

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA

LAND APPEAL No. 93 OF 2008

[Originating from District Land and Housing Tribunal of Tarime in Land Appeal No 2 of 2008]

NYAMHANGA NG'ARARE.....APPELLANT

VERSUS

1.KEMANGE VILLAGE COUNCIL	}	RESPONDENTS
2.MASIAGA CHACHA MATINYI.....		
3. ELIASI MATIKO CHACHA MATINYI.....		

JUDGMENT

MRUMA, J.

The appellant Nyamahanga Ng'arare instituted a land suit before the District Land and Housing Tribunal of Tarime seeking for a declaration that he was the lawfully owner of a piece of land measuring 1.5 acres which is situated at Kemange Village in

Tarime District. He also prayed for general damages for trespass at the tune of T.shs 5,000,000/= and costs of the suit. The respondents are the Kemange Village Council, Masiaga Matinyi and Elias Matiko Chacha Matinyi respectively. After hearing both parties the District Tribunal ruled in Respondents' favour.

In its Judgment the District Land and Housing Tribunal held that the Kemange Village Council being a trustees and Village Land Allocating Authority and after adhering to all due process had all legal power and had lawfully allocated the suit land to the 3rd Respondent Elias Matiko Chacha Matinyi. The trial tribunal directed that the appellant Nymhanga Ng'arare should accept compensation from the 3rd respondent for his 1600 trees found in the suit land and an alternative land from the 1st respondent.

The 2nd Respondent Masiga Chacha Matinyi was said to have no liability.

It is this decision which aggrieved the appellant and has decided to come to this court armed with four grounds of appeal.

In his first ground of appeal the appellant is complaining that the District Tribunal erred in law and in facts in not declaring him to be the lawfully owner of the suit land.

The second complaint is that the District Tribunal erred in law and in facts in declaring the 3rd respondent the owner of the land despite the fact that the appellant was in occupation of the land for over 20 years.

In his third ground, the appellant states that the District Tribunal erred in law and in facts in refusing to consider the respondents evidence i.e. the minutes of the Kamange Village council which were not signed by members

And finally that the District Tribunal erred in law in declaring the 3rd respondent Elias Matiko Chacha Matinyi the lawfully owner of the suit land despite the fact that there was no any pending application before the Ministry of Education for starting a secondary school in Kemange village.

Arguing the appeal before me, the appellant who was not represented reiterated what is stated in his grounds of appeal and insisted that he lives in a house which is on the suit land and that he has developed the land by planting therein coffee trees, banana plantations, mango trees and a sisal fence.

Mr. Nkanda, learned advocate who advocated for all respondents submitted that in this matter there is no dispute that the appellant was occupying the land and had developed it by planting mango trees, coffee trees and banana plantations but the issue in this case should be whether or not the appellant was adequately compensated.

The learned counsel stated that the judgment of the District Tribunal is very clear that the appellant had refused to accept compensation offered. The counsel said that although the Judgment does not show what was the amount of compensation but it would appear that the value of the suit land was T.shs 15m/=

Finally, the learned counsel submitted that following his grant by the Village Land Allocation Committee, the 3rd respondent Elias Matiko Chacha Matinyi have already acquired the Right of Occupancy over the said land. He therefore invited this court to apply the provisions of Section 33 of the Land Registration Act [Cap 334 R.E. 2002] in determining the lawful owner of the much disputed piece of land.

Those were the arguments for and against this appeal.

The back ground of this case is straight forward. It shows that the appellant is a resident of Kemange Village and he lives

there. The first respondent is the Village Government of Kimange. The second respondent Masiaga Chacha Matinyi is also a resident of that Village and like the appellant he lives there. The third respondent Elias Matiko Chacha Matinyi too is a resident of that Kimange Village.

In his evidence before the Tribunal the appellant told the trial tribunal that he was allocated the suit land by the Village Land Allocation Committee on 14th August 1987. He annexed to his application a letter of offer (annex N) and contended that despite the fact that he was officially allocated the suit land in 1987 actually he had been occupying it since 1971.

He called one witness **James Wambura Runanda PW2 (76 years)**, who introduced himself as a retired member of Village Land Allocation Committee who confirmed to the Tribunal that the suit land was allocated to the appellant in 1987. Wambura said that sometimes in 1994 there was a dispute over boundaries of

that land between the appellant and the 2nd and 3rd Respondents. The dispute was not resolved.

In its defence, the first Respondent the Village Council of Kemange called one witness Stephen Mageda Cheche DW2 (31 years), who was its Village Executive Officer at the time of the hearing of this matter before the District Tribunal to testify on its behalf. This witness denied the Village Council to have had ever allocated the disputed piece of land to the appellant. He however conceded that the appellant was occupying that land from 1971. He didn't tell up to when he was occupying it. He however told the trial tribunal that the appellant sold it (he didn't disclose to whom it was sold) and between 1975 and 1977 it was occupied by one Nyagebu Tekelo. The said Nyaregu Tekelo abandoned it and in 1988 the 3rd respondent applied to the Village Council to be allocated that land for purposes of constructing a school thereon.

The Village Land Allocation Committee gave the 3rd respondent some conditions to comply with before he could be allocated that land. According to this witness one of the conditions was to compensate the previous owners of that land. He said further that all the previous owners were compensated except the appellant and another person who refused compensation.

Other evidence worth reviewing for purpose of this appeal is that of Siaga Maricha DW4 (78 years old) a peasant of Kemange Village. In his testimony Siaga Maricha (DW4), said that he didn't know why his name appeared in the minutes of the Committee which is said to have had allocated land to the appellant while at the material time he was a public officer working with the government hospital. He said he didn't know any dispute involving the appellant and the Respondents.

On the other hand Stephano Magesa Ibaga DW5, told the tribunal that in 1994 when he was the Village Executive Officer

of Kemange Village the third Respondent applied for a land on which he could built a school. He (DW5) convened a meeting of the Land Allocating Committee of the village which was dully convened and allocated the suit land to the 3rd Respondent on condition that he compensates the previous owners. Some of the owners were compensated but the appellant refused.

Nyigega Marwa DW6, told the District Tribunal that in 1994 he was the chairman of Kemange Village Council. At that capacity (as a Village Chairman), he was informed by the Village Executive Officer that the 3rd Respondent had bought land for purposes of constructing a school thereon and that he was applying for more land. He (DW6) instructed the Village Executive Officer (VEO) to convene a meeting of the Village Council. The Village Council met and agreed to allocate some more land to the 3rd Respondent and it directed him to compensate previous owners of the land.

That was the evidence adduced at the trial.

In its judgment the trial District Tribunal was of the view that although the suit land was previously occupied by the appellant Nyamhanga Ng'arare but it had been legally granted and re-allocated to the 3rd Respondent Elias Matiko Chacha Matinyi. The tribunal held that;

“.....Reading the pleadings, the testimonies of the parties together with oral evidence of their respective witnesses, there is really undisputed [sic] that the land in dispute was previously occupied by the applicant Nyamhanga Ng'arare regardless of whether he was issued with a paper of owners”

Further to that, the tribunal observed that;

“There is also no dispute that the 3rd respondent was on 10th August 1994 granted the suit land by the 1st Respondent for construction of a secondary

school. That the 3rd Respondent, Elias Matiko Chacha subsequently acquired a certificate of occupancy with title No 14794 dated 02nd March 2004 registered on 24th April 2004”

From the foregoing findings and orders of the trial tribunal, the first issue which I should resolve in this appeal is **whether on the evidence on record the 3rd Respondent was legally allocated the suit land by the the Village Land Allocation Committee.**

In arriving at its conclusion that the Village Committee had legally allocated the suit land to the 3rd respondent, the tribunal seems to be influenced by the evidence of DW3, DW2, and DW1.

In his evidence before the Tribunal the 3rd Respondent Elias Matiko Chacha Matinyi who testified as DW3, told the trial tribunal that he applied to the Village Land Committee for the suit land on **22nd July 1994** and that on **10th August 1994** the

suit land was formally handed over to him with a direction that he should compensate previous owners of the land.

It is his further evidence that because he applied and the land was formally handed over to him he had caused it to be surveyed on **27th April 1994**. Consequently following the survey a certificate of the right of occupancy No **14794** in respect of **Plot No 2 Block A LO No 1860471** was issued in his favour

Now starting with his own evidence, whereas he told the Tribunal that he lodged his application to be allocate the suit land on **22nd July 1994** and that he was allocated and the suit land was formally handed over to him on **10th August 1994**, he said that he surveyed it on **27th April, 1994**, which means that he caused it to be surveyed four (3) months before he had applied for the same land and four (4) months before the land was formally allocated to him by the Village Council.

This was un-procedural and it may suggest that the 3rd respondent had an access to the appellant's land long time before the land was "formally handed over to him"

Secondly, this evidence is at variance with the testimony of Masiaga Chacha Matinyi DW2, his young brother who told the Tribunal that the suit land was surveyed under his supervision on 19th August 1998 in presence of the ten cell leader and the applicant who showed them his trees.

Another evidence which contradicts his testimony is the evidence of Steven Mageda Cheche DW1, the Village Executive Officer (VEO) of Kemange Village who said that Nyagebu Tekelo abandoned that land in 1988 and the 3rd Respondent applied for it.

There can be no doubt that what this witness told the tribunal is what he heard from other people. He was 31 years old when he gave his evidence on 14th May 2008. This means that he was 11

years old in 1988 when Nyagebu Tekelo is said to have abandoned the suit land and the 3rd Respondent applied for it. When the appellant is said to have sold the land in 1975 this witness was not yet born. He didn't tell the Tribunal that he was testifying in his capacity as the VEO and that what he said it was according to the records in his office. Had he said so he was bound to produce the records he was talking about otherwise what he said was hearsay.

Had the trial tribunal being keen in analysing the evidence adduced before it, it would have found that there were serious contradiction on the date(s) the third respondent Elias Matiko Chacha Matinyi is claiming to have had applied for the suit land. Whereas the evidence of DW1 is to the effect that it was in 1988, his own evidence is to the effect that it was in 1994.

Another contradiction is on the date the suit land was surveyed. Whereas the 3rd respondent says that it was surveyed on 27th

April 1994, his witness Masiaga Chacha Matinyi (who is his young brother) said that the suit land was surveyed on 19th August 1998. These contradictions were never reconciled. The only conclusion that could be fairly against such evidence is that the alleged application and consequently allocation of the suit land to the 3rd respondent was not real.

Now had the evidence of DW1, DW2 and DW3 been discredited by the trial tribunal as it ought to have been treated, the only evidence remaining about allocation of the suit land to the 3rd Respondent would be that of DW5, Stephano Magesa Ibega who said that in 1994 he was a Village Executive Officer (VEO) of Kemange Village and that in that capacity he convened a meeting of the Village Land Committee which allocated the suit land to the 3rd Respondent and that of Nyigega Marwa DW6, who said that in 1994 he was the Chairman of the Kemange Village Council and that in that capacity he instructed the VEO to call a meeting which allocated the suit land to the 3rd

Respondent. But there is no evidence whatsoever suggesting that in the alleged re-allocation, the Village Committee (if any) complied with the requirements of the and particularly **Part IV** and particularly **Sections 12 (1)(b), 22(1)(3)(a)and(b), 23 (1)(2) and (3) and/or Section 32 (1) and (2) of the Village Land Act [Cap 114 RE 2002]**

But even if there had been evidence to that effect and there was such allocation (which is not the case here), the next question would be **whether a Village Council could lawfully allocate land which is within its jurisdiction but which is under possession of another person who is developing it.** This question is important in view of the evidence of the appellant which is supported by that of James Wambura Runanda (PW2), that he was formally allocated the suit land by the Village Council and that of Masiaga Chacha Matinyi (DW2) and Elias Matiko Chacha Matinyi (DW3) who admittedly testified that the appellant had developed the suit land by planting some

permanent and perennial trees on it. In the case of Village Chairman KCU Mateka Vs Antony Hyera (1988) TLR 188, a similar situation was discussed by this Court (Mrosso Jas he then was), and it was held that a village government which allocated land which is already under development and in the possession of another person would not only bring lawlessness and anarchy to the Villagers but would also retard the development of the Villagers. In another case of Lucas Masirori Kateti Vs Sebege (1969) HCD n 11, this court warned Village Development Committees to use their powers justly and wisely instead of creating discontent among the inhabitants whom they are entrusted to look after. In that case the Respondent had already been allocated land. The Village Committee re-allocated the same land to the appellant in that case. The Court held the second allocation void. I associate myself with the decisions in those two cases and give a stronger warning to Kimange Village

leaders. What was done in this case was actually land grabbing which cannot be endorsed by a court worth the name.

If for instance we go by the 3rd respondent's own evidence he caused the appellant's land to be surveyed four months before he submitted his application to the Village Council for allocation of that land. The survey was done on 27th April 1994 and the application was submitted on 22nd July 1994. The land was formally handed over to him on 10th August 1994.

Admittedly he has now been issued with a certificate of the Right of Occupancy No 14794 over plot No 2 Block A for a medium term of 66 years.

Now, what would be the status of that grant in view of what has been observed above? Mr. Nkanda, learned counsel who advocated for the respondents has submitted that in such a situation, **Section 33 of the Land Registration Act [Cap 334 RE 2002]** comes into play.

Generally the provisions of **Section 33(1) of the Land Registration Act [Cap 334 RE 2002]**, gives the registered owner of land paramount rights over unregistered owner. However, there are exceptions to that general rule. The first exception is that the grant and registration of the right of occupancy must be free of fraud. [**See Section 33(1) of the Land Registration Act [Cap 334 R.E. 2002]**].

Now the logical question that follows is; can we say boldly and without blinking our eyes that the 3rd respondent Elias Matiko Chacha Matinyi was granted the Right of Occupancy over the suit land legally and free of fraud? The answer to this question can be a difficult one and particularly so where the issue of fraud is involved.

However, as I have already held and in view of the decision of this Court in the case of **Mateka Village Vs Antony Hyera (supra)**, the Village Council had no right and power to allocate

or ~~re-allocate~~ land to a villager which was in possession of ~~another~~ villager without the consent of that villager. In the case at hand the consent of the appellant was not obtained and the amount of compensation he is said to have refused is not disclosed. In other words it was left at the whims of the third respondent to decide how much he would pay as compensation.

There is evidence that the appellant was in possession of the suit land since 1971 and that he held it under customary right. There is also unchallenged evidence that in 1987 he formally applied to the Village Council and was granted a right of occupancy by the village authority. Under the provision of Section 18(1) of the Village Land Act, a customary Right of Occupancy is in every respect of equal status and effect to a granted right of occupancy.

Because his rights over the land had not been legally revoked or surrendered, the grant of the Right of Occupancy to

the third respondent under Section 9 of the Land Ordinance was ineffectual as far as the suit land is concerned because the Village Council had no right and legal capacity to re-allocate the suit land to another person.

In the event I allow the appeal and declare that the appellant is the lawfully owner of that part of land (suit land) 1. 5 acres which now form part of Plot No. 2 Block A which is registered under LO No. 1860471.


JUDGE

At Mwanza

28th September, 2012

Date : 28th September, 2012

Coram: Hon. A.R. Mruma, J.

For Appellant: Present in person.

For Respondents:

1st	}	Present in person
2nd		
3rd		

B/C : Rose

2nd Respondent:-

Our advocate is absent. We pray that our judgment be delivered despite his absence.


Appellant:-

I have no objection.

Order:-

Judgment delivered this 28th day of September, 2012 in presence of the Appellant and the 2nd and 3rd Respondent but in absence of the 1st Respondent and 2nd and 3rd Respondent's Advocate.

Right of Appeal Explained.


JUDGE

At Mwanza

28th September, 2012