

TANZANIA / JUDGMENT

SIMON AXWESSO

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24 December 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA [ARUSHA SUB- REGISTRY] AT
ARUSHA LAND CASE NO. 1103 OF 2024 (Original Application No. 02 of 2019 of District Land and
Housing Tribunal of Karatu at Karatu before Hon. M.R. Makombe, Chairperson) SIMON
AXWESSO.....APPLICANT VERSUS BARAN MAN KA
LA..... RESPONDENT

JUDGMENT

24th December, 2024 & 2ffhFebruary, 2025 I.C. MUGETA, J The first ground of appeal is that, the respondent's case was not proved on the balance of probability. The second is that the tribunal chairman poorly analysed the evidence on record. Before submitting on the grounds of appeal, Godfrey Saro, Counsel for the appellant has challenged some procedures adopted by the trial tribunal in the recording of evidence. One of them is that the chairman did not append his signature after recording evidence of each witness. I find the complaint without merits. Both the typed and handwritten records of the tribunal show that the chairperson signed after recording evidence of each witness to authenticate it. 1 IPage The second complaint which has no merit too is that the opinion of assessors was not read to the parties. However, page 38 of the typed proceedings reads: "Amri Maoni haya yamesomwa na wajumbe wa Baraza Mrs. - R. Panga na Mr. J.A. Akonaayna kuwa sehemu ya mwenendo wa shauri, pia yameambatan/shwa katika jalada...." This quotation proves that the opinions were read to the parties. It was on 22/11/2023. The above finding on the merits of the two objections mirrors the submission of Innocent Mmary, learned counsel, engaged by the respondent for drawing only. He has argued that the complaints have no merits for the same reasons as above stated. In the first ground of appeal, the appellant's argument is that the evidence of Laurean Gabriel (DW2) was not considered by the tribunal in its decision. That evidence reads: "...mwaka 1978 tuligawia wazazi wa wadaawa maeneno ya kujenga. Axwesso alipewa eneo /isi/o na makazi, eneo la mgogoro ni mali ya axwesso ameishipale na wazazi wake" Counsel for the appellant has argued that had the tribunal considered this evidence of a person who participated in allocating the dispute land to the fathers of the disputants, it would have reached a different decision considering the fact that the respondent failed to prove the actual size of his land. In his reply, counsel for the respondent referred to the pleadings to argue that the evidence of the appellant was incredible and it failed to prove the appellant's case on the balance of probabilities. Let me put the dispute in the right perspective according to the pleadings. The respondent pleaded at paragraph 6 of the application that the dispute land was

owned by his father and passed it to him by gift *intervivos*. That during operation vijiji he was already in possession of the land and it was not affected by the operation but later he gave part of it to the appellant's father. According to paragraph 6 (i) (v) of the amended application, the land he gave to the appellant's father measures 0.75 acres and it is that land which was bequeathed to the appellant upon his father's death as pleaded at paragraph 5 of the amended WSD to the amended application. At paragraph 6 (i) (vii) of the amended application, the respondent averred that the appellant trespassed into the dispute land in 2011. At the same time, he relocated from the 0.75 acres land whereby, he 3 | P a g e cutdown trees for charcoal and cultivated it without consent of the respondent. The reply to paragraph 6 of the application is at paragraph 5 of the amended WSD to the amended application. The fact that the appellant father's land measures 0.75 acres is undisputed. It is further stated that the applicant's father was allocated the dispute land during operation vijiji. Other details are as quoted hereunder per paragraph 5 of the amended WSD. "The applicant's father was the one who was bounded by the respondents father, the land which is later given by late Mankala Baran to his sons Nada Mankala and Su/uo Mankala. After the demise o f the aforesaid Manka/a's sons the applicant trespassed to their land and the respondent's land". For clarity of meaning, the word "bounded" in the above paragraph, I presume, is a broken English for "bordered" Two issues arise from the pleadings in paragraph 6 of the amended application and paragraph 5 of the amended WSD to the amended application. Firstly, that the appellant has a land around the dispute land which he lawfully inherited from his father. It measures 0.75 acres. How the appellant's father acquired this land is disputed. While the appellant states that it was by operation vijiji allocation, the respondent says he gave it to the appellant's father. Secondly, that there is another land which each party alleges the other party has trespassed. On his part the appellant alleges that that land belonged to the respondent's brothers called Nada and Suluo. Logically therefore, this is the land subject of this dispute as the respondent has not laid any claim over the 0.75 acres land of the appellant. It is not clear from the record why he says that the respondent trespassed into his brother's land. Did the trial Tribunal error to hold that the dispute land belongs to the respondent? I will start with the evidence of Laurean Gabriel (DW2) which the appellant alleges that it was not considered by the tribunal. In its judgment, indeed, the tribunal did not consider the evidence of DW2 that the village council gave land to the appellant's father. This was an irregularity. However, as first appellate court, I shall consider it in my role of re-evaluating the evidence. Evidence can be oral or documentary per section 61 of the Evidence Act [Cap 6 R.E. 2022]. The Tribunal chairman rejected the evidence of the appellant that operation vijiji gave his father the dispute land because: 5 | P a g e "...kiutaratibu wote waliopewa wa/ipata nyaraka za kuthibitisha kupewa au kuandikishwa kwenye register (sic) ya Kijiji jambo ambaio ha/ikufanyika wa/a kuthibitishwa na mdaiwa" It is my view that the fact that those allocated land during operation vijiji were given ownership documents or were registered in registers is extraneous to the evidence on record. No witness testified to this fact so the tribunal chairperson had no right to make statement of fact without acknowledging the source. Further, even if that was true, oral evidence of DW2 that he was a village council member in 1978 and he participate to allocate land to the appellant's father sufficed to prove the allocation. That evidence is undisputed. The only challenge in the evidence of DW2 is failure to state how much land was given to the appellant's father. In view of the foregoing, I ought to have

determined the credibility of DW2 who says the appellant's father was given the land by the village council against the respondent. When he testified as PW1, the respondent said that he gave the land to the appellant's father. However, there is no need to do so because there is no dispute that the appellant's father owned land at that area. The dispute is on the appellant expansion from the land of his father outwards. The respondent says that the land of the appellant's father measures 0.75 acres. The appellant, however, did not state its size either in the pleadings or in evidence. On that account, I hold that the land of the appellant's father which the appellant inherited and lawfully owns measures 0.75 acres. Whether it was given to him by the village council or the respondent does not matter. What matters, which in fact is the Kernel of his dispute, is whether the appellant, as pleaded in the amended application at paragraph 6 (vii) and testified by the respondent has expanded his activities outside the 0.75 acres. At paragraph 6 (i) (vii) of the amended application the respondent states: " That all o f sudden in the year 2011, the respondent herein trespassed into the dispute land, cut down trees, burnt charcoal and cultivated the same without consent o f the applicant. The respondent a/so shifted the house constructed by his father in 0.75 acre given by the appellant to the disputed land". The allegation of encroachment in the above pleading was proved in evidence. The respondent (PW1) testified that in 2011, the appellant encroached into his land. At page 13 of the typed proceedings, he testified: "...Mwaka 2011 Simon a/ivuka mpaka akajenga kwenye eneo /a mgogoro, akakata miti na kuchukuaa mawe yangu" In his evidence, the appellant did not address the question of encroachment. He limited his evidence to the land being owned by his father and so did his witnesses, namely, DW2 and Thomas Lulu (DW3). In his amended WSD, the appellant also says nothing about the encroachment pleaded at paragraph 6 (vii) of the amended application which amounts to admission. On account of the fact that the appellant did not dispute the allegation about his encroachment in both his pleadings and evidence, I hold that the appellant has exceeded from the 0.75 acres he owns and encroached into the respondent's land. The complaint in the appellant's submissions that the respondent did not state the actual size of the dispute land has no merits. At paragraph 3 of the amended application he stated that it measures approximately 6.2 acres. The first ground of appeal has no merits. The complaint in the second ground of appeal is almost resolved by the determination in the first ground of appeal. In his submission, counsel 8 |P a g e for the appellant has argued that, the Tribunal's verdict is not supported by sufficient reason for failure to discuss the appellant's evidence. This argument is a repetition. I have admitted that some parts, not all of the appellant's evidence, were not considered. The relevant evidence concerned the appellant having a land at the dispute area which is undisputed by the respondent. I have re-evaluated that evidence and found that even if the tribunal had considered it, nothing would have changed. The second ground of appeal has no merits too. In the final analysis, I hold that the whole appeal has no merits. It is dismissed with costs. I order that the whole dispute land other than 0.75 acres formerly owned by the appellant's father, belongs to the respondent. The decision of the tribunal is upheld. I.C. MU JUDGE 20/02/2025 Court: Judgment delivered in chambers in the presence of the respondent but in the absence of the appellant. Sgd: I. C. MUGETA JUDGE 20/02/2025 9 |P a g e

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Prepared on 12 October 2026 · Esheria