

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO 123 OF 2021

(From decision of the District Land and Housing Tribunal for Mara at Musoma Land Appeal No 59 of 2021, Originating from land case no 25 of 2020 at Salama Ward Tribunal)

MAGORI CHABWASI APPELLANT

VERSUS

JONATHAN BWIRE RESPONDENT

JUDGEMENT

17th August & 27th September, 2022

F. H. Mahimbali, J.

This is the second appeal now by the same appellant after she had failed her first appeal before the District Land and Housing Tribunal of Mara at Musoma.

According to the court records, the appellant had claimed the disputed land as hers as she had been using it together with her deceased husband since 1967. That by the time she was married by her deceased husband (Mzee Chabwasi in 1967), she had seen him living there and that there was no any known land dispute involving that land. That she had been renting it to various people for a long time who were

using it for vegetable gardening. Amongst the land tenants, was Alex Buhumu who used the said land for more than two years.

The dispute between the appellant and the respondent is on land boundary between the two. Whereas the appellant claims the respondent to have trespassed into her land, the respondent on the other hand claims that he has never trespassed as the land he is using is the portion of land he had legally purchased it.

As well as the trial tribunal, the District Land and Housing Tribunal according to the evidence in record confirmed that the appellant has failed to establish the said claims. Thus, the basis of this current appeal, based on the following grounds of appeal:

- 1. THAT, the honourable chairman grossly erred in law fact by not considering the defect before trial tribunal which reached into spite decision for failure of a trial tribunal to realize and understanding the boundaries existed before respondent bought his land and later respondent destroyed boundary existed by cutting the Omurogo tree.*
- 2. THAT, both trial and appellate tribunal erred in law and facts for failure to consider that appellant possess the dispute land for more than 40 years uninterrupted by late Sanai or his family.*
- 3. THAT, the appellate tribunal erred in law and facts for failure to use its revisionary power to revoke the proceedings of trial*

tribunal due to the illegality which violate the principle of dispense of justice.

4. That, the honourable chairman grossly erred in law and fact by deciding in favour of the respondent without considering evaluate and analyse the heavy weight evidence of the appellant adduced at the trial court.

5. That, both tribunals erred in law and facts for failure to observe the procedure of visiting locus in quo.

6. That, the trial and appellate tribunal erred in law and fact for failure to heed that respondent has encroached to the appellant land by removing the boundaries (sisal) owned by the appellant.

7. That, the trial tribunal erred in law and fact for issue a judgment in favour of respondent while respondent failed to tender documentary evidence to support his claim.

In support of the appeal, Ms. Mary Joachim learned advocate appeared for the appellant. She argued grounds 1, 2, and 3 separately. However, she argued grounds 4, 6, and 7 jointly. Meanwhile she abandoned ground no 5 of the appeal.

With the first ground of appeal, the appellant's grief is, the two lower tribunals failed to realize that there was an existing boundary between the parties – Omuorogo tree. The appellant and Mzee Sanai had been neighbours separated by Omuorogo tree. That just after the purchase of Mzee Sanai's plot by the respondent, the said boundary was

destructured. The trial tribunal then failed in this dispute to resolve the matter by not recognizing the existence of old boundaries.

As to the second ground of appeal, the appellant claims that the two lower tribunals failed to recognize that the appellant is in use of the said land from 1967 up to now, over 40 years now. During all this time there never existed any quarrel. The dispute arose from when this respondent purchased the said land. The respondent has no any claim of right and in his testimony, he has no evidence about the size of his land and its demarcation.

In arguing the third ground of appeal, Ms Marry Joachim submitted that the first appellate tribunal failed to use its revisionary powers of quashing the trial tribunal's proceedings as per pointed out illegalities. She said so pursuant to section 36 of the LDCA. It is her submission, that the trial tribunal's proceeding is tainted with illegalities.

First, there was no mediation done which is the fundamental duty of the Ward Tribunal (see section 17 (2) of the LDCA). This should be read together with section 8 of the Ward Tribunal Act. The proceedings of the trial court do not establish that there was mediation proceedings. Secondly, the issue of gender of the trial tribunal's members. The proceedings don't establish the members' gender. She submitted this is

in contravention of section 4 of Ward Tribunal Act, Cap 206 read together with section 11 of the LDCA. She therefore faulted the trial Ward Tribunal as was not properly constituted.

She made reference to the case of **Edward Kubingwa vs Matilda A. Pima**, Civil Appeal No 107 of 2018, CAT at Tabora, stressed on the issue of proper composition and constitution of the Ward Tribunal sitting as trial tribunal. She also made reference to the case of **Damianus Okuni vs John Mabone**, Misc. Land Appeal No 83 of 2021, High Court Musoma (Mbagwa, J).

Thirdly, another legal anomaly she pointed out was failure to file/register a complaint for the Ward Tribunal's determination. In this matter she argued that there is no proof of what was the legal complaint at the trial Ward Tribunal. There are just proceedings. This is in contravention to section 17 of the LDCA.

With the 4th, 6th and 7th grounds of appeal, she submitted that generally all the grounds base on factual issues. The important question as per available evidence, whose evidence is weightier than the other. She is of the view that the appellant's evidence is weightier than the respondent's evidence and that the appellant should be the rightful owner.

Otherwise, as per pointed out illegalities, she prayed that the appeal be quashed and sentence be set aside. The appeal be allowed with costs

On the other hand, the respondent who was unrepresented, resisted the appeal. He prayed that that his reply to the grounds of appeal be adopted by the court to form part of his submission. In addition, he clarified that the members who constituted the trial tribunal out of four, three were female: Tereza, Zena and Nyamuile Wasanda. The male member was only Julius Wesaka.

In her rejoinder submission and after she had read the respondent's reply to the ground of appeal by the respondent, she just reiterated her submission in chief.

Whether the Ward Tribunal was properly constituted, she left it to court after clarification that Nyamwile was also a female member with Zena and Tereza.

Having heard the learned counsel as well as the respondent's submission, I had decided to invite the appellant herself to address the Court on the issue of membership composition at the trial tribunal as how many were they and their respective gender. On this, Ms. Magori

- Chabwasi (the appellant) addressed the court that there were four members, of whom, three were women: Tereza, Zena and Nyamuise.

Thus, with the issue of membership, it is undoubted that it was duly constituted as per law. There were minimum of four members and out of whom, three were women.

In consideration to the facts and evidence of the case, I consider grounds 1, 2, 4, 6 and 7 as based on factual issues. As they are based on facts, it is a question of evidence. I will first reserve them, and consider the remaining legal issue.

According to land law, it is the requirement that a land dispute at the ward tribunal is commenced by a complaint. Section 17 of the Land Dispute Courts Act, provides:

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.

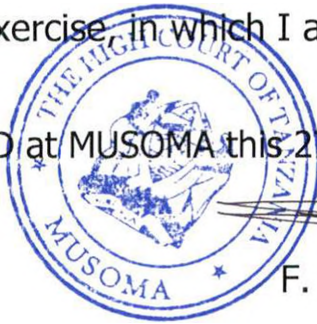
(2) When a complaint is made to the Secretary under subsection (1), that Secretary shall cause it to be submitted to the Chairman of the Tribunal who shall immediately select three members of the Tribunal to mediate.

(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.

Simply put, in the absence of a land complaint as per law above, there is no dispute for adjudication. That means, all that was adjudicated by the two tribunals below, abrogated the law. The trial was thus vitiated. All that was done is a nullity. The same is quashed and set aside. The status quo of the parties, revert to a situation before the institution of the said dispute. Parties are at liberty to file a proper suit before the proper forum in compliance with the current laws regulating land disputes.

As this legal ground argued by Ms Mary Joachim is capable of disposing of the appeal, the remaining grounds I will not dwell on them as there is no good reason to discuss them. Merely, it will be just for an academic exercise in which I am not prepared to give such a labour.

DATED at MUSOMA this 27th day of September, 2022.



F. H. Mahimbali

JUDGE

Court: Judgment delivered 27th day of September, 2022 in the presence of the both parties and Mr. Gidion Mugo, RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE