

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**

**(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A. And KENTE, J.A.)**

**CIVIL APPEAL NO. 167 OF 2020**

<b>PAULOS NAFTAR SAMBAY.....</b>	<b>1<sup>st</sup> APPELLANT</b>
<b>FATUMA BAKARI.....</b>	<b>2<sup>nd</sup> APPELLANT</b>
<b>JULIANA D. MFALAMAGOHA.....</b>	<b>3<sup>rd</sup> APPELLANT</b>
<b>ABUBAKAR RAJAB YUSUF.....</b>	<b>4<sup>th</sup> APPELLANT</b>
<b>JOSHUA ARTHUR MHAGAMA.....</b>	<b>5<sup>th</sup> APPELLANT</b>
<b>JOSEPH LUBILOHI MWANGUKI.....</b>	<b>6<sup>th</sup> APPELLANT</b>
<b>AGNESS KAGUO MBEYELA.....</b>	<b>7<sup>th</sup> APPELLANT</b>
<b>NUHU JUMA NKYERA.....</b>	<b>8<sup>th</sup> APPELLANT</b>
<b>ISDORY SEBASTIAN KIMARIO.....</b>	<b>9<sup>th</sup> APPELLANT</b>
<b>LETICIA GABRIEL MWALO.....</b>	<b>10<sup>th</sup> APPELLANT</b>
<b>MWAIKAMBO CLEVERLY CHARLES.....</b>	<b>11<sup>th</sup> APPELLANT</b>
<b>BROWN SEGELETI MWAIHABU.....</b>	<b>12<sup>th</sup> APPELLANT</b>
<b>AWADH RAMADHANI USHAKI.....</b>	<b>13<sup>th</sup> APPELLANT</b>
<b>DAVID OMARY MUSHI.....</b>	<b>14<sup>th</sup> APPELLANT</b>
<b>FELIX SALEMA KAVISHE.....</b>	<b>15<sup>th</sup> APPELLANT</b>
<b>MADATA JUSTIN MARTINE.....</b>	<b>16<sup>th</sup> APPELLANT</b>
<b>ISACK LAZARO KAZUNGU.....</b>	<b>17<sup>th</sup> APPELLANT</b>
<b>KHALID HAJI MTENGERA.....</b>	<b>18<sup>th</sup> APPELLANT</b>
<b>COSMAS LAURANCE.....</b>	<b>19<sup>th</sup> APPELLANT</b>
<b>ALI HAJI HAMISI.....</b>	<b>20<sup>th</sup> APPELLANT</b>
<b>PASCAL PASCAL HYERA.....</b>	<b>21<sup>st</sup> APPELLANT</b>
<b>BETRAM NICHOLAUS CHANDE.....</b>	<b>22<sup>nd</sup> APPELLANT</b>
<b>KOWERO KATELINE.....</b>	<b>23<sup>rd</sup> APPELLANT</b>
<b>JUMA RAMADHANI.....</b>	<b>24<sup>th</sup> APPELLANT</b>
<b>MOHAMED RAJABU.....</b>	<b>25<sup>th</sup> APPELLANT</b>
<b>AMINA SAID.....</b>	<b>26<sup>th</sup> APPELLANT</b>
<b>MIRIAM BUNDALA.....</b>	<b>27<sup>th</sup> APPELLANT</b>

**SALEHE KISENGENI.....28<sup>th</sup> APPELLANT**  
**GIBSON M. MASANGA.....29<sup>th</sup> APPELLANT**  
**KAZALA RASHID MSUHI.....30<sup>th</sup> APPELLANT**  
**EMTRUDA ARTHUR BARUTI.....31<sup>st</sup> APPELLANT**  
**ATHUMANI MKALI.....32<sup>nd</sup> APPELLANT**  
**ANAEL NIMROD MALISA.....33<sup>rd</sup> APPELLANT**

**VERSUS**

**SAID BAKARI MAZOE.....1<sup>st</sup> RESPONDENT**  
**ELLY MTANGO.....2<sup>nd</sup> RESPONDENT**  
**PAVEL MTANGO.....3<sup>rd</sup> RESPONDENT**  
**ELIYA MPEMBENI.....4<sup>th</sup> RESPONDENT**  
**EVOD ROKI BANZI.....5<sup>th</sup> RESPONDENT**  
**NARDI ANDREA MBURUJA.....6<sup>th</sup> RESPONDENT**

**[Appeal from the Judgment and decree of the High Court of Tanzania,  
Land Division at Dar es Salaam]**

**(Mzuna, J.)**

**dated the 13<sup>th</sup> day of October, 2017**

**in**

**Land Case No. 54 of 2013**

.....

**JUDGMENT OF THE COURT**

*14<sup>th</sup> & 20<sup>th</sup> March, 2023*

**LEVIRA, J.A.:**

In the High Court of Tanzania (Land Division) at Dar es Salaam (the trial Court), the appellants together with forty-four others who are not parties to this appeal, were sued by the respondents who claimed ownership of a piece of land measuring 338 acres distributed among them, located at Makurunge, Kiluvya 'A', Kisarawe District in Pwani

Region (the dispute land) in Land case No. 54 of 2013. It was the respondents' case that the appellants had trespassed onto their land, the dispute land. Thus, they sought for some reliefs including an injunction order restraining the appellants from performing activities on the said land and the declaration that they were the rightful owners of the dispute Land. The appellants filed a joint written statement of defence (WSD) opposing the respondents' claim.

Nevertheless, we wish to note that, during trial not all the respondents (plaintiffs) and the appellants (defendants) got an opportunity to testify before the trial court. It was only six plaintiffs and eight defendants who testified. However, at the end of the trial, the learned trial Judge, through his judgment delivered on 13<sup>th</sup> October, 2017 declared only six respondents the rightful owners of the suit land based on the size of plots each had proved ownership. He ordered further that the rest unproved plots to revert to the village for proper land use and management. The appellants were aggrieved by the decision of the High Court, hence the present appeal.

In this appeal, the appellants have presented four grounds of appeal as follows:

- 1. That the trial court erred in law and fact in declaring the 1<sup>st</sup> respondent the lawful owner of the land in*

*dispute having acquired it from the village authority by virtue of exhibits P1 and P4.*

- 2. That the trial court erred in law and in fact in holding that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents have lawful title having acquired the suit lands from the 1<sup>st</sup> respondent by virtue of sale agreements.*
- 3. That the trial judge erred in law and fact in holding that the 184 acres of unproved land by the plaintiffs revert to the village which was not party to the suit.*
- 4. That the trial court erred in law and fact in ordering the defence case be closed without specifying which defence among the 77 defendants was being closed leaving the other appellants with no right to defend the suit.*

At the hearing of the appeal, the appellants were represented by Mr. Daibu Kambo, learned advocate, whereas the respondents had the services of Mr. Rajab Mrindoko, also learned advocate. Counsel for the parties adopted the parties' written submissions in support of and against the appeal which they had filed in Court on 29<sup>th</sup> July, 2020 and 31<sup>st</sup> August 2020 respectively as part of their oral arguments before the Court with no more. However, upon being prompted by the Court, they offered elaboration in respect of the fourth ground of appeal.

Mr. Kambo submitted that, the basis of the fourth ground of appeal is that the trial Judge erred in closing the defence case while only six out of seventy-seven defendants including the appellants herein had testified. He went on submitting that, each defendant ought to have testified in respect of the piece of land he/she owns despite the fact that they filed a joint written statement of defence (the WSD), but the trial Judge did not give them that opportunity. Referring us to page 600 of the record of appeal, he faulted the trial Judge for failure to specifically indicate which defence case did he close as most of the defendants had not yet testified as of 27<sup>th</sup> July, 2017 when that order was given. It was Mr. Kambo's argument that the effect of that order was to bar more than seventy defendants from defending in the suit for no apparent reason provided in the record of appeal.

Mr. Kambo brought to our attention the fact that, on 4<sup>th</sup> August, 2020 the appellants filed Miscellaneous Land Application No. 657 of 2017 asking the trial court to vacate its order of 27<sup>th</sup> July, 2017 so as to allow other defendants to testify, in vain. Instead, it went on to compose judgment, the subject of the present appeal. He therefore urged us to find that the trial judge erred in closing the defence case without giving the appellants an opportunity to defend in the suit and

allow the appeal. He also urged us to nullify the judgment and proceedings of the trial court from where the order closing defence case was issued and proceed to order for a continuation of trial from immediately before the closure of the defence case.

In reply, Mr. Mrindoko submitted that the trial court was right to mark the defence case closed because before doing so, he asked the defendants who were present whether they had witnesses to call, but they had none. It was also his contention that, on the hearing date, the counsel for the appellants, without notice, did not enter appearance despite the fact that he was aware of the consent hearing of the case and his clients did not pray for an adjournment of the case. That is why, he said, the trial judge proceeded with the hearing of the defence witnesses who were present. According to him, under Orders XVII Rule 2 and IX Rule 11 of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC), the trial court was justified to proceed with the hearing of the case as the parties had consented to proceed with the hearing on that date (27<sup>th</sup> July, 2017) as reflected at page 598 of the record of appeal.

Mr. Mrindoko went on to submit that, when the defendants who were present in court on that date were asked by the trial Judge whether they had witnesses to call, they responded negatively and

prayed to close the defence case. Therefore, he said, the trial judge cannot be faulted for closing the defence case. Finally, he urged us to dismiss the appeal for lacking in merits.

Mr. Kambo had no rejoinder to make.

We have thoroughly gone through the record of appeal, submissions by the parties and the grounds of appeal. We wish to state at the outset that, although the appellants presented before us four grounds of appeal, we think, determination of the fourth ground of appeal is capable of disposing of this appeal. First and foremost, we observed that the counsel for both parties are at one that on 27<sup>th</sup> July, 2017 the trial court proceeded to hear the evidence from two defence witnesses. These were, Salehe Kisengeni (DW7) and Fatuma Iddi (DW8) who testified in the absence of their advocate and finally the trial Judge closed the defence case. It is undisputed that, each defendant in the present case claimed ownership of a separate piece of land constituting the dispute land.

That being the case, it means that, each of them had to prove his/her ownership over it notwithstanding the fact that they had filed a joint WSD. But that was not the case. It is crucial at this juncture to determine as to whether the trial court was justified to proceed with the

hearing of the defence case in the absence of the defendants' counsel and finally close it without giving other defendants an opportunity to be heard.

The right to be heard is one of the fundamental rights enshrined in our Constitution, a fact which we do not need to overemphasize – see: Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. Every party to a suit has a right to be heard before an adverse action or decision is taken against such party. Failure to observe this right has a consequential effect of rendering the decision of the trial court a nullity even if such a decision would have been reached had it been that a party to a case was accorded the right to be heard – see: **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2022 (unreported). The rationale behind being that, no one should be condemned unheard. The Court once held in the case of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251 as follows:

*"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be*



*heard: audi alteram partem. In Ridge v. Baldwin (1964) AC 40, the leading English case on the subject, it was held that, a power which affects rights must be exercised judicially, ie fairly. We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away.”*

In the present case, since it was not a representative suit, all the defendants had a right to be heard in their respective defences during trial. Therefore, we find that it was a misdirection on the part of the trial judge to close the defence case without according those 71 defendants an opportunity to defend. Indeed, by closing their case it amounted to denying them the right to be heard resulting in an unfair trial.

Before winding up, we also wish to observe that, on 27<sup>th</sup> July, 2017 when the parties appeared before the trial court to proceed with the hearing of the case, the counsel for the defendants was not present in court. However, the record is silent whether or not the trial judge gave the defendants who were present an opportunity to express

whether they would wish to proceed with the hearing of their case without being represented as all along they were represented by Mr. Kambo, learned advocate. Instead, the record reveals that he ordered the hearing to proceed as consented by the counsel for the parties. This is reflected at page 598 of the record of appeal. For ease of reference, we reproduce that part of proceedings; it reads:

**"27/07/2017**

***Coram-Hon. M.G. Mzuna, J.***

***For the plaintiff: Mr. Mrindoko advocate***

***For Defendant: Present No.11,19,43,53 and  
54.***

***CC: Monica***

***Defendant: Our advocate is absent and his  
mobile phone is unreachable.***

***MR. MRINDOKO ADVOCATE: I have no any  
information on him.***

***COURT: Hearing was fixed by consent and  
the case is under BRN Session. We have to  
proceed.***

***Sgd: Hon. M.G. Mzuna  
JUDGE***

***27/07/2017***

***DW7: Salehe Kisengeni, ...."***

The above extract shows clearly that the decision of the trial judge to proceed with the hearing of the case was based on the fact

that the counsel for the parties consented on that hearing date. In our considered opinion, a mere fact that there was a consent to proceed on that date, in itself did not supersede the defendants' right to be represented and to fair trial, more so as there was no notice of withdrawal of services from their advocate and they were not asked whether or not they would wish to proceed in the absence of their advocate. It is common knowledge that, parties to a suit have the right to legal representation unless they opt not to have one.

In the case at hand, we have intimated above that all along the respondents were represented by their advocate. Therefore, failure of their advocate to attend the court should not have been used as a weapon against the respondents' right to representation and fair trial. With due respect, it is our considered opinion that, in the circumstances of this case, it was a misdirection on the part of the trial judge to proceed with the hearing of evidence from the two defence witnesses on 27<sup>th</sup> July, 2017 and finally close the defence case.

In the upshot, we find that during trial, there was breach of the defendants' fundamental right to fair trial. For the interest of justice, we find it prudent to allow the appeal, quash the judgment and proceedings of the trial court from 27<sup>th</sup> July, 2017 when DW7 and DW8

testified to the end. We remit the case file to the trial court for it to proceed with the hearing of defence case from DW7 to the end. Having considered the circumstances of this case, we find and hold it justifiable to order no costs.

**DATED at DAR ES SALAAM** this 17<sup>th</sup> day of March, 2023.

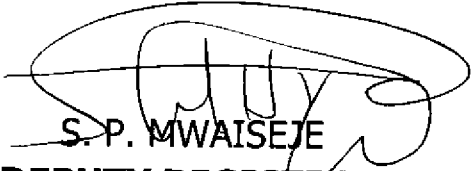
J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

P.M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 20<sup>th</sup> day of March, 2023 in the presence of Mr. Daibu Kambo, learned counsel for the appellants and Mr. Emmanuel Hayuka, learned counsel for the Respondents, is hereby certified as a true copy of the original.



  
S. P. MWAISEJE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**