

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 165 OF 2019

*(From the Decision of the District Land and Housing Tribunal for Kinondoni District
at Mwananyamala in Land Case No. 380 of 2016)*

HELENA ELIAS CHOMA..... APPELLANT

VERSUS

MAGAMBO MAKONGORO..... RESPONDENT

JUDGMENT

OPIYO, J.

A confusion over ownership of the suit land, which is Plot No. 509, Block G, located at Mbezi, Medium density area at Kinondoni, Dar es Salaam has resulted into a feud between Helena Elias Choma (Appellant) and Magambo Makongoro (Respondent). The respondent claims to have ownership of the said land, having been allocated the same by the Dar Es Salaam City Council in 6/7/1985. On the other side, we find the appellant, claiming to be the custodian of the suit plot, which being bought by her late husband, Elias Choma Mniko, registered in the name of their late daughter Flora Elias Joseph. The appellant is the legal representative of her late daughter, Flora Elias Choma.

At the trial tribunal, Mr. Magambo Makongoro took the ownership rights, after being declared by it, through a judgment delivered by Hon.

Chairperson, R. B: Mbilinyi, on 5th, July 2019. The appellant was ordered to vacate the suit land and remove whatever was put by her on it. Through the services of her learned Advocate, Ever Mayala, the appellant is before this Court now, challenging the appropriateness of the judgment and decree of the trial tribunal and further prayed for the same to be quashed and set aside with costs. Her memorandum of appeal contains the following grounds of appeal: -

1. That the trial tribunal erred both law and in facts for failure to consider that the disputed land was firstly allocated to managing Director Interfreight Tanzania Ltd. Since 1984 and that the allocation was not revoked.
2. That the trial tribunal erred both in law and in facts for failure to consider that the applicant at trial tribunal sued a wrong party.
3. That the trial tribunal erred both law and in facts by considering a weak and contradictory evidence from the respondent's side and failed to consider heavy expert evidence from the appellant's side.
4. That the decision and the decree of the trial tribunal are themselves problematic and incapable of being executed.

Mr. Makongoro, appearing in person refused to let it go. He strongly disputed the appeal and asked the court to dismiss it with costs for lack of merits.

Seeing that contest between the two parties above and through the request of parties themselves, the court ordered them to argue their appeal by way of written submissions. Submitting in favour of the appeal, on the 1st ground,

Advocate Eva was of the view that, there was a double allocation of the suit land. Therefore, in order to determine as to who is the rightful owner of the suit land the trial tribunal ought to have considered who was first to be allocated the suit land. Instead, the trial tribunal decided the respondent to be the lawful owner of the land without considering the fact that the same was first allocated to the Managing Director of Intefreight Tanzania Ltd on 21st July 1989 and it has not been revoked to date. Therefore, all the subsequent allocation is irregular and void. Advocate Eva cited the case of **Colonel Kashmir versus Naghinder Singh Mathur (1988) TLR 163** to substantiate her argument.

In reply to the submissions of the appellant's counsel in respect of the 1st ground of appeal, the respondent maintained that, he was the 1st to be allocated the land in 1985, four years before the appellant in 1989. Therefore, the trial tribunal was right to decide in his favour as stated in **Colonel Kashmir** (supra), having the gist that where a party has been given a piece of land, a subsequent grant of the same land to another person before the first is revoked renders the subsequent grant irregular.

In rejoinder, the Eva emphasized that, the Managing Director of Intefreight Tanzania Ltd was the 1st person to be allocated the suit land in 1984 and not the respondent. Therefore, the cited case of **Colonel Kashmir versus Naghinder Singh Mathur (1988) TLR 163 supra** defeats the respondent's submissions.

After going through the submissions of both parties and perusal of the records from the trial tribunal I have noted several issues as highlighted shortly. The respondent was allocated the suit land in 1985, as seen in

exhibit P1, letter of offer and exhibit P2 collectively, a letter from the Director Kinondoni to the Land commissioner dated 26 February 2016, narrating the history of disputed property ownership. The same land was again allocated to one Flora Elias Joseph in 1989 as per exhibit D1. The respondent has been paying land rents from then as shown on exhibit P3 collectively.

There is no tangible evidence suggesting that the suit land was firstly allocated to the Managing Director of Intefreight Tanzania Ltd as alleged by the appellant's counsel, save for the letter dated 17th July, 2017, written by J.C. Kamugisha, on behalf of the Land Commissioner, notifying the appellant that they were in the process of revoking the grant of the suit land to Managing Director of Intefreight Tanzania Ltd on 24/7/1985. It is not known if the said grant really existed and if the same was subsequently revoked or not. This is derived from the contradictions of exact when, if at all, the same was allocated to the said Managing Director of Interfreight Tanzania Ltd. According to exhibit D2, the allocation was on 24th July 1985, while according to DW3 testimony the same was allocated on 24th July 1984.

DW3, an officer from Commissioner for Lands Office admitted smelling double allocation business in the whole saga, but he supports the right to go to the respondent as the person who developed the property. However, I am not in agreement with his contention due to the reason that, the evidence is that, the initial developments were done by the respondent, construction of servant and story building foundation up to the beam level. The respondent failed to explain how the construction was done, she throws everything to be done by her late husband. In the circumstances the testimony on the condition of the property at the time the applicant came to

the hold of it remains a misery. She is not even aware how the land was acquired in the first place. It is also surprising how the Ministry records did not reflect the respondent at all in wake of plenty of evidence pointing to that. There is letter dated 26/ February/2016 and a list of those allocated properties in block G (exhibit P2 collectively) from Municipal Directors, Kinondoni, office to the Commissioner for Land office informing the commissioner about the missing hard copies records of the property save for respondent's ownership in the soft copy. How come about a year later, the same Commissioner's Office lacks any trace of the respondent in its records? and instead there Managing Director Interfreight is introduced to have gotten the property a month or year earlier than the respondent.

My take from the above situation is that, even if, it is true the grant was earlier on been to another person, it still remains that, it is the respondent who was allocated the property before the appellant, 1985 and 1989 respectively. According to testimony of PW1 and PW2, it is the respondent who had developed the land first. This testimony has not been challenged, as all appellant's witnesses could not show knowing anything about the acquisition and development of the property in question. The testimony of DW1 and DW2 remains hearsay as far as acquisition and development of the property is concerned. The evidential value of a hearsay evidence, being low, is a common understanding; I need not over emphasize. Therefore if any revocation of interfreights' title, then the same revolves to the respondent rather than the appellant. And if it was not yet revoked, then, how did exhibit D1 came into existence showing the suit land was allocated to Flora Elias Joseph?

Now, based on the above findings, it is my settled view that, there was a double allocation on the suit land and the respondent was the first person to be allocated the suit land before alleged appellant's daughter. The appellant and her family came after the first occupier was already there and even developed the property.

And thus, in case the application of the priority principle is put into play into play in solving the dispute between the parties, the respondent being the first person to be allocated the suit land, and first developer, he is the rightful owner of the suit land. The contextual meaning of the principle is that whenever there are two competing interest the earlier in time is stronger in law. Therefore, the first occupier in time prevails over the other. The same principle has been applied by this court to determine the rights of a parties in a number of cases where there exists competing interest on the land. In the case of ***Sara Ngonyani vs Jocye Philbert Hyera, Land Appeal No. 167 OF 2016 (Unreported)***, where Kerefu J. (*as she then was*) emphasized that:-

In other words, if rights are legally created in favour of two persons at different times, the one who was the first in time should have advantage in law.....I do therefore associate myself with the decision made by the tribunal in respect of this principle"

Therefore, the 1st ground of appeal is dismissed for lack of merits.

On the 2nd ground of appeal, the appellant claims to be the legal representative of the late Flora Elias Joseph, while the letters of Administration of the deceased, whose estate applicant administers, name

appears to be Elizabeth E. Choma. It remained unsolved if Elizabeth E. Choma and Flora Elias Joseph is one and the same person. It was the duty of the appellant to prove to the satisfaction of the trial tribunal that, the two names belong to the same person who is now deceased in whose name the property is allegedly registered. After all, be as it may, still under section 45 of the Land Disputes Courts Act, Cap 216 R.E 2019, such irregularity is curable. The same do not affect the substantive justice as far as the dispute of ownership of the suit land is concerned. The section provides that:-

"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or, rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice"

Based on the quoted provision above, I am of the opinion that, the records of the case can be corrected to include the proper names at any time upon proof, if such change does not affect substantive justice. But, as I insinuated earlier, there was no proof it the applicant is a legal representative of Flora Elias Joseph in the first place. The 2nd ground of appeal is also dismissed.

Thirdly, the appellant faulted the trial tribunal for considering the weak and contradictory evidence from the respondent while ignoring the heavy and expert evidence from the appellant. The submissions of Advocate Eva on this ground was to the effect that, the case at the trial tribunal was not proved

on balance of probabilities as required in law as far as civil suits are concerned. That, the evidence of the expert witness from the Land Commissioner's office showed that the suit land belonged to the Managing Director of Interfreight Tanzania Limited since 21.07.1989 and later the plot was allocated to Flora Elias Joseph on 21.01.1989. She argued that, the trial tribunal disregarded this evidence, thereby contravening section 110(1) of the Evidence Act, cap 6 R.E 2019. This was also her emphasis in rejoinder. The respondent maintained on this ground that, the submissions by the respondent on this ground are baseless as the trial court has done its duty of evaluating the evidence well and reached correct decision without omitting any evidence from either party.

Now, what I have on record is a confusing testimony of one Godfrey Mfalamagoha, who testified as DW3 at the trial tribunal. He stated that he came from the land Commissioner's office, Dar Es Salaam Zone. In his testimony, he stated that, the suit land was firstly allocated to Managing Director of Interfreight Tanzania Ltd on 24.7.1984, later the suit land was allocated to Flora Elias Joseph on 21.01.1989. The re-allocation of the suit land to Flora Elias Joseph according to DW3 was due to the fact that there was double allocation; therefore, the 1st allocation Managing Director of Interfreight Tanzania Ltd was unlawful and it was revoked. The question I ask myself at this juncture is, if there was double allocation, between the so called Managing Director of Interfreight Tanzania Ltd and Flora Elias Joseph, and further that, the allocation to the Managing Director of Interfreight Tanzania Ltd was the first in line, being allocated on 24/7/1984 (24/7/1985 as per exhibit P2), why was cancelled in favour of the 2nd allocation to Flora Elias Joseph, which came five years later and not to the one which came a

just a month or year later? It is hard to believe and rely on such kind of testimony and the trial tribunal was correct to disregard it. On the other hand, looking at the evidence of the respondent who was the applicant at the trial tribunal, I find it to be heavier than that of the appellant as detailed discussed in ground no one. It has always been the position of law in contentions matters in court like the case at hand, that parties to the suit cannot tie but a person whose evidence is heavier than the other is the one who must win (**see Hemed Said versus Mohamed Mbilu (1984), TLR 113**). To that end, ground no three is also found of no merit. It is accordingly dismissed.

Lastly on the 4th ground of appeal, the appellant's counsel was of the view that, the judgment of the trial tribunal was controversial, problematic and incapable of being executed. She insisted that, had the trial tribunal considered the revocation of the allocation of the suit land to the Managing Director of Interfreight Tanzania Ltd, then it would have given a proper decision as to who is the rightful owner of the suit land. The respondent in his reply, argued that, the arguments of the appellant's counsel as far as the 4th ground of appeal is concerned are misconceived. The appellant's counsel in her rejoinder maintained that the decision of the trial tribunal is controversial as the tribunal did not deny that the suit land was firstly allocated to Managing Director of Interfreight Tanzania Ltd.

Without wasting much of ado, I would like to align myself with the position of the respondent in his submissions that, this ground is a product of misconception on part of the appellant's counsel. I have read the whole judgment of the trial tribunal and failed to see the controversies alleged by

the appellant's counsel that could lead to incapability of execution. I therefore reject the 4th ground too and that marks all grounds of appeal to have been rejected for lack of merits.

Consequently, the entire appeal is dismissed and trial court decision up held.

Ordered accordingly.



A handwritten signature in blue ink, appearing to be "M. P. OPIYO", written over a horizontal line.

**M. P. OPIYO,
JUDGE
22/12/2020**