

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISC. LAND APPEAL NO. 45 OF 2021

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Appeal No. 223 of 2020. Originating from Rujewa Ward Tribunal in Land Case No. 32 of 2020.)

MARIAM D/O KIBONA.....APPELLANT

VERSUS

REHEMA D/O LUPENZA.....RESPONDENT

JUGDEMENT

Date of Last Order: 24/04/2022
Date of Judgment: 09/06/2022

MONGELLA, J.

This matter emanates from Rujewa Ward Tribunal (WT, hereinafter) whereby the appellant sued the respondent over a plot of land situated at Ihangha street, Mlimani hamlet, in Rujewa ward, Mbalari district. She claimed to have bought the suit land on 16th May 2005 and built a house therein together with her husband one Alex Mhema. She claimed to have resided in the said house until 2017 whereby she left for Mbeya following the demise of her husband. Upon returning to the suit land, she found the respondent had invaded.



The respondent also claimed to be the rightful owner of the suit premises. She claimed to have owned the suit land together with her husband one Alex Mhema. It appears that both parties claimed to be married to the said Alex Mhema, who is now deceased.

The WT ruled in favour of the respondent. The appellant appealed to the District Land and Housing Tribunal (the Tribunal, hereinafter) which upheld the decision of the WT in consideration of the evidence adduced in the WT. The Tribunal considered that the appellant failed to establish her relationship with the late Alex Mhema as the witnesses including her, testified that she was not around even when the deceased died. It considered the evidence showing that the appellant never lived closely with the deceased and for a long time never knew who lived in the said house. It as well considered the fact that after the demise of Alex Mhema, his family appointed the administrator of his estate, one Americ Mhema, who was approved by the primary court.

It further considered that the administrator distributed the deceased's estate whereby the house in dispute was distributed to the respondent as the widow of the deceased. The Tribunal as well considered the fact that the appellant never contested the appointment of the administrator and the distribution of the deceased's estate connoting that she had accepted everything. The Tribunal therefore dismissed the appeal with costs. Aggrieved by the decision she preferred this second appeal on two grounds as follows:



1. That: the district chairman of land and housing Tribunal of Mbeya erred in law to make a decision which relied on the fact that AMELYE MHEMA was the administrator of estates of the deceased together with the compound in which the house in dispute was built in the case original No. 32 of 2020 of Rujewa ward Tribunal. (sic)
2. That: and that since AMELYE MHEMA was nominated to be the administrator of estates I the appellant has never opposed the decision in the court and that Amelye Mhema distributed lawfully the properties of the house in dispute was built in the land case original No. 32 of 2020 a reason which was weak due to the following reason:- (sic)
 - i) That I the appellant could not oppose something which I was less informed something which was not had no document attached in the court proceedings of the Rujewa ward tribunal to verify that Amelye Mhema was the administrator of real estate as it was produced (sic)
 - ii) REHEMA LUPENZA (the respondent) why did she write a letter of 15/10/2020 seeking JIPSON MOSES MWACHULA who is in fact not a family member of ALEX MHEMA when the administrator of estates was present? (sic)

The appeal was argued by written submissions. The appellant defended for herself whereby she argued generally the appeal. She challenged the evidence of the respondent in the WT for being weak. She argued that

the respondent's witnesses one Rehema Lupenza, Anna Mhema and Jipson Moses Mwachula named one Amelye Mhema as the executor of the late Alex Mhema's estate but failed to present him to testify in court. In what I failed to grasp he later changed and said that since 2017 Amelye Mhema was the one running all the court proceedings connected to the conflict at hand. She further argued that the respondent claimed to have bought the land in dispute but failed to present purchase document. That the respondent claimed that the purchase documents were lost but no loss report was presented.

She further challenged the letter presented in the trial Tribunal introducing one Jipson Moses Mwachula as the respondent's representative for having legal shortcomings. She argued so saying that there was no power of attorney. She added that on 15th October 2020 the respondent presented another person to prosecute her case saying that she was sick, but failed to present any document from a doctor to substantiate her claim.

She complained that some of the family members with bad intentions are trying to use the respondent as a space (sic) goat to acquire the appellant's land and house, which she built with her late husband Alex Mhema. She disputed the assertion that the respondent had relationship with the late Alex Mhema, but only used by the family members to deprive her right.



The appellant further challenged the Tribunal for upholding the decision of the WT contending that the WT decision was not voted by its members. That, the names of the members and gender were not stated.

Arguing on the evidence she presented, she faulted the WT for rejecting her certificate of purchase of the land in dispute issued on 16th April 2005 on the ground that it lacked signature or stamp of the neighborhood chair (sic) thus having no legal force. She argued that the certificate of purchase was not challenged by presentation of another certificate from the respondent. She insisted that the certificate she presented was genuine because it contained the name and signature of the seller together with his witness. That, it also contained her name and signature and that of her witness. She further challenged the respondent's opposition of her certificate of purchase on the ground that it did not show the size and borders of the land. She argued that the size and borders were not relevant and should not be considered because the seller did not have any legal knowledge on drafting contracts and there is no any complaint from the neighbours regarding borders. She prayed for the appeal to be allowed.

The respondent as well fended for herself. Just like the appellant, she addressed the appeal generally. She argued that the appellant was the one who instituted Land Case No. 32 of 2020 in Rujewa WT against the respondent. The respondent won the case leading the appellant to appeal to the District Land and Housing Tribunal in Land Appeal No. 223 of 2020 whereby she lost resulting into this second appeal. She supported the lower tribunals' decisions on the ground that the appellant failed to



prove her claims. Addressing the evidence presented by the appellant, she contended that the appellant presented a certificate of purchase for an unknown land. She contended so saying that the said certificate was uncertain as it did not disclose clear address or location of the purchased land. That it contained insufficient information to the effect that the land was at Mlimani area near Chinese river canal and not more. She was of the view that the description provided was insufficient for determination of the dispute.

The respondent referred to **Regulation 3 (2) (b) of the Land Disputes Courts Act (the District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003**, which requires the location of the land to be provided. She was of the view that the location entails the designation of boundaries of the land either on record or on the land itself. She further referred to the case of **Daniel Dangala Kanuda vs. Masaka Ibeho and 4 Others**, Land Appeal No. 26 of 2015 (HC at Tabora, unreported) in support of her argument.

Addressing the issue of relationship with the late Alex Mhema, she argued that she was the wife of Alex Mhema whereby they were blessed with four children. That, they started living together as husband and wife at Kangaga village, Mawindi ward, within Mbarali district and in 2006 they bought the suit land. She described the boundaries of the suit land as bordering one, Rama Zayumba, a police officer on the East; one Mama Nzita and Baraka Okelo on the West; Chinese river canal on the North; and a street road on the South. She said that together with her husband they built a house in the disputed land and she lived in the said house to the date her husband demised without any disturbance.



She added that after the demise of her husband, a family meeting was convened to appoint the administrator of the deceased's estate whereby one Amelye Isaya Mhema was appointed and confirmed and granted letters of administration through Probate Cause No. 47 of 2017 in Rujewa primary court on 2nd November 2017. She said that before granting probate, the primary court issued a notice of ninety days giving right for interested persons to object the petition, but no one turned out. The administrator thus was granted the letters of administration and did his work whereby he distributed the house in dispute to the respondent as the wife of the late Alex Isaya Mhema.

The respondent further raised an issue of suing a wrong party whereby she claimed that the appellant who instituted the suit in the WT sued a wrong party as she was supposed to sue Amelye Isaya Mhema, the administrator of the deceased's estate. To support her argument she referred the case of **Nazareno Makilika and Another vs. Hamisa Salum Mohsin and 2 Others**, Misc. Land Application No. 683 of 2021 (HC at DSM, unreported); and that of **Ibrahim Kusaga vs. Emmanuel Mweta** [1986] TLR 26.

I have gone through the grounds of appeal, the submissions by the parties and the lower tribunals' record. Upon considering these records, I have noted that besides being vague in the grounds of appeal and the submission, the appellant has included new grounds in his submission. All the grounds of appeal are basically geared to challenge the Tribunal for considering that one Amelye Mhema was indeed appointed as administrator of the deceased Alex Mhema's estate. In the submission she also challenged the Tribunal for not considering the sale agreement she



presented at the Tribunal. She as well challenged the respondent's evidence for failure to present a sale agreement or loss report following defending that the sale agreement was lost. She as well challenged the Tribunal for upholding the WT decision while the same was not voted by the members.

I shall therefore address the grounds of appeal collectively, and for interest of justice, I find it pertinent to deliberate on who is the rightful owner of the suit premises between the appellant and the respondent, because the issue, in my view, is the centre of contention between the parties.

Like I pointed out earlier, the appellant in both grounds challenges the Tribunal decision acknowledging that one Amelye Mhema, a young brother of the deceased, Alex Mhema, was the appointed administrator of the deceased's estate and thus distributed the house in dispute to the respondent. She challenged the Tribunal finding that the appellant never objected to the said appointment thus showing that she accepted the appointment. She argued so saying that she was not in the position to object as she was not aware of the existence of the probate cause in court.

The appellant further challenged the finding that Amelye Mhema was appointed the administrator on the ground that the respondent during hearing in the Tribunal sent a letter to the Tribunal dated 15th October 2020 introducing one Jipson Moses Mwachula to represent her. She was of the opinion that if Amelye Mhema was indeed appointed the

administrator then the respondent ought to have been represented by him and not the said Jipson Moses Mwachula, who was not even a family member.

To start with, I do not believe that the appellant had no idea on the existence of the probate cause and appointment of Amelye Mhema as the administrator. The fact that she was in communication with her daughter Gertrude Mhema, who testified as PW2 in her favour, connotes that she was aware of what was going on. Gertrude testified to have been there when her father was sick and until he died and was buried. She testified to have attended the meeting whereby she was promised to be given money as her inheritance in her father's estate. The appellant's denial of being aware of the appointment of the administrator is found to be an afterthought. I agree with the Tribunal findings that for not objecting, she accepted the appointment of Amelye Mhema.

On the question that the respondent ought to have sent the administrator to represent her in the WT, I am of the view that the same is not mandatory. It should be noted that the respondent was sued in person and at a time when the property in dispute was already distributed to her. The administrator had therefore completed his duty to distribute the properties. In the premises, the respondent being sued on the property distributed to her, was at liberty to send any person to represent her in the WT. The grounds of appeal are therefore found to lack merit and are dismissed.



Who is the rightful owner of the suit premises? Despite the appellant denying the respondent being married to her late husband the record shows that both, the respondent and the appellant, were married customarily by the late Alex Mhema. They were married at different occasions and had children with him. It is however clear on record that the respondent abandoned her husband for a long time even during his sickness and death. She never even attended the burial ceremony of her late husband. The fact that she was not with her husband for a long time and during his death has been testified by the appellant herself and her witness, PW2.

Both women, that is, the appellant and the respondent, claim to have participated in the acquisition of the house in dispute. In the premises, I shall scrutinize the evidence on record. It is trite law that the one who alleges must prove. It is also trite law that the duty of proving the case lies with the plaintiff/applicant. This is provided under **section 110 (1) and (2) and section 112 of the Evidence Act, Cap 6 R.E. 2019** which states:

"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."



The legal position as settled above was reiterated and emphasized by the CAT in the case of **Geita Gold Mining Ltd. & Managing Director GGM v. Ignas Athanas**, Civil Appeal No. 227 of 2017 when revisiting its previous decision in **Anthony Masanga v. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014, (CAT, unreported).

As such, the appellant had the onus of proving the allegation that she purchased the land. To that effect, the record shows that the appellant presented a sale agreement but the same was not considered by both lower tribunals on the ground that it lacked signature of the village chairman. I find the decision by the lower tribunals correct, considering that the land is unsurveyed. The position of the law has long been settled to the effect that the sale of a village land becomes lawful upon obtaining sanction of the Village Council. This legal position was settled in the long celebrated case of **Metthuseleh Paul Nyagwaswa v. Christopher Mbote Nyirabu** [1985] TLR 10 in which the Court of Appeal (CAT) interpreted the directions issued under G.N. 168 of 1975, particularly direction 5 (6) which states:

- "5 (6) Except with the approval of the village council no person shall:*
- (a) Transfer to any other person his right to use of land in a village;*
 - (b) Dispose of his house, whether by sale or otherwise."*

Regarding the sale of land to the appellant (**Methusela Nyagwaswa**) in this case, the CAT held:



*"I am of the view that **the sale by Patrick to the appellant of the land in Mbezi was void and ineffectual as it took place without the approval of the Village Council...**" (Emphasis added).*

In the matter at hand, apart from the purported sale agreement not being sanctioned by the village council, it is in fact not a sale agreement in the sense of it. The sale agreement is titled "**Kurudishiana gharama za Kiwanja Mlimani.**" Translated into English it says "Refund of costs of plot at Mlimani." The same is between Mariam Kibona and Reuben Ndede. The sale agreement does not state any transaction of sale of land. It does not even describe the land involved in the sale. The appellant stated that the land was bought with her and her husband however; the purported sale agreement does not include the name of Alex Mhema as a co-buyer. In my considered view, the genuineness of the sale agreement is doubtful.

Another document presented by the appellant was on sale of unfinished house by Alex Mhema. Besides the fact that the appellant does not feature in the said document, the same is irrelevant in the matter at hand as it does not prove anything connected to the suit land. In essence the documents presented in the WT by the appellant do not prove her claim over the land in dispute.

In further consideration of her testimony, I find that she was even not acquainted with the land in dispute. This is because she failed to explain what trees were planted in the land in dispute though she claimed to have planted them. She also failed to describe the boundaries of the land she claimed to have bought. The appellant as well failed to explain how

the house in the land in dispute was built. This is unlike the respondent who explained how it was built. She explained that it was their late husband who built the house and the roof and doors were taken from the house they used to live in Kangaga village.

The appellant specifically stated that she left her husband in 2008 and returned in 2017. DW2, who is her sister in law, testified that she left earlier than that when they were still living in Morogoro region and that she left her children to be cared by her husband's relatives. This was proved by her own daughter who testified to have been brought up by her grandmother as her mother was not around. Thus, in further consideration that the appellant was never around the suit land when it was built, I am of the view that the appellant failed to prove her entitlement to the land in dispute.

On the other hand, the respondent proved to have been there and participated in the acquisition of the land and construction of the house. She testified that she was given the house as inheritance from the estate of her late husband. Her testimony was corroborated by DW2, her sister in law. The law is trite to the effect that every witness is entitled to credibility unless where there are cogent reasons not to believe the evidence. See: **Goodluck Kyando v. The Republic**, Criminal Appeal No. 118 of 2003 (CAT, unreported). The respondent gave clear evidence and I find no reason to interfere with the concurrent findings of the lower tribunals. It is also clear that the respondent had been in the suit land for a long time. Courts have always been reluctant of disturbing persons who have been in occupation of land for a long time and developed it, unless where there is

concrete proof that the ownership thereof is illegal, the case I do not find in the matter at hand. See: **Shaban Nassoro vs. Rajabu Simba** (1967) HCD 223.

The appellant on her part, contradicted with her witness, her own daughter to be precise, as to her whereabouts all the while. While she said she went to care for her sick father, PW2 said that she was hustling for money all that time. As stated area she failed to describe the land in dispute including the plants therein, and to state how the house was constructed, which proves that she was never involved in the acquisition of the house in dispute. In the circumstances I find her testimony questionable.

Having said all, I am of the conclusion that the appellant failed to prove ownership or entitlement to the land in dispute. I thus find no reason to interfere with the concurrent findings of the lower tribunals. The appellant's appeal is found to lack merit and consequently dismissed with costs.

Dated at Mbeya on this 09th day of June 2022.




L. M. MONGELLA
JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 09th day of June 2022 in the presence of the parties' representatives, that is,

Mr. William George Rweyemamu and Mr. Denis Alex Mhema,
respectively.



L. M. MONGELLA

JUDGE