

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL 233 OF 2024

*(Originating from Land Application No 30 of 2023 of Mbulu District Land and Housing Tribunal
at Dongobesh)*

JOHN MASSAY AMIAPPELLANT

VERSUS

JOSEPH EMANUEL MASSAY.....RESPONDENT

EX-PARTE JUDGMENT

27th May and 20th June, 2024

MIRINDO, J.:

John Massay Ami, the appellant, brought an action before Mbulu District Land and Housing Tribunal for the recovery of possession of a plot measuring 15 paces in length by 3 in breadth situated at Gwaami Village in Mbulu District. Tracing his 1990 ownership of the disputed land from his late father, the appellant pleaded that he recovered possession of the disputed land after two successfully mediation processes in 2009 and 2010. Subsequent to both mediation processes, the appellant was given possession of pieces of land that

forms part of the disputed land. At the trial the appellant testified that in 2009 there was a dispute between Dawite Massay and himself after Dawite Massay and his son Obote trespassed into the appellant's land. The appellant took the dispute before Hayloto Village Land Council and the Council held in his favour. After recovering possession of the disputed land, he continued to use the plot until 2021 when his nephew, Joseph Emanuel Massay, trespassed into it and claimed rightful ownership over it. When the dispute was taken before Gwaami Village Land Council, the Council mediated in favour of Joseph Emanuel Massay, the respondent in this appeal. I would return to this aspect of the appellant's case later in this judgment.

The respondent's case was that the mediation process in 2009 had no connection with the disputed land which was the property of the respondent's father, Emmanuel Massay. The respondent testified that his father acquired the plot from one Kwaima Qambo after their house was struck by lightning. His father gave him the plot in 2010. This evidence was supported by the testimony of Kwaima Qambo himself and Dawite Massay who testified for the respondent.

At the conclusion of the trial, the presiding Chairman disagreed with the two assessors and held in favour of the respondent.

John Massay Ami has come before the High Court with five grounds of appeal which principally challenge the decision of the trial tribunal as being

against the weight of evidence. The appellant was unrepresented but managed to argue his appeal. The respondent did not appear, though duly served, and the appeal was heard *ex parte*.

The first ground of appeal states that the respondent's witnesses were unreliable. At the hearing of the appeal, the appellant pointed out that the evidence of the second respondent's witness, Dawite Massay, was unreliable because he had some conflict with him, and he is the source of the respondent trespassing into the disputed land. In his second ground of appeal, the appellant's complaint is that there was no evidence establishing the respondent's ownership of the disputed land. There was no documentary evidence to establish respondent's ownership of the disputed land.

He complained about contradictory evidence in his fourth ground of appeal. The appellant connected the complaint of contradictory evidence with the complaint in the fifth ground of appeal. He pointed out that the respondent's witnesses confused between what took place before the village land council. He specifically complained that the trial tribunal erred in holding that the mediation process between the appellant and the respondent took place before Gwaami Ward Tribunal and not in Gwaami Village Council. Finally, the appellant complained that the trial tribunal did not consider his exhibits.

The fate of this appeal rests on the weight of evidence. Did John Massay Ami prove his claim on the preponderance of probabilities?

At the beginning of this judgment, I observed that the appellant's case rests on two set of facts. The first set of facts id that the appellant traces his ownership from his late father Massay Ami. Other than asserting that he was given the plot in 1990 in the presence of his mother and the respondent's father Emmanuel Massay, there is no evidence to support this claim. This was a bare assertion as the circumstances under which the appellant was given the plot were undisclosed. More specifically, there is no evidence to show his father's possession or ownership of the disputed land.

The second set of facts is in connection with the appellant's claim of recovery of possession of the disputed land through mediation processes that took place between 2009 and 2010. On 23 April, 2009, the Hayloto Village Land Council in Mbulu District mediated a land dispute involving plots A and B between the appellant, John Massay and his late father, Massay Ami. John Massay who features in this appeal as John Massay Ami recovered possession of Plot A that measured 95 paces in length by 35 in breadth. As to Plot B that measured 69 paces in length by 40 in breadth, it was resolved that it belonged to Massay Ami's father but the appellant should continue using the plot as he had used it without objection. Both parties affixed their thumbprints to signify their

approval of the resolution on Plot A but signified their disapproval on the decision relating to Plot B.

On 13 April 2010, the Secretary to the Halyoto Land Council wrote to a magistrate-in-charge in Endagikot Primary Court for execution of its decision of 23 April, 2009. This direction was complied with and on 27 September 2010, a senior primary court magistrate apparently at Endagikot Primary Court informed Mbulu District Commissioner of execution of the decision of the Hayloto Village Council. A copy of that letter was sent to Mbulu District Court.

On 30 September 2010, Mbulu District Administrative Secretary wrote a letter to the Murray Ward Executive Officer and copied it to the appellant, John Massay Ami instructing the Murray Ward Executive Officer to hand over to the appellant the possession of the plot measuring one acre and a quarter.

Clearly in 2009 parties reached mediation on ownership of Plot A yet it became necessary to secure compulsory enforcement almost a year later. This means that the mediation before the Hayloto Village Council had failed and either party could resume mediation or approach a land court of competent jurisdiction for the determination of the dispute. It was not open to John Massay Ami to invoke compulsory enforcement owing to the fact that the decision of the Hayloto Village Council was mediatory and not adjudicatory.

The law does not envisage compulsory enforcement. What is expected is voluntary compliance or lodging a claim before a land court of competent jurisdiction.

Section 61 of the Village Land Act [Cap 114 RE 2019] introduces voluntary mediation through a Village Land Council and section 62 of the same Act authorises an aggrieved party in the mediation or a party wishing to discontinue mediation process to approach a court of competent jurisdiction for the determination of the land dispute. The voluntary nature of this legal framework, as noted by Rwegasira A in **Land as a Human Right: A History and of Land Law and Practice in Tanzania**, Dar es Salaam: Mkuki na Nyota, 2012, at 327:

...Three things are very important to note as regards the rights of the parties who seek the assistance of the Council: first, seeking the service of the Council is voluntary and for this reason, no person is compelled to refer the matter to the Council...second, parties or any of them has the liberty to refer the matter to a court of competent jurisdiction if he is dissatisfied by the decision of the Council or when he wishes to cease to make use of the service of the Council... and third, the Council's role is mediatory as opposed to adjudicatory. It means the duty of the Council is to assist the parties to settle the dispute amicably and therefore, it cannot make binding decisions or issue enforceable orders.

The trial tribunal correctly held that the decision of the Hayloto Village Land Council could not attract compulsory enforcement and the Council acted without

jurisdiction in enforcing its decision. In view of the legal position I have set out, it is clear that the compulsory enforcement was contrary to the law. It is clear that the trial tribunal considered the appellant's exhibits and ruled that they relate to the decision of Hayloto District Land Council but that decision was and is not enforceable. I dismiss the complaint that the appellant's exhibits were not considered by the trial tribunal.

At this stage I would like to point out that at the conclusion of the hearing of the appeal, I remanded the file to the trial tribunal to view the disputed land and determine the nature of the disputed land and whether it forms part of the land that the appellant was given in compliance with the letter dated 30 September, 2010. The findings on the visit to locus in quo are that the disputed land is part of the plot given to the appellant in 2010. During the hearing on this additional issue in the trial tribunal, the appellant testified he was given a plot measuring 100 x 35 x 4 metres.

These findings raise more questions than answers but it is clear that the plot given to the appellant was in excess of that mediated by Hayloto Village Council. Similarly, it should be noted that during the 2009 mediation, the appellant was given ownership of Plot A only and there was no consensus on Plot B. These facts suggest that even if the findings of the Hayloto Tribunal were binding, they do not support the appellant's case.

Before concluding this judgment, I would like to reiterate that the appellant, John Massay Ami, pleaded that there were two mediation processes regarding two plots, one involving Dawite Massay Ami and the appellant, and another between the appellant and the appellant's father, Massay Ami respectively. However, the appellant's annexures to the application which were admitted in evidence and his testimony point to a single mediation process.

In either case, John Massay Ami's case was not proved on the preponderance of probabilities and it is no answer that the respondent's case was not proved to the required standard. Under section 110 (1) of the Evidence Act [Cap 6 RE 2022] John Massay Ami had the legal burden to prove land claim on the preponderance of probabilities and this burden rested on him throughout the trial.

For the reasons given above, this appeal stands dismissed. Each party to bear its own costs.

DATED at BABATI this 17th day of June, 2024.



A handwritten signature in blue ink, appearing to be "F.M. Mirindo", written over a blue circular stamp.

F.M. MIRINDO

JUDGE