

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB - REGISTRY AT MUSOMA MISC. LAND
APPEAL NO. 000022342 OF 2024 REFERENCE NO. 202409091000022342 (Arising from the decision
of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 158
of 2020) BETWEEN PETER MACHIRA..... APPELLANT VERSUS
EMMANUEL MAWUTI SOMBA..... RESPONDENT

JUDGMENT

ZS01 November & 03rd December, 2024 M. L, KOMBA. J. This appeal emanates from the decision of the District Land and Housing Tribunal for Mara at Musoma (the DLHT) in Land Application No. 158 of 2020 where the appellant was ordered to compensate the 1st respondent, I the land measured 10.4 meters by 9.2 meters. The order was a result of analysis done by the chairman of the DLHT that appellant and respondent own different surveyed Plots, 446 and 448 Block "Y" in Kigera area respectively. 1st respondent claimed that appellant wants to trespass to his Page 1 of 11 land while appellant claims that respondent has built a house in his plot. The decision of the DLHT that appellant has to compensate 1st respondent amused the respondent hence this appeal with four grounds that;

1. That the trial Court erred both in law and facts once admitted the application and determined it to its finality while the respondent was entitled to file objection proceedings as per Order XXI rule 57 of the Civil Procedure Code (Cap 33 R.E 2019) Instead of rushing to file a fresh suit.
2. ATENATIVELY TO GROUND 1, That the trial Tribunal errors both in law and facts when reached its decision without considering the strong evidence adduced by the appellant.
3. That the trial Tribunal erred both in law and facts when reached its decision without considering the merit of preliminary objection raised by the appellant.
4. That, the trial Tribunal erred both tn law and facts when granted the respondent a prayer never asked. •• When the appeal was placed before me for hearing, appellant was represented by Mr. Chiwalo Nchai Samweli while both respondents stood solo without any representation. It was the appellant counsel who was allowed first to make his submission in support of the appeal. Mr. Chiwalo submitted on the first ground that the 1st respondent was supposed to file objection proceedings instead of filing fresh application because the

appellant was a decree holder which was issued in Land Page 2 of 11 Application No. 61 of 2015 followed by application for execution No. 28 of

2018. Under that circumstances he went on submitting that so far as the 1st respondent claimed he was not party to case, he was supposed to file objection proceedings and the fresh application was supposed to follow when objection failed. He contests filling of fresh application because the judgment was executed. He supported his arguments by Order 21 rule 57 and 62 of the CPC. And decision in Neema Joseck Maganga and Others vs Yuda Gideon Mtigi and Others, Land Case No. 13505 of 2024 in which it was decided that when application fail then it follows fresh suit. On the second ground he submitted that the 1st respondent failed to prove to the balance of probability who trespassed to the land of the other as the 1st respondent evidence is in doubt when said he don't know the size of his land and he was not aware of the survey done in the plot. He further complained that respondent did not tender sale contract neither know the demarcation or size of land which was bought by his parents apart from contradictions on whether he inherit the said land or he was given when his parents were alive. He went on clarifying that if he was given the said land in the year 1997 by that time 1st respondent was 15 years old, he was Page 3 of 11 not able and allowed by law to own properties. However, Mr. Chiwalo was of the submission that his last parent died in 2000 that means he started to own that land in the year 2000. He insisted that the appellant managed to prove to the balance of probability that the land belongs to him as he bought in 1998 and it was surveyed land since 1995 and he has exhibits to prove his position. Counsel supply, this court with decision in Paulina Samson Ndawavya vs Theresia Thamos Madaha, Civil Appeal No. 45 of 2017 insisting that 1st respondent had a burden to prove his case on the balance of probability. He reminded this court there was Objection which was overruled during trial in which he believes the 1st respondent was supposed to be administrator because he testified that he inherits the said land and therefore he was supposed to apply for letter of administration. That was his submission on the 3rd ground. Submitting on the 4th ground he complained that the trial Tribunal granted what was not prayed as the appellant was ordered to surrender 10.40 by 9.20 meters of land but was not prayed by the 1st respondent as he applied for ownership of the land in plot 448 and declaration that appellant has trespassed to his land. He reminded the saying that the court is not the Page 4 of 11 mother of anybody that can grant what was not asked while citing Ekson Mtafya vs Maiko Mtafya, Probate Appeal No. 06 of 2020. He went on complaining that compensation is claimed within a year and not more. He prayed their appeal to succeed and nullify proceedings and order of the Tribunal in Application No. 158 of 2020 and he prayed for costs. On the 1st ground, the 1st respondent was of the submission that the Tribunal was correct to entertain the case as any person has right to file a matter in Tribunal. On the 2nd ground it was his submission that he had stronger evidence than appellant during trial and insisted that the dispute started after the death of their parents as tendered exhibits revealed. He went on submitting on the 3rd ground that the appellant applied private survey without involved the neighbours as party of his land was included in private survey. He complained that land officer did not inform other

neighbours on the survey and there were no forms to show survey and he did not consent while insisting PO had no merit. He was brief in 4th ground that it was right for the tribunal to order compensation as part of his land was included in the survey plan without being compensated. He prayed the appeal be dismissed with costs and the decision of DLHT be upheld. Page 5 of 11 The 2nd Respondent supported the submission made by the 1st respondent without addition. Having carefully considered the submission, I will now embark on determination of the grounds of appeal fronted by the appellant. This being the first appeal, I shall re-evaluate evidence while analysing grounds of appeal. See Mwita Cornel Philimon @ Gaucho vs Republic (Criminal Appeal No. 306 of 2020) [2023] TZCA 17822 (10th November, 2023). I shall start with the 3rd ground about PO which was overruled. Appellant insisted that 1st respondent was supposed to have a letter of administration of the estate of his late parents. In the land form which was filed by the 1st respondent he stated the land is located at Kigera, he mentioned names of neighbours and he attached letter of offer that he owns plot No 448 Block "Y". The letter of offer shows the land belongs to 1st respondent so he is not administering the deceased property so far as the offer has his name. I find the 3rd ground has no merit. The 1st ground the appellant complained of the procedure, that 1st respondent was supposed to file objection proceedings instead of the fresh suit. He supported his submission by Order 21 rule 57 and 62 of the CPC. I Page 6 of 11 agree with the counsel for appellant submission that there must be objection proceedings when a property attached was not liable to attachment or beneficiary was not party to the suit which resulted to the said attachment, I also subscribe to the principle in Neema Joseck Maganga and Others vs Yuda Gideon Mtigi and Others (supra). On top of that, I have read typed proceedings at page 20 when appellant gave his testimony, he testified that execution did not take place due to objections. That was proved in amended Application which was filed on November 2022 one of the attachments show there was Misc Application No. 368 of 2018. Am settled that there was objection as testified by appellant himself. On the 2nd second ground on analysis of the evidence by the appellant, Mr. Chiwalo contended that respondent failed to tender any exhibit to prove his parents bought the said land and he did not know the size of the land he claims to belong to him. The first respondent insisted that he had stronger evidence than of the appellant. Reading proceedings, it is true that first respondent did not tender any exhibit, however he testified that the land was bought in 1986 and his parents started to build house till 1995 when they started to occupy the said house. He mentioned the name of the Page 7 of 11 person whom he sold his land to first respondent parents and was the same person who sold to Cosmas then to appellant. Originally the land in which plot 446 and 448 are located was owned by one person, name of that person and each witness is credible. It was analysed by the Chairman of the Tribunal in the tribunal judgment that appellant bought his land from the same person who sold to parents of first respondent and he analysed exhibits tendered by the appellant at page 6 of the judgment. I find the evidence of the appellant was considered that he bought the land in 1998 from Julius Malima and therefore the ground is devoid of merit. 4th ground is about the respondent to be granted what he did not pray for. In the Land Application the first respondent complained of the attachment of

his house without following procedures and justification and the appellant encroached to first respondent land. There is no doubt that when first respondent parents bought the land, the area was surveyed. As per appellant testimony and exhibit the area was surveyed and the plan was approved in 1995 when first respondent and his family started to occupy their house and the offer was written in the name of first respondent name. That is to say, when Musoma Municipal survey the area in 1995 they found the house of the first respondent in place. Later in 1998 appellant Page 8 of 11 bought the land adjacent to first respondent and wanted it to be demolished as it seems to be encroached to his Land No. 446. From testimony of each side, the house in question was constructed before the survey. The land is now surveyed and is identified by plot number and block as indicated in amended land application. Further, in the same amended land application the first respondent complained that the decree issued affect part of his house and he will be left without a house. On these words, the first respondent is complaining part of his land in which there is part of his house. He claimed that appellant has encroached to his land and what was decided by the Chairman of the Tribunal was compensation of the land which belongs to first respondent before the survey. There is no doubt that there is a house which cut across both plots, 446 and 448 as witnessed during site visit and as testified by the Land Surveyor who appeared as Tribunal witness. The house which is claimed to encroach to another plot was built between 1986 and 1995 as per testimony of SMI and SM2. So far as the survey and planning of the area completed in 1995 as per testimony of land surveyor, the house which cross two plots was in existence when the area was planned in 1995. What does the law provide Page 9 of 11 for customary ownership of land. Section 34 of the Land Act, Cap 113 is relevant in this matter; {3} Where a right of occupancy includes land which is occupied by persons under customary law, it shall be a condition of that right of occupancy that those customary rights shall be recognised and those persons so occupying the land shall be moved or relocated, only-

- a) so far as is necessary to enable the purpose for which the right of occupancy was granted to be carried out; and
- b) in accordance with due process and principles of fair administration, being given- (i) not less than one hundred and eighty days'notice of any requirement to move; (H) the opportunity to reap crops sown before any notice to move was to those persons; (Hi) the right to continue to use water which those persons had a right to use before being given notice to move; and (iv) prompt payment of full compensation for loss of any interests in land and any other losses that are incurred due to any move or any other interference with their occupation or use of land. The right of occupancy issued to appellant interfere the land owned by the first respondent which had house which is subject to this appeal. So far as the offer and right of occupancy was issued after the 1995, the land had a Page 10 of 11 house in which first respondent has interest. Under section 34(3) (b) (iv) of the Land Act, Cap 113 the first respondent is entitled to compensation. In general, I find the appeal lacks merit as per above analysis and it is hereby dismissed with costs. DATED at MUSOMA this 03rd Day of December, 2024. M. L. KOMBA JUDGE Page 11 of 11

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