

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND CASE APPEAL NO. 28 OF 2018**

(Originating from the Judgment and Decree of Moshi District Land and Housing Tribunal of Kilimanjaro in Application No. 121 of 2015)

**ABAS A. MRUTU ----- APPELLANT**

**VERSUS**

**1. HONEST MMARY  
2. MATAYO MESHACK  
3. DORA PETRO**

}

**----- RESPONDENTS**

**JUDGEMENT**

**MUTUNGI.J.**

The Appellant herein has raised six grounds of appeal as hereunder: -

- 1) That, the Learned Chairman erred in finding that the third Respondent had witnessed her son's letter dated 23.6.2011 stating that the Land in dispute belongs to the Applicant (Appellant in this court) before Kisangenisangeni Village Executive Officer.
- 2) The Learned Chairman erred in finding that the Defence witness no. 5 Eliacha Semu had witnessed his Brother's

letter dated 23.6.2011 stating that the Land in dispute belongs to the Applicant before Kisangenisangeni Village Executive Officer.

- 3) The Learned Chairman erred in not finding that the Applicant had submitted a letter dated 20/1/2014 from the Kisangenisangeni Village Executive Officer stating that the Appellant illegally owns the Land in dispute.
- 4) The Learned Chairman erred in not finding that the Applicant had submitted a payment receipt no. 87243 dated 20/1/2012 from the Kisangenisangeni Village Council, as payment for the Right of occupancy for the Land in dispute.
- 5) The Learned Chairman also erred in not finding a proper link of the case as a Successor of Hon. Amina Rashid and Hon. G. Kagaruki by holding that, the Applicant did not tender the annexures before the Tribunal as Exhibits while they were tendered before Hon. Amina Rashid.
- 6) The Learned Chairman failed to find the respondent failed to prove the case on a balance of probability as the Respondents had no any document to prove their ownership while the Applicant has a legal document to prove his ownership over the Land in dispute.

**WHEREFORE:** - the Appellant prays,

- 1) The Judgment and decree be set aside and there be substituted a Judgment and decree for the Appellant as prayed in the application.
- 2) The Appellant also prays for the costs of the case in the Tribunal and of this honourable court.

The court ordered the appeal be disposed of by way of written submissions. Starting with the Appellant, he consolidated ground one to five of which the main grievance was the annexed documents which were not considered by the trial Chairman. The Appellant submitted that, it all started on 23/06/2011 when the third Respondent and her grandchild one Edwin Erasto were taken before the Kisangenisangeni Village Council for having trespassed on to the Appellant's Land which is the Land in dispute. The third Respondent and her child Eliacha Semu entered into an agreement promising never again to trespass on the said Land and the parties in conflict signed.

It is the Appellant's submission that despite the above fact being mentioned in the proceedings, the trial Chairman did not assist the Appellant to tender the annexures as exhibits

for the sake of justice knowing very well the Appellant was a lay person. The Appellant cited the case of **John Lessa V. Republic Zamcargo Ltd and Jonas Mmari** to hammer his point home. The Appellant further submitted that, there was yet a payment receipt no. 87243 dated 20/1/2012 from the Kisangenisangeni Village Council as payment of a right of occupancy and an introduction letter of ownership dated 20/1/2014 from the Village Executive Officer to the Moshi District Land and Housing Tribunal, but the trial Chairman turned a blind eye and did not find it just to remind the Appellant to tender these documents as Exhibits.

The Appellant went forth in his submission to highlight that, one Eliacha Semu was a witness to a letter written by his brother on 23.6.2011 confirming that the disputed land belonged to the Applicant before the Kisangenisangeni Village Executive Officer. To the contrary during the trial he turned around and testified that, the Land belonged to his brother. For all purposes and intent, this witness was not credible.

As far as the sixth ground of appeal is concerned the Appellant was disturbed by the fact that the Respondents won the case without any supporting evidence while they too had a burden to prove that which they were alleging.

On the other hand, the Respondents represented by Mr. Tumaini Materu, Advocate submitted that, it was the duty of the Appellant to tender all the annexures relied upon as exhibits during the trial. The Learned Advocate submitted that the court had no legal duty to assist the Appellant.

Commenting on the introduction letter from the Kisangenisangeni Village Executive Officer dated 20/1/2014 and the payment receipt from the Same Village these did not indicate the boundaries or demarcations of the land so introduced. On that avenue they had no evidential value. On the same stance the payment receipt was not an instrument to prove good title. To cap it all, the Learned Advocate explained in his submission that, the Appellant failed to show the relevant documents to prove how he acquired the suit land.

Responding to the sixth ground of appeal it was expounded that, the Appellant before the tribunal had failed to prove his case on a balance of probabilities. The Learned Counsel reminded the court that, the Appellant was duty bound to prove the allegations he had alleged in the tribunal. To cement his submission, he cited the case of **Abdul Kauni Haji V. Raymond Nchimbi Alois and Joseph [2006] TLR 414 and 429.**

In rejoinder, the Appellant insisted that the trial Chairman did not ask him to tender the annexures as exhibits for admission. The court is thus asked to consider the Appellant being a layman and proceed to open the gates of justice for him. The Appellant prays the Judgment be set aside and the appeal be allowed with costs.

Before deliberations on the filed submissions from the two camps, the trial Judge by then (Twaib J) invited the parties to address him on two issues namely: -

- 1) Whether the District Tribunal was right in determining the matter based on the fact that the said

annexures were not tendered as exhibits without giving the parties an opportunity to be heard?

- 2) Depending on the answer to question one, what should be the proper remedy to grant under the circumstances?

When the parties appeared to do what they had been asked to do, the trial Judge had already been transferred. I took up the matter and the parties, starting with the Appellant responded that, he had filed his complaint before the trial tribunal with corresponding annexures. It was thus important for the trial Chairman to have asked the parties to address him but he instead told him that as long as they are annexed in the file, he would consider them.

On the other side of the coin the first Respondent responded that the Appellant did not tender any exhibits. Even though the annexures do not speak much. What the Appellant was required to do is to prove his case on a balance of probabilities.

In brief, the background of the dispute is that, the Appellant had sued the Respondent's jointly and severally for trespass into the farm that lawfully belonged to him. The basis of the claim is that he was allocated the said land by the Village Authority in 1998 following an order from the Land Development Officer allowing a Village to allocate land to people in need. The Appellant had in the course been allocated 4<sup>3/4</sup> acres. He had turned the disputed area to a farm land.

Things changed in 2011 when the third Respondent's son unlawfully entered into the Appellant's land and felled down trees therein. The said son was arrested and reported, he apologized and the matter ended there.

The next ordeal was in 2012, the Respondents this time round invaded the same area and started cultivating therein. The Appellant instituted a case before the Kahe Ward Tribunal but the said tribunal found its hands tied for lack of pecuniary jurisdiction. The Appellant knocked at the doors of the District Land and Housing Tribunal for Moshi at Moshi claiming inter-alia for the following: -



- i) A declaration that the Applicant is the lawful owner of the suit land.
- ii) A declaration that the Respondents are trespassers to the disputed land.
- iii) An order that the Respondents give vacant possession of the suit land to the Applicant (Appellant) forthwith.
- iv) An order of perpetual injunction to restrain the Respondents, their agents, servants, workmen, assignee and whomsoever will be acting through them from further meddling of the suit land.
- v) An order that the Respondents pay the Appellant Tshs. 5,000,000/= (Five million shillings) in respect of General Damages for trespassing.
- vi) The Respondents pay the Applicant (Appellant) costs of and incidental to the application.
- vii) Any other orders that the Honorable Tribunal may deem fit and just to grant.

The Appellants witnesses Yahaya Athumani Mkinde and Musa Kabora Mdee joined hands with the Appellant that he

had been allocated the suit land by the Village Authority after the District. Commissioner had approved the land for agricultural activities.

On the other hand, the first Respondent alleged he was given the suit land in 1982 by his grandfather (one Majoloy Tevel Kimath) and the trespasser was actually the Appellant in 2011. The second Respondent has the same version of story. The third Respondent denied to have trespassed on the said land since her piece of land is situated on the opposite side. These had witnesses Kundaseli Julias Kimath, Eliacha Semu, Richard Maya, Ramadhani Saveruwa who knew how the first and second Respondent acquired the land from their grandfather. All these witnesses had never seen the Appellant around that area by then and knew all the boundaries.

At the end the tribunal made a finding that, there was no proof of allocation of the land to the Applicant and the application was consequently disallowed and dismissed with costs.

The Appellant is now seen before this court through the window of appeal. The court captures that his major grievance reading through the grounds of appeal is that, his annexures were never considered in evidence hence defeating justice. What then was the reasoning of the honourable Chairman. At page 6 of the Judgment he states and for the sake of clarity that: -

***“The Applicant relied upon annexures on the application filed which were not tendered as exhibits for admission.”***

On the same page the honourable Chairman proceeds to state and quote: -

***“This means the Applicant has failed to prove his case.”***

The court is alive with the famous maxim that “he who alleges must prove.” and the court is also mindful of the provisions of Section 110 (1) of the Evidence Act, Cap 16 R.E. 2002 and for the sake of reference the same is coached in the following words: -

***“Whoever desires any court to give Judgment as to any legal right or liability depended on the existence of facts, he asserts must prove those facts assist.”***

Gathering from the foregoing, the Appellant had a duty to prove before the tribunal ownership of the said land and its demarcations. This would only be possible if he had tendered documentary evidence as exhibits. This was a legal duty imposed on the Appellant.

The Appellant has tried to annunciate that, the tribunal should have warned itself of the fact that he is a lay person hence should have been assisted. The Appellant raised the same opinion when he was addressing the court. As already depicted from the legal stand, the duty to prove his case was solely vested on him and not the tribunal. Had he tendered the annexures as exhibits the conflicting side would have heard an opportunity to cross-examine on the said annexures since the same would be part of the evidence.

Be as it may, it is not that the honourable Chairman had no sense of justice, he in fact proceeded to make an observation of the said annexures. In his own words at page 16 of the Judgment he writes: -

***“On the other hand, the said annexures do not show the land given to the Applicant.”***

This court has also gone through the annexures and finds they do not speak much to assist the Appellant in his claims.

Lastly, the Appellant would seem to shift the burden of proof on the Respondents to prove that the disputed land was their property. There is ample evidence on their side of how they acquired the said land. Flipping through the Judgment, the tribunal had also framed an issue to the same effect that;

***“Who is the lawful owner of the suit land between the parties.”***

No wonder, basing on the evidence adduced the tribunal found the suit land was lawfully owned by the first and second Respondents which finding is not faltered by this court.

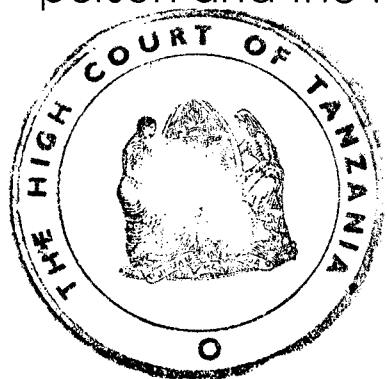
In the end result the court finds the appeal has no merits and the same is dismissed with costs.

  
**B. R. MUTUNGI**

**JUDGE**

**25/03/2020**

Read this day of 25/03/2020 in presence of the Appellant in person and the Respondents in person.



**B. R. MUTUNGI**  
**JUDGE**  
**25/03/2020**

RIGHT OF APPEAL EXPLAINED.

**B. R. MUTUNGI**  
**JUDGE**  
**25/03/2020**