

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**

**MISC. LAND APPEAL NO. 96 OF 2021**

*(Arising from Land Appeal No. 120 of 2014 in the District Land and Housing  
Tribunal for Mara at Musoma)*

***BETWEEN***

**NEEMA THOMAS MKURYA**  
**(The Administratrix of the Estate of**  
**the Late THOMAS MKURYA)..... APPELLANT**

**VERSUS**

**GISSEY CHACHA..... RESPONDENT**

**JUDGMENT**

*22<sup>nd</sup> March & 25<sup>th</sup> April, 2022*

**A. A. MBAGWA, J.:**

This is a second appeal from the District Land and Housing Tribunal for Mara sitting as the first appellate Tribunal.

Without much ado, it is apposite to mention that the late Thomas Mkurya, died after the matter was concluded in the Trial Tribunal. Thus, during trial Mr. Thomas Mkurya was alive and testified before the Trial Tribunal.

The respondent, Gissey Chacha sued the appellant, Thomas Mkurya in the Ward Tribunal for Nyamimange over encroachment of his land. At the trial each party brought three witnesses in support of its case.

The respondent claimed ownership over the disputed land. He stated that he occupied the suit premises since 1990 and in 2007 he formally applied to the village council for allocation of the land in dispute. It was the respondent's testimony that he has been using the land for agriculture throughout the time. The respondent contended that his land size is fifty (50) acres and that the appellant had encroached almost ten (10) acres of his land. He further stated that he was using the land peacefully until 2009 when the appellant trespassed into the land. The respondent's evidence was supported by Marwa Mwita who, at the material time, was a member of the village committee which surveyed and allocated the suit land to the respondent. Furthermore, Letisia Kibaso gave a similar account. She told the trial Tribunal that the respondent has been in occupation of the suit premises since 1990 and in 2007, upon the respondent's application, the village committee allocated him fifty (50) acres.

The appellant who was the defendant before the Ward Tribunal paraded three witnesses namely, Thomas Mkurya, Chacha Mwita and Sese Mkurya. Thomas Mkurya claimed that he bought the suit premises from Julius Mtatiro on 6<sup>th</sup> November, 2002. On cross examination, the appellant stated that he bought five acres and on further cross examination he said that the size of

the land he bought was not less than three (3) acres. Thomas Mkurya, admitted, during his testimony, that they did not actually measure the land at the time of sale. Although Chacha Mwita and Sese Mkurya testified that Thomas Mkurya purchased the suit premises from Julius Mtatiro, they admitted that the complainant who is a neighbour was not present at the time of sale. Unfortunately, the alleged seller of the suit premises one Julius Mtatiro was not called to testify nor was there any reason assigned for his failure to testify.

Upon hearing the evidence of both parties along with visiting the locus in quo, the trial Tribunal adjudged the matter in favour of the respondent, Gisseey Chacha.

Aggrieved by the Ward Tribunal's decision, the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Mara. As such, the appellant knocked the door of this Court.

The appellant filed a petition of appeal containing grounds to the following effect;

1. That the learned Chairman erred in law and fact for failure to consider that the secretary of the Ward Tribunal one MTABI MINALWO listed

himself in the coram as a member of the Ward Tribunal contrary to the law

2. That the learned Chairman erred in law and fact for failure to consider that VICK MATIKO and MWITA WARIOBA were not listeners of the case but they appeared on that coram of the Ward Tribunal as members hence they influenced the decision of the said Ward Tribunal.
3. That the learned Chairman erred in law and fact by reaching a decision in favour of the respondent by basing on contradictory evidence since the Village Council has no power to survey and receive payment for the same on behalf of the District Council.
4. That the learned Chairman erred in law and fact for failure to consider the priority principle because the appellant started to own the suit land before 2002 but the respondent started to claim the suit land in 2007.

When the matter was called on for hearing, the appellant was represented by Mdimi Thomas Ilanga, learned advocate whereas the respondent had the services of Amos Wilson, learned advocate.

At the very outset, Mr. Ilanga abandoned the 1<sup>st</sup> ground of appeal and submitted on the remaining three grounds.

Submitting in respect of the second ground, Mr. Ilanga said that Vick Matiko and Mwita Warioba did not participate fully in the hearing of the case but they were involved in composing judgment. He referred to page 10 of the Ward Tribunal's decision and submitted that the two members influenced the decision of the Ward Tribunal despite the fact that they did not hear the case. He was thus opined that their appearance in the coram was a fatal anomaly which vitiated the judgment.

On the 3<sup>rd</sup> ground, the appellant's counsel submitted that the respondent's evidence was contradictory. He said that the village council has no power to survey land and receive payment on behalf of the district council. Moreover, the appellant's counsel contended that the respondent evidence was contradictory in the sense the respondent testified that he cleared the land in 1990 and in 2007 applied to the village council but there is no evidence to prove the alleged application before the village council.

Ilanga submitted that, according to the law, if a person occupies land for seventeen years, that land ceases to belong to the village. As such, if the respondent had actually occupied the land since from 1990, he would not have applied for allocation to the village council.

The appellant's counsel expounded that as per section 9(1) of the Village Land Act, the application for allocation of land is not made before the village council rather it should be tabled before the village assembly. He was thus of the view that the respondent did not follow the proper procedure for acquiring land.

With regard to the 4<sup>th</sup> ground, Mr. Iranga faulted the Tribunal Chairman for failure to consider priority principle. He submitted that the appellant testified that he bought the suit land from Julius Mtairo on 06/11/2002 and his evidence was corroborated by DW2 Chacha Mwita and DW3 Sese Mkurya. He continued to tell the Court that the respondent did not dispute this evidence apart from claiming that he was allocated the land by the village council in 2007. The counsel therefore submitted that the appellant was the first person to occupy the disputed land hence he was entitled to be declared the owner of the premises under the priority principle. In support of his argument Mr. Iranga referred to the case of **Ombeni Kimaro vs Joseph Mishiri t/o Catholic Charismatic Renewal**, Civil Appeal No. 33 of 2017, CAT at Dar es Salaam and submitted that the court invoked priority principle at page 16.

·With regard to the minutes of the village meeting dated 23/03/2007, the applicant's counsel challenged the minutes on the ground that it did not comply with the legal requirements. He submitted that it appears village council made decision to allocate land to the respondent without involving the village assembly as such, the allocation was null and void.

Finally, the appellant's counsel prayed the Court to reverse the two lower Tribunal's decisions and declare the appellant lawful owner of the suit premises. He consequently beseeched the Court to allow the appeal with costs.

In rebuttal, the respondent's counsel strongly submitted that throughout the record there is nowhere Vick Matiko and Mwitwa Warioba were involved in the hearing of the case nor did they take part in making decision. The respondent counsel argued that their attendance on the judgment day does not mean that they were involved in the decision making. He thus dismissed the complaint for being unfounded.

Coming to the 3<sup>rd</sup> ground, Mr. Amos Wilson submitted that it was a new ground because it was raised for the first time before this Court. He lamented that the ground is based on the fact that the village council has no power to survey and receive payment on behalf of the District Council whereas the

respondent's testimony was to the effect that the village allocated him land meaning that he was referring to the village assembly. He said that the appellant's counsel attacked the procedures in respect of allocation of the village land but there is nowhere on the record the procedures were challenged at the lower Tribunals.

Pertaining to the 4<sup>th</sup> ground on the priority principle, Mr. Amos Wilson submitted that the respondent's evidence was that he started using the suit land since 1990 and in 2007 he applied for allocation to the village whereas the appellant states that he purchased the same on 06/11/2002. As such, the respondent was the first person to own the suit land, the respondent's counsel submitted.

In addition, the respondent's counsel submitted that the alleged sale by the appellant was not proved to the required standard. He pinpointed that the appellant, Thomas Mkurya was not consistent on the size of the land in dispute. Further, Chacha Mwita said that he was not present on the day of sale while Sese Mkurya said that it is Julius Mtatiro and Mwita Mtatiro who sold the land to the appellant. Based on this evidence, the counsel submitted that it goes without saying that the sale was not proved. He concluded that



since the sale was not proved, the Tribunal was right to find the respondent lawful owner of the suit premises.

He thus prayed the Court to find the appeal without merits and consequently dismiss it with costs.

I have painstakingly considered the rival submissions. I have also scrutinized the record of the lower Tribunals.

To start with the complaint on the involvement of two Tribunal members namely, VICK MATIKO and MWITA WARIOBA, it is true as contended by the appellant's counsel that the duo did not hear the case but appear in the coram on the day of judgment. I have thoroughly appraised the trial Tribunal's record. It is common cause that the matter was heard by four members namely, Katowa John, Mgaya Magesa, Dorica Yasson and Magwaiga Magige. These are the same persons who also went to the locus in quo on 30<sup>th</sup> April, 2014. Further, it is the very persons who gave their opinion which resulted into the judgment of the trial Tribunal. In addition, to prove that the two members were only present on the judgment day but did not participate in deciding the case, the judgment was signed by only four members who heard the case and gave their opinion. Although it is undesirable for a member who did not hear the case to appear in the coram

on the judgment day, their presence, in the instant case, did not affect the decision hence not fatal. Consequently, I dismiss this ground of appeal.

With regard to the ground that the respondent's evidence was contradictory as to when he started owning the suit premises, the record is to the effect that the respondent started occupying the suit premises in 1990 through clearance until in 2007 when he formally applied to the village council for allocation of the same. His evidence was further corroborated by Marwa Mwita who was among the village committee members who surveyed and allocated the respondent fifty (50) acres. Marwa Mwita clarified that the suit land was allocated to the respondent after he was using it for agriculture for quite some years. Indeed, there was no evidence from the appellant's side to challenge this fact. Mr. Ilanga in his submission sought to challenge the allocation on the basis that it was illegal in that it was done by the village council instead of the village assembly. In contrast, Mr. Amos Wilson argued that the ground was raised for the first time before this Court hence he was prevented from raising it. It is true that this ground was not raised in the first appellate Tribunal. Nonetheless, upon reviewing the evidence, I found the complaint baseless in that the respondent's evidence in the trial Tribunal was that he was allocated the suit land by the village. There in nowhere he

said that he was allocated the suit land by village council. His evidence was not challenged at the trial Tribunal. As such, it remains a fact that he was allocated the land by the village. Thus, raising it at this stage is an afterthought. I therefore find the complaint unfounded.

In the 4<sup>th</sup> ground, Mr. Ilanga faulted the Tribunal Chairman for failure to consider and apply priority principle. He argued that the appellant bought the suit land on 06/11/2002 while the respondent was allocated the same by the village in 2007. He was thus opined that his client was the first person to own the land hence he was entitled to be declared the lawful owner under the principle of first priority. I have keenly assessed the appellant's evidence in relation to the purchase of the suit premises. The appellant contends that he bought the disputed land from Julius Mtatiro. However, for some obscure reasons, this Julius Mtatiro was not called to testify. In my view, he was a key witness for he would have told the Tribunal the size and demarcations of the land he sold to the appellant. Secondly, the appellant was not certain of the size of land he bought from Julius Mtatiro. During cross examination, he said that he bought five (5) acres and upon further cross examination he said that the sale agreement shows three (3) acres and later on he admitted that they did not measure the land at the time of sale. It should be noted

that the respondent was complaining that the appellant had encroached almost ten (10) acres of his land. Assuming that the appellant bought three (3) acres from Julius Mtatiro as he contends, the question is where did he get the ten (10) acres which he encroached. In addition, the appellant's witness Chacha Mwita admitted that though the respondent is a neighbour to the disputed land, he was not called during sale. On all this account, I am of unfeigned findings that disputed land belongs to the respondent.

That said and done, it is my considered findings that this appeal is arid of merits and consequently I dismiss it with costs.

It is so ordered.

Right of appeal is explained.



  
**A. A. Mbagwa**

**JUDGE**

**25/04/2022**

**Court:** The judgment has been delivered in the presence of appellant and respondent this 25<sup>th</sup> day of April, 2022.

  
**A. A. Mbagwa**

**JUDGE**

**25/04/2022**