

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

Misc. LAND CASE APPEAL NO. 06 OF 2021

*(Arising from the appeal of the District Land and Housing Tribunal of Mwanza at
Mwanza Appeal No. 114 of 2018.)*

EVARIST MAGOTI----- APPELLANT

VERSUS

OMARI RWECHUNGURA KAKWEKE----- RESPONDENT

JUDGMENT

Last Order: 26.10.2021

Ruling Date: 25.11.2021

M. MNYUKWA, J.

This is a Misc. Land Appeal in which the Appellant EVARIST MAGOTI hereafter referred to as the appellant, appealed against a decision of the District Land and Housing Tribunal for Mwanza, hereafter referred to as the "DLHT" by Hon. Philip, D. Chairperson. The appellant moved this court with four grounds of appeal

1. That the first appellate tribunal erred in law and fact in deciding that the appellant has not proved that he is the original owner of the



land in dispute plot No. 916 block A Luchebele Mwanza or that he has a good title to the same.

2. That the 1st appellate tribunal erred in law and in fact disregarding the evidence which were to the extent that the appellant has good title to the land in dispute that is Plot No. 916 Block A Luchebele in Mwanza City.
3. That the 1st appellate tribunal erred in law and facts by ignoring the evidence that the appellant has used and occupied the land in dispute for a long time from 1999.
4. That the 1st appellate tribunal erred in law and fact in deciding that the appellant is not entitled to compensation.

By the order of this court, the appeal was argued orally where parties argued their case in person and unrepresented vide audio teleconference of which they were remotely present. The appellant was present vide mobile number 0756 986807 and the respondent vide mobile number 0763078964.

At the hearing, the appellant was the first to kick the ball. He avers that he was not satisfied with the decision of the DLHT by setting aside



the decision of the ward tribunal for the reasons he advanced in his petition of appeal.

On the first ground, he claims that the DLHT being the first appellate tribunal erred in law and fact by holding that the appellant failed to prove his original ownership of the disputed land. He went on to claim ownership of the disputed land through customary right of occupancy and the tribunal erred by ordering him to vacate his residential home. He insisted to be the lawful owner of the disputed area as he developed the same and he is living in the disputed plot to date. He claims that the respondent did not prove how he acquired the land before the DLHT for he did not show if he either acquired the same through sale, inheritance, or being given as a gift by the Mwanza Municipality. He maintained that, he managed to prove that he is the lawful owner of the disputed land through the evidence adduced by witnesses and exhibits tendered before Luchebele Ward Tribunal.

On the second ground, he avers that the DLHT erred in law and fact by declaring that the appellant did not exhibit to be the lawful owner of Plot No. 916 Block A Luchebele at Mwanza city. The appellant claims to own the disputed land way back in 1996 as he developed and occupied



the same land to date. He insisted that the DLHT relied on the documentary evidence that is the title deed tendered by the respondent which shows that the respondent was allocated plot No. 916 block "A" Luchebele in Mwanza City while his plot was also Plot No. 916 Block "A" Luchebele. He insisted that the DLHT erred and prays this court to revoke the ownership of the respondent until the appellant is properly compensated.

On the third ground of appeal, he claims that the DLHT erred for not considering the time the appellant occupied the plot that from 1996 and grant the ownership to the respondent for the reasons that the appellant failed to prove his ownership. Referring to page 9 of the typed judgment of the DLHT, he avers that the trial Chairman admitted the evidence of Emmanuel Majige who proved that the appellant is the lawful owner and he managed to establish that the appellant occupied and stayed on the disputed land for 18 years. He insisted that the law is clear that the person who once owned the land is the one to be allocated and DLHT erred in dis-allocating him for no reason. He went further that, he has a house built on the plot with registration No. 015/55 and he pays all the government taxes, hence the decision by the DLHT to demolish his house is against the law.



On the fourth ground of appeal, it was his averment that the DLHT erred to hold that the appellant is not entitled to compensation and order the demolition of his house. Referring to page 11 of the DLHT judgment, which held that the appellant was not entitled to compensation, he insisted that the decision goes contrary to Article 24(1) and (2) of the United Republic of Tanzania Constitution of 1977(as amended). He therefore prays this court to allow the appeal with costs.

Responding, the respondent opposed the appellant's grounds of appeal and he was very brief. He insisted that grounds of appeal advanced by the appellant have no leg to stand. He holds that he was granted the right of occupancy by Mwanza Municipal council in 2000 after he followed all due process of the law. Insistingly, he avers that the evidence on record supported that the respondent is the lawful owner of the disputed plot.

Re-joining, the appellant did not add much but reiterating his submissions in chief, he insisted that respondent failed to prove his case and prays this appeal be allowed with costs.

I have given careful consideration to the arguments for and against the appeal advanced by both parties, and taking into account that this is



the second appeal, the central issue for determination and consideration is *whether this appeal is meritorious*.

From the four grounds of appeal advanced and argued, I will in my determination, determine first, second and third grounds together for they are intertwined and the fourth ground alone. On the first, second and third grounds of appeal, the central issue is ownership of the suit land. This court will have to determine who is the lawful owner of the suit land described as Plot No 916 Block A Luchehele. The appellant claims that he proved his ownership before the ward tribunal for he owns the land customarily and the DLHT erred ordering him to vacate his residential home. He insisted that, he is the lawful owner of the disputed area as he developed the same and he is living in the disputed plot to date. The respondent objected and he kept insisting to be granted the plot as he was offered the right of occupancy by Mwanza City Council in 2000 after he followed the due process of the law.

What is in dispute before me, is who actually proved the ownership of the subject matter which is the disputed plot No. 916 Block "A" Luchehele. What can be seen is that, while the appellant is claiming to be the lawful owner of the disputed plot, the respondent managed to present



the documentary evidence from Mwanza City Council that he was legally allocated and was given a right of occupancy with title No. 54273 at a tenure of 33 years from 28/08/2015.

On the part of the appellant, the dispute is not on the exhibits presented by the respondent rather, he claims that the mode of acquisition of the plot and allocation to the respondent was invalid and therefore the title could not pass from his ownership to the respondent. The respondent fails to prove how he acquired the land as he did not show if he either acquired the same through sale, inheritance, or being given as a gift by the Mwanza Municipality.

From this point, the dispute centred on ownership for the appellant is claiming to own the plot under the customary right of occupancy and the respondent is claiming to own the same plot under the granted right of occupancy. To break the even, I find it wanting to make a thoroughly assessment first, to find out whether the appellant is the owner of the plot under customary ownership as he claims, and *second*, the allocation of the respondent under the granted right of occupancy, if at all, it was proper as he claimed.



Going through the records, the evidence of the appellant's first witness, Mr. Emmanuel Majige who proved that the appellant is the lawful owner, managed to establish that the appellant occupied and stayed at the disputed area. His evidence was also referred on the judgment of the DLHT which was straight, and with emphasis I reproduced hereunder for easy of reference: -

"...Ninachojua baba mzazi Dk. Majinge alinunua shamba kwa Ndugu Leonard. Baada ya kununua familia ilijenga nyumba na kaka yangu Evarist Magoti alikuja kuishi hapo. Baadaye baba yetu aliamua kutugawanya kila mmoja wetu akapata sehemu katika shamba hilo. Kaka yetu Evaristi Magoti alipata eneo nyumba ilipo..."

It is the confession by Mr. Emmanuel Majinge that the disputed land was allocated to the appellant by his father who holds the same under deemed right of occupancy through sale. The same evidence in favour of the appellant was given by Marko Mahande, Dominic Kasanda, and Fortunatus Maige, both testified in favour of the appellant and established that the appellant is the original owner of the disputed land.

From this point, and having revisited the records, I don't not agree with the holding of the DLHT that the evidence of the appellant and that



of his witnesses did not disclose the original owner of the disputed plot. It is clear that the evidence pointed out that the appellant is the original owner of the disputed plot through customary way. In the premise, and despite the respondent claim that he is the holder of the Right of Occupancy and therefore a rightful owner of the disputed plot, the respondent did not show what was the original status of the disputed plot if at all he denied the appellant to be the lawful original owner before the farm was demarcated to plots. I therefore find that the appellant's evidence of ownership on record is unchallenged as held by the trial tribunal and therefore established that the appellant was the original owner of the disputed plot before demarcation was done.

After the clear picture is cast, I proceed to find out as to the status of the respondent Granted Right of Occupancy No. 54273 of 28/08/2015 on plot 916 block "A" Luchebele. For what I have briefly discussed above, it is the holding of this court that the appellant was the original owner of the disputed plot hold under deemed right of occupancy a way back in 1996, and it is also undisputed that the respondent is holding a granted right of occupancy issued on 28/08/2015. In determining the status of the respondent title, the question is simple, does the granted right of



occupancy issued to the respondent on 28/08/2015 terminated the customary ownership of the appellant from the suit plot?

The question has its answer in the case of **Metthuselah Paul Nyagwaswa versus Christopher Mbote Nyirabu** (1985) TLR 103 where it was held by the Court of Appeal of Tanzania that:

"A holder of a right of occupancy under native or custom does not automatically become a squatter when an area is declared planning area".

In the premises, it was held in the case of **James Ibambas vs Francis Sariya Mosha**(1999) TLR 364 that

"Customary title to Land can only be extinguished by surrender, signified by offer of acceptance of a compensation."

The law is settled under section 3(1)(g) and section 34(3)(b)(iv) of the Land Act, Cap 113 RE: 2019 that a person occupying land shall be full compensated for loss of any interest in land and any other losses due to the interference to their occupation or Land use.

Despite the submissions that the appellant is claiming that he was not compensated, I perused the records and I agree with the appellant as there is no evidence to that effect. The trial tribunal admitted the appellant



exhibit which is the letter dated 12.12.2003 with Ref. No. L. 20/27/61 which was issued by the land officer of Mwanza City Council directed to the executive officer titled "*Wananchi Waliogawiwa Eneo la Kitalu 'A' Luchehele-Jiji la Mwanza*". Its loose translation means that the letter was directed to persons who were allocated plots on block "A" Luchehele-Mwanza City. Part of the contents of the said letter specifically in paragraph 3 reads as hereunder:-

"...Aidha kwa wale ambao sio wenyeji wanatakiwa kuwalipa fidia wale waliokuwa na mashamba kabla ya kuanza kuendeleza viwanja".

Going to the records, the respondent did not exhibit neither was a resident to the place prior to the demarcation, nor he complied to the directives of the authority issued the granted right of occupancy that is Mwanza City Council by paying compensation to the original owner of the plot acquired.

Since there is no evidence indicating that the appellant was compensated as required by the law and as it was directed by the issuing authority, this court is of the firm view that the DLHT wrongly held that the title to land did pass from the appellant to the respondent and



therefore it can be said lawfully that the appellant right of occupancy over the suit did pass to the respondent for a mere tittle.

This court finds that since the customary right of occupancy on the suit land existed prior to the respondent's granted right of occupancy and since it is the position of the law that the customary right of occupancy cannot be extinguished by the granted right of occupancy unless compensation is fully paid, appellant's right over the suit land is still in existence. In the case of **Metthuselah Paul Nyagwaswa** (supra), similarly, in the case of **Attorney General v Lohay Akonaay and Joseph Lohay** (1995) TLR 80 the Court of Appeal held that:

"Customary or deemed right in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania and their deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the constitution".

See also **Suzana Kakubukubu and 2 Others v Walwa Joseph Kasubi & The Municipal Director of Mwanza** (1998) TLR 119, and **Mulbadav Village Council & 67 Others v National Agricultural and**



Food Corporation (1984) TLR 15 and, George Benjamin Fernandes v Registrar of Titles & Another Civil Appeal No. 65 of 2018)

Guided by the above decisions, it is evident that the owner of the customary right of occupancy is of equal status of the granted right of occupancy. I am also of the view that since the disputed land was acquired by the Government through Mwanza City Council, it was primarily the duty of the Mwanza City Council to assess the value of the disputed land and pay full fair and prompt compensation as it is required by the law rather than leaving the duty of paying compensation to the one who is granted right of occupancy to compensate the previous occupier of the land.

In the same vein, by passing, I would like to point out that, this court had no power to revoke the right of occupancy as it was submitted by the appellant. This is because the power to revoke the right of occupancy is vested to the President pursuant to section 45 of the Land Act Cap. 113 R.E 2019.

In the light of the discussion above, the appeal is allowed, the respondent granted right of occupancy is void and therefore cannot establish ownership to the respondent because it was not proved that he had paid compensation to the original owner of the land as the law



requires. The appellant is declared as the lawful owner of the suit Plot No 916 Block "A" Luchelele. Considering the nature of the case I make no order as to costs. Each party to bear his own costs. It is so ordered.


M.MNYUKWA
JUDGE
25/11/2021

Right of appeal explained.




M.MNYUKWA
JUDGE
25/11/2021

Judgment delivered on 25th day of November, 2021 via audio teleconference whereby all parties were remotely present.


M.MNYUKWA
JUDGE
25/11/2021