IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 62 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 69 of 2018)

MARIA KAKWAYA ..... APPELLANT

VERSUS

LUCAS MAGORI ..... RESPONDENT

JUDGMENT

7th March & 1st April, 2022.

F. H. MAHIMBALI, J.:

The appellant herein first filed an application no. 69 of 2018 before the District Land and Housing Tribunal for Mara at Musoma (the DLHT) against the respondent. She claimed the respondent trespassed into her land and made the destruction thereon. The respondent contested the application and at the conclusion the DLHT delivered judgment in favour of the respondent and declared him the rightful owner of the disputed land.

The appellant has been dissatisfied with the said decision, she then steps up before this Court folded with five grounds of appeal challenging the DLHT's decision, namely;

1. *That, the trial tribunal erred in law and in fact in failing to evaluate the evidence before it thus misdirected itself in arriving at a wrong judgment.*
2. *That, the trial tribunal erred in law and fact to declare the respondent owner of dispute land without taking into account that appellant own the dispute land since 1979 without any dispute till 2011 when respondent invaded the dispute land.*
3. *That, the trial tribunal erred in law and fact for failure to observe that at the time respondent allocated the dispute land by Musoma Municipal Council appellant was in possession of dispute land.*
4. *That, the trial tribunal erred in law by denying the appellant exhibit which proof that appellant were given the dispute land by his late father KAKWAYA MASENYI MAGESA since 1979. The copy of the said letter are hereby attached and marked as annexture MK-1. Leave of this honorable court is craved to form part of this appeal.*
5. *That, the trial tribunal erred in law and fact for failure to observe that Muso the trial tribunal erred in law and fact for failure to observe that Musoma Municipal Council was supposed to be joined as necessary party to the suit in order to reach fair decision.*

With these grounds of appeal, the appellant prays that the appeal be allowed with costs and that the decision of the trial tribunal be set aside.

During the hearing of this appeal both parties appeared in person unrepresented.

Both parties being laypersons, they did not have much to argue before the Court. The appellant adopted the grounds of appeal filed to form part of her submission and she prayed the Court to allow her appeal.

On his part, the respondent submitted that he is the rightful owner of the disputed land since 1986 after being allocated to him by then Musoma District Council. He also adopted his reply to the grounds of appeal and prayed the appeal be dismissed with costs.

In rejoinder, the appellant reiterated her submission in chief and argued that the disputed land belonged to her since 1979 given to her by her late father.

In consideration of the argued grounds of appeal, the central question in disposing of this appeal is whether in consideration of the

evidence in record, who between the two is the rightful owner of the disputed land.

As per these grounds of appeal, the five grounds of appeal boil into one major ground as who between the two parties are the rightful owners of the suit land, the appellant or the respondent?.

The law is, a fact is said to be proved in civil matters if its existence is established by a preponderance of probability (See section 3(2)b of the Tanzania Evidence Act, Cap 6 R.E 2019). This is in alliance with spirit of sections 110-112 of the Evidence Act, that a party who wishes to obtain judgment of the court, is duty bound to establish the existence of those facts. In the case of **Hemed said vs Mohamed Mbilu** (1984) TLR 113, it was held that there can hardly be equal evidence to both parties in civil case but only a party with heavier evidence is the one that must win.

I have critically analysed the evidence in record, I am of the view that the appellant lacks evidence to claim right of the said land. I say so on the basis that in her evidence claims that she was given the said land by her deceased father. Her assertion is supported by PW2. Since land is a public asset and is vested to the president, the appellant's evidence is short of establishment if really her father owned that land. For it to be

transferred to her it ought to have been established that prior to that transfer, the said land was owned by her father. Otherwise, one cannot transfer what he/she does not possess. It being unsurveyed land by 1979, possession of it could have been established by active use of the occupant or possessor.

Conversely, the respondent in his testimony at the trial DLHT, testified that he was allocated the said land by the appropriate land authority of Musoma District Council by then (in 1986) as Plot No. 22 Block A Kwangwa Musoma while it was bare. Since then, he has been owning it to date and paying the requisite land fees to the relevant land authority. That in 2007, he noted someone has fenced part of his land. He reported the matter to the land offices of Musoma Municipal Council where he was given a letter to handover to the encroacher to remove her protruded fence. After some time, he noted that the said fence not removed as ordered by Musoma Municipal Council. In 2011 he started building construction where then the appellant first instituted a suit at the ward tribunal before the said decision was quashed by High Court Mwanza. The matter commenced again and reached High Court Musoma where also it quashed the decision of the trial tribunal. Then, the matter started afresh at the trial DLHT where it declared the respondent as

lawful owner. Aggrieved by that decision, the appellant appealed to this Court again. He submitted that in all this time, the respondent has been declared the rightful owner of the disputed plot. He also tendered DE exhibit which is the letter of offer of right of occupancy dated 24th July 1986.

Had it been established that the said land was originally owned by the respondent it could only be granted to someone else by the appropriate land authority (Village Land Council) upon there being full, fair and prompt compensation to the original owner (See – **The Village Chairman KCU – Mateka vs Antony Hyera** (1988) TLR 188- where it was held that there cannot be land allocation to another person without prior consultation to the former owner. Also, in the case of **Agro Industries Ltd vs A.G** (1994) TLR 43, it was held that any revocation must consider the interest of the original owner. As the right of ownership of the said land by the appellant had not been established, the appropriate land authority was legally justified to allocate the same land to the appellant. Otherwise, the land authority ought to have consulted the original owner before it revoked her rights. In the current case, the respondent failed to establish possession or ownership of the said land as claimed.

Having revisited the case's evidence and the submission of the parties, I am of the view that respondent failed at the DLHT to establish any colour of rights of the said land in the absence of proof of ownership of the same.

That said, the appeal hereby fails. Considering the nature of the respondent, I inclined to award costs as it will save no purpose as she looks of less means. Each party shall bear its own costs.

DATED at MUSOMA this 1st day of April, 2022.

F.H. Mahimbali

JUDGE

Court: Judgment delivered this 1st day of April, 2022 in the presence of Mr. Gidion Mugoa, RMA and the parties being absent.

F.H. Mahimbali

JUDGE

01/04/2022