

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**LAND APPEAL NO 42 OF 2022**

(Arising from Land Application No 112 District Land and Housing

Tribunal of Musoma at Mara)

**TAMBWE JUMA PANGANI ..... APPELLANT**

***VERSUS***

**EDREY MAGAI MUGENYI ..... RESPONDENT**

**JUDGMENT**

14<sup>th</sup> & 28<sup>th</sup> Feb, 2023

**F. H. Mahimbali, J.:**

The appellant and the respondent in this case are in a tug of ownership of the landed property in plot no. 5 Block D located at Iringo Musoma Urban. Whereas the appellant claims inheriting the said house through Probate Case no. 31 of 2021 of Musoma District Primary Court, the respondent on the other hand claims being gifted the same house by the deceased during her life time.

After being granted the letters of administration and eventually inheriting the said house, the appellant commenced a land case before

the trial tribunal claiming ownership of the said landed property against the respondent.

The trial tribunal upon hearing the parties, was satisfied that the respondent is the lawful owner of the said property on the basis that the transfer process of the said landed property to the respondent from the deceased Mwanahawa Maira had commenced during the life time of the said Mwanahawa Maira. Therefore, the alleged deceased's property in anyway could not form the basis of the deceased's estate. This decision aggrieved the appellant, thus this appeal.

According to the appellant's grounds of appeal, he has listed a total of twelve grounds of appeal which can be paraphrased this way:

1. That the trial tribunal had erred in law in not considering the decision of the probate court – Musoma Urban Primary Court from which he inherited the said house in consideration of a will testament by the deceased Mwanahawa Maira.
2. That the trial tribunal erred in law in considering appellant as administrator of the deceased's estate whereas he is the lawful heir of the said estate.

3. That there was no proof before the trial tribunal that the appellant had been gifted the said landed property on 12<sup>th</sup> October 2001.
4. That the evidence of SU2 before the trial tribunal was not reliable and thus not credible witness in determining the real dispute in law.
5. There is a contradiction on real dates of the gifting of the said property to the respondent by the deceased as the judgment bears two contradictory dates: 12<sup>th</sup> October 2001 and 12<sup>th</sup> October 2021. Considering the fact that the deceased died on 5<sup>th</sup> February 2021 and the probate matter was filed on 11<sup>th</sup> March 2021 and closed on 3<sup>rd</sup> June 2021, the dating of the gift deed is dated 12<sup>th</sup> October 2021, means it was issued after the death of the deceased which then its credibility is questionable.
6. That the transfer documents in respect of the landed property is questionable as it is contradictory to sections 36 and 62 of the Land Act, Cap 113 read together with forms 29, 30 and 35 as the transfer deed was also not signed by the said deceased-transferor.

7. That the issued certificate of right of occupancy in the name of the respondent appears to be frauded for want of valid transfer deed.
8. That since the respondent unsuccessfully challenged the status of the said house in dispute at probate court as not being one of the deceased's estate, cannot hide his back through this ordinary suit process.
9. There is no legal reasoning by the trial tribunal as basis for giving judgment in favour of the respondent.
10. That the admitted exhibit which was earlier marked as EMM1 was not properly named and the same had no legal qualities to be admitted as exhibits.
11. That the earlier marked exhibits EMM1, EMM2, EMM3, EMM4 were wrongly admitted as exhibits by strange names: Exhibit D1, Exhibit P1, thus wrong documents.

On the basis of these facts, the appellant prays his appeal be allowed with costs and that this Court should order the following:

- a) The decision of the DLHT be quashed and set aside.

- b) That the respondent is not the lawful owner of the suit plot No. 5 Block D now renamed as Plot No. 339, Block D at Iringo.
- c) That the appellant be declared as lawful owner of the said suit plot No. 5 Block D now renamed as Plot No. 339, Block D at Iringo.
- d) Any other relief as this Honourable Court may deem just and fit to grant.
- e) Costs of the appeal.

During the hearing of the appeal, the appellant appeared in person whereas the respondent was represented by Mr. Julius Morris Motete, learned advocate. The appellant on his part prayed that his grounds of appeal be admitted as they are and form part of his submission.

Mr. Julius Morris Motete learned advocate on the other hand represented the respondent who resisted the appeal.

With grounds number one and two of the appeal, he responded them jointly that the main issue at the DLHT was who between the appellant and respondent is the rightful owner of the said plot. That in consideration of the evidence by both parties, how the said house came

into their ownership, the appellant stated at the DLHT that he was the administrator and later heir of the said estate. However, there was evidence by the respondent at the DLHT that by the time the deceased had died in February, 2021, already the said house was gifted to the respondent by the deceased herself. Therefore, in anyway, it could not be part of the deceased's estate upon her death. The DLHT in a full determination of the evidence availed before it, ruled in favour of the respondent in which was proper as per law. With this submission, he was of the considered view that grounds no 1 and 2 are jointly responded in negative, thus devoid of any merit.

With the third ground of appeal, he replied that the respondent timely forwarded the requisite documents to the Commissioner for Lands for transfer. During all that time, the respondent was paying necessary fees in respect of the said plot. The said transfer deed dated 12<sup>th</sup> October, 2001 which then was dully stamped and registered on 16/10/2001.

With the confusion on dates (between 12/10/2001 and 12/10/2021 appearing in the judgment of the trial tribunal), he was of the admission that this is just a typing error in the judgment of the

DLHT but not correctly recorded from the proceedings before it. Therefore, there is no any miscarriage of justice occasioned.

With ground no 4, the main contest is with the testimony of SU2 as witness of the respondent. As he was paying rent all the time to the respondent, that established the fact that the deceased person no longer had control over the said property. As the SU2 had been tenant of the respondent since 2010 and that the deceased herself clarified so to him, the appellant had good opportunity to cross examine him on that fact. If he failed so at the trial court, he cannot challenge him now. As to why he just tendered the 2021 lease agreement and not the former, the appellant was duty bound to inquire the same.

With the 5<sup>th</sup> ground of appeal, he countered it relying in his submission in reply to the third ground of appeal. It was a mere typing error. Otherwise, the proceedings are clear on this.

The 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal he jointly responded them that relevant forms are forms no 29, 30 and 35. Form 29 is just a notification. Form 30 is for application, whereas form no 35 is the transfer form. In any way, a new owner could not be recognized in the certificate if form no 35 was not signed. What is clear is this, the said

transfer had failed to be completed timely because of the caveat put by the appellant here in between (2021). In essence it could not work after his judgment in 2021 as form 35 was filled and filed since 2001. He clarified that as this suit was filed later in 2021 (September) after the full transfer in May 2021, the appellant is, if really justified in his claims, could have joined the Commissioner for Lands and Registrar of Titles as necessary parties of the case for proper findings on the raised issue of forgery. Thus, it is a bankrupt ground.

With the 8<sup>th</sup> ground of appeal, that the respondent is one amongst the objectors at the probate court against the said property being listed as one of the deceased's estates, he responded that if the appellant is honest enough, he ought to have notified the probate court about the existence of the respondent in the said house as an obstacle. In any way, the appellant was not justified to list the respondent's house under the umbrella of the deceased's property. Thus, his if he was the lawful heir of the said house and upon being appointed so by the court, he ought to have exercised his right of possession by evicting him from the said house as per law.

With the 9<sup>th</sup> (ninth) ground of appeal, the basis as to why the said DLHT decided in favour of the respondent, the judgment as per page



five and six list grounds or reasons as to why the said decision was reached. On those reasons given, he considered this ground of appeal as baseless and of no legal effect.

On the 10<sup>th</sup> ground of appeal, he countered it as well that all these exhibits were legally admitted, and cannot be challenged now on their admissibility if he failed so at the trial tribunal. Nevertheless, he added that all the documents are dully stamped and verified.

With the twelfth and thirteenth grounds of appal, he jointly submitted that there is a difference between documents labelled as annexure but admitted as exhibits PE1 and PE is correct as the latter is exhibit name. With all this, he found these grounds of appeal as being bankrupt of merits and thus bound to fail. He insisted that the respondent is the lawful of the disputed plot.

In his rejoinder submission, the appellant maintained his submission in chief. He added that, with exhibit D1, it was improperly admitted by the court as it lacked mandatory legal features of the transfer deed as per law. It is not a legal form as per law. He invited this court to scrutinize it thoroughly. Since there is no any transfer deed tendered in court, one can hardly be sure of it.

With the contradictory dates of 12/10/2001 and 12/10/2021 being transfer dates, he countered it as not being true and that it is just a typo error. So long as it was dully signed, the trial chairperson meant it so. He insisted that with all this, the appeal be allowed with costs.

In a careful scanning of the evidence in record, the important question to ask is whether the appeal has merit. To arrive to that end, the vital issue for consideration is whether in a full digest of the case's material evidence at the trial court, was the case established to an acceptable legal standard to justify the awarded decree or otherwise.

The main parties' battle in this case is centred on the issue of ownership of the said landed property in question which is Plot No. 5 Block D at Iringo street in Musoma. Whereas the appellant claims ownership of the said property by succession proceeding via probate case no. 31 of 2021 at Musoma Primary Court following the death of Mwanahawa Maira, the respondent claims ownership of the same property through deed of gift dully signed by the same deceased Mwanahawa Maira.

Through the facts of the case as gathered, it is undisputed that the deceased Mwanahawa Maira is now dead since February 2021. It is

also undisputed that the said deceased during her life time was not blessed with any issue for her succession. The appellant and the respondent, both seem to be her remote relatives, however each claiming a the legal right as stated above against each other.

According to the evidence gathered from the records, the respondent contends that he was gifted the said property on 12<sup>th</sup> October, 2001 by the deceased herself during her lifetime, however he finally effected transfer of it in November 2021, few months after the deceased had died.

On the other hand, the appellant claiming related to the deceased, stated at the trial tribunal that the deceased died on 5<sup>th</sup> February 2021 and he filed probate case on 11<sup>th</sup> March 2021 and closed it on 3<sup>rd</sup> June 2021. Amongst the properties that came into the administration of the said estate is the said house in dispute. Interestingly, the respondent contends that the dating of the gifting and transfer is dated 12<sup>th</sup> October 2001, and the certificate of right of occupancy was issued on 20<sup>th</sup> September, 2021. To him (Appellant), that was a dubious transaction.

Mwanahawa Maira. It is also undisputed that the said Mwanahawa is now dead. Who then between the appellant and respondent is the rightful owner of the said property in dispute? Whereas the respondent claims ownership of the said land by gift of deed, to establish this, he provided copy of offer certificate dated 13<sup>th</sup> May, 1969, transfer of right of occupancy certificate dated 12<sup>th</sup> October, 2001, Certificate of Right of Occupancy dated 20<sup>th</sup> September, 2021. On the other hand, the appellant who is also claiming ownership over the same property, contends that he is the rightful owner of the said plot by being heir through probate case no. 31 of 2021. That is the only evidence in record available in the court record.

As to why the trial tribunal decided in favour of the respondent, the trial chairperson reasoned:

*"Nimesikiliza pande zote mbili kwa umakini mkubwa, nimepitia pia nyaraka na vielelezo mbalimabli vilivyotolewa hapa Mahakamani na wadaawa, Pamoja na kuyatafakari maoni yaliyotolewa na wajumbe wa Baraza hili. Kuna Ushahidi ulio wazi na ni mzito kuwa mnamo tarehe 12/10/2021 (sic) mjibu maombi, Edrey Magai Mugendi, alipewa kiwanja hiki chenye mgogoro kama zawadi (awali kikijulikana kama kiwanja Na.5 Kitalu D sasa ni Kiwanja Na. 339 Kitalu D) na mmiliki wake wa awali, marehemu Mwanahawa maira, kama ambavyo kielelezo kilichotolewa na*

*mjibu maombi hapa mahakamani kilichopokelewa kama Exh. D1 kinavyojieleza. Kuna Ushahidi pia unaoonesha kwamba mjibu maombi Edrey magari Mugenyi tayari alishapata hati miliki juu ya kiwanja hiki bishaniwa, hati Na. 1963 iliyotolewa tarehe 12/05/2021.*

*Mleta maombi Tambwe Juma Pangani, alitoa kielelezo hapa mahakamani ambacho kilipokelewa kama Exh. P1 kinachoonyesha kwamba yeye ni msimamizi wa mirathi ya marehemu Mwanahawa Maira. Kwamba kikao cha familia ya mleta maombi kilichokaa tarehe 16/05/2021 kiligawa kiwanja hiki kwa mleta maombi.*

*Ni maoni yangu kwamba mleta maombi, Tambwe Juma Pangani, asingeweza kugawiwa na kumiliki kiwanja hicho tayari kilikua kinamilikiwa na mjibu maombi Edrey Magai Mugenyi tangutarehe 12/10/2001 kama ambavyo nimwkwisha kueleza hapo juu kwenye hukumu hii.*

*Katika mazingira haya, na kwa kuungana na maoni ya wajumbe wa Baraza hili linaona kuwa mleta maombi anapigania ardhi ambayo hana haki nayo, hivyo madai ya mleta maombi yanatupiliwa mbali”.*

I have carefully scanned the evidence in record in support of the parties’ proposition. I have equally digested the grounds and submissions for and against the appeal. The central issue for determination of this appeal is only one, who as per available evidence in record is the rightful owner of the suit property.

I repeat the legal position that he who alleges must prove. For the appellant to establish that he owns the said property as heir, he was first charged to establish that the said property belonged to the deceased person and that it remained so up to the time of her death. Only if that was established, then his administration duty would have been effective and the grant of it to himself was then justified. A ruling granting letters of administration to the appellant was not a material document authorising ownership of the said property to the appellant, if there is no evidence in place that the said deceased owned the said property at the time of her death. The letters of administration per se are not legal authoritative documents granting ownership of the property to any person claiming heirship but can be instrument officiating transfer of ownership from the original owner to the heir as subsequent owner. A mere procurement of letters of administration from the probate court cannot lawfully substitute right of ownership to any property in lawful ownership of another person.

In the current appeal, in order to get satisfied of what had transpired at the probate court, I have encountered a copy of will annexed with the appellant's application of letters of administration. The said will reads:

1. *"Mimi Mwanahawa Maira, Dini yangu Islamu, natamka nikiwa na akili timamu bila ya kusulutishwa na mtu yeyeyote, endapo kama sitakuwepo siku za usoni yaani kama nitakufa tararibu zangu zote zifuata misingi ya dini ya Kiislamu. Na msimamizi wangu ni Tambwe Pangani,*
2. *Nyumba yangu ninayoishi nimejenga mwenyewe na sikusaidiwa na mtu yeyote na sikuzaa, isipokuwa dada yangu ndiyo aliyozaa Pamoja na kaka zangu.*
3. *Vilevile nimetengua kauli ama wosia wowote uliotangulia wa kumpa Hedfrey Magai Pamoja na Tatu Juma nimetengua wosia wowote uiotangulia na kwa yeyote isipokuwa Tambwe Juma Pangani ndio nimemteua kuwa mrithi wangu wa mali zangu Pamoja na nyumba yangu Plot No. 5 Block D, Iringo itabakai kuwa mikononi mwake, yeye ndiyo mrithi wangu, yeye ni mtoto (Mjukuu wa dada yangu tuliyezaliwa nae tumbo moja aitwae AMINA MAIRA (Nyandaro). Nafuta wosia wowote uliotangulia kwa yeyote isipokuwa Tambwe Pangani ndio mrithi wangu wa nyumba yangu Plot No. 5 Block D, Iringo. Maelezo haya niliyoyazungumza, yamethibitishwa mbele ya Hakimu".*

The same was dully signed by the testator of the will MWANAHAWA MAIRA and witnessed by Dotto Mussa and Mwanaidi Pangani. The same appears to be signed and dully dated on 14<sup>th</sup> August 2017 in the presence of Karim T. Mushi, Resident Magistrate, Musoma i.e 16 years later after the same person (deceased) had given and transferred the same property to the respondent (i.e on 12/10/2001).



On the other hand, the respondent claims that the said property (Plot No. 5 Block D, Iringo) could not validly form the deceased's estate it being already given to him out of love and affection by the same deceased person on 12<sup>th</sup> October 2001.

In law, gifting a property is equivalent to disposing it to someone else lawfully. Once legally done, it cannot still remain the donor's property unless she had first retaken it lawfully. The effect of gifting a property to someone, gives the subsequent receiver (donee) all ownership rights over the said property and that the donor of it becomes irresponsible with the said property unless it was onerous gift (a conditional gift). Otherwise, it would have been chaotic in the society and would have been causes of many quarrels and possibly blood shading. Therefore, since the same property was already disposed of by deed of gift dated 12<sup>th</sup> October, 2001, which was dully signed by the said MWANAHAWA MAIRA, and that the receiver (donee) processed it and has now a right of occupancy in his possession, it could not later be bequeathed to the appellant as done (say 16 years later). The latter transaction is legally not effectual as it is equivalent to a toy object. One cannot eat a cake and have it again.



In my considered view, since the gifting of the said property was done earlier than the will (16 years earlier), legally the will cannot override the earlier disposition process. The two are not similar transactions. Whereas in a will, the testator of it has a right of change, in a disposition process (gifting) once done, it is irrevocable unless what was gifted did not exist in law or was onerous gift. It is even astonishing in the current case that the deceased purported to write a will over the same property to someone else while acknowledging the fact that she had already disposed it to the respondent (see paragraph 3 of the said will).

The Academic's Legal Dictionary at page 157, defines "gift" as a voluntary transfer of anything made without consideration. It is a transfer of a certain existing movable or immovable property made voluntarily and without consideration by one person called donor to another called donee and accepted by or on behalf of the donee. The essential components to consider of a valid completed gift of a personal property are **competency of the donor to contract, voluntary intent on the part of the donor to make a gift** (donative intent), **delivery**, either actual or symbolic, acceptance actual or imputed, complete divestment of all control by the donor and a lack of

consideration for the gift (See Academic's Legal Dictionary, by S.L. Salwan, 22<sup>nd</sup> Edition, 2012 at page 157).

All the above conditions have been fully complied with by the deceased and consented by the donee-Respondent.

In the circumstances of this case, it was either of the ignorance of the deceased herself for failure to know the distinction between gift and will or fraudulent means of retaking the gifted property. As the two are distinct, they cannot co-exist in respect of the same subject matter. What is gifted today, cannot form the subject of will in the subsequent thought of the donor.

The appellant's argument that the said document duly signed by the deceased authorising transfer of the registered property to the respondent is forgery, it could only be valid had there been proof of it. In my careful scanning, it remained un-established fact. Otherwise, it was important to establish the said elements of fraud or forgery.

The argument that the said transfer certificate is not compatible with Land form no 35, I beg to differ with the appellant. That as per section 62 of the Land Act, the signed document is compatible to land

form No 35 which is the official document for transfer of a Right of occupancy.

It is a cardinal principle in civil trials that the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities (See **Anthony M. Massanga Vs. Penina and Another**, Civil Appeal No. 118 of 2014) that he is entitled of that right. For a party in civil cases to win a case, he/she must have greater and weightier evidence than the other. The appellant's case in a legal perspective is lighter than the respondent's case on the basis of the reasons stated above.

The argument on confusion of dates of transfer between 12<sup>th</sup> October 2001 and 12<sup>th</sup> October 2021 appearing in the trial tribunal's judgment is a typical clerical error and shouldn't be used to benefit the appellant. The real date as per proceedings in record is 12<sup>th</sup> October, 2001 and so is the transfer deed itself.

Therefore, as between the appellant and the respondent in this case, the respondent has better title than the former. I say so because it is clear by evidence that the appellant's case is weaker in evidential material than that of the respondent. In the current case, the appellant's

ownership of the said property is not founded on solid basis as the will cannot operate as an instrument of taking someone's property even if it was once the deceased's property. Once disposed of, it is not retaken by an operation of will. So, Mr. Tambwe Juma Pangani in the circumstances of this case cannot become the owner/heir of the said property against the respondent in which the deceased had already disposed of the said property and it is irrevocable by a latter will.

That said, the appeal is dismissed for want of merits. Considering the consanguinity factor of the parties, I order no costs.

It is so ordered.

DATED at MUSOMA this 28<sup>th</sup> day of February, 2023.



  
F.H. Mahimbali

Judge

**Court:** Ruling delivered this 28<sup>th</sup> day of February, 2023 in the presence of appellant, Mr. Julius Moris, advocate for the respondent and Mr. Kelvin Rutalemwa, RMA.

  
F. H. Mahimbali

JUDGE