

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

LAND APPEAL NO. 70 OF 2020

(Originating from the District Land and Housing Tribunal for Mbeya at
Mbeya in Land Application No. 196 of 2017.)

HARUNA KIBUGA.....1ST APPELLANT
EBIATHA MTEGA.....2ND APPELLANT
JOSEPH MWANGIMBA.....3RD APPELLANT
SELINA MGUTE.....4TH APPELLANT
SELINA MGUTE (Administratrix of the
Estate of the Late **PAULO MLINDA**).....**5TH APPELLANT**

VERSUS

SALUM KIGUGA.....1ST RESPONDENT
MAMLAKA YA MJI MDOGO RUJEWU.....2ND RESPONDENT

JUDGEMENT

Date of Last Order : 08/09/2021
Date of Judgement: 22/10/2021

MONGELLA, J.

The respondents instituted a suit in the District Land and Housing Tribunal for Mbeya (the Tribunal) claiming for a farm land located at Majengo village in Mbarali District. They claimed ownership of the suit land by virtue of being allocated the land by Mwakaganga Village Council in 1997. On


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the other hand, the 1st respondent also claimed rightful ownership of the suit land by virtue of being allocated the land by Mabanda Village Council in 1985.

The appellants sued the 1st respondent for trespassing into the suit land and the 2nd respondent as the caretaker of Mabanda Village Council, which re-allocated the suit land to the 1st respondent. The Tribunal ruled in favour of the 1st respondent on the reasoning that the allocation of land done in 1997 to the appellants was double allocation thus invalid. It took into consideration the provisions of section 15 (1) and 16 of the Village Land Act, Cap 114 R.E. 2002, which recognises as lawful any allocation of land, whether lawful or not, done between January 1970 and the date the Act came into operation. Having regarded that both allocations to the appellants and the 1st respondent were considered lawful under the law as they were done between 1970 and the date the Village Land Act came into operation, the Tribunal gave right to the 1st respondent for being the first to be allocated the land in dispute.

Aggrieved by the decision, the appellants, through their advocate, Mr. Luka Ngogo, filed this appeal on five grounds, to wit:

- 1. That the trial Chairman erred in law and fact to hold that there was double allocation of the disputed land while there was no evidence to prove that the 1st respondent was allocated the land by Mabanda Village Council in 1985.*



2. *That the disputed land being located at Majengo village (formally Mwakaganga village) the trial Chairman erred in law to grant ownership to the 1st respondent without considering that Mabanda Village Council had no power over lands situated at Majengo village.*
3. *That the trial Chairman erred in law on the interpretation and application of section 15 (1) and 16 of the Village Land Act, Cap 114 R.E. 2002.*
4. *That the trial Chairman erred in law and facts for failure to analyse the evidence on record properly to the detriment of the appellants.*
5. *That the trial Chairman erred in law and facts for failure to consider the appellants' evidence.*

In the written submissions, while arguing on the first ground, Mr. Ngogo, challenged the Tribunal findings that there was double allocation on the suit land. He contended that it was incorrect for the Tribunal Chairman to rule as such as there was no sufficient evidence that the 1st respondent was allocated the disputed land in 1985 by Mabanda Village Council. He claimed that the 1st respondent's evidence was tainted with substantial contradictions. He argued further that the Trial Chairman without analysing the evidence on record concluded that there was double allocation. He challenged the Tribunal's reliance on Exhibit D1 tendered by the 1st respondent purporting to be minutes of Mabanda Village Council. Regarding the exhibit, he contended that it left a lot to be desired. He argued further that the existence and authenticity of the

exhibit is highly questionable, thus the Tribunal Chairman had no justification to rely on it and arrive to his decision.

Addressing the contradictions, Mr. Ngogo argued that while exhibit D1 indicated that Mabanda Village Council conducted a meeting on 15th August 1985, the 1st respondent throughout his testimony insisted that the Village Council never met on 15th August 1985, but that it was the Village Land Committee that met on that date. He submitted further that the 1st respondent even during cross-examination maintained the story that it was the Village Land Committee that met on that date and prepared the minutes. In the premises, Mr. Ngogo had a stance that exhibit D1 lacks evidential value and it is a cooked document as it reflects a meeting which was never convened. He added that the minutes of the alleged Village Land Committee was never tendered.

Challenging the authenticity of exhibit D1, Mr. Ngogo contended that the minutes lack signature of the chairman and or any members who allegedly participated in the said meeting. He added that the 1st respondent alleged to be among the members of the Village Council and Village Land Committee and on cross examination when questioned about the signatures of members he replied that attending members have to sign the minutes and if exhibit D1 lacks the signature then it is not the minutes he is talking about. In consideration of the reply by the 1st respondent, Mr. Ngogo was of the argument that since exhibit D1 lacks the signatures of members it is not the document that was purportedly used to allocate the land in dispute to the 1st respondent.



In further scrutiny of exhibit D1, Mr. Ngogo argued that even if exhibit D1 was genuine, the same cannot be considered to have allocated the land in dispute to the 1st respondent. He argued so saying that what is reflected in exhibit D1 contradicts what was stated by the 1st respondent. Explaining further, he submitted that while the 1st respondent claimed to have been allocated the land in dispute through exhibit D1, the contents of exhibit D1 show that the Village Council just authorised the Welfare Committee (*Kamati ya Ustawi wa Jamii*) to allocate the land to the people who applied for. He added that the 1st respondent is not mentioned anywhere in exhibit D1 to have been allocated the land in dispute and also failed to call key witnesses from the members who purportedly participated in the said meeting.

Mr. Ngogo addressed another contradiction in the 1st respondent's evidence, which regards the size of the land in dispute. He said that while the 1st respondent through exhibit D1 and his testimony claimed to have been allocated 10 acres of land, he is in fact possessing 20 acres of land. He referred the court to the testimony of DW4 one Menan Nelson Mwalyambi and DW6 one Kenny Mlimbila who said that the 1st respondent is possessing 20 acres of land. He contended that there was no explanation provided as to how the 1st respondent came to possess the extra 10 acres from the 1st respondent or his witnesses. He concluded that in the circumstances it is justified to claim that the extra 10 acres are the ones claimed by the appellants to be trespassed by the 1st respondent and were never allocated to him by Mabanda Village Council.



The 2nd and 3rd grounds of appeal were argued collectively. Mr. Ngogo first challenged the remark by the trial Chairman that Majengo village was established after the split of two villages whereby while the applicants claim that it was split from Mwakaganga village, the 1st respondent claims that it was split from Mabanda village. He challenged the said remark on the ground that there is nowhere on record where the 1st respondent stated that Majengo village was split from Mbanda village.

He argued further that the evidence on record reveals that the disputed land has never been within Mabanda village, but was previously within Mwakaganga village and currently within Majengo village after the borders were changed in 2008. Referring to the testimony of the 1st respondent, DW2, DW3, DW4, and DW6, at page 73, 77, 80, 86, and 90 of the proceedings, respectively, he added that these witnesses conceded that in 1985 Mwakaganga village was in existence, Majengo village was split from Mwakaganga village and Mabanda village was never apportioned land located in Mwakaganga village.

Considering the evidence from both parties which proves that Majengo village was established after being split from Mwakaganga village and the 1st respondent's testimony that Mabanda village was never allocated land from Mwakaganga village, he had a view that the Hon. trial Chairman erred in holding that the disputed land was once allocated to the 1st respondent in 1985. That, there is no account as to how Mabanda village could allocate land which is part of another village, that is, Mwakaganga village. He concluded that the trial Chairman misconceived the interpretation and application of section 15 (1) and 16

of the Village Land Act, Cap 114 R.E. 2002 as there was no evidence of Mabanda village allocating the land in dispute lawfully or unlawfully.

The 4th and 5th grounds of appeal were also argued collectively whereby Mr. Ngogo challenged the Tribunal Chairman's analysis of evidence and weight accorded to the evidence on record. He had a stance that had the Hon. Chairman analysed properly the evidence on record, he would have arrived to a conclusion that the land in dispute belongs to the appellants and not the 1st respondent. He contended that the appellants clearly accounted on how they acquired the land in dispute through their oral testimonies and documentary evidence.

He added that the appellants testified to have acquired the land in dispute in 1997 through being allocated the same by Mwakaganga Village Council. They as well tendered receipts for payment of the land which were admitted as exhibit P1, P2, P5, and P7. He added that there was clear evidence that the appellants used the disputed land from 1997 to 2015 when the 1st respondent trespassed into it. That, this is unlike the evidence of the 1st respondent which was tainted with a lot of contradictions and inconsistencies. He concluded that had the Hon. Chairman weighed the evidence on balance of probability, he would have concluded that the appellants' evidence carried more weight than the respondent's.

In consideration of his submission, he prayed for the appeal to be allowed with costs and for the Tribunal judgment to be quashed.



The respondents defended jointly through written submission filed by the 1st respondent together with Mr. Fortunatus Mwandu, learned state attorney for Mbarali District Council.

They supported the Tribunal findings that there was double allocation on the land. In supporting the Tribunal findings, they argued that the existence of double allocation is based on the evidence adduced which proved that the 1st respondent was allocated the said land by Mabanda Village in 1985. They specifically referred to the testimony of the 1st respondent and his witnesses.

Considering the testimony of DW1, the 1st respondent, they argued that he managed to prove that he was allocated the land in dispute by Mabanda Village Council in 1985 whereby he tendered the minutes of the Village Council meeting and a letter and receipt through which he was allocated the land and made payments thereof. Referring to the testimony of DW2, they argued that DW2 also testified that the land was allocated to the 1st respondent on 15th August 1985 and that he was the one hired by the 1st respondent to clear the suit land for farming activities. They as well referred to the testimony of DW3 and DW4 who testified that the land belongs to the 1st respondent and he is their neighbour in the area.

They further referred to the testimony of DW6, a land surveyor at Mbarali District Council, who testified that the land in dispute was located within Mabanda village before the split of the villages giving rise to Majengo village. They argued further that DW6 elaborated in his testimony as to

which village had the authority to allocate the land in dispute. They submitted that DW6 testified that they noted a conflict on boundaries between Mabanda and Mwakaganga villages and directed that the land allocation done by Mabanda village in 1985 cannot be revoked by the allocation done by Mwakaganaa village in 1997. That DW6 testified that the 1st respondent is the rightful owner of the land in dispute as Majengo village was established on 01st September 2012 with registration no. MB/KJJ/955 from Mabanda village.

Considering the testimony of DW6 they argued that the provisions of section 15 and 16 of the Village Land Act were correctly invoked by the trial Tribunal. They added that the rationale behind the provisions is to recognise as lawful any allocation done between January 1970 and the date of coming into operation of the Village Land Act whether it was done by the authority lawfully or unlawfully. Considering these provisions of the law and referring to the claims by the parties that the appellants were allocated the land in 1997 while the 1st respondent was allocated the land in 1985, they supported the Tribunal findings that there was double allocation when the appellants were allocated the land in dispute.

They further argued that where there is double allocation, the court has to apply the "priority principle" which is to the effect that the party who acquired a title over the land earlier will be deemed to have a better or superior interest over the other. In support of his argument he referred to the case of **Ombeni Kimaro v. Joseph Mishili t/a Catholic Charismatic Renewal**, Civil Appeal No. 33 of 2017 (CAT at DSM, unreported).

They further disputed the appellants' claims that there are contradictions and weaknesses on exhibit D1. They contended that exhibit D1 proved that the 1st respondent was allocated the land in dispute by Mabanda village. They were of the view that the appellants cannot challenge the genuineness of the exhibit as they are not the makers or issuers of the document. They added that the testimony of DW1 and exhibit D1 were fully recognised by DW5, the Village Executive Officer of Mabanda village. That DW5 was allocated the land in dispute by the Village Council of Mabanda.

Regarding contradictions on the size of the land, the respondents argued that there were no any contradictions. They argued that there is no dispute regarding the size of the land of the 1st respondent and the same was not the point of controversy in the Tribunal, thus cannot be raised at this appeal stage. They contended that the appellants' counsel is trying to raise new facts and the same cannot be entertained by this court. They concluded that the trial Tribunal was therefore correct in declaring the 1st respondent the rightful owner of the suit land.

Replying to the 2nd and 3rd grounds of appeal, the respondents vehemently disputed the claim that Majengo village was split from Mwakaganga village and was established in 2008. They contended that Majengo village was established on 01st September 2012 with registration no. MB/KJJ/995. They added that in making the new village in 2012, as testified by DW6, Mabanda village apportioned part of its land to the new Majengo village. They argued that the testimony of DW6 was never challenged by the appellants. They disputed the claim that Mabanda

village allocated land belonging to Mwakaganga village. They had a stance that Mabanda village allocated land which was within its territory in 1985.

With regard to the 4th and 5th grounds of appeal, the respondents argued that the trial Chairman analysed the evidence of both parties and exhibits tendered before him. Thereafter, he came to a conclusion that the suit land belongs to the 1st respondent. They concluded by insisting that there were no any contradictions or inconsistencies on the respondents' evidence as alleged by the appellants. They prayed for the appeal to be dismissed with costs.

The respondents challenged Mr. Ngogo's arguments on the ground that the arguments were based on the testimonies of the respondents' witnesses on cross-examination and not on examination in chief. I find the argument by the respondents totally absurd because whether a witness testifies under examination in chief, cross-examination, or re-examination, the evidence he/she adduces is taken to part and parcel of his/her evidence as a whole. In fact, in my considered view, the court should mostly consider what the witness testifies during cross-examination because it is on cross-examination where the credibility of the testimony adduced in examination in chief is tested.

In rejoinder, Mr. Ngogo largely reiterated his arguments in submission in chief. He insisted that there was no sufficient evidence to prove that the 1st respondent was allocated the land in 1985 as there were material contradictions between his testimony and exhibit D1 as well as between

him and his witnesses regarding the size of the land. He had a stance that the contradictions are material thus putting the credibility of the testimony in question. He referred to a decision of this court in the case of **Lukondo Luseke v. Shukrani Lusato**, PC Civil Appeal No. 19 of 2019 (HC at Mwanza, unreported).

He further argued that the respondents have advanced misleading arguments in their submission, particularly regarding the testimony of DW6. He argued that there is nowhere on record showing that the 1st respondent presented in evidence a letter allocating him the land or any receipts on payment of the land in dispute. DW6 as well never confirmed allocation of the disputed land to the 1st respondent. He challenged the application of the "priority principle" in the matter at hand on the argument that there is no enough evidence on allocation of the disputed land to the 1st respondent in 1985.

With regard to the 2nd and 3rd grounds, he insisted that there is clear evidence on record that Majengo village was split from Mwakaganga village, which allocated the land in dispute to the appellants. He had a stance that in the absence of evidence that the land in dispute was once located at Mabanda village and in the absence of evidence that Mabanda village once allocated the land situated in another village, that is, Mwakaganga village, it cannot be concluded that the 1st respondent was allocated the disputed land at any point in time.

He reiterated his argument that the respondents have presented misleading arguments regarding the testimony of DW6. He argued that

contrary to what was argued by the appellants, DW6 testified that Majengo village was established after being split from Mwakaganga village. He concluded by reiterating his position that the Hon. Chairman had no bases to conclude that the land was prior allocated to the 1st respondent in 1985.

I have given the grounds of appeal and the submission by both parties due consideration. I have as well gone thoroughly through the trial Tribunal record. To this point I can confidently say that the grounds of appeal can be disposed in consideration of two issues being: One, whether the trial Tribunal's finding that there was double allocation when the appellants were allocated the land in dispute was correct; and two, who is the rightful owner of the land in dispute.

Starting with the first issue, it is not disputed that the land in dispute is currently located at Majengo village, which is a new village, having being established on 01st September 2012. Contrary to the respondents' submission, the evidence from witnesses on both sides, particularly that of PW5, the village chairman of Mwakaganga village, DW6, Kenny Mlimbila, the Village Executive Officer (VEO); and that of, DW7, Joel Isaya, the land surveyor, shows that Majengo village was split from Mwakaganga village.

While the appellants claim to have been allocated the suit land in 1997 by the Village Council of Mwakaganaga village, the 1st respondent claims to have been allocated the land in 1985 by Mabanda village. Considering the testimony of the witnesses from both sides as to the establishment of Majengo village, to the effect that Majengo village was established by

being split from Mwakaganga village, it is obvious that, if at all Mabanda village allocated the land in dispute to the 1st respondent, it allocated land which was not within its territory. I think in consideration of this fact, the Hon. Chairman invoked the provisions of section 15 (1) and section 16 of the Village Land Act, which recognises as lawful any allocation of land done between January 1970 and the date of coming into operation of the Village Land Act, done by any authority whether lawful or unlawful.

The Hon. Chairman in fact recognised all allocations by Mwakaganga village and Mabanda village as lawful in accordance with the provisions of section 15 (1) and 16 of the Village Land Act. Mr. Mwandu in consideration of the reasoning by the Hon. Tribunal Chairman in application of the above provisions of the law, argued that what was applied to determine the rightful owner of the suit land was the "priority principle" whereby the first to be allocated the land was regarded as having the rights over the land.

As much as I agree with Mr. Mwandu on the application of the priority principle, I as well subscribe to Mr. Ngogo's contention that there has to be provided proof of being allocated the land by the authorities by a person claiming to have been allocated first, regardless of whether the allocation was lawful or not.

Since both parties claimed to have been allocated the land by their respective village authorities, they all had a duty of proving that they were really allocated the land. The position of the law is to the effect that the one who alleges must prove. This means that the party to a suit who

alleges certain facts has the duty to prove the existence of those facts. This is provided under **section 110 (1) and (2) and section 112 of the Evidence Act, Cap 6 R.E. 2019** which states:

"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."

The legal position as settled above was reiterated and emphasized by the CAT in the case of **Geita Gold Mining Ltd. & Managing Director GGM v. Ignas Athanas**, Civil Appeal No. 227 of 2017 when revisiting its previous decision in **Anthony Masanga v. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014, (CAT, unreported).

In ascertaining the proof by the parties, I had to seriously scrutinize the record. It is clear on record that the 1st respondent tendered the minutes by Village Council of Mabanda village purportedly on allocation of land. The minutes show that the meeting was held on 15th August 1985. The minutes show that a total of 20 members were present, including the 1st respondent who testified to have been among the Village Council and

Village Land Committee members. However, as argued by Mr. Ngogo, none of the members signed the minutes including the 1st respondent.

In further scrutiny, I have also realised that the said minutes do not show allocation of land. Rather, the minutes only list the names of the people who applied to be allocated the land and the size applied for and directs the Welfare Committee to allocate the land to the people who applied. The 1st respondent is listed to have applied for 10 acres of land. I in fact agree with Mr. Ngogo that the said minutes did not confer any rights to the 1st respondent as they did not state the exact land allocated to him.

In my considered view therefore, further proof on allocation of the land in dispute, if any, ought to have been provided by the 1st respondent that he was allocated the land in dispute in 1985. There ought to have been a letter from the responsible village authority stating that the land in dispute has been allocated to the 1st respondent and also showing the boundaries to the said land. In addition, when the 1st respondent was questioned about the receipts on payment of the said land, he could not provide any receipt. He claimed that the receipts got lost, but could not explain how he realised that the same were lost and never tendered any loss report to substantiate his claims.

On the other hand, the appellants tendered documents including receipts proving that they were allocated the portions of lands in the land in dispute.



Further, the law is to the effect that every witness is entitled to have his testimony believed by the court unless where there are reasons not to believe the said evidence. See: **Goodluck Kyando v. The Republic**, Criminal Appeal No. 118 of 2003 (CAT, unreported). The reasons could be where the evidence is coupled with inconsistencies which put the credibility of the testimony in question.

While going through the testimony of DW1, the 1st respondent, I found inconsistencies as to the exact authority that allocated him the land in dispute. At some point he stated it was the Village Council, and then changed and said it was the Village Land Committee. In consideration that he testified to have been one of the members in both organs in the village, I never expected him to keep contradicting himself as to the correct organ that allocated him the land in dispute. In my considered view, the contradictions in his testimony, go to the root of the matter and puts his credibility in question.

Following the above observation, it is my finding that the 1st respondent failed to substantiate the allocation of the land in dispute to him by Mabanda village in 1985. The Tribunal ought to have keenly scrutinized the evidence on record in reaching a decision. The appellants are therefore declared to be the rightful owners of the portions of land they claim to own in the land in dispute.

The Tribunal decision is therefore hereby quashed. The 1st respondent is ordered to vacate the land in dispute and give way to the appellants as the rightful owners with immediate effect. The 2nd respondent was sued

but the appellants have failed to establish his liability in the matter. In the premises the costs of the suit shall be borne by the 1st respondent.

Appeal allowed.

Dated at Mbeya on this 22nd day of October 2021.


L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 22nd day of October 2021 in the presence of the appellants, the 1st respondent and Mr. Ramsey Mwamakamba, learned advocate, holding brief for Mr. Luka Ngogo, advocate for the appellants.




L. M. MONGELLA

JUDGE