

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[LAND DIVISION]  
AT ARUSHA**

**MISC. LAND APPEAL NO. 27 OF 2019**

*(C/f the Decision of the District Land and Housing Tribunal for Arusha at Arusha in Land Appeal No. 10 of 2018, Original Land Application No. 10 of 2017 at Tarakwa Ward Tribunal)*

**THOMAS LENGIYEU ..... APPELLANT**

***VERSUS***

**EMMANUEL S. MOTIKA ..... RESPONDENT**

**JUDGMENT**

*16<sup>th</sup> September & 16<sup>th</sup> October, 2020.*

**Masara, J.**

The Appellant herein has preferred this second appeal against the decision of the District Land and Housing Tribunal for Arusha, (the appellate Tribunal) in Land Appeal No. 10 of 2018 delivered on 23<sup>rd</sup> May, 2019. The Respondent successfully sued the Appellant before Tarakwa Ward Tribunal (the trial Tribunal) claiming for recovery of a piece of land measuring 28 metres length, 23 metres width. The trial Tribunal declared the Respondent the lawful owner of the suit land. The Appellant was aggrieved, he appealed to the appellate Tribunal which upheld the decision of the trial Tribunal. The Appellant still aggrieved, has preferred this second appeal seeking to challenge the decision of the two Tribunals on the following grounds reproduced verbatim:

*a) That, the Appellate Tribunal erred in law and fact by upholding the decision of the trial Tribunal and allocated (sic) to the Respondent*

*the said suit land which the same was allocated to the Appellant by the family elders as a result of division of the estate which was left behind by their father who died interstate;*

- b) That, the Appellate Tribunal erred in law and fact as it failed to dismiss the decision of the trial Tribunal which ignored strong evidence tendered by relatives, Lucas Singooi Babayetu, Murani Singooi, Levis Meiteena and Yohanas Singooi who collectively admitted that the suit land is the property of the Appellant;*
- c) That, the Appellate Tribunal erred in law and fact as it failed to dismiss the decision of the trial Tribunal which relied upon a decision of the village Land Council in which the Appellant was not summoned to defend his right; and*
- d) That, the Appellate tribunal erred in law and fact as it failed to rule that the judgment of the Village land Council is not conclusive so it is wrong for the trial tribunal to rely upon it in its decision.*

At the hearing of this appeal, the Appellant was represented by Lengai S. Loita, learned advocate whereas the Respondent appeared in person, unrepresented. The appeal was heard orally.

Before delving into the arguments of the parties in respect of the appeal, it is desirable that I recount the factual background leading to this appeal, albeit briefly. The Appellant and Respondent are blood brothers, sons of the late Long'obu. Their deceased father is said to have had four farms in Arusha. All these farms were in the hands of different people as lien or mortgage. Before his death, he gave two farms to each of his two sons, the Appellant and Respondent. The land in dispute is one of those farms. The suit land was initially mortgaged to one Ngoo Patel, but it was dispossessed by their uncle Koreka Samutani. According to the evidence obtained from the trial tribunal's record, on 7<sup>th</sup> February, 2008 the

Respondent approached his brother (the Appellant) seeking for assistance to repossess the farms left by their father in Arusha, but the Appellant declined stating that he was not in a position to battle a case for the farms left in Arusha. The Respondent on his own efforts sued his uncle Koreka Samutani at Siwandeti Village where he won the case and was declared the rightful owner of the land subject of this appeal on 26<sup>th</sup> August, 2009. Since then the Respondent has been occupying the suit land. On 9<sup>th</sup> August, 2017, he was issued with a letter from the clan elders (Mshili wa Ukoo), one Mepaashi Olesangau, notifying him that the farm has been allocated to the Appellant by the clan elders after the Respondent refused to attend the clan meeting which sat with the aim of distributing the estate of their late father. According to the Appellant the clan called for that division after the other land in Simanjiro was also divided equally to the parties herein. The Respondent was aggrieved by the act of the clan elders dispossessing him the land he had been in occupation since 2009. He immediately sued the Appellant in the trial Tribunal where he was declared the lawful owner of the suit land.

Submitting on the substance of the appeal, Mr. Lengai contended that the two lower Tribunals erred as the suit land was divided by the elders and the document to that effect was tendered. He maintained that in the clan meeting, the Respondent was summoned but failed to appear on 9<sup>th</sup> August, 2017. Mr. Lengai was of the view that the trial Tribunal had no jurisdiction to entertain the suit as it involved division of the deceased's estate. He further contended that parties are blood brothers, and that the

distribution was made in accordance with the Maasai customs. Mr. Lengai further argued that the Respondent's claims that his father had given him land was not supported by any evidence. In that regard, he cited the case of **John Ngomoi Vs. Mohamed Ali Bofu** [1988] TLR 63.

Elaborating on the second ground of appeal, Mr. Lengai contended that the lower Tribunals erred in not upholding the evidence tendered by the Appellant's witnesses as the witnesses testified that the suit property belongs to the Appellant. That these are the persons who were involved in distributing the property left by the deceased, therefore they were crucial witnesses.

On the third ground, the learned advocate for the Appellant stated that the trial Tribunal was incompetent to deal with the matter before it as the value of the disputed land is about 12,000,000/=

Arguing the fourth ground, it was Mr. Lengai's contention that the trial Tribunal based its decision on the decision made by the Baraza la Ardhi la Kijiji (Village Land Tribunal) where the Appellant was not summoned to testify. In his view, the decision was detrimental to the Appellant as he was not heard. The learned counsel contended that denial of the right to be heard was in contravention to Article 13(6)(a) of the Constitution. To support his argument on the right to be heard he referred to the decisions in **Ndesamburo Vs. Attorney General** [1997] TLR 137; **Ramadhan**

***Salum Mtei Vs. Republic*** [1985] TLR 223 and ***Kulera Daud Vs. Rebecca Steven*** [1985] TLR 116.

Contesting the appeal, the Respondent argued that their father left four plots and all of them were mortgaged. Their late father directed that two plots be taken by the Appellant after paying the mortgagees. Two others were given to him on the same conditions. The family meeting was not justified to take his piece of land that is why he sued the Appellant at the trial Tribunal. In his view, the Respondent won fairly in the lower tribunals. He maintained that his matter was not dealt with by Village land Authorities rather the Ward Tribunal.

I have carefully gone through Tribunals' records, the grounds of appeal and the arguments of the parties in support and against the appeal. The issues for determination are: whether the decisions of the trial and appellate Tribunals were based on the decision of the village land tribunal and who is the lawful owner of the suit land between the Appellant and the Respondent.

As far as the first issue is concerned, Mr. Lengai's claim is that the decisions of the two lower Tribunals were based on the decision made by the Village Land Tribunal Baraza la Ardhi la Kijiji), in which the Appellant was never summoned to testify. In his view, the Appellant was denied the right to be heard. The Respondent's denies this allegation and that the dispute was decided by the Ward Tribunal which declared him the lawful owner of the land in dispute.

I have carefully revisited the record of the lower tribunals. It is on record that in 2009, the Respondent sued Koreka Samutani in Siwandeti Village Land Tribunal. The Tribunal ruled in favour of the Respondent, and the suit land was handed to him. The copy of the decision of that Tribunal was tendered as an exhibit by the Respondent in the trial Tribunal. However, such decision did not feature in either the trial Tribunal or the Appellate Tribunal decisions. For clarity purpose, let me reproduce the trial Tribunal decision and its reasoning, which is found at the last page titled 'Hukumu'. It reads:

*"Baada ya shauri hii kupokelewa Barazani na kuandikwa maelezo ya pande zote 2, yaani upande wa mdai na upande wa mdaiwa, na maelezo ya ushahidi wa pande zote mbili (mdai & mdaiwa) pamoja na maswali yaliyolizwa Barazani ikiambatanishwa na majibu yaliyotoiwa, na uchunguzi wa kina uliofanywa na wazee wa Baraza walipotembelea eneo hilo lenye mgogoro. Wajumbe wa Baraza waliona kuwa mdai katika shauri la msingi (Emmanuel S. Motika) anayo haki ya kuendelea kumiliki eneo alilopewa na baba yake mzazi."*

After such findings, the trial Tribunal declared the Respondent to be the lawful owner of the suit land. From the above, it is clear that the decision of the trial Tribunal was not solely based on the decision made by the Village Land Tribunal as alleged by the Appellant. The trial Tribunal's decision was based on the evidence adduced by the parties and their witnesses, the findings discovered at the *locus in quo* and the fact that the land was given to the Respondent by his late father prior to his death.

In the premise, I find the argument put forward by Mr. Lengai that the Appellant was unheard to be devoid of merits. I say so because the decision the Appellant complains that he was not summoned, did not form the basis of the lower Tribunals' decisions. I associate myself to the findings of the first Appellate Tribunal in this aspect, which I consider the proper position. Therefore, the first issue is resolved in the negative.

I now proceed to determine the second issue which centres on the ownership of the disputed land. In his evidence, the Respondent testified on how their late father distributed his four farms to them before his death. He stated that all the four farms were mortgaged. The farms mortgaged to Sironga Sikoi and Singooi Samutana were given to the Appellant who was to pay a goat, a cow and one he goat respectively in order to redeem them. The farm mortgaged to Ngoo Patel and Singooi Samutana were given to the Respondent who was to pay Tshs 200/= and a bull to redeem them. The Respondent played his part, the Appellant did not. Admittedly, there was no evidence to corroborate these assertions, but the Respondent's witness provided a clue in that the Appellant had disassociated himself from following up the issue of the farms.

In the trial Tribunal, the Respondent narrated how he employed his efforts to recover the suit land from Koreka Samutana, the deceased's young brother, who by then had taken over the suit land from Ngoo Patel (the mortgagee). On 7<sup>th</sup> February, 2008, the Respondent approached the Appellant for his assistance to repossess the suit and the other farms left

by their father in Arusha, but the Appellant declined. This piece of evidence was corroborated by that of Timoth Sokooi who accompanied the Respondent to meet the Appellant at Ngaramtoni. The Respondent, by his own efforts, regained the suit land from Koreka who had initially refused to give it back until he was sued in the village land tribunal.

This implies that the Appellant was no longer interested in the Arusha farms as the Respondent and his witness testified. Proving that the Appellant had lost interest in that land, the Respondent occupied it since 2009. He developed the suit land but the Respondent never bothered to involve clan elders in the early stages until 2017, which is almost ten years later. In my view, considering all the time the Respondent had been occupying the suit land, and from the fact that he played his role in redeeming the land as instructed by their father, the Appellant's claim over that land was an afterthought. The Respondent's version of the story on how the land was given to him by his father and the way he fought to repossess it from trespassers is more cogent, I see no reasons to doubt it.

The basis of the Appellant's claim over the suit land is solely based on the allocation made by the clan elders, led by the Clan leader (Mshili wa Ukoo). The law is settled that a clan elder is not one of the authorities mandated to allocate land. Their decision would have caught this Court's attention had there been a person appointed as the administrator of the deceased's estate. The clan meeting, or a Clan elder for that matter, had no business in dealing with the division of the suit land.



The Appellant raised another claim that the trial Tribunal had no jurisdiction to entertain the suit since the value of the suit land is about 12,000,000/=. This also is an afterthought as it was not raised in the trial Tribunal or one of the grounds of appeal before the appellate Tribunal. I am alive that the issue of jurisdiction in any suit is very fundamental. However, the Appellant did not have any evidence to support his allegation. The issue touching jurisdiction of a court has to be dealt with at the earliest opportunity. This was stated by the Court of Appeal in ***Nkwabi Shing'oma Lume Vs. Secretary General, Chama cha Mapinduzi***, Civil Appeal No. 234 of 2017 (unreported), where the Court held inter alia:

*"It is settled that the issue of jurisdiction for any court is so basic as 'It goes to the very root of the authority of the court to adjudicate upon cases of different nature' and this must always be ascertained at the commencement of any proceeding"*

See also ***Richard Julius Rukambara Vs. Isack N. Mwakajila and Another***, CAT Civil Appeal No. 08 of 1995 (unreported); ***Tanzania China Friendship Textile Ltd Vs. Our Lady of Usambara Sisters*** [2006] TLR 70 and ***Fanuel Mantiri Ng'unda v. Herman M. Ng'unda & Others***, Civil Appeal No. 8 of 1995 (unreported)

The other claim by the Appellant that the testimonies of his witnesses Lucas Singooi Babayetu, Murani Singooi, Levis Meiteena and Yohanas Singooi were not considered as they were crucial witnesses is unfounded because these witnesses never testified at the trial Tribunal. This as well was very well addressed by the appellate Tribunal. It is on record that the

only witness who testified for the Appellant is Losioki Sokooi, whose evidence was on the allocation of the land to the Appellant by the elders. From the evidence at the trial, there is no doubt that the Respondent managed to prove his entitlement to the suit land. The second issue is resolved against the Appellant.

Basing on the above reasons and findings, I find that the Respondent is the lawful owner of the suit land. I therefore find no reasons to fault the decisions of the two lower Tribunals. I dismiss the appeal on its entirety. The decisions of the trial Tribunal as well as that of the appellate Tribunal are hereby upheld. The Appellant to pay costs.

It is so ordered.



  
Y. B. Masara

**JUDGE**

16<sup>th</sup> October, 2020