been stated hereinabove the court has failed to comprehend what made the Chairman of the tribunal to fail to concur with unanimous opinion of the assessors who participated in the hearing of the matter and opined the appellant is the lawful owner of the land in dispute. In the premises the court has found the tribunal Chairman erred in law in failing to hold the land in dispute was part of estate of the late Martin Nyamwihura and later on inherited by the appellant.

Consequently, the appeal filed in this court by the appellant is hereby allowed, the judgment of the tribunal is quashed and its decree is set aside accordingly. The appellant is hereby declared to be a lawful owner of the land in dispute and the second respondent is ordered to vacate from the land in dispute

forthwith. Taking into consideration the parties sued in this matter the court has found proper to make no order as to costs in this matter. Order accordingly.

Dated at Bukoba this 26th day of October, 2018




I. ARUFANI, J
26/10/2018

Date: 26/10/2018

Coram: Hon. I. Arufani, J

Appellant: Present in person

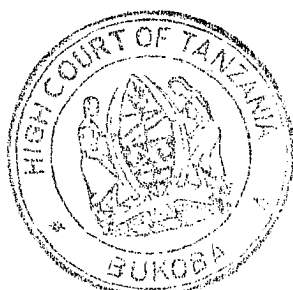
1st Respondent: Mr. Archard Marcel, Village Chairman for.

2nd Respondent: Present in person.

B/Clerk: Tatu.

Court:

Judgment delivered today 26th day of October, 2018 in the presence of the appellant and the second respondent in person and in the presence of Mr. Archard Marcel, Chairman for the first respondent village. Right of appeal is fully explained.




I. ARUFANI, J
26/10/2018