

**IN THE HIGH COURT OF TANZANIA
MUSOMA SUB-REGISTRY
AT MUSOMA**

**LAND APPEAL NO. 460 OF 2024
REFERENCE NO. 20240109000000460**

*(Originating from Land Application No. 76 of 2023 in the District Land and Housing
Tribunal for Mara at Musoma)*

BETWEEN

JOSEPHINA MAGWARA APPELLANT

VERSUS

VICTOR NZAGI RESPONDENT

JUDGEMENT

11th & 24th June, 2024

M. L. KOMBA, J.:

The appellant, **Josephina Magwara** was aggrieved by the decision of the District and Land Housing for Mara at Musoma (herein to be referred as the DLHT) issued on 25th October, 2023 in Land Application No. 76 of 2023, hence, the present appeal.

At the trial tribunal, appellant complained over the trespass done by the respondent over the disputed land measure 12 by 13 footsteps located at Kilimani street, Bunda Stoo ward within Bunda town (disputed land). The respondent has built a house on the said land and denied the allegation. From pleadings, appellant and respondent are neighbours and that

respondent trespassed into the disputed land and cut trees which was the property of the appellant. After hearing the matter in the DLHT, the respondent was declared the rightful owner of the disputed land.

The DLHT decision dissatisfied the appellant, he then steps up before this court folded 7 grounds of appeal as follows;

- 1. That, the trial chairman erred in law and fact to decide without involving the opinion of assessors of the tribunal in composing his judgment.*
- 2. That, the trial tribunal erred in law and fact to decide in favor of the respondent without regard the principle of adverse possession, the appellant acquired the land in dispute since 1982, and the respondent claimed to acquire the same in 2010.*
- 3. That, the trial tribunal erred in law and fact to decide in favor of the respondent even without involving the core witness SUMAI MWARA who as alleged to sale the land in dispute.*
- 4. That, the trial tribunal erred in law and fact to decide in favor of the respondent who failed to tender any documentary evidence as proof of the ownership of the land in dispute.*
- 5. That, the trial erred in law and fact to determine land in dispute and decide basing on weak evidence adduced by the respondent.*
- 6. That, the trial chairman erred in law and fact for disregard documentary evidence tendered by the appellant during the trial.*
- 7. That, the trial tribunal erred in law and fact for failure to evaluate and analyze properly the evidence adduced by both parties.*

During the hearing of this appeal, appellant stood solo without representation while the respondent had a legal service of Mr. Emmanuel Paul Mng'arwe who is an advocate.

The appellant being a lay person, she had a short submission in all of filed grounds. Starting with the 1st ground she informed the court that she dissatisfied with the decision of Hon. Chairman over the matter as he did not involve assessors in decision. She complained that it was like she was not heard as there is nothing concerning her submission, like she did not give any testimony. On the second ground it was her submission that she acquired the suit land in 1982, it was gift from her mother and respondent found the appellant in that land and she wonders how the respondent claim to own the land while she was occupied.

Arguing for the third ground, she submitted that DLHT did not bother to call Sumai Mwara who was said to sale the disputed land. It was submission that so far as the respondent claimed to buy the disputed land from Sumai Mwara, then it was Sumai who was supposed to be sued. Josephina did not end there, she attacks the testimony of the respondent in her fourth ground that during trial respondent had no documentary

evidence to prove ownership and wonders how can he be declared as lawful owner while he has no documentary evidence.

It was the appellant further submission on the fifth ground 3 that respondent had weak defence as he failed to show how he acquired the disputed land while faulting the Hon. Chairman by not consider her documentary evidence which were rejected during hearing. While arguing ground number 6 she complained that the respondent tendered nothing even a letter from a ten-cell leader while she had many documents to support ownership of her land. On the last ground about evaluation of the evidence, she complained that Hon. Chairman did not accept her evidence and base his decision on respondent's testimony. She prayed the decision of the DLHT in Application Number 76 of 2023 to be nullified and her appeal to be allowed with costs.

Resisting the appeal Mr. Mng'arwe submitted serially as appellant did. On the 1st ground it was his submission that the ground has no merit because the judgment considered opinion of assessors who read their opinion in open court and further, he submitted that the opinion was considered by Hon. Chairman in last page of the judgment while agreed with their position.

On the second ground he submitted that the issue of adverse possession was not introduced during trial as at para 6 (a) (i) of the application of the appellant at the DLHT that she was given the disputed land by her mother (Sumai Marwa) in the year 1982 and there was no adverse possession. He prayed this court to find the ground has no merit. Arguing for the 3rd ground Mr. Mng'arwe submitted that Sumai Mwara was important witness to appellant as she was introduced by the appellant herself during trial while insisted that Sumai was alive and with good health when the case was heard at the DLHT and the appellant did not provide any reason for her failure to bring Sumai, her mother, as a witness who gave her the disputed land and urge me to borrow the principle in **Kasim Arimu @ Mbawala vs Republic Criminal Appeal 607 of 2021** at page 10 where the Court referred the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113** on adverse inference when a party fail to call material witness.

Counsel went on to briefly submitted that respondent tendered a map (Exh D1) via the third defence witness (SU3) which show the registration of residence and the disputed land is surveyed and known as plot No. 534 Block B and prayed this court to find the 4th ground is less merit. On the 5th

ground the counsel tendered that the respondent and other two witness provide testimony during hearing persuaded the Hon. Chairman and ruled that the land is owned by respondent. Elaborating the testimony of the respondent he said it is clear from the record that respondent informed the DLHT that he got the land from his mother, the testimony which was supported by the SU2. He concluded that the respondent had heavier testimony than the appellant who failed to call any witness. Citing the case of **Joakim Ndelembi vs Maulid Mshido and Two Others**, Civil Appeal No. 106 of 2020 at page 7 urge this court to note that not always ownership of land can be proved by documentary evidence but testimony may suffice.

On the 6th ground that DLHT did not accept appellant documents during trial, Mr. Mng'arwe was brief that it was not true as the record is silent on denial as there is nowhere appellant prayed to tender any documents and was denied by Chairman. On the last ground about the analysis of evidence it was his submission that the judgment delivered by Hon. Chairman of DLHT show evidence of both sides were considered and the Chairman prepared judgment on what he gathers from record. He prayed this court to dismiss appeal with costs.

While rejoining the appellant insisted that respondent failed to tender document on how he acquired that land, she further insisted that Assessors did not read opinion and re iterate her prayers in submission in chief.

Having carefully considered the submission, I will now embark on determination of the grounds of appeal fronted by the appellant. This being a first appeal, I will preface my determination with the position of the law as to the duty of the first appellate court as held in **The Registered Trustees of Joy in The Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 Of 2017, CAT at Tabora (Unreported) thus; it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its decision. This court is also the final court of facts as was elaborated in **Firmon Mlowe vs Republic**, Criminal Appeal No.504 of 2020

Starting with the first ground about considering assessors opinion, I had time to read the judgment and find at page five (5) Hon Chairman agreed with assessors' opinion that the appellant failed to prove ownership over the disputed land. Without wasting time, the first ground is found to be of less merit.

About the adverse possession as found at the second ground, appellant claimed to own the land since 1982 and that the respondent found her in possession of disputed land. The counsel for respondent on the other hand submitted that the issue of adverse possession was not argued during trial. I find the appellant informed the DLHT in her application that she owned the disputed land since 1982, however she had no any evidence or witness who testified in support of what she alleges as required under section 110 and 112 of the Evidence Act, Cap 6 R.E 2019. See also **Abdul Karim Haji vs Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014 (unreported), **Airtel Tanzania Ltd vs Majura Matage T/a Majura General Suppliers** (Civil Appeal 60 of 2017) [2020] TZHC 829 (17 April 2020) and **C. R. J Construction Co. Ltd vs Maneno Ndaliye & Another**, Rev. No. 205/2015.

On the other hand, respondent had three witnesses who supports his testimony. I subscribe to the principle in **Joakim Ndelembi vs Maulid Mshido and two Others** (Supra) that not always ownership of land can be proved by documentary evidence but testimony and the appellant had none. This ground is fruitless.

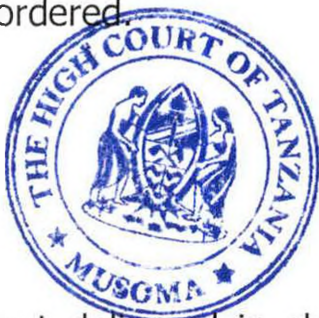
I now combine the third and fifth ground, appellant faulted the Chairman of the DLHT for not summoning Sumai Mwara who was alleged to sale the disputed land to respondent and faulted that respondent had weak defence. To the contrary, counsel for respondent submitted that Sumai was important witness to appellant as she was introduced by the appellant during trial. He further submitted that respondent case was well supported by the other witnesses. I careful read record and find during cross examination appellant informed the DLHT that she was given the disputed land by her mother but she did not mention the name. When appellant cross examined respondent, the respondent clarified that Sumai is the appellant mother. That comes clear that appellant was given land by her mother and respondent claim that respondent's mother and respondent's uncle bought the disputed land from appellant mother. Basing on section 110 and 112 of the Evidence Act it was the appellant who was complainant at the DLHT and she was supposed to prove her case. It was not for the respondent to prove from whom they bought the land as the standard of proof in civil case is to the balance of probability. The combined grounds also lack merit.

Appellant complained of absence of documentary evidence from the respondent as to how he owned the disputed land in the fourth ground. Mr. Mng'arwe submitted that SU3 tendered a map showing the disputed land is surveyed. I wish to make correction that after reading proceedings careful I noted that the disputed land was given Plot number 534 Block "V" and not Block "B" as recorded in proceedings. That was evidence to prove registration of residence (leseni za makazi). Read the testimony of all witnesses, I find it is true that there is no document tendered by the respondent to prove ownership, however, it is not necessary to prove facts by document even oral testimony may prove ownership. See **Joakim Ndelembi vs Maulid Mshido and Two Others** (supra). I find this ground is baseless.

On the 6th ground about documents in support of appellant ownership, just as submitted by Mr. Mng'arwe that the proceedings are silent on whether the appellant, then applicant tendered no document during trial. Her testimony is found from page 3 up to 5 of the typed proceedings which I got time to read and there is nowhere she tendered any document, leave alone none consideration during analysis. Without further ado this ground has no merit.

The last about the analysis of evidence by both parties, the appellant complained that her evidence was not considered (accepted) by Hon. Chairman. At this point I join hands with Mr. Mng'arwe that the judgment which was prepared and delivered by Hon. Chairman of DLHT show evidence of both sides and analysis was done. Judgment was prepared basing on the testimony by witnesses. In the case at hand the evidence by both appellant and respondent was evaluated at page 4 of the judgment and was based on what he gathered from testimony. In general, I find all grounds as analysed lacks merit to move this court to allow the appeal. The consequence is clear that the for lack of merit the appeal is dismissed. Respondent is awarded costs.

It is so ordered.



NK
M. L. KOMBA
Judge

Judgement delivered in chamber today 24th June, 2024 before appellant who appeared in person.

NK
M. L. KOMBA
Judge
24th June, 2024