IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 09 OF 2022

(Arising from the District land and Housing Tribunal for Tarime at Tarime in Land Application NO 45 of 2019)

MWITA MASERO MANGURE ..... APPELLANT

VERSUS

ENOCK ISACK MWITA ..... RESPONDENT

JUDGEMENT

25th July & 16th September, 2022

F. H. Mahimbali, J.

The respondent Enock Isack Mwita had been the applicant at the DLHT against the appellant Mwita Masero Mangure over a claim of land. It was the respondent's contention that, he has been owning the land in dispute measuring 210 acres since 1999. That to his surprise, on 12th July 2019, he had seen the advertisement/public advertisement that on 19th July 2019 there will be a General Assembly Meeting of Mrito Village with one main agenda of discussing land application and grant of its ownership to the appellant. He then filed land dispute at the DLHT to question the said application and its grant to the appellant.

The main issue for consideration at the DLHT was one, whether the land in dispute in which the Village Assembly had planned to allocate and grant to the appellant belonged to the respondent. Upon digest of the testimony of the case, the trial tribunal ruled in favour of the respondent that the said land in dispute (measuring 210 acres) belonged to the respondent.

The decision of the trial tribunal, discomforted the appellant, thus the basis of the current appeal propped up on three main grounds of appeal, namely;

1. *That, the Honourable Chairperson erred in law and fact by declaring the respondent herein to be the lawful owner of the land in dispute while he failed to prove his application to the required standard.*
2. *That, as the complaint of ownership over the land in dispute arose out of the alleged* ***double allocation*** *made by* ***Mrito Village Council****, the trial Tribunal erred in law and fact in granting the Application in favour of the respondent herein while he failed to join the said village council to the Application as a necessary party.*
3. *That, the trial Tribunal erred in land and fact by failing to take into consideration that the evidence adduced by the appellant herein was heavier than that of the respondent.*

During the hearing of the appeal, Mr. Emmanuel Paul Mng'arwe learned advocate appeared for the appellant, whereas the respondent who resisted the appeal was dully represented by Mr. Onyango, also learned advocate.

In arguing the first ground of appeal in which the trial chairperson erred in law and fact by declaring the respondent herein the lawful owner of the land in dispute while he failed to prove his application to the required standard, Mr. Emmanuel Paul Mng'arwe submitted that, the appellant's evidence at the DLHT is collaborated by four witnesses. He testified how he was given that plot by his father and has been in use of it since 1976 for both agricultural and mining activities. At page 6 (paragraph 1) of the typed judgment he is quoted that in 1997, he went to the village council for purposes of being granted ownership. The said village council on 10/06/1997, granted him with ownership, thus dully recognized so.

He argued further that as per law, the Village Council has no powers to grant ownership of the land which is out of its jurisdiction. As per section 15 (1) of the Village Land Act, Cap 114 R. E. 2019 provides it clearly so. Thus, as per P1 exhibit, the village council had no mandate to allocate the said land to the respondent whereas the appellant had been

lawfully using it since 1976. Moreover, the same village council on 12/07/2019 had discussed this dispute where it prepared a report/minute (D3 exhibit), where the same village council denounced exhibit P1 classifying it that it had no valid members. On this evidence, he paused two questions which he thought are relevant to support the arguments in the first ground of appeal:

- Why the respondent asked to be approved with the said village land in 1997 if at all he was using it since 1976.
- If village council approved the land in 1997, why then the respondent after the village's notice of 2019 of allocating the land to the appellant didn't take appropriate steps?

In his digest to these two posed questions, he concluded that the answer to these questions, was for a prudent person to go to the village authority for clarification/lodgement of his concern. Only after the village authority had failed to settle the matter should he then had referred to the court, joining the village council. By his conduct, there is a hidden agenda in it. Relying on the contents of D3 exhibit denouncing P1 exhibit, he prayed that exhibit P1 be expunged and in its place, the appellant be declared the rightful owner.

In the second ground of appeal the concern is a double allocation of the said land. It is obvious that the trial tribunal erred in granting the respondent ownership while the respondent failed to join the village council as party to the suit. He said this relying on page 1 of the typed judgment of the DLHT (paragraph 1), that the allocation was being done by Mrito Village Assembly. Therefore, ought it to have been a grievance against the village council as well, being necessary party. By this, the village Council has been denied the right of being heard pursuant to article 13 (6) of the Constitution of the URT. The village Authority on the other hand was denied with a right of reply to the issues raised during the proceedings of the case. This is contrary to order 1, Rule 10 (2) of the CPC, Cap 33 R. E. 2019. The trial DLHT ought to have seen it and considered the Village Council as necessary party to the matter. With this, he invited this court to fault the proceedings, quash it and set aside. In its place there be retrial with necessary parties.

With the third ground of appeal, the trial tribunal failed to consider the weightier evidence by the appellant visa viz of the respondent. Should this court not fault the proceedings as per ground two above, yet the evidence by the appellant was weightier than that of the respondent. He said so on the basis of exhibits (D1 – D5) by the

appellant that, the appellant's evidence is heavier and mightier than that of the respondent.

He added that section 8 (1) a of the Village Land Act is clear on the authority of the village council. He considered the appellant's evidence weightier and meritorious. He cited the case of **Ulamu Wisaka vs Bwaheri Masauna,** Misc. Land Appeal No 49 of 2020 , at page 4 that " He who alleges must prove" in relying to his submission that as per this case and in consideration of the appellant's exhibits (D1-D5), the appeal is merited. It be allowed with costs.

On his part, Mr. Onyango learned advocate for the respondent, countered the submission of the appellant's submission that the appeal is misplaced. Relying on the village Land Act in section 23 talk of recognition of customary right of occupancy.

The same provision (section 23 (2) i.e of the VLA provides that where the customary right of occupancy is approved (1997), that is the legal requirement. As per record, PW2 is the chairperson of that committee who approved the said grant, it is illogical to disregard this evidence in the absence of disapproval. In essence, what PW2 testified collaborated with what PW1 testified. As per section 29 of the VLA, after

the grant of the said land, what follows are the conditions of the grant. The priority principle as per the case of **Ombeni Kimaro vs Joseph Michiri**, Civil Appeal No 33 of 2017, CAT at Dar es Salaam, the CAT at page 16 says all. He argued that the appellant in this matter, never owned land or even showing that he had documents of owning the same. That he had a mining licence, is not a conditional precedent that he owned land. He clarified that mining licence is not right of occupancy.

Relying on PE 8 exhibit, the appellant who had a mineral right was advised to discuss with the respondent as he has land surface right. Considering further the question posed by Tribunal Assessor (mama monge) on the same date of 1/3/2021, who asked the appellant whether he had owned land prior to mining licence, he replied that he first owned mining licence prior to land. DW2-Zefania Mahati Chacha when cross-examined (at page 58), replied that the land is village land. The appellant never owned land. With this evidence, on balance of probability the respondent is the rightful owner. PE1 exhibit is valid document and relevant.

As per ground two, as to why the village authority has not been sued considering the fact it was double allocation issue, Mr. Onyango argued that what is clear, the appellant is a mere trespasser. The

plaintiff is at liberty who to sue. Equally the appellant had option to apply for joining the village authority if he thought had relevant material to support. As DW2 is the chairman of Mrito village (2014 – 2019) he testified well during his cross examination that the appellant was not a land owner but just a miner. Thus, for a miner (licence holder) to have mining right to land, he must first negotiate with the surface holder/ owner. As per this, this appeal be dismissed with costs as ownership of the respondent is far away from 1976 and authorized in 1997.

In his rejoinder submission, Mr. Emmanuel Paul Mng'arwe submitted that as how a person becomes an occupier of village land, the law is very clear and that as between the appellant and the respondent, the one who complied with the legal procedure is the appellant and not the respondent. What is provided under section 22 and 23 of the VLA is for the new owners. What is the procedure for those occupying land without applying? He submitted that, he thinks the law is silent. As per this case, in consideration of exhibits D1-D5, the appellant was justified in making the application as that land was village land, thus he legally processed it whereas the respondent didn't. He submitted further that after the colonialism, the land returned to the village Authority. From then, the village authority just allowed people to do mining but didn't

grant ownership to anyone, therefore as no body owned the said land the appellant was justified to apply for its ownership. And that as per the cited case (by the learned counsel), he considered it as distinguishable with the current situation. Thus, the respondent has no benefit of it. He considered the testimony of DW2 as of a mere citizen and not an authority. He prayed that this appeal be allowed with costs.

I have digested the submissions of both learned counsel in respect of this appeal, I have also gone through the evidence in trial tribunal as per record, the vital question to dispose of this appeal is mainly one; who is the rightful owner of the suit land? Further, whether the appeal is meritorious.

In consideration to the first ground of appeal that, the Honourable Chairperson erred in law and fact by declaring the respondent herein to be the lawful owner of the land in dispute while he failed to prove his case to the required standard. According to the evidence in record, the respondent claims ownership of the said land from his deceased father who had been living in the said land since 1961. During the lifetime of his father, he being the elderly son, he was given the said land in 1976 by his father – Isack Mwita (during his lifetime). His father then died in 1997. His assertion is supported by the testimony of PW2, PW3, PW4,

PW5 and DW2 who claim to have known the said land as originally being owned by the father of the respondent. The respondent further claims that in 1997, was granted ownership of the said land by village authority via P1 exhibit.

On the other hand, the appellant claims to have been dully allocated the said land by the Mrito Village Authority in 2019. His assertion is supported by the testimony of DW2, DW3 and DW4.

According to law, a civil claim (land inclusive), is said to be established where on balance of probability, the evidence of one party is weightier than the other (**HEMEDI SAIDI VS MOHAMED MBILU 1984 TLR 113**). In the current case, weighing the evidence of the appellant and that of the respondent, it is convincing that the respondent's occupation of that land traces its origin from 1961 as opposed to the appellant who just happens to have been allocated/granted the mining right in 2019. The DW2 and DW3 acknowledges granting of the said land to the appellant for mining activities but with condition that he should settle with the respondent.

With this, it is not clear whether the said land was free for allocation to anyone who was in need of land for whatever reason. The

law is, where someone is in lawful occupation of land be it under customary law or deemed customary law, no valid right of occupancy can be offered to anyone else over the same land unless the provisions of the land Acquisition Act have been complied with (See the case of **Mulbadaw Village Council and 67 others vs National Agricultural and Food Corporation** (1984) TLR 19).

The law is, customary or deemed rights of occupancy in land though by their nature are nothing but rights to occupy and use land, are nevertheless real property protected by Article 24 of the Constitution of the United Republic of Tanzania. The deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the constitution. (see **Attorney General vs Lohay Akonaay and Joseph Lohay,** Civil appeal No 31 of 1994, CAT).

Moreover, when two persons are in dispute of ownership of the same plot by means of double allocation, I agree with Mr. Onyango's submission that the priority principle has to take its course. In the case of **Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewal,** civil Appeal no 33 of 2017, the Court of Appeal at Dar es Salaam (unreported) at page 16 appreciated the application of priority principle. It stated:

"The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have titled over it, a party who acquired it earlier in point of time will be deemed to have better or superior interest over the other"

See also court of Appeal decision in **Colonel Kashimiri vs Naginder Singh Mathain** (1988) TLR 162 and **Melchades Johan Mbaga, the deceased) and two others**, Civil Appeal No 57 of 2018 (unreported) amongst others.

In the current case, it has not been clear by the appellant when being allocated the said land in 2019, was it virgin land or not. Had it been a virgin land and unowned by any one, then the allocation by the Village Assembly through the Village Land Council would have been justified. A mere fact that the said land is within a particular village is not by itself a licence that it belonged to the Village Authority. Village land is not necessarily owned by village authority unless it is unoccupied by anyone. It remains a village land even if under possession and use by people just because it is within a village. Just like Commissioner for Lands does not own land in Tanzania, Village Authority equally does not own land by mere fact that it is a village land but villagers. The village authority does not become the landlord of the village land by being

elected leaders but by a due process of law. Nevertheless, it is my considered view that the village land or general land can be under full control of the Commissioner for Lands or appropriate Village Authority if a particular land is unoccupied by people or occupied illegally. But for other parcels of lands under full control of the people, the central or village government can only allocate that land to other persons if dully acquired as per law. Therefore, as the existing right and recognised long standing occupation of the respondent has to be protected, the Village Authority had no legal mandate to grab that land from the respondent and re-allocate it to the appellant without due process of law.

In my considered view, as per evidence in record, it is my firm finding that the respondent's case was weightier than that of the appellant in terms of value of evidence as opposed to quantity of witnesses as claimed by the appellant.

As far as the second ground of appeal is concerned, that the trial Tribunal erred in law and fact in granting the Application in favour of the respondent while he failed to join the said village council to the case as a necessary party, I am of the different view. The said Village Council was not barred from applying to the trial tribunal if it considered it right to do so. However, since the plaintiff is at liberty to sue whom he wants,

any party with interests can apply to be joined as necessary or interested party to the case. In the current case, since the said third parties didn't find it proper to join in the case, the appellant cannot be their spokesperson for that matter. This second ground equally fails.

With the third ground of appeal, I find it as already responded in discussion with the first ground of appeal.

All this said and done, I find the appeal bankrupt of any merit, and it is hereby dismissed with costs in its entirety.

DATED at MUSOMA this 16th day of September, 2022.

F. H. Mahimbali

Judge

Court: Judgment delivered this 16th day of September, 2022 in the presence of the Emmanuel Paul Mang'ara, advocate for the appellant, MRY Joachim, advocate for the respondent and Mr. Gidion Mugoa, RMA.

Right to appeal to any aggrieved party is explained.

F. H. Mahimbali

Judge