

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

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

**LAND APPEAL NO. 54 OF 2021**

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 26 of 2019.)

**ABDALLAH PATRICK MAFWANGA.....APPELLANT**

**VERSUS**

**PHOBATI KYANDO.....1<sup>ST</sup> RESPONDENT  
WESTON A. SIMWELU.....2<sup>ND</sup> RESPONDENT  
TUNDUMA TOWNSHIP COUNCIL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

Date of Last Order : 17/02/2022  
Date of Judgement: 24/03/2022

**MONGELLA, J.**

The appellant unsuccessfully sued the respondents in Land Application No. 26 of 2019 in the District Land and Housing Tribunal for Mbeya (the Tribunal). The suit concerned a piece of land measuring 1.75 acres located at Mwaka area in Tunduma town within Momba district, Songwe region. He claimed to be the rightful owner of the land in dispute and that the 1<sup>st</sup> respondent invaded the land in 2013 leading into the dispute at hand. He claimed that the land in dispute is a family land whereby it was initially used by his father in 1974 and later it was agreed that he and his



brother should continue using the land. He sought to be declared the rightful owner.

The respondents on the other hand challenged the claims. They claimed that the land in dispute is the property of Phobati Kyando, the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent claimed that the land is surveyed and is his property. That the land forms plot no. 272 and 276 at Block A, Mwaka-Tunduma area. That it was Tunduma Town Council that surveyed the land for industrial use and allocated the same to him. He presented title deeds to substantiate his claims. He further claimed that he found the 2<sup>nd</sup> respondent as the indigenous owner of the land in dispute. The 2<sup>nd</sup> respondent supported the 1<sup>st</sup> respondent whereby he averred that he was the original owner using it for farming activities and was paid compensation by the 1<sup>st</sup> respondent for the land.

In the end the Tribunal found that the land in dispute was rightfully owned by the 1<sup>st</sup> respondent, Phobati Kyando. The appellant's case was dismissed with costs. The decision never amused the appellant. He preferred the appeal at hand on six grounds being:

- 1. That the District land tribunal for MBEYA erred in law and fact to declare that Phobati Kyando was the rightful owner of the disputed land disregarding the fact that I succeeded against WISTON A. SIMWELU in the land Application No. 106 of 2014. That PHOBATI KYANDO succeeded without any evidence and WESTON SIMWELU did not appeal anywhere. (sic)*

2. That the Tribunal erred in law and fact to declare that Phobat Kyando was the owner of the disputed area purporting that he had a right of occupancy, that the Tribunal was not kin (sic) in determining the matter as it disregarded my argument that those documents were attached illegally and the land officer who signed them was not mentioned in it.
3. That the Tribunal erred in law and fact to consider the minutes purported to be from village allocated the land to the 1<sup>st</sup> respondent illegally without being tendered during hearing of the case. That the minutes were just inserted in the proceedings which were already complete. On the ground that all parties were closed its case hence I had no room to cross examine on that minutes (sic).
4. That the Tribunal erred in law and fact to insist that I was represented disregarding the fact that I did withdraw my advocate before the matter was disposed and I did inform the court through a letter but it was disregarded. (sic)
5. That the trial Tribunal erred in law and fact to rule out that I had no letter of administration, regardless of my explanation to it that my mother is still alive and the Tribunal ordered an affidavit to be sworn by her to justify that she gave me her land, an order that was fulfilled on 6<sup>th</sup> August 2020 and the affidavit was brought before it. (sic)
6. That the trial Tribunal erred in law and fact to proceed with my application motivated with bias as he adjourned the application without setting any date a fact that made me to file a letter praying





*for a date on 4<sup>th</sup> June 2020 a fact that annoyed him and he yelled at me vigorously as if I was a small child and told me that he was going to destroy my case a fact that he fulfilled on the day of judgment and granted my property to the 1<sup>st</sup> respondent disregarding the fact that I had used it for 35 years under my parents ownership. (sic)*

The appellant appeared in person, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mr. James Kyando, learned advocate, and the 3<sup>rd</sup> respondent was represented by Mr. Skalengo from the Legal Unit-Tunduma Town Council. The appeal was argued by written submissions.

In his submission in chief, the appellant first of all appears to have brought a new claim. He faulted the Tribunal for determining the matter while disregarding the amended application which joined necessary parties. Like I said, this is a new ground as it does not feature in the grounds of appeal listed in the memorandum of appeal. It is trite law that parties are bound by their pleading and therefore I shall not deliberate on this issue considering that it is factual.

With regard to the grounds of appeal, he appears to have argued only on the 1<sup>st</sup> and 2<sup>nd</sup> grounds whereby he basically reiterated what he stated in the grounds of appeal. He faulted the Tribunal for declaring the 1<sup>st</sup> respondent the rightful owner on the ground that the 1<sup>st</sup> respondent had a right of occupancy. He further claimed that there was a misunderstanding that they did not recognise who the appellant was and the respondent was between Phobati Kyando and Abdallah Patrick



Mafwanga, while he defeated Weston A. Simwelu in Land Appeal No. 106 of 2014.

He claimed that from 2014 to the moment many years have passed and if he is deprived he will suffer great loss. He added that the Tribunal erred for not considering the evidence that the appellant had used the land in dispute for many years. That the documentary evidence proved that the suit land was used by his parents and later by him for many years without any interruption whereby the person who used the land to cultivate maize was one Joseph J. Mwashilindi. He prayed for the appeal to be allowed with costs.

Mr. Kyando on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents challenged the appeal. He first noted that the appellant in his submission abandoned grounds three, four and five in the memorandum of appeal.

With regard to the first ground, he challenged the appellant's claims that he succeeded against the 2<sup>nd</sup> respondent in Land Application No. 106 of 2014 and no appeal was preferred against the decision; and that the 1<sup>st</sup> respondent succeeded without any evidence. With regard to Land Appeal No. 106 of 2014, he explained that the matter was not determined on merits. That the matter was struck out for want of service of summons to the rest of the respondents and therefore the issue of ownership was not determined. Referring to the Tribunal Order in that matter, attached by the appellant, he contended that the 2<sup>nd</sup> respondent was given leave to re-file the matter when he is prepared to do so. He thus found the argument that the appellant won the case misconceived.



Replying to the argument that the 1<sup>st</sup> respondent succeeded without evidence, Mr. Kyando found the same baseless. He argued that the 1<sup>st</sup> respondent in addition to furnishing witnesses in his favour, he furnished documentary evidence which included certificate of title, land receipts and compensation agreement, which were admitted as Exhibit D1 and D2.

He further argued that DW4 testified in support of the 1<sup>st</sup> respondent whereby he tendered minutes from the village council recognizing the 2<sup>nd</sup> respondent as the original owner of the suit land. That the minutes were filed by the 3<sup>rd</sup> respondent on 17<sup>th</sup> February 2021 in compliance with Regulation 10 (2) of the District Land and Housing Tribunal Regulations of 2003, G.N. No. 174 of 2013. He added that the appellant was given a chance to respond to the prayer to tender the document and his objection was overruled for want of point of law, but he had a chance to cross examine on the document after its admission. He said that the appellant asked three questions to the witnesses two of them relating to the minutes.

Mr. Kyando further argued that the appellant on the other hand, never tendered any documentary evidence to prove ownership of the suit land. That even his own witness, that is, PW2 declared to know nothing regarding the appellant's ownership of the suit land. That the appellant claimed to have been allocated the suit land by Mwaka Village Council, but failed to present evidence or call relevant witness to that effect. He was of the view that the balance of probability does not support the appellant's case.





Replying to the appellant's assertion on legality on the documents presented, as presented on the 2<sup>nd</sup> ground, he disputed the claim for being unfounded. Referring the Court to page 34 and 35 of the typed proceeding, he submitted that the documents were properly attached to the WSD at paragraph 6 and later on tendered and admitted as exhibit without being challenged by the appellant. That the said documents were also supported by DW4, the land officer from the 3<sup>rd</sup> respondent's office. He further argued that the appellant's claim is unfounded as he even failed to explain the illegality in his submission. He prayed for the ground to be dismissed.

Addressing the appellant's allegation under ground six of the memorandum of appeal to the effect that the Tribunal was biased, Mr. Kyando submitted on three parts. First regards the allegation that the Tribunal adjourned the case without setting any date leading the appellant to write a letter on 4<sup>th</sup> June 2020 asking for the same. He found the allegation unfounded arguing that on the alleged date, the appellant was still being represented by Advocate Omari, as reflected on page 27 and 28 of the proceeding. He said that having lost track of his case it was his duty to consult his advocate who was in control of his case and not to blame the Tribunal. He added that the appellant failed to elaborate in his submission how the same affected his prosecution of the case.

The second allegation was that the Tribunal Chairman told the appellant that he was going to destroy his case. Addressing this point, Mr. Kyando contended that there is nowhere in the Tribunal proceeding where such allegation features. He found the allegation a mere lie as no affidavit has



been sworn by the appellant in support of the allegations. He invited the Court to be guided by the principle settled in the case of **Alex Ndendya vs. the Republic**, Criminal Appeal No. 207 of 2018 (CAT at Iringa, unreported); **Halfan Sudi vs. Abieza Chichili** (1998) TLR 527; and that of **Paul Osinya vs. R.** (1959) EA 353, in which it was held that "*there is always a presumption that a court record accurately represents what happened.*"

Third, the appellant claimed that the Hon. Chairman destroyed his case by disregarding that he had used the same for 35 years under his parents' ownership. In reply, Mr. Kyando contended that the appellant failed to prove his allegations and his statements were so contradictory. Referring to item 4 of the appellant's written submission, he argued that the appellant clearly states that he entered the suit land in 2014, and later under item 5 he refuted his own argument by stating that the person who was responsible for maize cultivation at all time was one Joseph J. Mwashilindi, which makes it clear that the appellant was never in use of the land as claimed.

Commenting further on the contradictions, Mr. Kyando argued that while the appellant stated in his testimony before the Tribunal and in his written submission that the land was used for cultivation, in his pleadings, under paragraph 8 item (iii), particularly in the "Amended Application" which is the basis of the suit, the appellant stated that his father used the suit land for residential purpose until his death in 2004. He further contended that the appellant refuted his statement in the pleading when cross examined, as seen at page 19, line 7 and 8 of the proceeding, whereby he said that





the suit land has never been used for residential purposes, and that neither himself nor his father lived in the suit land.

On his part, the 3<sup>rd</sup> respondent also challenged the appeal. Like Mr. Kyando, Mr. Skalengo also observed that the appellant abandoned the third, fourth, and fifth grounds of appeal. Further, as observed by the Court, he also noted that the appellant introduced new grounds of appeal. He challenged the grounds on argument that no leave of the Court was sought first.

Addressing the appellant's claim on ground one that he succeeded in Land Appeal No. 106 of 2014, Mr. Skalengo first found the appellant's submission confusing. He argued so saying that there has never been such case in the Tribunal, but rather it was Land Application No. 106 of 2014. He said, the same was struck out and never heard on merit to warrant the alleged victory by the appellant against the 2<sup>nd</sup> respondent.

Replying to the 2<sup>nd</sup> ground, Mr. Skalengo while referring the Court to page 34 and 35 of the Tribunal proceeding, argued that a number of exhibits were tendered by the 1<sup>st</sup> respondent and admitted in evidence without objection from the appellant. He said that the exhibits were also supported by DW4, a land officer from the 3<sup>rd</sup> respondent's office who further tendered minutes recognizing the 2<sup>nd</sup> respondent as one of the indigenous found in the land. He said that the minutes were tendered subsequent to being filed in the Tribunal by the 3<sup>rd</sup> respondent on 17<sup>th</sup> February 2021, as per Regulation 10 (2) of G.N. No. 174 of 2003.



Replying to ground six of appeal, he averred that the appellant had never used the land in dispute. He further argued that even if it is assumed that the said Joseph J. Mwashilindi, whom he claimed to have been cultivating maize in the land, was his invitee, the appellant failed to call him as his witness. He argued that it is trite law that where a litigant fails to call a potential witness in his case, then the Court is entitled to draw a negative inference of what is alleged by the respective litigant.

The appellant filed his rejoinder. On the issue regarding Land Application No. 106 of 2014, he insisted to have won the said case against the 2<sup>nd</sup> respondent. He argued that it was the 2<sup>nd</sup> respondent who instituted the case against him involving the same subject matter. While conceding that the 2<sup>nd</sup> respondent was given leave to re-file the suit, he questioned as to why he never re-filed the suit while he was the one using the suit land at the material time. In his view, failure to re-file the suit is as good as not winning the case. He contended that the 2<sup>nd</sup> respondent should have re-filed the suit if she had genuine claims over the land in dispute, but resorted into selling the land to the 1<sup>st</sup> respondent. That, the Tribunal authorised him to re-file the suit, but not to sell the suit land.

The appellant disputed the respondents' claim that he did not bring any documentary proof to prove his claims. He argued that he tendered documentary proof to wit the Order of the Tribunal in Land Application No. 106 of 2014 and his mother's affidavit. The documents were received by the Tribunal on 06<sup>th</sup> August 2020. He said that the said documents were fraudulently removed from the Tribunal file or were intentionally not recorded in the proceeding. He further denied the respondents' assertion



that he was allocated the land in dispute by Mwaka Village Council. He said that he never made such statement.

He further challenged the 1<sup>st</sup> respondent's certificate of title arguing that the same was obtained illegally. He added that the said Certificate was obtained illegally as it was processed while the case was pending in the Tribunal. He wondered how the Land Office could issue a Certificate while there is a case pending in court. With regard to the village council minutes recognizing the 2<sup>nd</sup> respondent as the rightful owner of the suit land, he contended that he was never furnished with the said minutes and accorded the opportunity to challenge the same. He said that the minutes were brought into the Tribunal proceeding through a back door. With regard to one Joseph J. Mwashilindi, he argued that though he did not bring him to testify, he is the one who worked for him in the farm, cultivating maize.

I have considered the arguments by the parties and keenly gone through the Tribunal record. Like observed by the counsels for the respondents, the appellant in his submission abandoned ground three, four, five and six, in that respect I shall only deliberate on ground one, two and on the issue as to who is the rightful owner of the suit land, which I find pertinent in determining the rights of the parties.

Under ground one, the appellant faults the Tribunal for not considering the fact that he won against the 2<sup>nd</sup> respondent in Land Application No. 106 of 2014. He attached the Order of the Tribunal to that effect. The order clearly states that the suit was struck for want of service of summons to the





respondents. It should be noted that the said suit was for declaration on rightful ownership of the disputed and between the parties.

Therefore, as argued by Mr. Kyando, to which I subscribe, the question of ownership was not determined in that matter. The fact that the 2<sup>nd</sup> appellant never opted to re-file the case after being granted leave to do so does not render the case being determined on merits on the question of ownership which was the controversial issue between the parties. It is therefore a misconception on the appellant's part to claim that he won the case against the 2<sup>nd</sup> respondent. If that was really the case, then the case at hand would be *res judicata*.

With regard to ground two, the appellant challenges the Tribunal decision for being founded on a right of occupancy tendered by the 1<sup>st</sup> respondent. He challenges the Tribunal for failure to consider his argument that the documents were attached illegally and that the land officer who signed the document was not mentioned therein. I have gone through the certificates of title for plot No. 226 and 272 and found that they were signed by the Commissioner for Lands whereby an official seal and signature of the signing officer has been appended. In my view, the official seal suffices to signify that the certificate of title was issued by the issuing authority.

To this juncture the remaining issue is who the rightful owner of the suit land is. It is undisputed that the 1<sup>st</sup> respondent was allocated the land in dispute by the 3<sup>rd</sup> respondent. The land claimed to be indigenously owned by the 2<sup>nd</sup> respondent, who was supposedly paid compensation



by the 1<sup>st</sup> respondent. To that effect a compensation agreement was tendered and admitted in evidence by the Tribunal. The controversial issue is therefore whether the 2<sup>nd</sup> respondent had good title to pass to the 1<sup>st</sup> respondent upon receiving compensation as he did.

The 2<sup>nd</sup> respondent testified as DW2. He stated that the suit land belonged to his family, but in 1974 was taken by the village council for Ujamaa village farms. Later in 1983 the farms were returned back to them. That he acquired the farms from his parents. He claimed that even the village leaders particularly, one Simweye, and one Eliud Mwamlima witnessed the return of the land to his family. However, none of them was brought to testify in his favour. The claims by the 2<sup>nd</sup> respondent were purportedly supported by the testimony of DW4, one Devotha Mahela, a land officer from the 3<sup>rd</sup> respondent's office, who appears to have tendered minutes from the village council recognizing the 2<sup>nd</sup> respondent as the indigenous owner.

I however, find the testimony of DW4 being admitted illegally or rather irregularly. The Tribunal proceeding shows that on 18/03/2021 the Hon. Chairman made orders for last adjournment whereby the case was scheduled to come for hearing on 22/03/2021. On 22/03/2021 it shows that the Hon. Chairman (T. Munzerere), the clerk, (one Zamda), and the applicant (now appellant) were the only persons in attendance.

The proceeding of this date shows that none of the assessors were present. It also shows that the respondents were not present as it was specifically recorded that they have failed to attend. Consequently, the



Hon. Chairman made orders that: 1. The defence case was closed; 2. Opinion (supposedly of assessors) on 12/04/2021; and 3. Issue of summons (though not stated to who and for which purpose) 30/03/2021. The date of signature as well, surprisingly reads 12/03/2021. Then over a sudden the proceeding shows DW4 testifying and tendering the village council meeting minutes.

Like I said, I find the proceeding of 22/03/2021 or in confusion 12/03/2021 seriously irregular for a number of reasons. First, the Tribunal on that day was not duly composed as required under **Section 23 (1) of the Land Disputes Courts Act, Cap 216 R.E. 2019**, which provides that the Tribunal shall be dully composed when seated with the Chairman and at least two assessors. In essence, there was no any Tribunal in session that day.

Second, DW4 came to testify in favour of the respondents, and particularly the 3<sup>rd</sup> respondent. As a witness of the 3<sup>rd</sup> respondent who was legally represented by its lawyer, it is obvious that she would be led to testify in chief by his lawyer. The Coram however, as I said earlier, shows that none of the respondents or their representatives entered appearance on that date. Something must be wrong somewhere.

Third, the Tribunal had already closed the proceeding for the day by making orders that opinion shall be on 12/03/2021. In the circumstances, I hereby expunge the Tribunal proceeding of 22/0/2021. Consequently, the minutes tendered crumbles down as well.



After expunging the proceeding of 22/03/2021, there remains on record no evidence supporting the 2<sup>nd</sup> respondent's claim that he was the indigenous owner of the suit land. It is also my finding that the appellant did not prove being the indigenous owner of the suit land either. He only brought one witness to support his case who claimed to be neighbouring the suit land since 1972 when the same was used by the appellant's father. However, when questioned as to how the appellant's father came to own the land, he stated that he had no idea if the appellant's father owned the land or leased it from the village council. His testimony never supported the appellant's claims.

In consideration of the observation I have made above, I find that both, the appellant and the 2<sup>nd</sup> respondent failed to prove their indigenous ownership over the land in dispute. In my view however, for interest of justice, I find that the village council leaders, being the custodians of documents and information as to ownership of land in the village by the citizens, are in a better position to clear the air. However, none of the parties presented any of the village leaders to testify in the Tribunal. In the premises, the Tribunal should have ordered the village leaders to appear and testify.

In consideration thereof, I order the matter be remitted to the Tribunal for it to take additional evidence from the village council leaders as to who between the appellant and the 2<sup>nd</sup> respondent was the rightful indigenous owner of the suit land before it was surveyed by the 3<sup>rd</sup>



respondent and allocated to the 1<sup>st</sup> respondent. Thereafter the Tribunal shall compose a fresh judgment.

Order accordingly.

Dated at Mbeya on this 24<sup>th</sup> day of March 2022.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Judgement delivered in Mbeya in Chambers on this 24<sup>th</sup> day of March 2022 in the presence of the appellant and Ms. Edna Mwamlima, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

  
**L. M. MONGELLA**

**JUDGE**

