

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 53 OF 2021

(Arising from the Land Application No. 60 of 2019 in the District Land and Housing Tribunal for Tarime at Tarime)

MARIA CHACHA PAKA APPELLANT

VERSUS

PAUL CHACHA PAKA 1ST RESPONDENT

JOHN CHACHA PAKA 2ND RESPONDENT

Ghati Manyengo 3RD RESPONDENT

SUZANA MASHAURI @ SUTI MASHAURI NGOMENI 4TH RESPONDENT

JOSEPH RANGE 5TH RESPONDENT

JUDGMENT

7th October, 2021 and 30th November, 2021

F. H. MAHIMBALI, J.:

The appellant and the 4th respondent are co-wives married to one Chacha Paka Mniko who died intestate in 1979. The 4th respondent is senior wife to the appellant. She is the mother to the 1st and 2nd Respondents.

The dispute between these parties is in respect of ownership of the disputed land. The appellant claims that at one time she was given a piece of land by one Wambura Mang'wena at Nyamongo area which is now the land in dispute.

The appellant claims sole ownership of the said land as given to her by one Wambura Mang'wena at Nyamongo whereas, the respondents claim that the said land does not belong to the appellant solely but is part of the estate of the late Paka Chacha Muniko granted to him in 1974 during operation vijiji (Village Settlement Scheme). That the appellant is part of the family of the deceased as she is a co-wife to the 4th Respondent, she being a junior wife of the deceased Paka Chacha Muniko. That the deceased Paka Chacha Muniko died intestate in 1979 and from there no probate matter was filed in court for the proper administration of the deceased's estate.

The agreed issues for determination before the trial tribunal were five, namely:

- i. How the applicant begot the land in dispute.
- ii. Whether the 1st, 2nd and 4th respondents have interests in the disputed plot.
- iii. Whether or not the 3rd Respondent abused the good will.
- iv. Whether or not the 5th respondent purchased the land in dispute from the 3rd respondent.
- v. Reliefs.

Upon hearing the parties, the trial tribunal dismissed the suit and decreed that the disputed land belongs to the family of the late Paka

Chacha Muniko and further ordered that the third respondent to remain within her established land measuring 57x100 paces. Equally the trial tribunal in respect of the land measuring 20x70 paces decreed it belonging to the 5th Respondent, hence should remain with it.

This decision of the trial tribunal has displeased the appellant, hence the basis of this appeal. The appellant is armed with a total of five grounds of appeal, namely:

- 1. That, the trial tribunal erred in law and in fact for failure to properly evaluate the evidence adduced by the parties to the case before it and their witnesses before the tribunal, the failure which caused the Tribunal to reach a very gross conclusion on the ownership of the suit land.*
- 2. That, the chairman of the District Land and Housing Tribunal disgustingly erred in Law and facts when he delivered unreasoned and horrible judgment upon giving division of the suit Land between the 3^d, 5th and the "SO CALLED FAMILY OF PAKA CHACHA MUNIKO" while the "The so called Family of Paka Chacha Muniko" was not a party to the case before the Tribunal.*
- 3. The Chairman of the District Land and Housing did a very big **mistake in Law** upon basing his decision in respect of the Land in dispute to be the property of the deceased **Paka Chacha Muniko** and proceeded to hear and determine the matter before him the way the "estate" of the **deceased Paka chacha Muniko** is concerned if at all, the*

said land in dispute was the property of the said deceased person.

4. *That, the Honourable Chairman of the District Land and Housing Tribunal, grossly erred in Law and fact, to hold that, the 3^d and the 5th respondents lawfully acquired the suit Land through either inheritance or purchasing the same, while there was no sufficient evidence that substantiate the same acquired the suit land from the person (s) who had **"legal title"** to the Land, the said Chairman held in favour of the two.*

During the hearing of the appeal, Mr. Magwayega learned advocate appeared for the appellant whereas Mr. Emmanuel Gervas learned advocate appeared for the respondents.

Submitting in support of the appeal, Mr. Magwayega learned advocate first prayed to adopt all grounds of appeal as part of his submission and in elaborating the grounds of appeal, he submitted as hereunder:

With the first ground of appeal, he submitted that the DLHT failed to evaluate the evidence and therefore arrived at wrong decision of the case. In consideration of the appellant's testimony at the trial tribunal, it is clear how the appellant owned the said land and that her testimony is corroborated by other people (available witnesses) submitted Mr. Magwayega. Insisting on this point, Mr. Magwayega argued that on the

other hand, the respondents had not established how these respondents got the said land. The law is who has no title cannot dispose it/pass it. Had the trial tribunal evaluated well the evidence on record, he would have arrived at a just decision and not the one given at the trial tribunal.

With the respect to the second ground of appeal, the parties to the case were Maria Chacha Paka and these five respondents. There was no party by the name of the family of Chacha Paka Mniko. Therefore, it was a gross mistake by the trial tribunal to grant the said land to a person who is not a party to the suit. There was no any justification of the DLHT's judgment in reaching the said verdict. At page 5 of the judgment, you find a division of the said plot/land. As there is no any justification, this judgment is very vague.

Turning to the 3rd ground, the concern is on the procedure of dealing with the deceased's property of the late Chacha Paka Mniko. It has been submitted that there ought to have been an administrator if so wished. This means, all that done is a nullity in the eyes of the law.

Lastly, on the fourth ground of appeal, that the 3rd and 5th respondents were declared to be owners of the said land it has been submitted that there is no any documentation establishing ownership of land from the 3rd respondent to the 5th respondent as none held any

good title. In his considered view, the whole proceedings and judgment of the DLHT is a nullity.

With this, Mr. Magwayega prayed that this appeal be allowed with costs basing on this submission.

Responding to the submission done, Mr. Emmanuel Gervas learned advocate for the respondents, resisted the appeal.

With the 1st, 2nd and 4th grounds of appeal, he jointly argued them by submitting that they bear the same context. In his submission, he argued that in comparison between the appellant's evidence and that of the respondents, the respondents' case is more established than that of the appellant. The law is clear that he who claims, must establish it. What she claimed has not been established (see section 110 and 111 of TEA). Linking the evidence and the framed issues, it is unclear how the appellant acquired title to that land in the absence of establishment.

Considering all this, it is Mr. Gervas' submission that the DLHT rightly decreed on the plot as the land belonged to the deceased Paka Chacha Mniko. This means the land neither belongs to the appellant nor the respondents but that of the deceased.

In his further digest to the appeal as per evidence in the tribunal record, the issue of adverse possession does not arise in the

circumstances of this case. As the land belonged to the deceased Paka Chacha Mniko (57X100), the heirs cannot acquire it automatically but on due process of law. The declaration that the land belonged to the family of Paka Chacha Mniko is not from the air but on the basis of evidence adduced before the trial tribunal. A properly minded tribunal/court cannot close its eyes and make unjust decision simply because the said person has not been a party to the said case despite the fact there is ample evidence establishing the same, submitted Mr. Gervas.

With the 3rd ground of appeal that DLHT erred in law in declaring that the said land belongs to the family of Paka Chacha Mniko, it has been submitted that as per facts of the case, the one who instituted the suit is the appellant. Upon filing the suit there were five framed issues. Amongst the issues framed, none suggested that it belonged to Paka Chacha Mniko. However, during the hearing of the said application, it revealed that the land belonged to Paka Chacha Mniko. Therefore, the DLHT's verdict was proper and justifiable. As per testimonies of DW7, DW8 and DW9, the evidence on ownership is clear.

The argument that the 3rd and 5th Respondents had no good title over the said plots, the appellant ought to have sued the vendors (sellers) as well. At page 42 of the typed proceedings is very clear on

how the third and fifth respondents got the said land. He eventually prayed that his appeal be dismissed with costs.

In his rejoinder submission, Mr. Magwayega while reiterating his submission in chief submitted that as it has been established that the said land belongs to the deceased Paka Chacha Mniko, it was wrong for DLHT to rule on the fact that was not raised. By ruling that the land in dispute belongs to the deceased Paka Chacha Mniko the DLHT assumed the powers of the probate court which powers it didn't have. He concluded by saying that digesting the evidence in record, the respondents' evidence is weak and self-contradictory in law.

Having considered the rival submissions by both parties' counsel in this appeal, the issue for determination here is who is the rightful owner of the land in dispute in respect of this matter.

According to law, in civil cases a fact is said to be proved when its existence is established by a preponderance of probability (section 3(2)b of the TEA). The law is, both parties cannot tally but whose evidence is heavier, is the one who must win (See **Hemed Said V. Mohamed Mbilu (1984) TLR 113 &114**). In this case considering the evidence of both parties, it is clear that the defense testimony is weightier than that of the appellant. I say so because, the appellant's evidence (PW1&

PW2), in the absence of credible evidence against that of defense can hardly give verdict that the said land was given to the appellant by Wambura Mang'wena. The testimony of PW2 is weaker in support of the assertion that the land belongs to the appellant by a mere saying that he witnessed the giving of the said land to the appellant by Wambura Mang'wena. How he witnessed is dumb. Compared to the testimony of DW7 and DW8, I am convinced that the said land in dispute (part of it) was once used by the deceased Paka Chacha Mniko who was given the said land by Wambura Mang'wena in 1976. Part of DW8's testimony is reproduced:

"Mzee Paka alipokuja alituomba mahali pa kujenga. Alikua ni mzee sana tena ni kipofu.....mama mkwe alimkatia eneo la kujenga. Mama Mkwe ndiyo aliyompa. Anaitwa Wambura Mang'wena. Kwa mama mkwe wangu alikuja na Watoto na alikua `na mke. Mimi nilikuepo...."

This evidence of DW8 is corroborated by the evidence of DW7 who also testified as follows:

".... Marehemu Paka nilimwacha Serengeti mwaka 1975. Si kweli, Paka hakuja Matongo mwaka 1974. 1974, Paka hakujenga wala hakuwepo eneo lile. Hadi naondoka 1975 Paka hakuwepo Matongo. Nilimkuta 1977 mwezi wa 12. Wakati narudi likizo nilimkuta Paka anaishi kwenye eneo la Wambura Mang'wena....."

Connecting the testimony of DW7 and that of DW8, it is clear that the claim of the appellant that the said land was given to her is not convincing. In her testimony she testified that the said land was given to her by Wambura Mang'wena and that her husband died in the year the late Mwl. Julius Kambarage Nyerere (the founding father of our nation) died, suggesting that it was the year 1999, while all the defense testimony testified that the deceased Paka Chacha Mniko died in 1979. The testimony of PW1 – the appellant is hardly credible. Conclusively, grounds 1, 2 and 4 are devoid of merits. The trial tribunal properly apprehended the facts of the case, analysed the evidence well and reached a proper verdict that the said land belongs to the family of Paka Chacha Mniko and that the 3rd and 5th respondents rightly acquired the said land by purchase from the ones with good titles (DW8 and DW10).

With the 3rd ground of appeal that the Chairman of the District Land and Housing Tribunal did a very big **mistake in Law** upon basing his decision in respect of the Land in dispute to be the property of the deceased **Paka Chacha Muniko** and proceeded to hear and determine the matter before him the way the "estate" of the ***deceased Paka chacha Muniko*** is concerned if at all, the said land in dispute was the property of the said deceased person. In my considered view as to the available evidence in record, it is clear that none of the relatives or

children of the deceased **Paka Chacha Muniko** has been declared the owner of it or heir. But the DLHT ruled that the said land belongs to the deceased **Paka Chacha Muniko** and advised the parties to file a probate matter in safeguarding their interests if they so desire. Otherwise, the evidence in record didn't favour the appellant to be sole owner of it. The vital issue would be upon the demise of the deceased **Paka Chacha Muniko** whether the said estate transferred to the appellant automatically. Here then comes the probate issue.

Since the father is now deceased, his properties including the alleged land in dispute does not automatically vest to the appellant upon demise of her husband. She had to follow the requisite legal procedures governing probate matters so that she assumes ownership of it. A mere assumption that she is the owner of it in the absence of specific legal grant is not permissible. In the case 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".

Thus, before the appellant had invoked her legal rights on ownership of the said land, she ought to have established first whether she had a good title of it. Being a mere wife of the deceased, does not automatically grant her with right of ownership over the said land alleged to be owned by the deceased who also left surviving him another wife and children as well.

What the DLHT did in my opinion was right in the circumstances of this case as none of the parties is prejudiced. What is evidently clear in this matter is the appellant assuming ownership of the said land in which she has not sufficiently established her ownership. She is thus


barred by law that “*who alleges must prove*” (s.110 and 111 of the Tanzanian Evidence Act, Cap 6, R.E 2019).

That the appellant’s evidence being skimpy and un-convincing, it is equally not conclusively supportive by evidence in record.


That said, the appeal is devoid of any merits and is hereby dismissed. Considering the consanguinity of the parties, each party shall bear its own costs.

DATED at MUSOMA this 30th day of November, 2021.




F. H. Mahimbali
JUDGE
30/11/2021

Court: Judgment delivered this 30th day of November, 2021 in the presence of Mr. Magwayega learned advocate for the appellant, the first respondent being in person and Mr. Gidion Mugo – RMA.


F. H. Mahimbali
JUDGE
30/11/2021