

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

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

**LAND APPEAL NO. 30 OF 2020**

(From the District Land and Housing Tribunal for Rungwe in Consolidated  
Land Application No. 13 and 14 of 2018.)

**AGNES MAFWENGA.....APPELLANT**

**VERSUS**

**PHILIMON MWAPEMELA.....1<sup>ST</sup> RESPONDENT**  
**FRED MBUGI.....2<sup>ND</sup> RESPONDENT**  
**MUSA MAFWENGA.....3<sup>RD</sup> RESPONDENT**  
**KISA MAFWENGA.....4<sup>TH</sup> RESPONDENT**  
**GAMALIEL MAFWENGA.....5<sup>TH</sup> RESPONDENT**  
**HOSIANA MAFWENGA.....6<sup>TH</sup> RESPONDENT**  
**AFYUSISYE NGALA.....7<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

Date of Last Order : 04/11/2021  
Date of Judgement: 26/01/2022

**MONGELLA, J.**

The appellant was partly successful in the suits she instituted in the District Land and Housing Tribunal for Rungwe (the Tribunal) against the respondents. She instituted two suits being Land Application No. 13 of 2018 and Land Application No. 14 of 2018. Land Application No. 13 of 2018 was against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents with respect to

a piece of land located at Ilenge/Igiligito Kyimo ward in Rungwe district measuring 5 acres. Land Application No. 14 of 2018 was against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents with respect to a piece of land located at Nsongwa Kyimo ward in Rungwe district as well, measuring 8 acres.

The appellant claimed to be the rightful owner of the suit lands and to be declared as such. She also prayed for permanent injunction restraining the respondents from selling and cutting trees in the disputed land; and payment of T.shs. 4,500,000/- for 300 trees at T.shs. 15,000/- each, for the farm at Igiligito, and T.shs. 50,000,000/- for 1,000 trees at Nsongwa farm.

The basis of her claims as she averred at the Tribunal are that: the land located at Igiligito was allocated to her by her late father named Fabian Mafwenga in 1994 whereby she developed the same by planting trees and building a house. With regard to the land at Nsongwa, she claimed that the same was bought on her behalf by her late father in 1990s whereby she sent money to her father for him to buy the land for her. She claimed to have as well developed the said land by planting trees.

The appellant further claimed that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents harvested trees at the Igiligito and Nsongwa farms respectively, and sold them to the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent respectively. As a result she claimed to have suffered monetary loss, inconveniences, and psychological torture together with her family.

The respondents on their side denied the claims. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents' main line of argument was that their late father Fabian



Mafwenga would never allocate the land in dispute to the appellant alone without notifying the whole family about the same. They as well claimed that the appellant lacked any supporting documents to substantiate her claims.

The Tribunal found that the appellant proved to be the rightful owner of the land situated at Igiligito hamlet and awarded all the claims attached to that land. With regard to the land situated at Nsongwa hamlet, it found the appellant failed to prove ownership and thus dismissed her claims over that land. Aggrieved by that decision, she preferred this appeal on four grounds, being:

1. *While the trial chairman was satisfied with the strong evidence in relation to the farm at Igiligita and awarded that farm to appellant, the same Chairman dismissed the claim in relation to the second farm at Nsongwa on the unclear reasons and against the strong evidence led by the appellant and her same witnesses including documentary evidence such as minutes of Ilenge Village Council dated 14/3/2017, Hati ya Kimila dated .... and valuation report dated 4/2/2019 which were admitted in evidence without strong objection or at all by the Respondents (sic).*
2. *The trial chairman wrongly construed evidence on record which was heavier in favour of the appellant consisting 6 witnesses while Respondents called none.*





3. *The trial chairman did not assign any clear reasons or at (sic) all, why he did not agree with the concurrent opinions of both assessors.*
4. *On the basis (sic) of expert evidence of the valuation expert (PW4) and his valuation report (Exh. P2), which was admitted in evidence without strong objection, the trial chairman erred to hold that report contradicted with the oral evidence of PW1 which was based on estimation of a lay person and should have allowed the claim of compensation on basis of expert evidence (sic)*

The appellant was represented by Mr. Justinian Mushokorwa, learned advocate. In the written submission filed by him, he generally addressed the grounds of appeal. Mr. Mushokorwa submitted that the contention in this appeal lies with the farm at Nsongwa hamlet measuring between 9 to 10 acres, which the Tribunal declined to declare her the rightful owner. He argued that the said land in dispute is exclusively owned by the appellant by purchase. That the appellant's father bought that land on her behalf in the year 1998 at T.shs. 7,000/- from one "Kasisi" in the presence of one "Nyondo" who testified as PW4.

He added that the appellant proceeded to develop the said land by planting trees whereby she hired one "Noel Kalinga" a motor cycle driver (PW3) to transport some seedlings to the said land from town where she bought them. Apart from planting the trees, he added that, the appellant applied for approval of Ilenge village to survey the land. He referred the Court to Exhibit P1, "minutes" showing that she was in the process of registering the land in dispute. Further, he submitted that the appellant

employed one "Nicodem" (PW7) to work on the farm. He as well referred to the testimony of PW6, the sister of the deceased Fabian Mafwenga, who testified that the deceased confided in her that the farm at Nsongwa exclusively belonged to the appellant.

Referring to the respondents' evidence, Mr. Mushokorwa contended that the 2<sup>nd</sup> respondent, who is now deceased (sic), asserted that the land at Nsongwa belonged to their late father, hence subject for distribution among all heirs. That the 3<sup>rd</sup> to 5<sup>th</sup> respondents admitted to have cut trees from the Nsongwa farm and sold the same to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, claiming to be the rightful heirs of the said farm. He disputed the claims arguing that the evidence laid down by the appellant's 7 witnesses in the Tribunal revealed that the late Fabian Mafwenga had allocated properties to all his family members including his two wives, and thereby allocating the appellant a land at Igiligito hamlet. The land in dispute in this appeal, that is, the one at Nsongwa hamlet, was bought by the late Fabian Mafwenga on behalf of the appellant.

Mr. Mushokorwa challenged the respondents' evidence which was only presented by one witness being Musa Mafwenga, as being insufficient. On those bases he faulted the Tribunal's findings. He contended that the Tribunal failed to weigh the evidence adduced before it. Specifically, he referred to the testimony of PW4 who witnessed the sale of that land between one "Kasisi" and the late Fabian Mafwenga on behalf of the appellant; and that of PW6 to whom the late Fabian Mafwenga confided that he bought the land in dispute on behalf of the appellant. Mr. Mushokorwa challenged the Tribunal findings regarding these witnesses to

the effect that they were hearsay witnesses. He contended that these witnesses deposed what they heard from the horse's mouth thus not falling in the category of hearsay witnesses.

Further, he faulted the Tribunal decision on the ground that it ignored another crucial piece of evidence from PW3 and PW7 who were sent to take seedlings and to work, respectively, in the farm in dispute. He added that Exhibit P1 "minutes" was also disregarded by the Tribunal in reaching its decision. He argued that if the village council did not approve that the appellant was the rightful owner of the disputed land it would not have heeded to her request to have the land surveyed.

Mr. Mushokorwa further challenged the Tribunal's decision based on the ground that the number of trees claimed for compensation on the appellant's pleadings differed from the one stated in the valuation report (exhibit P2). He contended that the Hon. Chairman overlooked the fact that the appellant averred that the figure she stated in the plaint and her testimony was an estimated one. He added that the appellant decided to employ an expert to conduct a realistic exercise. In his view, the discrepancy was natural as the appellant could not be expected to count all the trees and determine their current value when preparing her case. He had a stance that that was not a reasonable ground to discredit the appellant's evidence and dismiss her claims.

Mr. Mushokorwa concluded that the appellant had put up in the Tribunal more than probable evidence to associate herself with the Nsongwa land thus the Hon. Chairman ought to have agreed with the opinion of the



wise assessors who opined in favour of the appellant, the same way he did with regard to the land at Igiligito hamlet. He added that a fair decision ought to have been in favour of the appellant over both farms and with reasonable compensation for the wrongful destruction of trees done and admitted by the respondents.

With regard to the liability of the 6<sup>th</sup> respondent whom the rest of the respondents contended that he was not liable, Mr. Mushokorwa argued that he is equally liable because he being the administrator of the deceased's estate, wrongfully approved correspondences to cut down and sell the appellant's trees. He added that the 6<sup>th</sup> respondent had reasons to know that the appellant was the rightful owner as he was aware of unresolved dispute over the estate. He prayed for the appeal to be allowed with costs and for the Nsongwa farm to be declared the appellant's exclusive property, and for compensation based on exhibit P2 to be awarded to the appellant.

The respondents appeared in person. In their written submission they opposed the appeal. They maintained their argument that the disputed land belonged to their deceased father, Fabian Mafwenga. Contesting that the same was given to the appellant, they argued that unlike other items, transfer of ownership of land needs adherence to certain procedures such as execution of contract of sale or deed of gift. To buttress their point they referred the case of **Priskila Mwainunu vs. Magongo**, Land Case Appeal No. 9 of 2020. Considering the principle settled in this case, they contended that the appellant failed to produce any document to support her claims in both lands at Igiligito and

Nsongwa. Apart from lack of documentary evidence, they contended further that the appellant failed to present any eyewitness to the claimed purchase of land. With regard to the claim that the appellant cultivates in the farm in dispute, they argued that since the land was family land, it was not strange for the appellant to cultivate the family land. In essence they agreed that the appellant cultivated in the land in dispute.

In what I found misplaced, the respondents challenged the competence of the appellant's suit on the ground that it involved the deceased's estate and no administrator of the deceased's estate was joined. On this point they referred to Rule 6 of the Fifth Schedule to the Magistrates Court's Act, Cap 11 R.E. 2019.

Replying to the appellant's contention that there was no dispute regarding claims under Land Application No. 13 of 2018, they argued that the appellant appealed against both applications, being Land Application No. 13 and 14 of 2018 and therefore this Court has to consider the rights of the parties in both claims.

After considering the arguments by the parties, I find that the dispute lies with the land at Nsongwa hamlet. In their submission the respondents purported to challenge the Tribunal decision on the land at Igiligito hamlet, I however, agree with Mr. Mushokorwa that that was an improper way of challenging that decision. If the respondents were not satisfied by that decision they ought to have challenged the same by filling a cross-appeal within the time prescribed by the law. In the premises, I shall only





deal with the appellant's grounds of appeal in relation to the farm located at Nsongwa hamlet.

The main question to be determined in this appeal shall therefore be ***"whether the appellant is the rightful owner of the land located at Nsongwa hamlet."*** In determining this question and considering the fact that this is a first appellate court, I prefer to re-evaluate and reconsider the evidence on record.

In proving her claim, the appellant mounted 7 witnesses, including herself. The appellant testified as PW1 whereby she claimed that the land at Nsongwa measuring between 8 and 10 acres is her personal property. She claimed to have sent money amounting to T.shs. 7,000/- to her father, the late Fabian Mafwenga, who purchased the same on her and husband's behalf. Thereafter she planted trees including pines, "*mikambokambo*," and "*mikaratusi*." She testified to have engaged one Israel Nyondo to plant the trees. Israel as well accompanied her father to purchase the land in dispute. After some time, that is, between 2017 and 2018, the 3<sup>rd</sup> to 7<sup>th</sup> respondents trespassed, cut trees, and sold them to the 2<sup>nd</sup> respondent.

PW1's testimony was corroborated by the rest of the witnesses except PW5. PW2 who is her mother testified that the land in dispute belongs to the appellant and her husband whereby her late husband bought it on her behalf from one named "Kasisi." She said she was informed of the transaction by her late husband. The appellant then planted trees on the land. This testimony was further corroborated by PW4 who testified to



have witnessed the sale of land between the said "Kasisi" who was the owner and the late "Fabian Mafwenga," the appellant's father. He said that the late Fabian Mafwenga who was his friend told him that he was purchasing the land on behalf of his daughter, the appellant.

PW4 further testified to have been employed by the appellant to plant the trees in the land in dispute whereby he did part of the work and fell sick, leading the appellant to engage other workers. PW7 testified to have also been engaged by the appellant to work in the land in dispute by clearing the land. He said that he was taken to the land by "Hosiana" the 6<sup>th</sup> respondent, but it was the appellant who paid them their dues. PW3 testified to have transported the seedlings to Nsongwa hamlet for the appellant. He said that since the road was not good he had to offload the seedlings at someplace whereby they were carried by people to the farm. PW6, the sister of the late Fabian Mafwenga, also testified to have been informed by his brother before his demise that the land in dispute was the appellant's property having been purchased on her behalf.

PW5, though called to testify in favour of the appellant, gave evidence in disfavour of the appellant. He denied the land in dispute belonging to the appellant. He testified that the land in dispute is a family property as it belonged to their late father, Fabian Mafwenga. He said that his father bought it from one named "Mtefya" and also planted the trees. However, he was not so sure of the transaction and the planting of trees as he said that he heard that his father bought the land and did not state from who he got such information.



The evidence of PW5 resembled that of the respondents which was testified by the 3<sup>rd</sup> respondent, Musa Mafwenga (DW1), on behalf of all the respondents. There is a contradiction though on the previous owner of the land in dispute before it was supposedly sold to their father. While PW5 said that their father bought the land from one "Mtefya," DW1 testified that their father bought the farm in dispute from "Kasisi." DW1 as well could not recall when the farm was bought. He admitted though to have cut the trees together with his relatives in the land in dispute and sold the same to Fred Mbugi, the 2<sup>nd</sup> respondent and a businessman dealing in timber. He said that the trees were cut because they were family property. He added that while cutting the trees they did not involve the appellant because the appellant wrote a letter to Kiwira primary court saying that she was not concerned with the estate of Fabian Mafwenga.

In their submission, the respondents challenged the appellant's claims on the ground that she failed to substantiate her claims by providing documentary evidence on the transaction over the land in dispute. The evidence on record reveals that the land in dispute is unsurveyed and used to belong to one named "Kasisi" before being passed over. The record shows that both sides never produced documentary evidence signifying sale of land by the said "Kasisi." Though DW1 and PW5 claimed the land to have been bought by their late father, no documentary evidence was presented to that effect.

Mr. Mushokorwa argued that the appellant presented exhibit P1 and P2, the minute on approval of survey of the land and the valuation report. With all due respect, I do not find these documents proving the





transaction on sale of land or legal ownership of the land. In the premises, the only evidence to be relied upon is oral evidence adduced by the witnesses for both sides. With regard to oral evidence, the law is trite to the effect that every witness is entitled to credence on his/her evidence unless where there are tangible reasons not to find the evidence credible. See: **Goodluck Kyando v. The Republic**, Criminal Appeal No. 118 of 2003 (CAT, unreported).

As I pointed out earlier, the appellant mounted 7 witnesses whereby 6 of them, including herself, testified in favour of her. PW1, PW2, PW4, and PW6 testified that the land was bought by the late Fabian Mafwenga on behalf of the appellant and her husband who sent money to Fabian Mafwenga for purchase of the land in dispute. The trial Tribunal disregarded the testimony of PW4 and PW6 for being hearsay. To the contrary however, I subscribe to Mr. Mushokorwa's argument that these witnesses testified what they heard from the horse's mouth. PW4 particularly, witnessed the transaction between the said "Kasisi" and the late Fabian Mafwenga who told him that he was purchasing the land on behalf of her daughter, the appellant. I, in fact find the appellant's evidence more tangible compared to that of the respondents. This is because while DW1 testified that their father bought the land from "Kasisi" as well, he could not state as to when the transaction took place. This shows that he had no details of the transaction compared to the appellant and her witnesses.

Apart from the evidence on sale of land, the appellant and her witnesses proved that the appellant was in use of the land ever since whereby she

planted trees. PW3 testified to have been hired to transport the trees to the farm area. PW4 and PW7 testified to have been employed by the appellant to work in the farm in clearing the land and planting the trees. In his testimony, on the other hand, DW1 was not even sure as to who planted the trees in the farm and when the same were planted. Likewise, PW5 who testified in disfavour of the appellant could also not tell as to who planted the trees in the said farm.

In my view, the appellant's evidence is overwhelming in showing that the appellant was in active use of the farm from the time it was purchased to the time it was trespassed by the respondents. The law is trite to the effect that the one with stronger evidence stands to win the case. See: **Hemed Said v. Mohamed Mbilu** [1983] TLR 113. In the case at hand, I find the appellant's evidence stronger than that of the respondents who only gave general denials on the appellant's ownership of the disputed land.

In their submission, the respondents also appear to admit that the appellant was in use of the land in dispute defending that she could use the family land as she was part of the family. In my view however, since the appellant was in use since the time of purchase and remained undisturbed until 2017 when the respondents trespassed, an inference can be drawn to substantiate her claims that she is the rightful owner of the land in dispute. To this juncture this Court finds the appellant the rightful owner of the land in dispute. The respondents have no colour of right on the land. They are trespassers.



From the record it is not disputed that the respondents, particularly the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup>, respondents cut the trees in the farm at Nsongwa hamlet and sold the same to the 2<sup>nd</sup> respondent. In the premises they are directly liable to compensate the appellant on the loss occasioned by their actions. I find the 2<sup>nd</sup> respondent a bonafide purchaser of the timber already harvested by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. He is thus not liable for trespassing the appellant's land in any way.

Since this appeal involves the land at Nsongwa hamlet whereby the 1<sup>st</sup> respondent is not connected with in any way, I find the 1<sup>st</sup> respondent not liable for the farm in Nsongwa. The 6<sup>th</sup> respondent is not liable either. This is because I find no tangible evidence showing that he participated in cutting the trees or authorised the same. His administration of the deceased estate was revoked as per the record and evidence, particularly from the respondents' side which shows he was not involved in anything connected to the land at Nsongwa.

The appellant prayed to be declared the rightful owner of the suit land at Nsongwa hamlet and this Court declares her as such. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents are trespassers and are hereby permanently restrained from interfering with the suit land in any way.

In the pleading she prayed to be compensated T.shs. 50,000,000/- for 1,000 trees cut in the suit land. During the hearing however, she presented a valuation report, which was admitted as "Exhibit P2" stating the value to be T.shs. 57,150,000/-. It is trite law however, that parties are bound by their own pleadings and a party cannot be granted reliefs not pleaded. See:





**Salehe Surur v. Tanzania Scouts Association**, Land Appeal No. 80 of 2018; **Fatma Idha Salum v. Khalifa Khamisi Said**, Civil Appeal No. 28 of 2002 (CAT at Zanzibar, unreported); **Bachar Nahar v. Nilima Mandal & Others**, Civil Appeal No. 5798-5799 of 2008. In the circumstances the appellant is granted T.shs. 50,000,000/- as compensation for the cut trees in the suit land as pleaded.

The appellant's appeal is therefore allowed. Costs of the suit shall be borne by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents.

Dated at Mbeya on this 26<sup>th</sup> day of January 2022.

  
**L. M. MONGELLA**

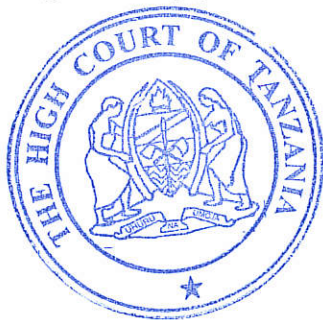
**JUDGE**

**Court:** Judgement delivered in Mbeya in Chambers on this 26<sup>th</sup> day of January 2022 in the presence of the 4<sup>th</sup> and 7<sup>th</sup> respondents appearing in person.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Right of Appeal to the Court of Appeal duly explained.



  
**L. M. MONGELLA**

**JUDGE**