

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO 77 OF 2021

(Arising from Land Appeal No. 103 of 2018 District Land and Housing Tribunal for Mara at Musoma, Original Land Case Np 28 of 2017, Ward Tribunal of Nyambureti, Serengeti)

MARO CHACHA MAHUCHA APPELLANT

VERSUS

WILLIAM MAGIGE MAGABERESPONDENT

JUDGMENT

15th March and 29th April 2022

F. H. MAHIMBALI, J.:

This appeal traces its origin from the decision of Nyambureti Ward Tribunal in which the respondent unsuccessfully sued the appellant for a claim of land in which the respondent had been enjoying peacefully from 2002 to 2017. Aggrieved by that decision, the respondent successfully challenged that decision by way of appeal in which the District Land and Housing Tribunal of Musoma overturned the trial Ward Tribunal's decision on ground of adverse possession in which the respondent successfully persuaded the DLHT sitting in appeal.

Aggrieved by that decision, the appellant is now knocking the

doors of this Court equally to challenge the respondent's victory armed up with a total of seven grounds of appeal, namely: -

- 1. That the appellate chairman erred on point of law when he banked his finding that the respondent then appellant produced evidence of allocation by his village authority despite the fact the same had no sanction from the village council.*
- 2. That the appellate chairman erred in law to condone to the irregularities committed during the hearing of the matter though he could have done so by using his revisionary powers under the law.*
- 3. That the appellate chairman misdirected himself on points of facts and law when he failed to find that there was a denial of justice when parties' witnesses were objected to and ordered not to testify before the Ward Tribunal.*
- 4. That since there was evidence on the record that the appellant's father has interest in the land and he so claimed before the Ward Tribunal, the 1st appellate forum erred when it failed to find and order that such interest was to be defended by allowing that person to be joined in the appeal.*
- 5. That the appellate Tribunal misdirected itself on points of facts and law to find that the respondent had occupied the land in dispute for a long time i.e from 2002 while not.*
- 6. That the appellate Tribunal misdirected itself on point of law and facts to dislodge the findings of the trial Tribunal which*

was reasoned and had weighed evidence of both sides effectively.

7. That the appellate Tribunal Chairman erred on point of fact and law to bank on minor contradictions that never affected the merits of the case of the appellant anyhow to decide against him.

However, during the hearing of the said appeal, the seven grounds of appeal were fused up to 4 grounds of appeal. Mr. Makowe learned counsel advocated for the appellant while Mr. Wambura learned counsel, advocated for the respondent.

In arguing the 2nd and 4th grounds of appeal jointly, Mr. Makowe submitted that as per proceedings of the trial Ward Tribunal (page 3 of hand written). The respondent had a witness before the trial Ward Tribunal who was denied right to be heard on grounds of being non-resident of the said area of the local jurisdiction of the Ward Tribunal (relevant village (SM3)). The appellant on the other side had two witnesses but denied reception of their evidence (SU3 and SU4). These were denied testifying on different reasons of being present during trial proceedings and also being connected in one exhibit respectively. The legal concern here is, the DLHT closed its eyes on not finding that the trial Ward Tribunal had denied the parties their rights to natural justice.

As by law, presentation of evidence before the tribunal or court is a natural justice. Denial of it amounts to unfair trial as per law. Therefore, this amounted to breach of fundamental right of natural justice which was a grave error committed by the trial Ward Tribunal in which the DLHT was fully mandated to fault it on revision. On that basis, he faults the DLHT on that closure and prays for an order that the proceedings thereof be quashed and its decision set aside. This should also apply to the proceedings and decision of the DLHT.

He further submitted in arguing his appeal that as per trial tribunal's proceedings, and assessment of the evidence at the trial ward tribunal, had the DLHT examined and evaluated well the evidence in record, there were some legal issues for intervention. He pointed out some confusions such as who between the appellant and SU2 was the owner of the said plot in dispute. He submitted further that, reading the testimony of the defense case (appellant), it is clear that there was confusion on how the said land came into possession by the said appellant and his father. He argued this basing on evidence of one Mokiri Mwita as opposed to that of Mzee Chacha Mahucha. With this confusion, he argued that the DLHT by virtue of section 36 of the LDCA,

had legal mandate to examine the said evidence and direct appropriately.

On his further submission, he argued whether under section 17 (1) of the LDCA there was a proper case before the trial Ward Tribunal. In his observation, he submitted that there was no any complaint form at the DLHT at the trial Ward Tribunal which commenced/initiated the case. As per law, a suit is commenced by written complaint lodged to the Trial Ward Tribunal or by oral complaint reduced into writing by the secretary which shall then be forwarded to the chairman. In the present case, there was no such compliance. Failure to have a complaint, the trial Ward Tribunal is not privileged to know what is the land in dispute, size, and value in dealing with. Therefore, the danger of it is so high as it touches the issue of jurisdiction. With all these errors, he invited this Court under section 43 (1) b of the LDCA, to fault the findings of the DLHT which failed to revise the trial Tribunal's proceedings and findings.

On the 6th and 7th grounds, he faulted the DLHT by looking only at trivial issue as who actually owned the said land in dispute. In dealing with it, he failed to evaluate the evidence and assess it properly. He also failed to consider the procedural issues on reception of evidence and commencement of the case at the ward tribunal.

On the first ground of appeal, he submitted that the respondent had no better evidence than the appellant. There has not been evidence by the village authority that the respondent applied for the said land and was duly allocated. However, in the absence of proof of allocation of the said land by appropriate village authority to the respondent, then the allocation was improper and that the respondent had no better title than the appellant. That said, he prayed that, the decision of the DLHT, be quashed and set aside. If there are no irregularities, then the appeal be allowed with costs. If there are irregularities, the same be quashed and set aside and there be trial denovo.

In opposing the appeal, Mr. Wambura first submitted that what has been submitted by his fellow learned brother Mr. Makowe, perplexed him because he raised issues as if it was the first appeal. All this he submitted, was just faulting the trial tribunal's proceedings and then pointing fingers to the DLHT for closing its eyes. He argued that this being the second appeal, it has been confusing by Mr. Makowe's submission as what decision exactly is being challenged by the appellant. Is it of the trial Tribunal or first appellate tribunal. He elaborated that this appeal is not clear as it is against the decision

emanating from what proceedings. Interestingly, this same advocate is the one who also argued the appeal at the DLHT.

After this preamble, he submitted as follows as regards the merit of the appeal that for good records, the present appellant was the successful party at the trial Ward Tribunal whereas the respondent is the winner at the DLHT (appellate level). With the second and fourth grounds of appeal, he is of the view that on failure to invoke the provisions of 36 of LDCA, as there was no revision but appeal, the said revisionary powers could not be exercised. What section 36 of LDCA says is calling record of the trial Ward tribunal for inspection in event of impropriety. It being an appeal, the DLHT was not compelled to use revisionary powers. Thus, the DLHT did as per law on what was prayed by the respondent. The said DLHT did so by passing through the grounds of appeal and proceedings of the case. It is very unfortunate that though Mr. Makowe also represented the appellant at the first appellate level, failed to raise them there as cross appeal if so minded.

As to why those witnesses were denied the right to give their evidence, it was well explained by the Hon. chairperson of DLHT.

He added further that, the one to be sued is the invader of the land. In the current matter, it was the appellant who invaded the land as known by the respondent. Thus, the respondent could not sue anyone but the one who only invaded his land as rightly done.

On the issue of jurisdiction, he argued that it is short of range as the trial Ward Tribunal's record established very well how the respondent identified his land. The opening remarks of SM1 is clear on this. Thus, the size, place, boundaries of the suit land was well identified by the respondent at the trial as well as at the DLHT. So long as there was mediation and trial, pre supposes a complaint at the trial Ward Tribunal. It not being recorded, he submitted that, in the circumstances of this case has not occasioned any injustice to any party as to his candid view.

Concluding on this, he submitted that revisionary power is not automatic but only when it is right to do so. Thus, grounds 2 and 4 are meritless.

Turning to grounds 6 and 7 as jointly argued, he submitted that the DLHT rightly ruled on contradiction issue of the appellant's witnesses. The little logic is this, the appellant did not know who is the

owner of the said plot. Therefore, the DLHT was justified to reach that finding as done.

On the ownership of the said plot, he submitted that it is evident the respondent, first started clearing the bush in 2001. In 2002, he cultivated and in 2003 dug paddy blocks (jaruba). After he had done all this, then he went to the village authority for being officially recognized and that was in 2005. In essence it is not the evidence in record that he was asking for the allocation of the plot but just getting official recognition of the land he was in possession with. Therefore, this official recognition had no any element of dispossessing any one's right of ownership as alleged. This submission also serves the submission in the first ground of appeal, submitted Mr. Wambura.

Lastly, as putting things clear, he prayed to add the following. That as per what has been submitted by Mr. Makowe, had the appellant been mindful, he would have exercised his right to cross appeal against the DLHT's decision. As he benefited from the fruits of the trial Ward in its wrongdoings as he faults today, but now shifts burden to the DLHT for not having scrutinized them. He is of the view that, the proper course was cross – appeal to the DLHT over the encountered wrongs of the trial Ward Tribunal as alleged.

Considering the prayers of the appellant's counsel despite these pointed faults of the trial Ward Tribunal, yet he wants his client to be declared the rightful owner of the same plot in which the trial Ward Tribunal is faulted to have conducted it, he wondered as being.

As there were no such appeal over these anomalies to the DLHT, is equal raising new issues at the 2nd appellate court, something not right in his considered view. Thus, the same be disregarded. The appeal be dismissed with costs, he prayed and concluded.

In his rejoinder submission, Mr. Makowe submitted that what he has submitted today, he also submitted the same at DLHT as its hearing was done by way of written submissions. He invited this court to have a look of the record properly. Thus, there are no new issues raised as submitted by Mr. Wambura. Submission in chief that his that there was no complaint before the trial Ward Tribunal, he still maintains that the proceedings were irregular for want of proper case. That being a requirement of Law, the court cannot assume the complaint. In the absence of legal complaint, means there was nothing to commence the suit. He insisted his prayer that this appeal be allowed with costs as prayed.

Having heard the submissions from both parties, gone through the lower court records, the vital question for determination is one, whether the appeal is meritorious to grant.

On the pointed-out deficiencies by the appellant such as lack of complaint at the trial tribunal commencing the suit, the issue of witnesses and the issue of locus I consider some of them as not being material in the circumstances of this case as being fundamental in the determination of the said case by the trial tribunal, first appellate tribunal and this Court as well. I say so basing on the following reasons.

On the issue of locus, since the respondent rightly defended his claim at the trial ward tribunal, I wonder how should he have been affected on the issue of locus should that land be owned jointly with his father as claimed. If so, then the right course is on the father and not the appellant. He is not legally precluded from claiming his right if he so desires.

On the issue of conflicting views of defense witnesses on ascertaining the land ownership, I think that is the basis of decision. The trial tribunal was of the strong conviction that the land belonged to the

appellant whereas the DLHT ruled in favour of the respondent applying the principle of adverse possession.

Therefore, there was no issue of revision proceedings by the DLHT as the aggrieved party had the right course against that decision if so touched. The respondent rightly in my view apprehended the law well and got what it deserved. Now it is the turn of the appellant, let us wait for the outcome of this verdict as well.

On the issue of failure to commence the suit at the trial ward tribunal by way of complaint, I agree with Mr. Makowe that is the correct position of the law. I agree with Makowe learned counsel for the appellant that for a Ward Tribunal to handle a matter, there must be a formal complaint dully lodged at it. The same can be made orally or in writing. However, if made orally, the responsible officer (Secretary of the Ward Tribunal) is duty bound to reduce it into writing. In this particular matter, it is absurd that this legal requirement was not observed and complied with by the Ward Tribunal. The trial tribunal record does not bear any complaint. What is evident in court record is seeing statements of witnesses being recorded. The law (the Land Disputes Courts Act, Cap 216, R.E 2019) is:

*"17.-(1) Any person may, subject to section 61 of the Village Land Act, and sections 11, 12 and 13 of the Ward Tribunals Act, **make a complaint to the Secretary of the Tribunal.***

*(2) When a complaint is made to the Secretary under subsection (1), that Secretary shall cause it to be submitted to the Chairman of the Tribunal who shall immediately select **three members of the Tribunal** to mediate. (3) Where the complaint is received orally from the complainant, the Secretary shall immediately put it **in writing and produce a copy** for a complainant (emphasis added)."*

In this case, we don't see what is a complaint about and who complained it, yet, there is a case of **William Magige Vs. Maro Chacha Mahucha**. The provided legal procedure has not been complied with. What is the issue, it is not clear.

On this Mr. Wambura is of the view that there is no prejudice of justice occasioned. I am of a different view that, the law was not enacted for decoration but for compliance. This being the central issue of what went on there, should not be easily be condoned. This is in itself a prejudice. It is similar of having evidence in a civil case or criminal case without a plaint or criminal charge. Should there be said to be a formal case? The proceedings were thus vitiated.

That said, by virtue of Section 43(1) and (2) of the LCDA, Cap 216 on the revisionary powers vested to this Court, the resulting proceedings and orders from the both lower tribunal records are hereby for interest of justice quashed and set aside.

In its place I order trial *denovo* of the matter before the competent tribunal as per current regime in the administration of land disputes. Considering the circumstances of the matter, each party shall bear own costs.



DATED at MUSOMA this 29th day of April, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered this 29th day of April, 2022 in the presence of the Appellant, Mr. Gidion Mugo, RMA and Respondent being absent.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

29/04/2021