

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

AT MOSHI

LAND APPEAL NO. 02 OF 2021

*(Originating from Land Case No. 41 of 2016 District Land and Housing
Tribunal of Moshi at Moshi)*

DAMAS MATHIAS KIMARIO (As Administrator of the late
Mathias Colman Mathias Kimario **APPELLANT**

VERSUS

FLORA MATHIAS KIMARIO..... **1ST RESPONDENT**

FARES GERVAS **2ND RESPONDENT**

JUDGMENT

MUTUNGI .J.

The appellant was aggrieved by the decision of the District Land and Housing Tribunal of Moshi (trial tribunal) in Land Application No. 41 of 2016 delivered on 11th November, 2020.

A brief background surrounding this appeal is to the effect that, the appellant sued the respondents for trespassing over a piece of land measuring one (1) acre located at Usseri Village in Rombo District (the suit land). At the trial tribunal, the appellant claimed that the suit land belonged to his father, the late Mathias Colman Kimario. In his capacity as his father's administrator he sued the

respondents for trespass on the suit land. He alleged the 1st respondent had no colour of right over the suit property since she was merely employed as a house girl. On the other hand, the 1st respondent claimed she is the lawful owner of the suit land having bought the same from one Theresia Mangalili on 15th March, 1985 as seen in Exhibit D1. The 2nd respondent claimed the suit land was the 1st respondent's property, as he borrowed her money to purchase the same. In the end, the trial tribunal dismissed the application, on the ground the appellant failed to prove his claims and declared the first respondent the lawful owner of the suit land. Aggrieved by the decision, the appellant preferred this appeal on the following grounds: -

1. That, the trial tribunal erred in law and fact in not considering other factors in proving ownership of the said land.
2. That, the trial tribunal erred in law and fact in not giving a chance to the appellant's witness to adduce evidence before the tribunal.

The appellant appeared in person/unrepresented while the respondents were jointly represented by Ms. Elizabeth Minde, learned advocate.

Supporting the appeal the appellant submitted, he was not given an opportunity to see the 1st respondent's document which

confers the first respondent ownership of the suit land. He stated, the deceased was his father and was buried on the suit land but as they prepared to build a grave, the 1st respondent stopped them from doing so.

Referring to the complaint on his witnesses, he stated, he summoned his witnesses but they were not able to testify despite making appearances six times before the tribunal. To his surprise when they appeared the seventh time the case was closed.

In reply, Ms. Minde submitted, the tribunal's proceedings clearly show who is the owner as per Exhibit "D1". The same reveal the first respondent (Flora) bought the suit land. The exhibit was not objected to or any evidence tendered to show the Exhibit was a nullity. It is also clear that the 1st respondent had lived on the suit land peacefully for 20 years. The argument she was the deceased's worker was baseless considering the documents tendered. This is the reason the assessors opined, the 1st respondent was the owner. The appellant had no witness to testify to the contrary.

On the second ground, Ms. Minde submitted, the tribunal had adjourned the matter for a long period to give an opportunity to the appellant to get witnesses but he failed. The appellant had an advocate and when the matter was always adjourned was

at the instance of the appellant's side. Be as it may there is no record to show the appellant had witnesses. The learned advocate finally prayed the appeal be dismissed for lack of merits with costs. There was no rejoinder.

After going through the parties' submission and trial court's record, I now proceed to determine the grounds of appeal as they appear. Starting with the 1st ground that the trial tribunal erred in declaring the 1st respondent the owner of the suit land. The law is clear and the Court of Appeal decisions are at one that, in civil proceedings, the party who asserts a fact exists has a legal and evidential burden of proof and the standard in each case is on a balance of probabilities. In discharging this burden the weight/quality and not quantity of evidence adduced is considered. In the case of **Paulina Samson Ndawavya V Theresia Thomas Madaha, Civil Appeal No. 45 of 2017, CAT at Mwanza (Unreported)**, the Court of Appeal emphasized that: -

"It is a trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap 6 [R.E. 2002]. It is equally elementary that since the 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

other on a particular fact to be proved..."

With the above guidance in mind, passing through the trial court's record, the appellant's evidence shows, he is aware his late father purchased the suit land but he had no any proof substantiating when, how or from whom was the suit land bought from. He testified to have been living with the 1st respondent on the suit land since when he was 12 years, and that at the time the 1st respondent was his late father's 2nd wife. On the other side, the 1st respondent produced evidence which shows when she bought the suit land from one Theresia Mangalili. Further, the late Mathias Colman was a witness to the sale transaction which evidence was undisputedly admitted as Exhibit D1. That evidence is supported by DW2 who borrowed her money to purchase the suit land. DW3 (the neighbour) and even the appellant himself stated the 1st respondent had been living on the suit land for more than 20 years.

In that regard, it is clear the trial tribunal did scrutinize the evidence and reached a fair decision in declaring the 1st respondent the lawful owner of the suit land, since the appellant failed to prove otherwise. This ground has no merit and the same is dismissed.

As for the 2nd ground the record shows, there were more than 10

opportunities for the appellant to bring his witnesses but he didn't and in the end his advocate prayed to close the appellant's case. In the circumstances, he was not curtailed the right to call witnesses but he failed to do so on his own volition. This ground also fails.

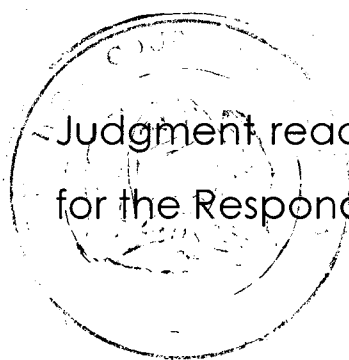
From the above analysis, I find the appeal lacks merit and the same is hereby dismissed with costs. The trial tribunal's Judgment is upheld.

It is so ordered


B. R. MUTUNGI

JUDGE

31/08/2021



Judgment read this day of 31/8/2021 in presence of Miss Minde for the Respondents and in absence of the Appellant.


B. R. MUTUNGI

JUDGE

31/8/2021

RIGHT OF APPEAL EXPLAINED.