

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB REGISTRY OF MUSOMA**

**AT MUSOMA**

**MISC. LAND APPEAL NO. 12 OF 2022**

*(From the decision of the District Land and Housing Tribunal of Musoma District at Musoma in Land Appeal No. 27 of 2021 and Original Ward Tribunal of Kisorya Ward in Application No. 53 of 2020)*

**EMMANUEL TENGULE LUGEZI .....APPELLANT**

***VERSUS***

**SILVANUS MAFURU ..... RESPONDENT**

**JUDGMENT**

10<sup>th</sup> & 31<sup>st</sup> August, 2022

**F. H. MAHIMBALI, J.**

The appellant and the respondent are at tag of war on a claim of suit land. Each claims ownership of it. Whereas the respondent claims that the said land belonging to him after being granted by his friend – Mr. Chigenya, the appellant on the other hand claims that the said land is his as it was given to him by his deceased father who was the son the late Chigenya – the friend of the respondent. The appellant lost the suit at both lower tribunals. He is now dissatisfied by the decision of the DLHT and thus appeals to this Court with the following grounds of appeal:

1. *That the learned trial chairman erred in law and fact in holding that the respondent is the lawful owner of the land in dispute.*
2. *That the learned trial chairman of the tribunal erred both in law and fact in entertaining the matter without considering that the credibility of the evidence adduced by the respondent and without considering that disputed land is owned by his father.*
3. *That the learned trial chairman of the tribunal erred in law and fact in not considering that the respondents had no right to own the disputed land.*
4. *The learned trial chairman of the tribunal erred in law and fact in entertaining the matter without considering the document adduced by applicant.*

During the hearing of the appeal, both parties fended for themselves as they had no advocates to represent. On his part, the appellant prayed that his grounds of appeal be adopted to form part of his submission. In essence, he submitted that the respondent has no any evidence that he was given the said land by Mr. Chigenya. He clarified that the said land in dispute was originally owned by his grandfather in 1962 (his name is Mr. Chigenya). Mr. Chigenya had two sons. Buyegere and Lugenzi. His land was then inherited by his two sons. Buyegere and Lugenzi. The two sons of Mzee Chigenya (Buyegere and Lugenzi) divided the land into two main

portions for Buyegere (appellant's father) and (Lugenzi – their uncle). That upon the death of his father in 1977 the land was under the supervision of Mr. January who was the elder son of Mr. Lugenzi. The appellant was born in 1972. So, by the time their father died, he was just 5 years old. He started using that land from 1987 when January (son of Lugenzi) had given him the said land he was taking care of where then he started using it until 2001 when this dispute arose with this respondent. With his submission, he concluded saying that the respondent has no any better title of the said land as he claims. He prayed that his appeal be allowed.

On the other hand, the respondent resisted the appeal and submitted that he has been using the said land since 1968. The said land was given to him by his friend called Chigenya in that year 1968. From there on he had been using it till today. The size of the said land is about  $\frac{1}{4}$  acre. The said land is at Kisorya. He gave him the said farm while at the farm place and there were no witnesses neither exhibit for the said transaction. When asked whether in anyway was related with the appellant or the land lord who gave me the said land, he denied it. However, he admitted to know a little that the appellant's family and Mr. Chigenya are related.

As regards this appeal, he was of the firm view that though he had no any document to tender neither witness for that, but he be believed that he

was granted the said land by his late friend Mzee Chigenya and he has been using it since 1968. He prayed for the appeal to be dismissed.

Having heard and digested the submission from both parties and upon perusal of the trial and first appellate tribunal's records, the vital question to pose is one, whether the appeal is meritorious.

The grounds of appeal and the facts of the case raise one main ground of appeal as who between the appellant and the respondent is the rightful owner of the disputed land. Whereas the appellant claims it to be his' land tracing ownership from his grandfather Chigenya to his father Buyegere, the respondent claims ownership of the same from the same late Chigenya.

It is trite law that, he who alleges must prove. This being a branch of civil claim, the degree of proof is on balance of probability. Thus, a party with weightier evidence is the one who must win. I have digested the evidence at the trial tribunal. It is abundantly clear and undisputed that the said land belonged to the late Chigenya. On this, the testimony of SU1, SU2 and SU3 are elaborative. At page 3 of the trial tribunal's judgment reads as follows, I quote:

*"Baada ya Ushahidi wa ndani na nje kumalizika, uchambuzi uko kama ifuatavyo;*

1. *SM1 ameona lalamiko ni kuwa SU1 anangangania shamba ambalo siyo lake na kuingilia kulima na kukata miti iliyomo inawezekana ikawa kweli au siyo kweli kwasababu hakuna kielelezo cha tathmini kniaonyesha uharibifu huo.*
2. *SM1 anadai shamba alipewa na rafiki yake aitwaye Chigenya alime na liwe mali yake. Baraza limeshindwa kuelewa kuwa ni kweli au si kweli kwasababu hakuna Ushahidi wa moja kwa moja vya vielelezo au shahidi aliyeshuhudia makabidhiano hayo.*
3. *Ushahidi katika eneo la mgogoro haukuonekana kwa SM1 wa kuelezea kuwa ana haki katika kumiliki eneo hilo. Baraza linatambua hivyo.*
4. *SU1 yeye ancahodai eneo lililokuwa linatumiwa na baba yake na ambalo alimwazimisha sm1 kulitumia kwa muda na baadae lirudi mikononi mwa familia ya Buyegere kutokana na Ushahidi wa mbalimbaliwa ndani nan je, Baraza linaafikiana kuwa ni kweli.*
5. *Kwamba mgogoro huu ulishasuluhishwa na mwenyekiti wa kitongoji hapo nyuma ikaonekana kuwa umeisha na suluhu ilikua ni kwamba SM1 aondoe miti yake aliyoipanda ndani ya shamba hilo na libaki wazi mgogoro uishe.*
6. *SU1 ana Ushahidi wa ndani na nje ya unaothibitisha baraza kuwa eneo la mgogoro lilikuwa la baba yake SU1 na shamba hilo liliazimishwa kwa muda kwa SM1. Baraza halina shaka na hilo Ushahidi huo ni wa Makene Ginga, Sasi, Masinde Malage na Andrea Magafu Longino.”*

Despite all these findings of the trial tribunal, when the members came to vote, the majority voted for the respondent. Since the decision of the ward tribunal is on majority of votes it is recorded that four members

voted for the respondent (declaring him rightful owner) and one member declared the appellant as rightful owner. This aggrieved the appellant, who then unsuccessfully appealed to the District Land and Housing Tribunal. Still dissatisfied with the decision of the DLHT, this appeal was then preferred.

I have digested the testimony at the trial ward tribunal, I am persuaded to find that that the two lower tribunals below, reached that decision per incuriam. I say so because, the evidence is richer for the appellant that he owns that land. The manner the respondent claims ownership of the said land is not established. Land is a real property. It cannot be claimed to be given to someone lightly in the absence of the concrete proof either by documentary proof or by witness. It was thus expected there to be proof of the assertion that the respondent was given that land. In the absence of that, the claim of that ownership cannot stand against the descendants of the original owner. This is because in principle, they are of better title than the respondent.

Though the trial tribunal members had majority votes for the respondent, the votes cast though formed decision of the trial tribunal, the same lacked evidential value. It be noted that the casting of votes should not be for love and affiliation to the party but based on valid and believable

evidence which is lacking in the current matter. The casting of vote in this case as per my digest was more for love than evidentiary value.

That said, the appeal by the appellant succeeds. The decisions of the two lower tribunals are quashed for being unjust to the appellant. In its place, the appellant is declared the rightful owner of the suit land.



DATED at MUSOMA this 31<sup>st</sup> day of August, 2022.

F.H. Mahimbali  
Judge

**Court:** Judgment delivered this 31<sup>st</sup> day of August, 2022 in the presence of both parties and Mr. Gidion Mugo, RMA.

Right of appeal is explained.

F.H. Mahimbali  
Judge