

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO. 46 OF 2021

*(Arising from Land Appeal No. 130 of 2019, District Land and Housing Tribunal
Tarime, Original Land Case No. 382 of 2019, Ward Tribunal of Kibasuka)*

MUNGOSI MANG’ACHE 1ST APPELLANT

GIMONGE MANG’ACHE 2ND APPELLANT

VERSUS

BHOKE MANG’ACHE RESPONDENT

JUDGMENT

2nd Sept & 29th Sept, 2021

F. H. MAHIMBALI, J.:

The appellants and the respondent have a dispute of land ownership originally owned by the late Mang’ache. Whereas the appellants are sons of the late Mang’ache by his first wife (deceased), the respondent is the surviving wife of the late Mang’ache.

The facts of the case stipulate that upon the demise of the late Mang’ache, the appellants left the village for their own life affairs somewhere else (unknown). In their return in 2019, they went to the

respondent (step mother) demanding for their portions of Land in respect of their father's land. It was unsettled on the basis that there was no land belonging to them.

This prompted them to filing a land dispute at the Ward Tribunal of Kibasuka unsuccessfully. Aggrieved by that decision of the trial Ward Tribunal, they unsuccessfully appealed to the DLHT of Tarime.

Still dissatisfied, they have tossed for their second appeal to this Court on the following grounds:

- 1. That the appellate Tribunal erred on point of law to preside over a matter on which it had no jurisdiction.*
- 2. That the appellate Tribunal erred on point of law when it failed to find that the trial Tribunal acted without jurisdiction and that such proceedings were a nullity and could not be saved.*
- 3. That since there is evidence that the parties had subjected themselves to the services of the village Land Council, the appellate Tribunal erred when it failed to find the Ward Tribunal which purportedly dealt with the matter afresh lacked such mandate and was acting ultra vires.*

4. That the appellate Tribunal misdirected itself on point of law and facts when it came to a decision that the appellants had abandoned the land.

5. That since there was no mediation and if any, it had failed and since our adversarial system operates on winner takes all basis, the order to divide the land was a misdirection and that the appellate Tribunal misdirected itself to bless an ultra-act in prejudice of the appellants' right.

During the hearing of the appeal, the appellants were represented by Mr. Baraka Makowe learned counsel whereas the Respondent was represented by Miss Mary Samson, learned counsel.

Arguing together the first and second grounds of appeals, Mr. Baraka Makowe, submitted that in essence the trial Ward Tribunal lacked jurisdiction to preside over the matter as the claim was purely a non-land matter. Basing his argument on the testimonies of the two appellants at the trial tribunal, the learned counsel queried if failure to distribute the deceased's land amounts to land dispute and not a probate issue as making reference to the proceedings of the trial tribunal dated 8th October, 2019.

The Third ground of appeal was abandoned by the learned counsel for reasons better known by the appellant's counsel.

As regards the fourth ground of appeal, that the first appellate tribunal misdirected itself in finding that the appellants abandoned the purported land, Mr. Makowe learned counsel is of the view that appellants being away from their home for employment purposes does not render their lawful land abandoned as claimed on claim of non-attendance.

On the fifth ground of appeal since mediation process had failed prior to the hearing of the suit, it was then improper to order apportionment of the land in dispute describing it as a win - win situation. Mr. Makowe learned counsel, bitterly argued that in our adversarial system the one who establishes takes all and the loser loses all. It was thus wrong after the appellants had established their claims, the trial tribunal to order otherwise. What was required by it was just to declare the appellants as owners of the disputed but now as done.

Countering the appellants' grounds of appeal as argued in the submission in chief by Mr. Makowe learned counsel, Miss Mary, learned

counsel for the respondent first submitted that the appeal is vigorously contested.

Starting with the fourth ground of appeal, she submitted in reply that as the appellants had left their home village since 1979 and that they had taken all that belonged to each one of them, their return in 2018 and demanding land from the Respondent was unjustified and uncalled for. The fact that they were employees didn't by itself justify leaving their land unattended (if they really had) and that in any way they had no any share interest in the said land.

In respect to the first and second grounds of appeal which were argued together, the learned counsel responded that though the dispute involved relatives, but the crystal issue was ownership of the said land upon the death of their father and upon the appellants having abandoned it for over 39 years now but claiming ownership of it. Though it is undisputed that part of that land belonged to the deceased Mang'ache (their father), the appellants are not justified to take it all as the respondent being the deceased's widow, apart from adding other portions of land. She had a vested interest as widow. Nevertheless, she was ready to surrender part of it (deceased land) and remain with her own land.

The fact that our legal system is adversarial is by itself not necessarily that in every suit there must be a winner of all and loser of all. There are times a win-win situation may arise in the adjudication process considering the fact that reconciliation and amicable settlement is envisaged by our laws. She thus concluded by submitting that let this appeal be dismissed with costs and that the decision of the two lower tribunals be upheld as decreed.

In his rejoinder submission, Mr. Makowe learned counsel apart from reiterating what he submitted earlier insisted that the appeal is meritorious and be allowed. He buttressed further that he is aware of the mediatory and reconciliatory duty/power of the trial tribunal and courts of law, however upon failure of that attempt in the midst, there remains only one task for a court of law, to determine the matter as per evidence and law and not otherwise. Thus, it was not right in the circumstances of the matter for a trial tribunal to determine the matter in a win - win situation.

Having heard both parties via respective learned counsel, the vital issue here for determination is whether the appeal is meritorious. In reaching that end, the court will determine who is the rightful owner of the disputed land; the appellants or the Respondent.

As stated above, the parties in this case claim ownership of land in dispute as belonging to their deceased father (the late Mang'ache). The appellants are sons of the deceased whereas the respondent is the widow of the deceased.

It is undisputed that soon after the demise of the deceased, the appellants left their home for their own life somewhere while the Respondent continued with her normal life at the disputed land together with her children.

In determining the first and second grounds of appeal, I have digested whether the two tribunals below lacked jurisdiction to determine the matter. In essence the crystal point of dispute between the parties is on ownership of the deceased's estate (land belonging to the late Mang'ache). The appellants upon their return in 2018 after their joint departure in 1979 (after the death of their father), are now claiming ownership of the same land left by their deceased father. It is open fact that when a person dies, his properties are not left wasted. They must be very well governed by law. The right of ownership from the deceased's property is not automatic transfer but regulated by law.

In the instant matter, the appellants' rights over ownership of the

said properties which belonged to their father didn't automatically revert to them upon his demise. There ought to have complied with the due process of law. Thus, whereas the dispute between the parties in this matter concerned land, strictly speaking does not fall in trespass, encroachment etc but instead on heirship. If this is the position, then I concur that the two tribunals below lacked jurisdiction to entertain the same when the appellants filed their land case there. The appropriate court to determine their matter was not a land court but probate court (see of **MALIETHA GABO vs ADAMU MTENGU** miscellaneous Land Appeal no. 21 of 2020) my learned brother, I. C. Mugeta, J cited the case of **MGENI SEIF V. MOHAMED YAHAYA KHALFANI** , Civil Application No. 1 / 2009, Court of Appeal – Dar es Salaam (unreported) where at page 14 , it was held :

"As we have said earlier, where there is a dispute Over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership".

Additionally, on page 8 of the cited case of the Court of Appeal had this to say;

"It seems to us that there are competing claims between the applicant and the respondent over deceased person's estate.

In the circumstances, only a probate and administration court can explain how the deceased person's estate passed on to the beneficiary or a bona fide purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate”.

On the fourth ground of appeal, it is concerned with issue of abandonment of the land in dispute by the appellants. Whereas the appellants' absence at the suit land from 1979 or 1987 to 2018 amounts to abandonment of that land, Mr. Makowe counters that the time one spends in employment should not be counted as abandonment in the event his land is left unattended. Should this proposition by Mr. Makowe prevail, then an employee who is not attending his land for 39 years on account of employment reason still retains that land. I wonder if this is the proper position of the law in Tanzania so long as ownership of land in Tanzania is not absolute. Anyone apportioned land either by certificate of right of occupancy or customarily, he or she is subject to compliance with the law in place providing for terms and conditions of land ownership. Abandonment of land is a sufficient cause of revocation

of one's right of occupancy granted in ownership of land. If this condition applies to registered land which is more protected, then it is worse to unregistered land upon abandonment.

Thus, my finding in this ground of appeal is simple. Had that land been owned by the appellants, the 29 years spent in their employment without attending that land amounted to abandonment and thus had their land right (if any) extinguished by their absence from it and on non – attendance to it.

Having discussed the first, second and fourth grounds of appeal, I find no longer necessary to proceed with the remaining ground of appeal as the same serves no any useful purpose. However, I may subscribe that depending on the facts and evidence of the case, it is not always true that in adversarial system always the winner takes all and the loser loses all. There are situations of win – win as well or a hybrid system in which the strict adversarial system is watered down on matters involving probate, matrimonial and tort (Article 107A of our Constitution pioneers it clearly).

All this said and done, this appeal is unmeritorious. The appellants being the ones who filed the land suit at the trial tribunal lost their

channel. The same is hereby dismissed. Each party to bear its own costs. Subject to the law of limitation, they may wish to file a proper course before the proper probate court to determine the real owner if still interested.

DATED at MUSOMA this 29th day of September, 2021.




F. H. Mahimbali

JUDGE

29/09/2021

Court: Judgment delivered this 29th day of September, 2021 in the presence of Makowe, Advocate and absence of Respondent with notice.

B/C: Neema P. Likuga – RMA.

Right of appeal is explained.


F. H. Mahimbali

JUDGE

29/09/2021