

TANZANIA / JUDGMENT

marry charles macharo vs kibaha district council 2022 tzhc 12614 31 august 202

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO 181 OF 2018 MARRY CHARLES MACHARO

.....PLAINTIFF (Administratrix of the Estate of the Late Charles Mcharo) VERSUS KIBAHA DISTRICT COUNCIL..... 1ST DEFENDANT
HASSAIN SALEHE MIKOLE2ND DEFENDANT (Administrator of the Estate of the late Mimulia Mikole) SAID HEMEDI 3RD DEFENDANT ALLY MSIMULIA4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

12th July & 31st August 2022 F. H. MAHIMBALI, J. The plaintiff Mary Charles Mcharo is suing as administratrix of the estate of the late Charles Mcharo, her husband. She is suing the first and fifth defendants for illegally taking the plaintiff's parcels of land legally owned and rectified 1 her title of ownership in the name of the President of the United Republic of Tanzania. As against the 2nd, 3rd and 4th defendants, the plaintiff claims invasion of the suit plots which she legally owns. During the hearing of the case, the plaintiff established how they bought the suit land from various natives/indigenous people at Msongola village, Mlandizi "B" at Kibaha area between July and December 1988. The evidence established a total land purchased from Said Msimulia is 4 acres, Mohamed Chengule – 8 acres, Wasiwasi Mpendu – 6 acres, Issa Msimulia – 40 acres, Peter Muswa – 5 acres, Said Mwinyimkuu – 10 acres, Mango Chongo Said – 3 acres, Omar Majaliwa – 1 acre and Said Majaliwa 18 acres. This is as per evidence by purchase agreements admitted as exhibits PE2 and PE3 collectively. The said suit land was then surveyed in 2007 and was divided into four registered farms namely: Farm No 3379, 3380, 3381 and 3382 with certificate of Titles 80602, 80601 and 80561 respectively. These Certificate of Titles were admitted as exhibits PE7, PE6, PE5 and PE8 respectively. 2 It is the plaintiff's testimony that following her ownership of the suit land, sometimes in 2012, the first defendant (DED) approached and informed her that as Kibaha was then District Council, the plots' farms she was possessing must be changed their land use from farms to residential area. So, there must be re-survey and that upon allocation of residential plots, the 1 st Defendant and Plaintiff would share the proceeds of sale of residential plots as per memorandum of understanding to be entered. To her surprise, before the

Memorandum of Understanding was agreed and signed between them, she wondered to have noted the 1st Defendant to have unilaterally put on advert via Mwananchi Newspaper (exhibit PE4) about sale of land plots (in the suit land) on the various prices ranging from 3000 to 3500/= per square meter depending whether the plot is for residential or commercial uses. On the other hand, the 1st Defendant disputes to have been in any negotiation or agreement with the plaintiff on the said deal. To the contrary, DW1 admitted that the suit premises which is at Mlandizi "B" in Kibaha District Council is part of 301 acres of land size – in which part of it the plaintiff claims (101 acres) was reserved by the Government for Freedom Fighters 3 of Mozambique Commonly known as FRELIMO area. That prior for the said area being reserved for FRELIMO freedom fighters of Mozambique, it was being owned by indigenous. The Government acquired it and dully made compensation to the original owners (indigenous people) who were recognized by then. DW2 in support of this assertion, relied on exhibit DE1 which is letter with Reference No LD/279678/11 dated 2/5/2013 from the Commissioner for Lands to DED Kibaha with this claim/ assertion the 1st defendant in collaboration with the Commissioner for Lands and Registrar of Titles claimed that the plaintiff's survey and allocation of the said land was unlawfully done as the Government was not dully involved. As to why the whole process was unlawful, DW2 testified that the necessary documents the plaintiff relied on the purchase of the land had no legal backup as those vendors were not residents of the said place for them to hold title and lawfully pass it to the plaintiff. Thus, as per this finding by the office of the Commissioner for Lands and Kibaha District Council, the Commissioner for Lands then issued notices for rectification on the previous issued certificates to Marry Mcharo for the President of the United 4 Republic of Tanzania (DE2 exhibit). Thereafter, through DE3 exhibit, the said rectifications were dully done as there was no any objection or reaction registered by the plaintiff to oppose the said rectification. With this evidence, Kibaha District Council (1st Defendant) claims that the plaintiff ownership's tittle over the suit land has already been rectified, so she is no longer the owner to contest anything as she failed to do so when was dully notified by the Commissioner for Lands. As regards the 2nd, 3rd and 4th defendants, there was only the testimony of Mr. Ally Msimulia (4th defendant). He testified that their father first lived at Msongola village where he obtained virgin land. He had a total of 95 acres. After the death of their father in 1988 (April), they decided to sell part of that land to the husband of the plaintiff measuring 44 acres. They had thus remained with 51 acres. They had been using it until 2008 when they noted their farm being invaded for farming. His claim then is, as per available evidence, the family of Msimulia had only sold to the plaintiff a total of 44 acres and not more. That their area is distinct from the area known as FRELIMO. 5 Following the contesting interests of the parties in respect of this suit, the issues for determination of this suit were agreed to be two:

1. Whether the total of 101 acres are owned by the plaintiff.
2. To what reliefs are the parties entitled to. In digest to the PW1's evidence, and her documentary exhibits - purchase agreements (PE2 and PE3 exhibits) it is undisputed that there was a purchase of that land measuring of 95 acres. The documentary exhibits (PE2 and PE3) are explicit on this. On the other side, the Commissioner for Lands through exhibit DE1 (his letter with Ref. No LD/27967811) dated 2/5/2013 informs DED Kibaha as follows, I quote:

“YAH: MASHAMBA NA. 3379, 3380, 3381, 3382, MLANDIZI B KIBAHA” Rejea kichwa cha habari hapo juu, Ofisi ya Kamishina wa Ardhi Nyumba na Maendenleo ya Makazi, inakiri kupokea nyaraka za kiwanja husika kwa ajili ya kupata saina na kusajiliwa mnamo tarehe 7/12/2008. kwakuwa kipindi hicho nyaraka zilizoambatanishwa zilikuwa hazijahakikiwa kwa usahilhi na kwakua hazikuleta mgogoro wakati huo, kiasi cha kufanya Rasimu za Hati 6 husika kuweza kupata usajili wenye namba C.T. 80605, 80561, 80602. Aidha baada ya malalamiko kuwasilishwa kutoka kwa Mkurugenzi Mtendaji Halmashauri ya wWlaya ya Kibaha ya kwamba mashamba tajwa hapo juu yalimilikishwa kimakosa aidha ofisi ya kamishina wa Ardhi ililazimika kufanya uchunguzi wa malalamiko hayo. Uchunguzi wa malalamiko hayo umefanyika na ofisi ya Kamishina wa Ardhi kwa kushirikiana na Halmashauri ya Wilaya ya Kibaha na kubaini kwamba kulikua hakuna uhalali wa Marry Mcharo kumilikishwa mashamba namba 3379,3380,3381, na 3382 katika kijiji cha Mlandizi B. Matokeo ya uchunguzi umebaini ya kwamaba umiliki wa Marry Mcharo kwenye mashamba hayo ni batili kwa kuwa umegubikwa na udanganyifu na kughushi nyaraka. Moja ya mambo yaliobainika kuwa sio haki kwa kumilikisha mashamba husika kwa ndugu Marry Mcharo ambaye alidai kuwa ni msimamizi wa mali za marehemu Charles Mcharo ni kwamba hawa wote hawakuwai kumiliki ardhi katika eneo la Mlandizi B kama wakazi wa asili au kuwa na uthibitisho wa ununuzi wa eneo hilo toka kwa wakazi wa asili au serikali ya kijiji. Pia kwa kuangalia nyaraka husika zilizowasilishwa ni kwamba nyaraka ziliwasilishwa kama mhutasari wa Kijiji cha Mlandizi B ziligushiwa, hii inaonyesha kwa kuangalia kuwa baadhi ya wajumbe hawakuwahi kuwa wajumbe wa Serekiari ya kijiji. Wajumbe 7 walioorodheshwa hawakushiriki katika kikao hicho, hakuna saina za wajumbe kwenye muhtasari hawakuonesha ukubwa wa shamba linaloombewa kwa hayo basi ilijulikana ya kwamba muhtasari ulighushiwa au kutengenezwa na aidha kwa kushirikiana na Afisa Mtendaji au yeye mwenyewe pamoja na hayo maombi yaliyowasilishwa na ndugu Charles Mcharo hayakuonesha ukubwa wa shamba analimiliki katika kitongoji cha Msongola kijiji cha Mlandizi B. Aidha imethibitishwa kwamba eneo lilipimwa mashamba namba 3379, 3380, 3381 na 3382 ni eneo ambalo awali lilitengwa kwa ajili ya kujenga kambi ya wakimbizi ambapo serikali ililipa fidia kwa wakazi wa asili waliokuwa wakiishi eneo hilo. Kwa hilo basi uhalali wa ndugu Marry Mcharo kumiliki Mashamba tajwa hapo juu na ndugu Charles Mcharo haukuwasilishwa na kwamba yeye ndugu Marry Mcharo alikua ni Msimamizi wa mirathi tu na wala siyo mmiliki kama kungekua na uhalali. Na mwisho kwa kuangalia uteuzi wa mtayarishaji wa nyaraka zilizowasilishwa na ofisi yako ndugu Damian Peter Mwang’umbi Afisa Ardhi wa Mji wa Kibaha kutoka kwa Kamishina wa Ardhi kuhusu masuala ya Kibaha District Council haukufanyika. Hivyo barua ya toleo ya ndugu Marry Mcharo ni batili. kwa barua hii ofisi ya Kamishina wa Ardhi inakuutarifu kuwa imeandaa nyaraka za kusimamisha umiliki wa mashamba haya mpaka mgogoro huu utakapomalizika. Sgd: S. B. Maliza K.N. Y. Kmishina wa Ardhi. 8 It is on the basis of this letter (admitted as exhibit DE1), DW2 informs this court that the grant of ownership of the said farms to Charles Mcharo was faulted. The evidence of DW2 for 1st defendant falls short on many aspects. One, there has been no proof if those persons listed in PE2 and PE3 exhibits were not original owners of the said parcels of land as claimed. To prove, this there ought to have been a clear valid register of residents

and owners of land at Msongola village by the said time and who received the said compensation as alleged in order counter or rebut the evidence by the plaintiff's ownership. Two there has not been tendered in court the said investigation report as claimed. Three, the alleged forgeries by VEO or other village leaders has equally not been established in court as alleged. Four, the alleged notices/ letter and notice of rectifications as per alleged frauds or forgeries were not established to have been dully communicated to the plaintiff. The said letters: DE1, DE2 and DE3 exhibits seem to be addressed to DED Kibaha and not Mary Mcharo herself; but only copied to her. I wonder if that is the proper procedure. In my considered view, the defense by the 1 st defendant has not been of any legal significance to legalise the said 9 purported rectification as done. There is ample evidence through PE2 and PE3 exhibits and testimony of DW1 that Charles Mcharo purchased the said land lawfully and from the original owners. The purported cancellation or rectification is unjustified and it is unacceptable. Should the first Defendant or Commissioner for Lands needed that land for any Public use, he ought to have complied with the requisite law i.e. The land Acquisition Act. Short of that there is no way the Kibaha District Council or Commissioner for Lands, were justified to do what they did. Since neither Kibaha District Council nor Commissioner for Lands own Lands in Tanzania, they can only do so by acquiring it as per law (The Land Acquisition Act, Cap 118-section 3 and 11 read together with section 3 (1) (b), (f) and (g) of the Land Act Cap 113 R. E. 2019). All this considered and digested, the first issue is answered in affirmative that the plaintiff lawfully purchased parcels of land from the indigenous people. As what is the land size as per exhibit PE2 and PE3 must be confined to 95 acres only. This then comes to the claims against the 2nd – 4th defendants. As per available evidence, it is undisputed that the total sold land by Msimulia family is 44 10 acres. However, there is no proof that they validly own 51 acres parcel of land. As to what reliefs are parties entitled to, I order the following:

1. The suit land measuring 95 acres belongs to the late Charles Mcharo and lawfully administered/inherited by his wife Marry Charles Mcharo.
2. The purported rectification/cancellation of her titles of land by the Commissioner for Lands through DED Kibaha is unlawful, unjustified and of no legal effect. The same are hereby annulled.
3. Should the 1st Defendant need to acquire that land, should only do so in strict compliance to the law in place – the land Acquisition Act, Cap 118 (section 3 and 11 of Cap 118 read together with section 3 (1), (b) (f) and (g) of the Land Act Cap 113 R. E. 2019).
4. As regards the 2nd – 4th defendants are trespassers to the suit land to the extent of encroachment.
5. All existing structures or anything erected buildings by the defendants are hereby ordered to be demolished soonest.

6. Permanent injunctions to all the defendants or their agents, assignees and whatsoever, are issued restraining them from interfering with the plaintiff's suit premises unless due process of the law is involved. That said the plaintiff's claims hereby succeeds to the extent explained above. Parties shall bear their own costs. DATED at DAR ES SALAAM and MUSOMA this 31 st August 2022 Court: Judgment delivered this 31st day of August, 2022 by live video link connected from Musoma High Court and High Court Land Division – Dar es Salaam in the presence of Mr. Luoga, state attorney for the 1st defendant, Mr. Gidion Mugo, RMA, 2nd defendant, 3rd defendant, 4th defendant 5th defendant and plaintiff all being absent but duly notified. 12 13

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