**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOROGORO**

**(CORAM: MWARIJA, J. A., MASHAKA, J. A. And MAKUNGU, J.A.:)**

**CIVIL APPEAL NO. 318 OF 2021**

**DOTO ISODA.....1ST PPELLANT**
**TEOFRIDA MBOGO (As lawful Administratrix of the**
**Estate of the late EMILIANA KISANGILO.....2ND APPELLANT**
**GABCHANDA GIBUYA.....3RD APPELLANT**
**SUMBA SAI.....4TH APPELLANT**
**GWISU GUHUMA.....5TH APPELLANT**
**BARIADI LUKELA.....6TH APPELLANT**
**MINZA MAIGE.....7TH APPELLANT**
**MABULA NYAMHANGA.....8TH APPELLANT**
**MARKO KIJA MAIGE.....9TH APPELLANT**

**VERSUS**

**AMBOGO ELLY AMBOGO..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)**

**(Wambura, J.)**

**dated the 28th day of April, 2017**

**in**

**Land Case No. 35 of 2015**

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## JUDGMENT OF THE COURT

3rd & 12th May, 2023

**MAKUNGU, J. A.:**

Before the High Court of Tanzania (Land Division) at Dar es Salaam (the trial court) (Wambura, J.) in Land Case No. 35 of 2015, the respondent successfully sued the appellants for trespassing into his

piece of land measured 200 acres located at Malinyi Ward in the Region of Morogoro (the suit land). It was the respondent's claim at the trial court that the appellants jointly have trespassed into his suit land and cut down trees and planted the others. He prayed to the trial court to declare the appellants the trespassers, to evict the appellants from the suit land and issue the order of vacant possession, or if the appellants failed to give vacant possession, be ordered to pay the respondent Tshs 100,000,000/= as the value of the 200 acres, the respondent to be paid Tshs 803,565,000/= as compensation for the loss of income expected from the sale of timber. The appellants also be ordered to pay interest rate of 22% on the decretal amount per annum until payment in full, payment for specific and general damages and the costs of the suit.

The trial court culminated in the verdict in the respondent's favour. The learned Judge granted the declaratory reliefs and other orders prayed for except for an order on specific damages as they were not proved. The suit land was found to be lawfully owned by the respondent, thus the purported allocation made to the appellants by the village authority was found to be invalid.

Being aggrieved by the decision of the trial court, the appellants have lodged this appeal against the whole of the said decision on the following grounds:

1. That, the learned trial Judge grossly erred in law for failure to interpret that the village government has no mandate to allocate 200 acres of the land to the respondent while the law provides that the village government has mandate to allocate only 50 acres.
2. That, the trial Judge grossly erred in law and fact for not considering counter claim raised in the respondents' (appellants) written statement of defence to join village leaders who allocated the plot to plaintiff (respondent).
3. That, decision is tainted with fatal irregularities / illegalities which should not be left to stand.
4. That, the trial Judge erred in law and facts by failure to hold that the proper procedure for allocating village government in the allocation of land to the respondent was not followed.

When the appeal was called for hearing, the appellants' appeared in person without legal representation while the respondent had the services of Mr. Josephat Sayi Mabula, learned advocate.

At the very outset, Mr. Mabula prayed for substitution of the word *"applicants"* appeared in the respondent's written submissions in reply to the word *"appellants."* To the aforesaid prayer, the appellants had no objection. We granted the prayers.

Before the commencement of the hearing of the appeal, we wanted to know from Mr. Mabula whether he intended to proceed with his notice of preliminary objection lodged in Court on 24th April, 2023. Upon our probing, he admitted that the two points raised were not based on points of law but based on rather factual matters. He thus prayed to abandon them and to proceed with the hearing of the appeal.

When we called upon the appellants to amplify their grounds of appeal, they opted to adopt the written submissions in support of their appeal filed before the Court imploring the Court to consider them and allow the appeal.

When Mr. Mabula took the floor in opposition of the grounds of appeal, he too adopted the respondent's written submissions in reply and list of authorities filed before the Court. He then argued the four grounds of complaint individually.

The appellants' complaint in ground one is that the High Court Judge was wrong to hold that the respondent was right to be allocated

200 acres by the village council because it does not have powers under section 32(5) (a) (b) and (c) of the Village Land Act, 1999 (the Act) to allocate to one person more than 30 acres at a time. In their written submission, the appellants cited Land Case No. 104 of 2015, **Peter Peter Junior and 17 Others v. Mohamed Ikibal**, (unreported) from the High Court of Tanzania Land Division to support their argument. Mr. Mabula submitted that the law is very clear. It uses the word "*more than*" as directly means that it sets only the minimum hectares to be allocated by the village council but the limit is within the village council to decide. He submitted further that the decision of the High Court of Tanzania referred to by the appellants is not binding to this Court. He implored us to find this ground has no merit and dismiss it.

In ground two, the appellants are faulting the trial court for not considering the counter-claim raised in the appellants' written statement of defence to join village council which allocated the plot to the respondent. Arguing against this contention, Mr. Mabula submitted that there has never been any counter-claim from the appellants filed in court subsequent to the written statement of defence. He pointed out that, if the appellants thought it was important to join the village council, they could have asked the trial court but nowhere in the

proceedings the appellants did ask the court to join the village council. He prayed the Court to ignore this ground of appeal.

In ground three, the appellants are claiming that the decision of the trial court is tainted with fatal irregularities / illegalities which should not be left to stand. Mr. Mabula briefly submitted that there are no illegalities on the face of proceedings of the trial court and the appellants failed to indicate those alleged illegularities in their written submissions. He prayed that this ground be dismissed.

In the last ground of complaint, the appellants are faulting the trial court for its failure to hold that the proper procedure for allocating the land to the respondent was not followed. That is why the village council took back the suit land from the respondent and allocated to the appellants who are the rightful owners of the suit land. Mr. Mabula submitted that all procedures were followed and after considering the evidence adduced before it the trial court was satisfied that the respondent was the rightful owner of the suit land. He invited the Court to re-appraise the evidence on record and come to its own conclusion which will reveal that the ownership of the respondent was proved to the required standard. The learned advocate drew our attention to the testimony of PW2 at pages 200 – 202 of the record of appeal. He

pointed out that the appellants have already been evicted from the suit land as per the notice to vacate dated 9/6/2022. He invited us to dismiss the appeal with costs.

Submitting in rejoinder, the appellants admitted that the execution has already been done and the suit land is in the hands of the respondent.

We should begin our deliberations on the first complaint by noting the provisions of section 32(5) (c) of the Act:

> *"32 (5) An application for the grant of lease under this section –*
>
> *(c) of more than thirty hectares or for more than ten years, to be known as a Class "C" application, shall be determined by the village council subject to confirmation by the village assembly and the advice of the Commissioner".*

It is our understanding that the above section vestes a village council with power to allocate more than thirty hectares of land. Thus, the complaint by the appellants that the allocation of 200 acres was not within the mandate of the village council of Malinyi has no merit. We find that this ground of appeal has no merit. The finding in this ground

of appeal is sufficient to dispose of this matter, but for clarity, we find it apposite to decide on other grounds of appeal as well.

As regards the second ground of appeal, we are in agreement with the respondent's learned counsel that there has never been any counter-claim from the appellants then defendants filed in court subsequent to the written statement of defence which required the respondent to join the village council in the original suit. We find that this complaint by the appellants at this stage is an afterthought. This ground fails.

In the third ground of appeal, the appellants are faulting the decision of the trial court as it is tainted with irregularities and illegalities. In the written submission the appellants indicated that the alleged irregularities and illegalities can be found in paragraph 6 of page 79 of the record of appeal. We have tried to find out the alleged illegalities and irregularities in the impugned decision without success. It is a trite principle of law that once the illegalities or irregularities are alleged in the impugned decision the same must be apparent on the face of record as it was observed by the Court in the case of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218, among other the Court had this:

*"An error on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably by two opinions".*

In the light of the above position, we are satisfied that there are no detected illegalities which are apparent in the impugned decision as alleged by the appellants, leaving alone that even themselves the appellants had failed to show those illegalities in their written submission, hence this complaint has no merit.

The last appellants' complaint is that the trial Judge erred in law by her failure to hold that the proper procedure for the village government in the allocation of the land to the respondent was flawed. This issue should not detain us much. It is clear from the record of appeal that this complaint by the appellants was not among the issues framed and agreed to be determined by the trial court. On that stand, we have the view that it may not be fair to fault the trial court at this stage on the failure to determine the propriety of the procedure during the allocation of the suit land to the respondent while the issue was not raised in the trial court. This ground has no merit.

On the basis of the above, we find and hold that the appeal is without merit and we dismiss it with costs.

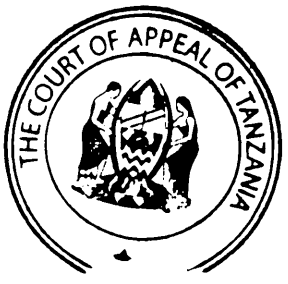
**DATED** at **MOROGORO** this 12th day of May, 2023.

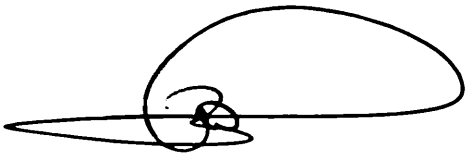
A. G. MWARIJA
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

This Judgment delivered this 12th day of May, 2023 in the presence of the 2nd, 3rd, 6th and 9th appellants appeared in person via Video Link from Malinyi District Court at Morogoro and in the absence of the 1st, 4th, 5th, 7th, 8th appellants and Mr. Nehemia Gabo holding brief for Mr. Josephat Mabula, learned counsel for the respondent via Video Link from Court of Appeal of Tanzania at Dar es Salaam, is hereby certified as a true copy of the original.



J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**