

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**LAND CASE APPEAL NO. 5 OF 2020**

(Appeal from the Decision of the District Land and Housing Tribunal of Mtwara District at  
Mtwara in Land Case No. 99 of 2018)

**KASIMU FAKIHI BAKARI (as administrator of the estate of the late  
FAKIHI BAKARI AKALAMA).....APPELLANT**

**VERSUS**

**SHABAN FAKIHI BAKARI.....1<sup>ST</sup> RESPONDENT**

**HAMIS FAKIHI BAKARI.....2<sup>ND</sup> RESPONDENT**

**ISSA FAKIHI BAKARI.....3<sup>RD</sup> RESPONDENT**

**HAMIS SAIDI KUBEDA.....4<sup>TH</sup> RESPONDENT**

**SHAIBU HASSAN MPETA.....5<sup>TH</sup> RESPONDENT**

**SHAZI ALI MASUMBUKO.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

15 April, & 1 June, 2021

**DYANSOBERA, J.:**

Kasimu Fakihi Bakari, Shaban Fakihi Bakari, Hamis Bakihi Bakari and Issa Fakihi Bakari, herein after referred to as the appellant, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>

respondents, respectively, are siblings. Their father Fakihi Bakari Akalama died on 7<sup>th</sup> July, 2000. The deceased owned the suit land located at Chihanga village, Mkunya Ward in Newala District estimated to be valued at Tshs. 40, 000,000/=. On 23<sup>rd</sup> day of March, 2015 the appellant was granted letters of administration and when he sought to distribute the deceased's estate, he met a stumbling block in that the six respondents refused to surrender the suit land.

On 29<sup>th</sup> day of November, 2018 the appellant filed a suit before the District Land and Housing Tribunal for Mtwara. In that suit, he averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were occupying the suit land as licensees pending the appointment of the administrator of the estate of their late father but then illegally distributed the land among themselves and disposed it to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. Before the said Tribunal, the appellant prayed for a declaratory orders that the twelve (12) acres located at Chihanga village at Mkunya Ward within Newala District is the property of the late FAKIHI BAKARI AKALAMA, the respondents are unlawful occupiers of twelve acres located at Chihanga villave, Mkunya Ward within Newala District in Mtwara Region, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were licensees of to the disputed farm, the sale between 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are nullity. The appellant also claimed for an eviction order against the respondents from the disputed farms, payment of general damages to the tune of Tshs. 30,000,000/= and costs of the suit.

In their written statements of defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied to have been licensees and argued that they were legal owners of the suit property after it was distributed to them by the former administrator and then legally sold the land to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.

In a judgment delivered on 19<sup>th</sup> day of December, 2019, the Hon. Chairperson dismissed the suit with costs and declared the 5<sup>th</sup> and 6<sup>th</sup> respondents as the owner of the respective suit lands.

Aggrieved, the appellant has appealed to this court on the following grounds:-

1. That the Honourable trial Chairman erred both in law and fact by holding that the estate of the late FAKIHI BAKARI AKALAMA was distributed to the heirs by SWAREHE SAIDI MAWAZO, the former administrator of the estate of the late FAKIHI BAKARI AKALAMA.
2. That the Honourable trial Chairman erred both in law and in fact by holding that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had locus standi to sale the disputed property to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.
3. That the Honourable trial Chairman erred both in law and in fact by considering and relying on the exhibits D 5, D7 and D8 which were improperly tendered and received by the Honourable Tribunal.

4. That the Honourable trial Chairman erred both in law and in fact by failure to analyse properly exhibits D 5, D 6, D 7 and D 8 as a result failed to reach at a just and equitable decision.

On 9<sup>th</sup> day of March, 2021, Mr. Hussein Mtembwa, learned Counsel for the appellant prayed the appeal to be argued by way of written submissions. The 1<sup>st</sup> and 3<sup>rd</sup> respondents had no objection. The court granted the prayer and parties filed their written submissions.

Mr. Hussein Mtembwa dropped the 4<sup>th</sup> ground of appeal and argued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal. Submitting in support of the 1<sup>st</sup> ground of appeal, learned Counsel for the appellant was of the view that there are two issues which calls for determination. One, whether the suit property was distributed to the heirs, that is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and two, whether part of the suit land was actually given to the late Mwajuma Bodo by the deceased during his life time.

Mr. Hussein Mtembwa maintained that the suit land located at Chihanga village in Newala measuring twelve acres was distributed to none and that this was what the appellant had told the trial Tribunal as seen at pages 12 and 13 of the trial court's proceedings and that the reliance by the Chairman on exhibits D 5, D 6, D 7 and D. 8 was wrong as the said documents which were copies were illegally admitted in the Tribunal.

It was Counsel's argument that the distribution that had been made by the former administrator had been revoked as indicated at page 5 of the trial court's proceedings. Mr. Hussein insisted that there was no evidence that the 2<sup>nd</sup> respondent inherited part of the suit land from his late mother as such no title could pass from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to the 4<sup>th</sup>, 5<sup>th</sup> and the 6<sup>th</sup> respondents since all the property of the deceased vests in the administrator. Reliance was placed on the Magistrate's Courts Act and the Probate and Administration of Estates Act.

On the third ground, learned counsel for the appellant contended that there was improper admission of exhibits D 5, D 7 and D 8 as all were photocopies and their admission was, therefore, in contravention of sections 66 and 67 of the Evidence Act. To support this argument, learned counsel quoted SARKAR in his book titled LAW OF EVIDENCE, 17<sup>th</sup> edition at page 1405 where it is stated:

'The general rule is that secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved'.

It was argued on part of the appellant that DW 4 did not give reasons why the primary evidence was not tendered. Reference was also made to the case of **Edward Dick Mwakamela v. R** (1987) TLR 122 where the Court held:

For the secondary evidence to be admissible, it must satisfy the provisions of section 67 of TEA on the admissibility of secondary evidence.

Replying to the submission, Mr. Nimrod Mafwele, learned Advocate of Brotherhood Attorneys who represented the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents told this court that the Chairman was right in his finding that the estate of the late Fakihi Bakari Akalama was distributed by Swalehe Said Mawazo, the former administrator as testified by DW 1, DW 3, DW 4 and DW 5; also by PW 1 and PW 2 during cross examination.

In further elaboration, learned counsel for the respondents contended that it is clear the land in dispute was distributed by Swalehe Said Mawazo to all the heirs of the late Fakihi Bakari Akalama, the fact that Swalehe Said Mawazo commented in the proceedings of Newala Primary Court (exhibit D.6) that he want the division to be cancelled and everything to start again/afresh it doesn't mean the estate of the late FAKIH BAKALI AKALAMA especially the land in question was not distributed among the heirs but rather it prove there was distribution which left some complain among the beneficiaries.

Counsel for the respondents also submitted that the Land Disputes Court Regulations of 2003 which was made under GN. No. 174 of 2003 ease the strictness on the rule of admissibility of documentary evidence provided under sections 66, 67 and 68 of the Law of Evidence. Regulation 10 (2) and (3) of the Land Dispute Courts Regulations of 2003 provides that the Tribunal may at any stage of proceedings before the conclusion of hearing allow any party to the proceedings to produce any material document which were not annexed or

produced at the first hearing . (3) The tribunal shall before admitting any document under sub regulation (2) also have regard to the authenticity of the document.

With regard to the authenticity, learned counsel for the respondents contended that the testimony of witnesses D 1, D 3, D 4 and D 5 suffices as it has been elaborated in the case of **Makubi Dogani v. Ngodingo Maganga** (2019), Civil Appeal No. 78 of 2019. He said that no objection was raised when the documents were being tendered in the Tribunal. Reference was made to the case of **Abas Kondo v. Gede v. R** (2007), Crim. Appeal No. 472 of 2017 (Wambali, J.) quoted the case of **Malanga Kumar Ganguly v. Sukumar Mukherjee** AR 2010 SC 1162 where it was held:

It is trite that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as exhibit, he is estopped and precluded from questioning the admissibility at a later stage

In further emphasis, learned Counsel for the respondents referred this court to the case of **Makubi Gogani v. Ngodingo Maganga** (2019), Civil Appeal No. 78 of 2019 (Kerefu, JA)

I have carefully considered the trial court's record, the grounds of appeal and the submissions.

As far as the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal is concerned, the arguments are that there was no distribution of the estate by the former administrator one

Swalehe Said Mawazo to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and that the said respondents had no *locus standi* to sell the said pieces of land to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.

While Mr. Mtembwa, learned Counsel for the appellant supports this view, Mr. Mafwele, learned Advocate for the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents was of the contrary view stressing that there was distribution. Reliance was placed on the evidence of DW 4 and Exhibit D 6 to support this argument.

I have taken ample opportunity of considering the evidence of the appellant vis a vis that of DW 4 and exhibit D 6. There is no dispute that the appellant became the administrator of the deceased's estate after the former Swalehe Said Mawazo's letters of administration were revoked. He is well conversant of what transpired during that period. On the contrary, DW 4 was clear in his evidence that by the time, that is in 2003 he, DW 4, was in prison after he was incarcerated on a murder case from 22<sup>nd</sup> February, 2002 to 4<sup>th</sup> April, 2006. This means that the evidence on what took place in 2002 onwards to 2006 while he was in prison was not within his knowledge but, hearsay.

There is exhibit D 6 which is the decision of the Primary Court in Probate and Administration Cause No.22 of 2003 which appointed the said Swalehe Said Mawazo as the administrator, revoked his appointment and appointed the present appellant in his behalf. The appointment is clear at page 2 of the proceedings. It is recorded thus:-



**Amri: kuanzia leo hii Ndg. Swalehe Said Mawazo anateuliwa rasmi kuwa msimamizi wa mirathi ya merehemu Fakihi Bakari ana anashauriwa kusimamia kwa uaminifu na uadilifu hadi mwisho wa mirathi hii.**

Did Swalehe Mawazo distribute the estate? The answer is No. the same proceedings dated 5<sup>th</sup> May, 2004 shows:-

**Msimamizi: Mheshimiwa hakim u ninaomba Mahakama yako tukufu ifanye mgao wa mali za marehemu kwa wategemezi wa marehemu ili kila mtegemezi apate haki yake kama nilivyouleta:**

**Mahakama: kufuatia ombi la msimamizi wa mirathi hii mgao wa mali ya marehemu kwa wategemezi wa mirathi hii umefanywa kama ifuatavyo: 1, 2, 3, 4.1, 4.2 and 5.**

This means that the former administrator did not distribute the said estate; only the court did. This was wrong. Even if it is established that the former administrator did the distribution, still the record does not show that the disputed land was among the estate he distributed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Indeed, the record is clear that on 27<sup>th</sup> March, 2013 his letters of administration were revoked. The relevant record indicates:-

**Amri: kuanzia leo tarehe 27.3.2013 ndugu Kassim Fakihi Bakari anateuliwa kuwa msimamizi wa mirathi ya marehemu Fakihi**

**Bakari badala ya Mzee Swalehe Saidi Mawazo ambaye kwa hivi sasa afya yake hairuhusu kukabiliana na majukumu ya mirathi.**

Since it was not proved that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents were bonafide purchasers, their owning the suit lands in dispute cannot be legal.

With the foregoing, I am satisfied and hereby find that the former administrator one Swalehe Said Mawazo did not distribute the estate to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and as such, the latter had no title to pass to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.

The 3<sup>rd</sup> ground of appeal is on the considering and relying on exhibits D 5, D 7 and D 8 by the trial Tribunal which documents were improperly tendered and improperly received. As indicated above, DW 4 who tendered the said exhibits was neither the author, the addressee nor the custodian as he was in prison on a murder case. As to how he came by them has not been satisfactorily explained. In such a case, he was not competent to tender them in evidence as he could not authenticate them.

The argument that they were not objected to by the appellant in no way means that they were properly received in evidence.

I am alive to the obvious fact that proceedings relating to the admissibility of evidence in the District Land and Housing Tribunals, are supposed to be governed by regulations made in terms of section 51 of the Act as amended by Written Laws (Miscellaneous Amendments) Act, No. 2 of 2010. I am also live to

the provisions of section 45 of the Land Dispute Courts Act [Cap. 216 R.E.2002] which provides that:-

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

Equally, I am bound by the decision of the Court of Appeal in the case of **Makubi Gogani v. Ngodingo Maganga** (2019), Civil Appeal No. 78 of 2019 in which the Court of Appeal speaking through Her Lady Justice Kerefu, JA observed:

It is settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. Therefore, since the appellant did not utilize that opportunity, challenging the said exhibits at this stage is nothing but an afterthought"

However, the facts in that case are distinguishable from the facts obtaining in this case. In that case, the issue was not admissibility but irrelevancy. In that cited case it was stated thus:-

..It is our further considered view that, even the claim by Mr. Masige under the fourth ground of appeal that the said exhibits are irrelevant in this case is misconceived'

Moreover, the Court of Appeal's legal position is that the decision of the court must be based on evidence properly adduced. This is clearly emphasised in Civil Appeal No. 55 of 2013 between **Mohamed A. Issa v. John Machela**, CAT-Mwanza p. 12 of the typed judgment when it observed thus:-

We think we need not overemphasize what we take to be trite law that the judgment of any Court or quasi-judicial tribunal must be grounded on evidence properly adduced during the trial, otherwise it is not a decision at all. The purported decision becomes a nullity. Therefore, the appellate Tribunal and/or the High Court on appeal could not uphold what was a nullity from the beginning.

Since the said documents were improperly tendered and received in evidence, the trial Tribunal erred in considering and relying on them in arriving at its decision. This ground, too, has merit.

To cap it all, the 1<sup>st</sup> and 3<sup>rd</sup> respondents have not resisted this appeal. According to their joint written submission presented for filing on 1<sup>st</sup> April, 2021, they are recorded to have informed the court:-

'Your Lordship, we passed through the Memorandum of Appeal by the appellant and the submissions in support of it. We have come to note that the appeal has merit. We have no objection with the appeal. Let it be allowed with no order as to costs. You're Lordship, therefore, we support the appeal as filed by the Appellant. We pray the costs not to be granted.

We humbly submit’.

This weakens the defence case of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.

For the reasons stated, this appeal succeeds and is allowed. The proceedings and judgment of the District Land and Housing Tribunal are quashed and set aside. The 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are awarded costs.

Order accordingly.



  
**W.P.Dyansobera**

**Judge**

**1.6.2021**

This judgment is delivered under my hand and the seal of this Court on this 1<sup>st</sup> day of June, 2021 in the presence of Mr. Hussein Mtembwa, learned counsel for the appellant and Ms Happy Sabatho, learned Advocate for the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are absent.

Rights of appeal to the Court of Appeal explained.



  
**W.P.Dyansobera**

**JUDGE**