

TANZANIA / JUDGMENT

kabende magesa vs berthha mwasi

2020 tzhc 2404 31 august 2020

COURT
TZHCDECIDED
31 August 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF MUSOMA AT MUSOMA MISCELLANEOUS LAND APPEAL NO 50 OF 2020 {Arising from Land
Appeal No 46 of 2019 in the District Land and Housing Tribunal of Musoma and Originating in the
Iramba Ward Tribunal in land Application No 15 of 2018) KABENDE
MAGESA..... APPELLANT Versus BERTHA
MWASI..... RESPONDENT

JUDGMENT

July & 31th August, 2020 Kahyoza, J. Bertha Mwasi sued Kabende Magesa at the Ward Tribunal of Iramba for encroaching her land, which she previously owned with her late husband. Bertha Mwasi won the case. The ward tribunal found Kabende Magesa a trespasser. Aggrieved, Kabende Magesa appealed to the District Land and Housing Tribunal (the DLHT). The DLHT upheld the decision of the ward tribunal. Dissatisfied still, Kabende Magesa appealed to this court raising seven grounds of appeal contending; one, that the tribunal erred in law and fact by declining to hold that the ward tribunal refused to admit his documentary evidence without legal justification; two, that the judgment of the DLHT is misconceived and self-contradicting; three, that the 1 chairman erred in law for not calling for additional evidence despite the appellant's request; four; that the chairman erred in law and fact to declare the respondent as the legal owner of the disputed land without iota of evidence; five, that the chairman erred in law and fact by failure to record the assessors' opinion in his judgment and reasons, which made him to differ; six, the chairman failed to call for additional evidence and admit the appellant's evidence yet he relied on it; and seven, that the chairman fatally erred to explain right of appeal in his judgment. The issues for determination are-

1. Did the DLHT err by not holding that ward tribunal refused to admit the appellant's documentary evidence?
2. Was the judgment of the DLHT misconceived and self-contradicting?
3. Did the chairman err in law for not calling for additional evidence?
4. Was there evidence to substantiate the findings of the ward tribunal?

5. Did the chairman give reasons for differing with the opinion of the assessors in his judgment?
6. Was it proper for the chairman to explain the right of appeal within its judgment? The appeal was argued orally. Both the appellant and the respondent were unrepresented. The Court heard the appeal orally. The appellant submitted generally on the grounds of appeal and the respondent replied generally. The appellant argued that the land in dispute was allocated to him by the Village Land Council. He submitted that he did not buy it. The Ward Tribunal manufactured its own evidence. He submitted further that the respondent once trespassed to his land, she was charged and convicted. 2 The appellant further argued that the DLHT refused to examine his evidence. It was biased. He added that the Ward Tribunal rejected to receive his evidence. He prayed to this court to analyze the evidence tendered by the village council. Replying to the appellant's arguments, the respondent stated that her evidence was in the record. She contended that she had evidence to prove that the appellant bought land. She submitted that it was not true that the village council allocated land to the appellant. In his brief rejoinder, the appellant insisted that the disputed land was allocated to him by the village council. Given the above submission and the evidence on record I, now answer the issues. Did the DLHT err by not holding that ward tribunal refused to admit the appellant's documentary evidence? I went through the records of the ward tribunal and found no way did the appellant intend to tender any document and the tribunal refused to admit it. To the contrary, the appellant promised in vain to submit the document to establish that the land in question was allocated to him. The ward tribunal's record shows the appellant's evidence as follows- "Kwanza kabisa napinga maelezo ya Mlalamikaji ya kuwa nilivamia shamba si kweli. Mimi ninatambua Serikali ya Kijiji cha Sikiro Hiyoniuzia eneo hiilo tarehe 11.10.2014" Hayo ndiyo maelezo yangu Mbele ya Baraza la Kata. Sgd K. Magesa The appellant told the tribunal that he did not have document to prove ownership while replying to the question, one of the members of the ward 3 tribunal, asked. The record reads as follows- Swali: Je Barua za mauziano unazo? Jibu: Hapana." It in the ward tribunal's judgment that the appellant failed to produce any documentary evidence. The ward tribunal stated- "Mlalamikaji ameshindwa kuwasilisha barua ya mauziano kati yake na Serikali ya Kijiji. Hivyo basi hakuna/ hana barua ya mwauziano hayo. Hivyo basi hakuna ushahidi wowote unaonyesha kuwa ' halmashauri ya kijiji iliuzia eneo hi/o kama mlalamikaji anavyodai." It is undisputed fact that the ward tribunal did not refuse to admit the appellant's document but he had none. Thus, the DLHT was right not to hold that ward tribunal refused to admit the appellant's document evidence. The appellant did not have any document to produce to the ward tribunal. The appellant manufactured the document, he attached to the petition of appeal to this Court and to the DLHT, as a reaction to the ward tribunal's judgment. I am unable to buy the appellant's complaint that the DLHT denied him a right to adduce additional evidence. That said I find no merit in the first and third grounds of appeal. I dismiss them. Was the judgment of the DLHT misconceived and self- contradicting? I have pointed out that the appellant argued the grounds of appeal generally. It is hard to tell which argument supports the second ground of appeal. I dissected the judgment of the DLHT to

determine whether it was misconceived and self-contradictory. I find no such contradictions. The judgment of the DLHT was based on the evidence on record. The DLHT 4 considered the evidence before the ward tribunal and the ward tribunal's conclusion. Finally, the DLHT concluded that it had no reason to fault the ward tribunal's reasoning. I dismiss the third ground of appeal. It is baseless. Was there evidence to substantiate the findings of the ward tribunal? The appellant submitted to this Court that the village, council allocated the disputed land to him. The record of the ward tribunal shows that the appellant stated that the village council sold the disputed land to him. There is no difference whether village council sold or allocated disputed land to him. The disquieting issue is whether the disputed land belonged to the village and whether the village council followed the proper procedure before it allocated land to the appellant. The appellant deposed that the village council sold him the disputed land on the 11.10.2014. The appellant while answering questions from the respondent he deposed that before the disputed land was allocated to him it was a village land. He added that Magere Kurwijira, the village chairman, supervised the allocation. He deposed- "Swali: Je shamba ulipewa Hkiwa la nani? Jibu: la Serikali ya Kijiji. Maana maana walikuja na hukumu fa ill No. 112/2001 iliyothibitisha kuwa ni eneo la kijiji. Swa/i: Je Mwenyekiti Serikali ya Kijiji aliyesimamia ugawaji huo ninani 2014? Jibu: Ndg. Magere Kurwijira" The evidence on record is clear. The respondent sued the Chairman of the village, Mr. Magere Kurwijira for allocating part of her land to the 5 appellant in 2014. The judgment of the tribunal is titled- "HATI YA HUKUMU DAI NO. 38 MDAI BI- BERTHA MWASI DHIDI YA, WENYEKITI WA S/KIJIJI SIKIRO NDG. MAGERE KULWIJIRA ILIYOTOLEWA NIBBLE YA BARAZA TAREHE 9/9/2014 KUSIKILIZWA KUGAWIWA SHAMBA LAKE EKARI TANO (5) NA SERIKALI YA KIJIJ SIKIRO KUMPA NDG. KABENDE MAGESA WA KIJJIJI SIKIRO." The ward tribunal decided that case in favour of Bertha Mwasi. It decided- "Ngd Magere Kulwuhira alishindwa kuleta ushaidi wake mfululizo mara tatu pamoja na kie/ elezo alichothibitishia Baraza, kwamba ataleta Ha tai ya kimilikishwa shamba hiIo na serikali ya kijiji Sikiro. Kwa kuzingatia ushahidi wa M dai Bertha Mwasi pamoja na Lucasi Musavyo M dai Bertha Mwasi ameshinda na Mdaiwa Ngd Magere Kulwuhira mwenyekiti wa s/ kijiji Sikiro ameshind.. Vilevile Baraza la Ardhi Kata Iramba limezingatia sheria ya Mabalaza ya Ardhi No. (5) ya Vijiji ya Mwaka 199 pia sehemu ya IV B na kifungu cha 54." Given the judgment of the Iramba ward tribunal in Land Case 38/2014 Ngd Magere Kulwuhira, the village chairman had no title over the disputed land to pass to the appellant by either selling or allocation. The doctrine of nemo dat quod non habet applies. Mr. Magere Kulwuhira, the village chairman or the village council had nothing to transfer to the appellant. That apart, even if Mr. Magere Kulwuhira, the village chairman or the village council had titled to pass, they could do so by following the laid down procedures. There is no proof that the village land council published its intention to allocated land as required by section 145(4) of the Village Land Act [Cap 114 R.E. 2019] (the Act). Section 145(4) provides: ■ "145.- (1) N/A; 6 (2)N/A; (3)N/A;

- (4) Where a village council considers that any village land held for a customary right of occupancy has been abandoned, it shall publish a notice in the prescribed form at the offices of the village council and affix a copy of the notice in a prominent place on that land-
- (a) Stating that the question of whether that land has been abandoned will be considered by the village council at a time which shall be not less than thirty days from the date of the publication of the notice;
- (b) Inviting any person in the village with an interest in that land to show cause as to why that land should not be declared to be abandoned." (emphasis supplied) There could be no valid allocation without following the procedures. In the upshot, I find that there was no evidence to support the appellant that the village council allocated or sold the disputed land to him legally. The contrary is true, I find that there was overwhelming evidence to prove that the disputed land belongs to the respondent. The ward tribunal properly found for the respondent. I have no reason to fault the DLHT to uphold the decision of the ward tribunal. I dismiss the fourth ground of appeal. Did the chairman give reasons for differing with the opinion of the assessors in his judgement? The appellant contended that the chairman did give reason for not upholding the assessors opinion. The decision of the DLHT was reached unanimously. In such a circumstance the chairman had no duty to account why he made a different conclusion from the assessors' opinion. This ground of appeal is baseless. I dismiss it. 7 Was it proper for the chairman to explain the right of appeal within its judgment? The appellant complained that the chairman of the DLHT erred to explain the right of appeal in the judgment. A cursory look at the judgment does support the allegation. I find that the chairman did not explain that the aggrieved party has a right to appeal. Even, if, the error is there in the judgment, I would hold that it occasioned no injustice. Thus, not fatal. The complaint is baseless. I dismiss it. Finally, I find the appeal meritless and dismiss it with costs. I uphold the decision of the two tribunals below, that the respondent is the legal owner of the disputed land. It is ordered accordingly. J. R. Kahyoza JUDGE 31/8/2020 Court: Judgment delivered in the presence of the parties. Right of appeal explained. B/CTenga present. J. R. Kahyoza JUDGE 31/8/2020 8

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