IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA
(LAND DIVISION)
LAND APPEAL NO. 12 OF 2020
(Originating from District Land and Housing Tribunal Iringa Consolidated Applications No. 46 of 2011 and 19 of 2012)

REGISTERED TRUSTEES OF TELESINA SISTERS ... 1ST APPELLANT
RUNATI BENITO KIMBE..... 2ND APPELLANT
MAGNUS BENITO KIMBE..... 3RD APPELLANT
RENATO BENITO KIMBE ..... 4TH APPELLANT
JUVILALI KIMBE ..... 5TH APPELLANT
ISSA MATUGA ..... 6TH APPELLANT
ELIO NGILWANGWA ..... 7TH APPELLANT
ONESMO KIMBE ..... 8TH APPELLANT
JUMANNE MAHENGE ..... 9TH APPELLANT
OSWARD MAHENGE ..... 10TH APPELLANT
JOSEPH PILLA 11THAPPELLANT

VERSUS

RUKIA LIPANGILE ..... 1ST RESPONDENT
KHAMIS MUSSA.....2ND RESPONDENT

Date of Last Order: 17/09/2020
Date of Judgment: 03/11/2020

JUDGMENT

MATOGOLO, J.

The applicants above named have appealed to this court after being aggrieved with the judgment and decree of the District Land and Housing

Tribunal Iringa in consolidated applications No. 46 of 2011 and 19 of 2012 between them and Rukia Lipangile and Khamis Mussa.

The dispute is over the land known as Farm No. 559 located at Ipokela village and Farm No. 560 allegedly that the present appellants have trespassed there to. The District Land and Housing Tribunal entered judgment for the present Respondents.

In their appeal the appellants raised a total of nine (9) grounds which will be reproduced in the cause of this judgment. The appeal was argued by way of written submissions.

The appellants were represented by Ms. Mary Mgaya learned advocate, and the respondents were represented by Mr. Anthony Samson Rutebuka and Mr. Marco Kisakali both learned advocates.

The first ground of appeal is to the effect that the whole of the trial and consequential judgment and decree of the District Land and Housing Tribunal is bad in law for failure to involve the gentleman assessors contrary to the requirement of the law, further that no reason has been made for the omission. It is the submission by Mary Mgaya in support of the ground that the trial in the District Land and Husing Tribunal is to be composed by the chairman and assessors. This requirement is provided under Section 23(1) and (2) of the Land Disputes Courts Act Cap. 216 R. E. 2016 and Regulations 19(2).

But the above cited provisions were not complied with. The record does not show if there were assessors involved and if they aired their

opinions for consideration by the chairman. The proceedings and judgment are silent of this vital requirement of the law which renders the same a nullity Ms. Mgaya supported her argument by citing the case of ***Edna Adam Kibona vs. Absolom Swebe (shell)***, Civil Appeal No. 286 of 2017 and ***Ameir Mbaraka and Another vs. Edger Kahwil***, Civil Appeal No. 154 of 2015 CAT (all unreported).

Regarding the second ground of appeal that the whole of the proceedings and consequential judgment and decree of the District Land and Housing Tribunal is irregular and bad in law for non-joinder of interested, necessary as well as proper parties, hence the judgment is chaotic as it impairs the rights of individual and institutions without affording them right to be heard, and the material issues were left undetermined. In respect of this ground, it is the submission by the leaned counsel that joinder of necessary and proper parties is a necessary in any adjudication process, the rationale being that all material issue relating to the matter in question to be addressed and fairly decided.

She said the fact that the land in question which belong two distinct villages is allegedly to have been acquired by one Khamis Mussa, a fictious person through auction and later surveyed and registered and then divided into two. Thus the relevant allocating authorities as well as the two village councils were necessary and proper parties to the suit for fair determination of the dispute.

Ms. Mary Mgaya learned counsel contended that besides those parties, the material questions and issues relating to the certificates of titles and

the modalities employed in processing the same mandated the joinder of the commissioner for land or his delegates. She stated further that it is on the records that the appellants requested the Tribunal to conduct a locus in quo, inviting the commissioner for Lands, Southern Highland Zone who delegated the duty to the Regional surveyor to appear to the tribunal and respond the issues and identify the land allegedly allocated to the respondents, but at it could be, the delegate failed to answer it. The learned counsel supported her argument by citing the case of ***Oil Com Tanzania Ltd vs. Christopher Letson Mgalla*** Land Case No. 29 of 2015 High Court Mbeya (unreported).

The learned counsel argued third and fourth grounds jointly. The complaint in the two grounds is that the whole of the findings and decision of the District Land and Housing Tribunal is irregular for reason that one of the parties Khamis Mussa who purported to feature as the 2nd Applicant/claimant had never entered appearance nor testified before the Tribunal hence the decision of the Tribunal is based on speculations. Further that the District Land and Housing Tribunal erred in law for declaring the 2nd Respondent Khamis Mussa as lawful owner of the suit properties without there being evidence. Further that the Tribunal failed to hold that the said Khamiss Mussa is fictitious person.

It is the contention by the learned counsel that the suit was preferred by two applicants who are now respondents. However going through the proceedings the said Khamis Mussa who is allegedly son and sometimes husband of Rukia Lipangile has never appeared before the tribunal and the

records are silent on his where about. There is evidence through records for instance the Tribunal declined to admit the document bearing the name of Khamis Mussa purporting to be a receipt for purchasing the land on reason that the (purchaser) Khamisi is the proper person to tender the same, expecting that he will enter appearance, unfortunately he has never appeared and the purported exhibits had remained untendered thus it was improper for the Tribunal to declare the said Khamiss Mussa (2nd Applicant) as owner of the village Land.

Regarding the fifth and sixth grounds of appeal, that the District Land and Housing Tribunal erred in law for disregarding the evidence tendered by the appellants without assigning any reason, and that the trial chairman erred in law and fact for failure to hold that the certificate of occupancy allegedly possessed and issued in favour of the Respondents were dubiously made.

The learned counsel argued that the law requires the determination of civil matters to be on preponderance of probabilities. The appellants were sued as trespassers to the land composing of 366 acres on farm No. 559 allegedly located at Ipokela village and 360 acres in farm No. 560 allegedly located at Magulilwa village.

The appellants defended the allegations by adducing evidence and other documentary evidence, that is a letter from the District Commissioner dated 1971, to the effect that they were placed to the said lands by the Government, and that they have been occupying and developing the land without any interference since then, the 1st appellant (Teresina sisters)

went further to produce the letter of offer and the certificate of occupancy to that effect, unfortunately the trial chairman did not consider the same. The learned counsel submitted that had the trial chairman properly directed himself to the material issue (trespass) he could have arrived into deferent premises with regards to the appellant's presence over the land in question. Instead the chairman capitalized on registration of the respondents as owners in total disregard that the alleged purchase, survey and purported registration of title deeds remains to be questionable. She further submitted that the registration processing and issuance of the certificate of occupancy is one thing, the legality of the same is a different thing altogether, the trial chairman did not make any findings on the issues and questions raised with regard to the genuineness or otherwise of the processes of acquiring and registration of the land by the respondents for that she prayed for these grounds to be allowed.

Regarding the 7th ground of appeal, that the District Land and Housing Tribunal erred in law for failure to critically analyze the evidence in records consequently reached to a grave unjust decision.

The learned counsel submitted that the appellants' complaint over this ground is on the failure by the chairman to analyze the evidence on record.

It is the contention by the learned counsel that analysis, evaluation and scrutiny of the evidence on records for proper findings before making a verdict is a legal requirement.

She said it is alleged 1st respondent once she sued some of the villagers but were acquitted, no further steps were taken after acquittal.

That trespassers were ordered not to trespass again, but no order was tendered before the tribunal. Majembe auction was ordered to carry out eviction against the villagers it is not stated why not affected.

It is alleged Teresina Sisters grabbed 42 acres or 50 acres. This contradiction was made by the witnesses from Kilolo District Council but no finding was made by the Tribunal on this vital fact.

The learned counsel contended that there is a question remains unanswered on how the land claimed by the Respondents can be identified for purposes of evicting the appellants as trespassers. It is her submission that the trial Tribunal did not determine the dispute as required under the law, the undisputed facts remain that the respondents claims are unfounded and unjustifiable, and the purported certificates of occupancy as relied by the Trial Chairman were manufactured and dubiously processed, calculated at alienating the appellants land to suit the respondents desire. She therefore prayed for this appeal to be allowed with costs.

In his reply submission. Mr. Anthony Samson Rutebuka learned advocate submitted that the Respondents acquired the disputed land by purchase through public auction ordered by the District Court of Iringa conducted by the court Broker executing a court decree as reflected at page 6-7 of the proceedings and per exhibit P1 collectively, P2 collectively and P3 collectively. He said appellants were sued for trespass and the trial Tribunal heard the matter at first and delivered judgment on 19/12/2014 in

favour of the Respondents. The appellants were dissatisfied, they appealed to this court vide Land Appeal No. 2 of 2015. Hon. Feleshi Judge quashed part of the trial proceedings recorded after 12/03/2014, the other part of the proceeding remained intact.

He quashed the judgment and set aside the decree. He ordered the trial Tribunal to conduct a re-trial starting from where DW4 had ended by issuing summons to the Registrar of Titles and leave hearing to continue. After hearing has resumed where DW5 testified on 25/07/2018, the same witness (DW5) was recalled on 09/11/2018.

Mr. Rutebuka contended that Section 23(1) and (3) of Cap. 216 and Regulation 19 were complied with. He said the record shows at page 13 - 30 of the old proceedings that assessors present at the commencement of the trial were Mr. Vahaye and Mrs. Tagalile until when the Respondent closed their case. And page 36 of the old proceedings show that on 16th July, 2013 only Mrs. Tagalile was present, Mr. Vahaye absented himself and DW1 gave evidence. He said that assessor being absent he would not participate in hearing other witnesses. On 11/12/2013 the remaining assessor was absent and DW3- was heard as revealed at page 46. That pages 50-52 of the old proceedings show that DW4 was heard in the absence of the remaining assessor. When hearing resumed both assessors could not participate as they had not heard all witnesses. He said that was discussed in the new proceedings at page 16. The advocate for the Appellants noted that there were no assessors. Mr. Rutebuka informed the Tribunal the understanding on Section 23(2)(3) of Cap. 216 Mr. Rwezaula

conceded to that opinion of Mr. Rutebuka. As shown at page 16 of the new proceedings, the Tribunal ordered hearing to continue without assessors per Section 23(3). There was no reason therefore to incorporate the assessors opinion because Regulation 19 requires that assessors who were present at the conclusion of the hearing are the ones to give opinion, since the assessors were not present at the conclusion of hearing there was no need for them to give their opinion. He said the chairman was therefore correct for not taking their opinion and was not bound even to give reasons. Mr. Rutebuka argued that even the cited case of ***Ameir Mbarak and Another vs. Edgar Kahwil*** (supra) give guidance at page 6-7 of the judgment that assessors who have not heard all evidence are not allowed to give opinion otherwise if he/she does amounts to proceedings and judgment a nullity. It is that is because the chairman correctly did not allow assessors who had not heard all evidence to give opinion. Mr. Rutebuka saw this ground as baseless and pray for the proceedings and subsequent judgment be sustained.

In regard to third ground of appeal Mr. Rutebuka submitted that this is a new issue which was neither framed nor determined by the trial Tribunal. The same cannot be determined at an appellate level. To that he cited the cases of ***Hotel Travertine Limited and 2 Others vs. National Bank of Commerce Limited (2006) TLR 133*** and ***James Funke Gwagiio vs. Attorney General (2004) TLR 161***.

He said the parties were being represented by advocates, they would have raised it before the trial Tribunal for determination. The appellants

have not mentioned the names of the parties she is complaining that were not made parties to the case. However he said the Respondents had no claim against the village councils and the allocating authorities. He said if at all the appellants had interest, they would have joined them by way of third party notice. They would bring them to adduce evidence in their favour. He said the representatives of the commissioner, PW2 and PW4 were brought by the Respondents to adduce evidence but the appellants did not challenge their evidence or even raise the issue before them. Even the witnesses did not complain to have any interest on the disputed land. The representative of the Registrar was brought by the appellants as a witness everything was clarified on the certificate. Even the cited case of ***Oil Com Tanzania*** (supra) is immaterial to this case as the matter was raised as a preliminary objection before the trial court contrary to the case at hand that was the opinion of the judge thus this court is not bound to follow his opinion. Section 45 of Cap. 216, should be considered as there have been no failure of justice. There are no complaints from the purported parties and if it happens then have a chance to challenge by way of objection proceedings during execution of the Tribunal decree.

Replying to grounds 3 and 4, Mr. Rutebuka submitted that the 2nd Respondent is not a fictitious person. Evidence by PW1, PW4 and DW5 reveal that he owns with his mother, the 1st Respondent equal shares of the disputed land. He said exhibit P1 collectively and exhibit P3 collectively were not challenged this shows clearly that the disputed land is of the

Respondents, they are occupiers in common as per Section 159(1) – (8) of the Land Act, Cap. 113.

He said when cross-examined by Mr. Kaijage Rwezaula advocate she replied that 2nd Respondent is his son. Thus the speculation alleged by the Appellants' advocate are words from the Bar. The learned counsel submitted further that PW1 stated that she issued the money but it was Hamis who gave the money to the auctioneer as revealed at page 23 of the old proceedings. And the reasons for absence of the 2nd Respondent is shown at page 24 of the old proceedings when PW1 is heard when asked that Hamis Mussa was there but is sick the learned advocate submitted further that the witnesses who were brought testified in favour of the Respondents. The 2nd Respondent is not complaining that he has been declared the rightful owner of the disputed land. Even appellants not all gave evidence only DW1, DW2 and DW3 testified out of 11 Appellants. Looking at the nature of ownership, there is no way the trial Tribunal could have done to separate the ownership. By not challenging exhibit P3, they admitted that the disputed land belong to the Respondents thus no fault was committed by the trial Tribunal.

With regard to the 5th, 6th and 7th grounds of appeal (E,F and G). It is the submission by the learned counsel that the evidence of all parties was considered by the trial Tribunal, the evidence that they acquired the disputed land via the district commissioner is at fault. There is no such evidence on record. They are words from the bar which cannot be considered by the appellate court. He said the only available evidence is

exhibit D1 dated 12/09/1978 which was analyzed by the trial Tribunal and found to be weak as explained at page 9 of the judgment. The decision by the trial Tribunal was therefore correct being guided by court decision in ***Hemed Said Case*** and Section 110 (1) of the Law of Evidence Act. He is of the view that evidence of PW1, PW2, PW4 and PW5 was not challenged at all.

The learned counsel submitted further that Teresina Sisters asserted that they own the land, in addition Teresina Sisters asserted that they purchased the disputed land. However they never produce the sale agreement and no reason for having not have transferred the land ownership into their name. He said all these prove they are trespassers. Mr. Rutebuka went on and stated that registration processing and issuance of the certificate of occupancy was neither among the issues framed and pleaded. This is a new issue which cannot be determined at this appeal stage. To that he cited the case of ***Hotel Traveline Limited and 2 Others vs. National Bank of Commerce Limited (2006) TLR 133 CAT, and James Funke Gwagito vs. Attorney General (2004) TLE 161.***

Mr. Rutebuka Submitted further that the trial Tribunal critically evaluated the evidence before it in exhibits P1, P2 and P3 and that of PW1, PW2, PW4 and PW5 and declared the Respondents lawful owners of the disputed land he also cited the case of ***Peter Adam Mboweto vs. Abdallah Kulala and Mohamed Mukole (1981) TLR 336*** where the Court of Appeal held that the appellant had clearly acquired good title to

the shamba and that no good reasons raised for disturbing his title. The respondent's counsel prayed for the appeal to be dismissed with costs.

In her rejoinder counsel for the appellant mainly reinstated to what she submitted in her submission in chief with some emphasis on certain areas.

Having carefully read the submission by the respective counsel for the parties, the controversy appears to be centred on the question of acquisition of the land in dispute.

Each of the parties is claiming to have a superior title than the other. The appellants on their part with the exception of the 1st appellant who was the 10th respondent at the trial said they were allocated that land by the District Authority. While the 1st appellant alleged that they purchased the land from George Tawel. The Trial Tribunal Found for the Respondents.

In their 1st ground of appeal the appellants complaint is that the whole of the trial Tribunal judgment and decree is bad in law for failure to involve the gentleman assessors contrary to the requirement of the law and that no reasons has been made for the omission. I have gone through the Tribunal record it appears that after the parties have closed their case and issue of visiting locus in quo was deliberated, the learned Tribunal chairman invited the counsel from both sides to address him on whether or not the gentle assessors should be invited to give opinion. This happened so because in the course of hearing it appears the assessors dropped attendance. The first one not to attend is Mr. Vahaye and later the

remaining one Mrs. Tagalile also did not attend. Both assessors were recorded to have not attended from 29/01/2014. There are no reasons were assigned for their absence. However, this case reached this court on appeal, where Feleshi Judge ordered for retrial from DW4 the Registrar of titles. When retrial commenced on 25/07/2018 no assessor attended. After the counsel for the parties were invited to address the Tribunal chairman on the issue of assessors, there were different suggestions by the learned counsel some suggested that the trial should start afresh. But some were of different opinion that since the matter reached the High Court while assessors had ceased participation in the case and this court did not nullify the proceedings instead ordered retrial from DW4, then the District Land and Housing Tribunal cannot act against the order of this court. And that it is on record that the chairman proceeded alone while hearing evidence of DW3 and DW4. But the High Court ordered the District Land and Housing Tribunal to proceed from DW4. For that case the Tribunal chairman proceeded to the end without assessors.

It is this act of the Tribunal chairman containing with a trial without assigning reasons for not involving assessors is complained against. I must point out from the outset that an assessor who has participated in a trial but failed to attend in the subsequent trial for whatever reason he/she cannot join the trial later on. In the trial of this case after Mr. Vahaye has failed to attend the trial on 16/7/2013, he could not attend in the trial again likewise for Mrs. Tagalile who from 11/12/2013 did not attend the trial, she could not attend again and continue with the trial. After the two

assessors have absented themselves from the trial, the trial chairman proceeded with the trial alone which is permitted by law. Section 23(3) of the Land Disputes Courts Act, Cap 216. R. E. 2019 provides:-

> *"23(3) Notwithstanding the provisions of subsection (2) if in the course of any proceedings before the Tribunal either both members of the Tribunal who were present at the commencement of proceedings is or are absent the chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence"*

Similar wording were given in Regulation 19(2) of the Land Disputes Court Act (District Land and Housing Tribunal) Regulations 2002 G.N No. 174 of *2003, which provides:-*

> *"Notwithstanding regulation (1) the chairman shall, before making his judgment,* ***require every assessor present at the conclusion of the hearing to give opinion*** *in writing and the assessor may give his opinion in Kiswahili" (emphasis supplied)*

See also the case of ***Tubone Mwambeta vs. Mbeya City Council***, Civil Appeal No. 287 of 2017 CAT at Mbeya (unreported). The proceedings is clear that both assessors in this case dropped before the conclusion of the proceedings. The provisions above reproduced permit the chairman to

continue and conclude the proceedings alone in the absence of assessors. The complaint by the appellants' advocate that the trial chairman did not involve assessors to give opinion and that he did not give reasons for so doing is baseless. There is no any provision requiring the Tribunal chairman to give reasons as to why the assessors were not involved to give opinion. The proceedings themselves tell all about. In the case of ***Ameir Mbarak and Another vs. Edgar Kahwil,*** (supra) at page 6-7 the court explained circumstances under which assessors who did not attend proceedings from its commencement to its conclusion cannot be involved in the decision by giving opinion. Citing the case of ***Joseph Kabul vs. Reginam (1954 – 55) EACA VOL XX1-2,*** the court emphasized on the consequences of involving assessors who did not participate in the proceedings to the end, in that case it was held:

> "where an assessor who has not heard all the evidence is allowed to give an opinion on the case, ***the trial is a nullity*** (emphasis supplied)"

The assessors in this case Mr. Vahaye and Mrs. Tagalile could not give opinion because they did not participate in the proceedings from its commencement to its conclusion. This ground of appeal lack legal base.

In the second ground of appeal on non-joinder of interested, necessary as well as proper parties, the argument by Mary Mgaya is that as there is contention that the land in question belongs to two distinct villages which

the said Khamis Mussa whom she termed a fictitious persons purchased it at the auction, and later it was surveyed and registered, the relevant allocating authorities and the village councils were necessary and proper parties to the suit for fair determination of the dispute. In their reply submission the respondents argued, that is a new issue not raised in the pleadings nor in the hearing at the trial Tribunal.

In rejoinder Mary Mgaya did not dispute that the issue was first raised before this court on appeal. But she argued that it is a point of law which she can raise it even at an appeal stage. Reading through the trial Tribunal proceedings there are PW2 and PW4 who were representatives of the commissioner for land were called by the respondents.

PW2 Dominic Mpise Nongole the Land surveyor, was working with Kilolo District Council, he was involved after the matter was reported in their office. The 1st appellant showed to him her documents and he made follow up and went to the site where he was shown the boundaries. He compared the 1st appellant title deeds with the office documents. After he has verified the boundaries of the two farms using GPS, he discovered that the sisters grabbed 62 acres, as they had land bordering farm No. 560.

PW4 Elinazer Kiswaga is the Land Officer with Kilolo District Court. In his evidence had explained how the land in dispute was owned by Tawel who had a title deed issued in 1949 for a term of 99 years. But the latter abandoned the land in between 1960 and 1970. But the title was revoked on 2/5/1966. PW4 said according to their office records the farm is the property of Hamis Mussa and Rukia Lipangile.

The appellants' counsel complaint on non-joinder of necessary parties is a point of law as the learned counsel has said but which is incapable of being raised at any stage. The point of law which can be raised at any time is that relating to jurisdiction and time limitation. See for example the case of ***Tanzania- China Friendship Textile Co. Ltd V. Our Lady of the Usambara Sisters [2006] TLR 70***. The parties in this case were represented by advocates from the District Land and Housing Tribunal, but the question of non-joinder of parties was not raised. It just featured at this appeal level which cannot be permitted, and more so because O. 1 r. 13 of the Civil Procedure Code requires the objection on the ground of non-joinder or misjoinder of parties to be raised at the earliest moment.

The same provides:-

> *"All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all case where issues are settled at or before such settlement which is the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived".*

But further misjoinder and non-joinder of parties cannot render the matter defective as it is provided under O.1 r. 9, which provides.

> *"9 No Suit shall be defeated by reasons of the misjoinder or non-joinder of parties and the court*

may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it"

The two witness PW2 and PW4 representative of the commissioner for lands who testified before the trial Tribunal their testimonies was not challenged by the appellants by way of cross-examination. The appellants' counsel cannot now be heard complaining about non joinder of necessary parties. A person who is necessary to be joined is the one, and on the ground that his presence in the suit is necessary for effectual and complete determination of the dispute. And without which would legally affect the interests of that person and for purpose of avoiding multiplicity of suits. The other necessary party is whose absence the defendant cannot affectively set up his defence. But not every person is a necessary party. As said above the representative of the commissioner were called and testified in court regarding the suit land and how the title deed was issued to the respondents. In my view the interest of the commissioner for lands was well protected by persons who were working under him and who represented him such that it cannot be said that without him an effectual judgment and decree cannot be made. I therefore find this ground of appeal without merit.

The appellant's counsel argued grounds No. 3 and 4 together that the findings and decision of the District Land and Housing Tribunal is irregular for failure by Khamis Mussa 2nd Applicant to appear and testify before the Tribunal. And that the decision thereof is based on speculations. And for

the Tribunal to declare him lawful owner of the suit land while is a fictitious person. The respondent's counsel on his part disagreed with her because it is on record that PW1 testified that 2nd respondent was sick. But is the one who paid the money for the purchase of the said land although those money were issued by PW1.

During cross-examination by Mr. Kaijage advocate PW1 stated that Hamis Mussa is her son she purchased the shamba through public auction in 1991. After purchase the land she went to verify the boundaries. She went there together with the surveyor who showed her beacons, the land was surveyed and has title deed. This evidence is found at page 22-23 of the typed proceedings. There is also documentary evidence, exhibit P1 collectively, and Exhibit P3 collectively which were tendered and admitted by the Tribunal and were not challenged by the appellants counsel.

Failure by 2nd respondent to testify for reason of sickness cannot be ignored. But appellant's counsel did not lead evidence to prove her allegations that 2nd Respondent is a fictitious person. I therefore find no merit in the two grounds.

The complaint in the ground No. 5 is for the Tribunal disregarding the appellants' evidence without assigning reasons. Ground No. 6 is to the effect that the trial chairman erred for failure to hold that the certificate of occupancy issued in favour of the respondents were dubiously made, and grounds No. 7 that the trial chairman failed to critically analyze the evidence on record have gave unjust decision. The learned counsel for the appellants argued them jointly and her contention is that the trial chairman

appeared to be influenced more with the evidence that the area in dispute was surveyed and title deed issued to the respondents. But the learned counsel argument is that the learned chairman was required to make findings on the issues and questions raised with regard to the genuineness of the process of acquiring and registration of land by the respondents.

Before the District Land and Housing Tribunal, the following issues were framed and recorded by the trial Tribunal.

1. Who is the lawful owner of the disputed farms.
2. Whether the applicants have occupied the suit farm and effected therein the alleged unexhausted improvements.
3. To what reliefs are the parties entitled.

Those issues were framed by the trial tribunal chairman by the assistance of the Advocate for the parties.

The first issue was resolved in favour of the respondents.

The appellants counsel complaint is that the trial chairman should have resolved the issues raised. It is on the record of the trial tribunal and its judgment from page 9 that all issues raised were resolved. But it appears the basis of complaint by the learned counsel for the appellants is that the trial tribunal did not satisfy himself on the genuineness of the title deed (exhibit P1). It is a settled principle of law that where two persons have a dispute over a piece of land as to ownership the party with a certificate over it is taken to be the lawful owner. This was the position of

the Court of Appeal in the case of ***Amina Maulid Amball vs. Ramdhan Juma***, Civil Appeal No. 35 of 2019 CAT at Mwanza (unreported) at page 6 has this to say:-

> *"in our considered view when two persons have competing interests in a landed property. The person with a certificate thereof will always be taken to be a lawful owner,* ***unless it is proved that the certificate was not legally obtained"*** *(Emphasis supplied).*

Mary Mgaya learned counsel for the appellants has alleged that the genuineness of the processes of acquiring and registration of the land by the respondents was not resolved. However it is unfortunately that despite such allegations of unlawful title deed, the learned counsel did not lead evidence to prove that the same was actually unlawful. As it is settled law that the one who alleges so, she had the burden to prove that the processes of acquisition of the suit land by the respondents and their registration, and issuance of title deed were unlawful. The learned counsel did not prove such allegations therefore cannot be considered as remain as mere speculations.

It is on the trial court record that both PW2 Dominic Mpise Nongole the land surveyor and PW4 Elinazer Kiswaga the land officer Kilolo District Council gave evidence and clearly stated that the land in dispute is a surveyed land. The same was surveyed in 1932.

According to DW5 Frida Mwasulama the delegate from the office of the Registrar of Titles Mbeya, the suit land is in two titles deeds. The farm with title number 7162 MBYLR is known as farm No. 560 measuring 360 acre located at Magulilwa and the farm with title deed No. 7163 MBYLR, farm No. 559 located at Ipokela measuring 566 acres. DW5 explained that before 1995 when the farm was allocated to the Respondents, the title was issued to Gerald Richard Courtenary for a term of 99 years and it was issued to him in 1949. In 1961 the title was transferred to George Daniel Michael Palmer, in 1966 it was revoked. DW5 stated further that since then up to 1996 it was not owned by any person. In 1996 it was resurveyed and subdivided. DW5 explained that the office of the Registrar of Titles was able to know changes of ownership of the land using index card which is used to record all what happened to a plot. But she stated further that the Teresina sisters do not feature in the Register of the Registrar of Titles as owner of the suit land. She was not aware if the Registered Trustees of Teresina sisters have even been allocated the sit land as they do not appear in the register.

Even do they boarder the suit land as the documents do not show that. She stated further that while the farm was still one it was not indicated as in which village it was located. But after division, one form appears to be located at Ipokela village what and the other at Magulilwa village. And further that Exhibit P2 was not issued to the suit land. It was over Luwona Farm The Registrar of Title in the custodian of all Titles deeds such that the Registered Trustees of Teresina Sisters would have been

allocated land in the suit farm that would be shown in the Registrar Register. But their name do not feature which means that if they had their land should be not on the suit land because as DW5 has stated they farm is at Luwona a different face altogether. But for the suit land heather Registered Trustees Teresina sisters nor any of the other appellants was allocated land there on as there is no evidence tendered to show that.

According to Sr. Octavian Gomano DW2, she said she know the suit land she witnessed when her congregator purchasing the land from Tawel in 1995. The same was surveyed. They were given offer and drawing (exhibit P2). But on his part Issa Mtunga DW3 said the suit land was allocated to Austin George Austan by Ukumbi village in 1982 but original, its belonged to Kiyeyeu family, He said in 1985. Tawel applied for survey of the land with this evidence definitely this would be different land to the one in dispute. The disputed land was surveyed in 1932 and allocated to Gerald Richard Courtenary Wilson which in 1961 the titles was transferred to George Daniel Michael Palmer. The same land connote be surveyed again in 1986 as DW3 has stated. Merina Chonya DW4 told the Tribunal that she was the wife of George Tawel from whom Teresina Sisters purchased the land. Although she said in the one who actually sold the land after the death of her husband she was not sure if there was any written sale agreement and if she signed the same. This appears not to be credible witnesses, it she could not remember even there was which agreement. But it should be noted that although the 1st appellant claimed to have an offer over the suit land in on way two different title deed can be

issued on the same landed property because even if we assume that the said Tawel unlawfully sold part of the piece of land to the 1st appellant in 1995, only a year later an auction to the suit land was conducted which could not be done secretly. The same was done following court order an involved several bidders but the respondents emerged as successfully bidders. But if the said suit land was surveyed way back in 1932 and there is a title deed issued to Gerald Richard Courtenary for a term of 99 years in 1949. Then in 1961 the same title was transferred to George Daniel Michael Palina which was revoked in 1966.

According to the evidence of DW5 Frida Mwasulama from that time until 1996 none owned that land until 1996 when it was resurveyed subdivided and allocated to the present respondents.

In her testimony DW5 was using official records. However there is no where shown that Austin George Alan Tawel had at a certain period owned that suit land even the 1st appellant did not explain as to where and when he acquired the land which he sold to them such that it might be true that the 1st appellant purchased land different to that the respondents purchased at the auction. And for reasons that the said land was not developed, they encroached part of that land like the villagers of Lupembe Lwasenga did after find that nobody was developing the same. But even if the said land had not been attended at a certain period, that was not a justification for anyone to enter into and then claim ownership. As there are documents of ownership in favour of the respondents from the period the said land was surveyed, any other person who entered into such land

in between must be a trespasser. It like the present appellants, they might have purchased the land from a person possessing no valid title to the land. The 1st Appellant might have purchased the land without making search to see if the same was not encumbered. The position therefore remains the same that the one with a valid title is the true owner of the suit land. The appellant have failed to lead sufficient evidence to prove superior title to the suit land compare to the respondents whose evidence is straight forward. These ground also lack merit. As to the allegations of failure by the trial chairman to critically analyze the evidence on record, this ground too lack merit. The trial chairman analyzed the evidence before him basing on the farmed issues and resolved each issue accordingly basing on the evidence received. He cannot therefore be said that he failed analyze the evidence. The learned chairman even considered the administrative letters from the District Commissioner Iringa of 1971.

There is also the complaint by the appellant's counsel for the Tribunal failure to make finding on the letter issued by the administrative authority placing the appellants and other more than 1026 villagers to the land. This on the face of it appears to be new issue, however can be covered under ground (g) for failure by the trial chairman to critically analyze the evidence on record. The trial chairman had analyzed the evidence, if you look at page 9 of the Tribunal Judgment from paragraph 3 up to page 10, it appears after the title deed by one George Daniel Michael Palmer was mortgaged and after he has failed to discharge the mortgage, one Mohamed Salehe assumed owner of the said land on which he entered and

made developments. however there is no any piece of evidence indicating that he lawfully occupied that land. At a certain period he was arrested on allegations that he participated in the murder of Dr. Kleruu. He was detained for some years and where he was released he found the said land invaded by villagers and through the village authority of Lupembe Lwasenga a school was built there on that forced the said Mohamed Salehe to sue the village council for Lupembelwasenga village in Civil Case No. 58 of 1990 for unexhausted improvements. He won the case and was awarded compensation in the sum of Tshs. 200,000/=. It is the same farm which on 05/05/1995 was legally acquired by the present Respondents who acquired it through an auction by Court order. Since then efforts by the Land Office Iringa to make sure that all persons who unlawfully entered into the said land were removed started by involving the village authority of Lupembelwasenga village as shown in several administrative letters and correspondences between the Court of Resident magistrate Iringa and the land Office Iringa and the Court broker exhibit A. and annexeture 6. The trial chairman correctly found that although some of the appellants 2nd and 11th appellants claimed to have acquired the land by being allocated by the village Council but the latter was not a land allocating authority at that time particularly for a surveyed land

This complaint also lack merit. It appears there has been a confusion on the boundaries of such land, according to exhibit P2 it was very simple for the seller of Luwona Farms to overstep to the Respondents Ipokela farm. Upon carefully reading the evidence for the appellants, by DW1

Magnus Benito Kimbe he said the 1st appellant purchased land from Tawa and that Tawa owned 726 acres. But he went further and said Tawa and Tawel are two different people. This can be seen at page 40 of the trial Tribunal typed proceedings while being cross –examined.

On her part Sr. Octavia Gomano (DW2) said they got the land from Tawel in 1995 who also gave them the offer and drawing (exhibit D2). DW2 clearly stated that the transfer of the title deed from Tawel to Teresina Sisters was not complete as from 1995 to 2012 they were in the process. She stated further that their farm is measuring 350 acres. DW2 clearly stated that she did not attend during the locus in quo visiting where the suit farm was being identified by PW2 by locating the beacons which he said were planted way back in 1933.

On his part DW3 Issa Mtuga said Tawel was working with Mtanga Diaries at Mgagao. After retirement he applied for land at Luwona area Ukumbi village in 1992 he said that land originally was owned customarily by the Kiyeyeu family. He was allocated the land in 1985. That land was surveyed in 1985. There were other 60 acres added for Lupembe lwasenga villagers. And that Tawel sold his land to Teresina Sisters. But the same was sold by the late Mhelela after the death of Tawel. Unlike DW2, DW3 said the Sisters title deed shows that their land is measuring 35 acres. But Merina Chonya the widow of Tawel denied for Mhelela to have sold the land to sisters. But she also disclosed that she cannot be sure if Teresina Sisters maintained to their boundaries or they have crossed. By considering the whole evidence, in my view the determinant evidence is that of DW5

who clearly told the trial Tribunal that the document which 1st appellant were given by the vender and which was tendered by DW2 (exhibit D2) was not issued in respect of the suit land. It was issued in respect of Luwona Farm which is a different farm to the one now in dispute. As clearly stated by DW5, the Registrar of Title being the custodian of all title deeds if Teresina sisters would have been allocated land in the suit land, that would have been shown in the Registrar's Register. But their name do not feature which means if they were allocated land it should be outside the suit land. It is unfortunately that the 1st appellants did not tender any document showing that they registered with the Registrar of titles the land they acquired from Tawel and Merina Chonya in 1995. Exhibits D2 shows the title of the land while being owned by Tawel, there is no any document showing transfer of that title deed. In actual fact the appellants tendered no any document establishing ownership to the suit land. The way evidence shows particularly as testified by PW2 at the locus in quo, the land that Teresina Sisters purchased from Tawel is a different land. But as there is no valid document tendered by the appellants to show specifically the boundaries of the land sold to them by Tawel there is the possibility for them to overstep and thus trespass to the respondents' farm. But provided that the respondents' farm is surveyed with a title deed, they are the one who must be recognized as lawful owner of the suit land. And they shall be left to enjoy peaceful ownership without any interference by any other person. The appellants counsel did not submit on ground No. 8, it is possible as it was submitted by the respondents' counsel she decided to

abandon it, I will also not discuss it. That said therefore I find the appeal by the appellants without merit. The same is dismissed with costs.

DATED at **IRINGA,** this 3rd day of November, 2020.

F N. MATOGOLO

JUDGE

03/11/2020

Date: 03/11/2020

Coram: Hon. F. N. Matogolo – Judge

1st Appellant: Present

2nd Appellant:

3rd Appellant:

4th Appellant:

5th Appellant:

6th Appellant: Present

7th Appellant:

8th Appellant:

9th Appellant: Absent

10th Appellant:

11th Appellant:

1st Respondent:

2nd Respondent: Mr. Marco Kisakali Advocate

C/C: Grace

Sr. Chalamila - Advocate:

My Lord I am holding brief for Mary Mgaya advocate for the appellants.

Mr. Marco Kisakali - Advocate:

My Lord I am appearing for the Respondents. The matter is for judgment we are ready.

COURT:

Judgment delivered.

F N. MATOGOLO

JUDGE

03/11/2020

COURT:

Right of Appeal is explained.

F N. MATOGOLO

JUDGE

03/11/2020