

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**LAND APPEAL NO. 15 OF 2020**

**(Originating from Application No. 11 of 2017 by the District Land and Housing Tribunal for Njombe at Njombe)**

**BETWEEN**

<b>GIDEON MWAUTENZI</b>	.....	<b>1<sup>ST</sup> APPELLANT</b>
<b>KANISIUS MGANI</b>	.....	<b>2<sup>ND</sup> APPELLANT</b>
<b>GOD NGOLE</b>	.....	<b>3<sup>RD</sup> APPELLANT</b>
<b>JONATHAN MNYUKA</b>	.....	<b>4<sup>TH</sup> APPELLANT</b>
<b>MAGODA VILLAGE COUNCIL</b>	.....	<b>5<sup>TH</sup> APPELLANT</b>

**VERSUS**

<b>MAURUS MSIGWA</b>	.....	<b>RESPONDENT</b>
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15/2 & 8/4/2022

**JUDGMENT**

**MATOGOLO, J.**

In the District Land and Housing Tribunal for Njombe, the Respondent herein above one Maurus Msigwa filed an application against

the Appellants namely Gideon Mwautenzi, Kanisius Mgani, God Ngole, Jonathan Mnyuka and Magoda Village Council alleging that they trespassed into his land and declared and used the two plots of the land owned by the Respondent, which he claimed to have bought the same from one Johnson Malipula who owned it for more than 15 years. The suit land is located at Magoda village, Magoda "B" Hamlet in Njombe District. The matter was decided in favour of the Respondent. The Appellants were aggrieved with the decision of the District Land and Housing Tribunal, they filed their petition of appeal to this court which contained six grounds of appeal as follows:

1. That, the trial Tribunal erred both in law and facts by deciding the matter in favour of the respondent here in while he sued a wrong party who is the 1<sup>st</sup> Appellant as he acted as the Chairman of the Magoda Village.
2. That, the Trial Tribunal erred both in law and facts by deciding in favour of the respondent while he had no cause of action against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants herein.
3. That, the Trial Tribunal erred both in law and facts by deciding the matter in favour of the respondent basing on the weak and bias evidence adduced by the Respondent and his relatives.
4. That, the Trial Tribunal erred both in law and facts by deciding the matter in favour of the respondent basing on the sale agreement which not witnessed by the village Government,

also contradictory as the Applicant stands as the seller and witness at the same time.

5. That, the Trial Tribunal erred both in law and facts by applying the principle of adverse possession where it is not applicable.
6. That, the Trial Tribunal erred both in law and facts by failing to consider the weight of evidence adduced by the Appellants herein before deciding in favor of the Respondent.

The appellants pray this appeal to be allowed with costs.

At the hearing of this appeal the appellants were represented by Ms. Theresia Charles Learned Advocate while Mr. Innocent Kibadu Learned Advocate represented the respondent. The matter was disposed of by way of written submissions.

With regard to the first ground and second ground of appeal, Ms. Theresia submitted that, the Respondent has sued a wrong party as the disputed land belonged to Magoda Village Council, the 1<sup>st</sup> Appellant acted as a Village Chairman, and 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants were the members of Magoda Village Council. She submitted that, the Respondent ought to have sued Magoda Village Council and not suing them in their personal capacities. To support her argument, she cited O. XXX Rule 1 of the Civil Procedure Code (Cap 33 R.E 2019) which provides:

*"In all suits concerning property vested in a trustee, executor or administrator,*

*where the contention is between the persons beneficially interested in such property and third person, the trustee, executor or administrator shall represent the persons so interested and it shall not ordinarily be necessary to make them parties to the suit but the court may, if it thinks fit, order them or any of them to be made parties”.*

She submitted further that, the Village Council has legal capacity of suing and being sued by its own capacity, she supported her argument by referring to Article 26 (2) (b) of The Local Government of (District Authorities) Act, Cap 287 R.E 2002 which reads as follow:

*“Upon the issue of a certificate of incorporation in relation to a village in question shall, with effect from the date of that certificate, be a body corporate and shall... (...), (b) in its corporate name, be capable of suing or being sued”.*

She contended that, since the dispute was between the Respondent and Magoda Village Council, the Respondent ought to have sued Magoda Village Council and not the Chairman and the members of the Magoda Village Council in their personal capacities.

With regard to the third ground of appeal the learned counsel argued that, the trial Tribunal erred in law and facts by deciding the matter in favour of the Respondent basing on the weak and biased evidence adduced by Respondent and his relatives, she said, for instance the evidence of the Respondent as reflected at page 2 of the judgment that he bought the land from Johnson Malipula, that the 1<sup>st</sup> land is bounded by Emmanuel Mgani, Christopher Nziku, Wafram Mgani and Victoria Kilasi and the 2<sup>nd</sup> plot of land is bounded to Kilennzi Primary School, Lotary Mdetele and the main road of Njombe to Uwemba. She contended further that, his testimony does not hold water at all because the documentation (sale agreement) which was tendered to backup the facts was silence on the said sale agreement was not written, only the signatures of witnesses appeared on the said sale agreement, worse enough even the names of the seller and buyer are written but they did not sign to authenticate the alleged sale agreement.

She argued that, it is a trite law that "where a document is not signed by the parties its authenticity is questionable. To support her argument she cited the case of ***Prucheria John Vs. Wilbard Wilson and William Wilson***, Land Appeal No. 64 of 2019 High Court of Tanzania at Bukoba (unreported). She submitted further that, in the case at hand in the sale agreement, leaving apart the abovementioned defects, was not signed by the parties, therefore even the authenticity of the said sale agreement is questionable as well. She said, it is quite clear that there is

no any valid agreement which was executed between the Respondent as a buyer and the seller pertaining to the respondent's claim.

Regarding the fourth ground of appeal, she submitted that, the sale agreement which was the main piece of evidence which the honorable Chairman used in giving title of Land to Maurus Msigwa (The respondent herein) lacked authentication from the seller who also appeared as a witness at the same time. She supported her argument by citing section 147 (1) of the Local Government (District Authorities) Act, which empowers the Village Council to manage the affairs and business of a village. The Section Provides that:

*"A Village Council is the Organ in which is vested all Executive power in respect of all the affairs and business of a village".*

She also argued that, the above provision was insisted by the Court of Appeal of Tanzania in a case of ***Prucheria John vs. Wilbad Wilson and William Wilson*** (supra) at page 8 of the Judgment in which the Court made reference to the case of ***Bakari Mhando Swanga versus Mzee Mohamed Bakari Shelukindo & Others***, Civil Appeal No. 389 of 2019 CAT at Tanga (unreported) where it was stated that:

*"Even if we assume that the purported sale Agreement was valid, which is not*

*the case then the same was supposed to be approved by the Village Council".*

The Court of Appeal went on stating that;

*"Under normal circumstances, it was expected for the Appellant after he had executed the purported sale deed with Katibu Shembiiu, to present the document to the Village Council of Kasiga to get its blessings.... The Observation we make here is that there is no due diligence on the part of the Appellant in the whole process of executing the purported deed of sale. In our view, he ought to have consulted the Village Council before embarking on the transaction".*

She argued that, as the sale agreement in the instant case lacks approval from the Government Leader hence contravened the requirement of the Statutory Provisions and decided cases above cited, and she prayed for this Court to nullify the said sale agreement for lack of approval from responsible area leaders.

Regarding the fifth ground of appeal, she submitted that, the trial Tribunal erred in law and facts by applying the principle of adverse possession where it was not applicable. She went on submitting that, it is now settled law that the statutory period of limitation of twelve years should be lapsed without interruption in between and the nature of

property was such that adverse possession would result. She contended further that, this is provided for under Customary Law (Limitation of Proceedings) Rules GN. No. 436/1963 and the Customary Law (Limitation of Proceedings) Rules GN. No. 311/1964 item No. 6 in the Schedule, which states that in any proceeding to recover possession of land, should be filed within 12 years from the day the right accrued.

She submitted further that, the evidence adduced by both Respondent, Appellant and Appellant's witnesses show clearly that the Respondent has not been in possession of the disputed land for more than twelve years, even the purported sale agreement adduced before the Tribunal for a 2<sup>nd</sup> farm was executed in 2008 while the dispute arose in late 2016, only eight years has elapsed. She was of the considered opinion that, the Chairman in this case wrongly observed that from 2008 and 2016 is twelve years which under the doctrine of adverse possession the respondent became the owner of the suit land as lightly found by the trial Tribunal.

Regarding the Sixth ground of appeal, Ms. Theresia submitted that, the District Land and Housing Tribunal erred in law and facts by failing to consider the weight of evidence adduced by the Appellants and deciding the matter in favour of the Respondent. She argued that, the law requires the determination of civil matters to be on preponderance of probabilities. She said the appellants defended the allegations by adducing evidence which without any reasonable grounds was rejected to be admitted to form part of evidence by the trial Tribunal that is list of defaulter which shows



that the seller one Johnson Malipula who the Respondent alleges he has purchased the said disputed land had a debt of Tshs 145, 000/= owed by the Appellant for leasing the village farm. She submitted that, the trial Chairman did not make any findings on the issues and questions raised by the Appellants with regard to the genuineness of the sale contract that was tendered by the Respondent, for that reason, she prayed for this ground be allowed.

Regarding ground no. 7 the complaint here is that, the assessors were not given an opportunity to give their opinions in presence of the parties before the Chairman reached the decision in light of section 23(2) of The Land Dispute Courts Act (Cap 216 R.E 2019 and Regulation 19(2) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003, she argued that the provisions imposes a duty to the Chairman to require every assessor present at the conclusion of the hearing to give opinion in writing before making his judgment. She went on contending that, the proceedings is silent on whether the assessors were called upon to give their opinion, thus the act by the Chairman was against the clear holding of the High Court of Tanzania at Mbeya in ***Maranatha Engineering and Trading Co. Ltd versus Tanzania Postal Bank Mbeya*** Land Appeal No. 04 of 2021 (unreported), the Court held that:

*"In view of the settled position of the law where the trial has to be conducted with the aid of assessor/... they must actively and effectively participate in the proceedings so as*

*to make meaningful their role of giving their opinion before the judgment is composed... since Regulation 19(2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give opinion in writing/ such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict”.*

She also cited the case of ***Edina Adam Kibona versus Absolom Swebe***, Civil Appeal No. 286 of 2017 CAT (unreported). The Appellants prayed for this Court to nullify the proceedings, quash the judgment and set aside the orders of the trial Tribunal and the appeal be allowed with costs.

In Reply Mr. Kibadu submitted that, before going further into submitting, he prayed to bring to the attention of this court two issues as follows;

The first issue is that, the status of a legal representation of the 5<sup>th</sup> appellant in this case, the 5<sup>th</sup> appellant is a Local Government Authority, but represented by a private practitioner/Advocate contrary to the dictates of the provisions of section 15 and 16 of the Attorney General (Discharge of Duties) Act [Cap 268 R.E 2019], thus, since the 5<sup>th</sup> appellant involved

legal representation contrary to the law regulating Government legal representations in Courts of law, is as good as non- appearance entered by the 5<sup>th</sup> appellant by deploying unqualified legal person in this case.

The second issue is that, as per the trial Tribunal records at paragraph 1 of page 8 (Tribunal; The 4<sup>th</sup> respondent has not filed his defence over two months now the matter is to proceed ex-parte against him), the 4<sup>th</sup> appellant did not file his written submission, hence the matter proceeded ex-parte against the 4<sup>th</sup> appellant. In the event the appellant's remedy is to file an Application for setting aside ex-parte orders against him to the court which made such orders, and not to appeal as he did at this stage.

With regard to the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, he submitted that, the appellants submitted that the respondent sued wrong party, that is the 1<sup>st</sup> appellant, and that the respondent has no cause of action against the appellants. He submitted further that, the suit against the appellants was proper as in their defence they did not tender in evidence as to how they acted as Village Council, that notice to the respondent to vacate the suit land, rather they appeared invaded the appellants in their persons. He argued that, the Government works on papers. He contended further that, the trial Tribunal properly determined the preliminary objection raised by the appellants and ordered the respondent to amend the application in which had disclose the cause of action against the appellants and join the Magoda Village Council as a necessary party to suit.

He went on submitting that, thus the Provision of Order XXX Rule 1 of the Civil Procedure Code, is in line with the decision in ***J.B Shirima and Others Express Bus Services vs Humphrey Meena T/a Comfort Bus Services (1992) TLR 290***, cited by the trial Tribunal at page 5 of the typed proceedings.

He submitted further that, the nature of the dispute and the manner the 1<sup>st</sup> -4<sup>th</sup> appellants acted against the respondent necessitated the appellants to sue as proper and necessary parties so that it can determine the suit. He argued that Order 1 Rule 10 (2) of The Civil Procedure Code empowers the court to make orders as to addition of any party as necessary party. The Provision provides:

*"The Court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added".*

He further cited the case of ***Nuta Press Limited vs Mac Holdings and Foma Industries Limited***, Civil Appeal No. 80 of 2016 (Unreported) the Court of Appeal reiterated the decision in the case of ***Farida Mbaraka and 6 Farid Ahmed Mbaraka Vs Domina Kagaruki***, Civil Appeal No. 136 of 2006 (Unreported) where the Court states that:

*“Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as plaintiff or defendant and is not joined so, or (ii) when, without his presence, the questions in the suit cannot be completely decided”*

The Court of Appeal went on further stating that;

*“It is settled law that, once it is discovered that a necessary party has not been joined in the suit and neither party is ready to have such party added, it is incumbent on the court to have such party added”.*

He submitted further that, would the trial Tribunal have omitted to order amendment of the Application to include the 5<sup>th</sup> Appellant, such order would have condemned the 5<sup>th</sup> unheard contrary to the principle of natural justice.

Regarding the 3<sup>rd</sup> ground of appeal he contended that, his testimony at the trial tribunal properly identified the suit premises with its bounded neighbors in all four sides, and that the sale agreement tendered in evidence was properly admitted. The appellants did not object on the admission of the said sale agreement. Challenging the same on appeal is to be estopped, to bolster his argument he cited the case of ***Paulo Antony vs Republic [2016] TLR 37*** which it was held that;

*"It is trite law that a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".*

Regarding the case of ***Prucheria John vs Wilbard Wilson and William Wilson*** (supra), he said the same does not bind this court to rely on it, and is incompatible with the submission of the appellants and is distinguishable, thus, he was of the considered opinion that, the appellants failed to point out clearly the alleged weakness and biased evidence, hence this ground is non- meritorious.

With regard to the 4<sup>th</sup> ground of appeal, the respondent submitted that, the suit land was sold between individuals (between Johnson Malipula and sold the land to the respondent) and not between the Magoda Village Council and the respondent, hence approval of the Village Council was not Mandatory. Regarding the provision of section 147(1) of the Local Government (District Authorities) Act, Cap 287 as cited by the counsel for

the Appellants, Mr. Kibadu was of the considered view that, the same covers affairs and business done by Village Council with other parties and not between private individuals. And there is no law which mandatorily requires individual's sale agreement in land to be approved by the Village Council.

Regarding the case of ***Bakari Mhando Swanga vs Mzee Mohamedi Bakari Shelukindo and Others*** (supra), as cited by the counsel for the Appellants is distinguishable to our case at hand because, in the cited case the respondent claimed to have been allocated the suit land by the Village Council, while in the instant case the respondent said he bought the suit land from Johnson Malipula, the deceased who owned the suit land since 1978, he went on contending that, even if the Court will consider the appellants' submissions, yet the appellants failed to prove ownership of the suit land that it belongs to them and not the respondent or the late Johnson Malipula. He went on submitting that, there is no proof on the part of the appellants that the suit land belongs to the Appellants apart from the evidence of the respondent. He argued that, had the appellants proved before the trial Tribunal that the suit land belongs to the 5<sup>th</sup> appellant, the trial Tribunal would have decided otherwise. As it is trite law that he who alleges has a burden of proving his allegation, to support his argument he cited section 110 of the Evidence Act (Cap 6 R.E 2019). He argued further that, It was therefore the duty of the appellants to prove the ownership of the suit land on balance of probabilities something which they did not.

With regard to the 5<sup>th</sup> ground of appeal Mr. Kibadu submitted that, the appellants faulted the decision of the trial tribunal that the respondent had been in possession of the suit land since the 2000 until he bought it in the year 2008 from Johnson Malipula. He went on submitting that, in light of the case of ***Registered Trustees of The Holy Spirit Sisters Tanzania vs January Kamili Shayo & 136 Others*** (supra) cited by the Counsel for the appellants it is true that respondent cannot claim adverse possession as he bought on 2008 though had been in possession of the suit land since the year 2000. He contended that, while agreeing with the appellants submission that adverse possession cannot stand as there was interruption in between, on the other hand the appellants neither proved ownership of the suit land nor claim of occupancy prior the sale of the suit land to the appellants by the late Johnson Malipula. He argued that appellants submission cannot in any way resurrect the appellants from the decision of the trial tribunal that the suit land belongs to the respondent.

With regard to the 6<sup>th</sup> ground of appeal Mr. Kibadu submitted that, the appellants inquire on the evidence of the respondent being on low side than the appellants side. He cited the case of ***Hemed Said vs Mohamed Mbilu [1984] TLR 113***, where the Court held that;

*"According to law both parties to suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win... in measuring the weight of*



*evidence it is not the number of witnesses that counts most but the quality of the evidence”.*

With regard to the allegation by the appellants that, their document tendered in evidence were denied without justifiable reasons, he argued that, the allegations is unfounded, as the trial tribunal record, shows that the appellants tendered in evidence copies of document intended to rely on at page 28-29 of the typed proceedings, but the same were objected by the applicant on the ground that they are certified copies and the appellants ought to produce the original. And the argument that, the original is lost or not seen in the office, were an afterthought as no loss report was tendered in evidence, and a doubt as to how copies could be certified in absence of the lost original was obvious. He was of the opinion that, the appellants failed to comply with the provision of Section 67 of The Evidence Act (supra).

He went on submitting that, the appellants failed to tender any documentary proof during trial, rather relied on the scripture of their words, the respondent tendered in evidence documentary proof which was admitted without objection by the appellants as per the trial Tribunal records. He argued that, it is on the strength of the respondent's evidence, the trial Tribunal decided in favour of the respondent.

With regard to the 7<sup>th</sup> ground of appeal Mr. Kibadu submitted that, looking at the judgment at last paragraph it is lucid that the assessors gave their opinion before the Chairperson composing his judgment. He

contended further that, the appellants might have put a strong eye on the typed proceeding which is subjective to omission of typing error of parts of the original handwritten proceedings.

Mr. Kibadu concluded by praying to this court to dismiss the appeal with cost for want of merit.

In rejoinder Ms. Theresia reiterated what she submitted in chief and regarding the allegation on status of legal representation of the 5<sup>th</sup> appellant, that the 5<sup>th</sup> appellant is a local Government Authority but represented by private Advocate contrary to the provisions of section 15 and 16 of the office of the Attorney General (Discharge of Duties) Act. She submitted that, it should be noted that joining the Attorney General in disputes which the Government has interest in Local Government Authorities was made through the Amendment made in the Government Proceedings Act through Miscellaneous Amendment Act No. 01 of 2020 which amended the provision of section 6 of the Government proceedings Act. And the instant case was filed in 2017 in which the law was not yet amended to include the Attorney General in Local Government Authority disputes, even at the trial tribunal the 5<sup>th</sup> Appellant was not represented by the Attorney General, as the law does not act retrospective per the dictate of section 14 of the Interpretation of Law Act (Cap 1).

With regard to the allegation that, the matter proceeded ex-parte against 4<sup>th</sup> respondent, she submitted that, the 4<sup>th</sup> respondent did not file his defence but he gave his defence before the trial tribunal as R.W.4 as seen at page 31 of the trial tribunal proceedings. She contended further

that, even if the 4<sup>th</sup> respondent did not file his defence it is not fatal irregularity, she invited this Court to invoke the Principles of overriding objective in line with the Written Laws (Miscellaneous Amendments) No. 3 of 2018 which requires the court to deal with cases justly and have regard to substantial justice and the provision of the Constitution of The United Republic of Tanzania Article 107A (2) (e) as amended from time to time which directs the court to dispense justice without being tied up with technicalities.

With regard to the allegation that, the respondents did not object the sale agreement, she submitted that, it is not true that the appellants did not object on the admission of the sale agreement. The trial Tribunal records at page 13 proves that, the appellants questioned on the genuineness of the sale Agreement but surprisingly the trial Chairman did not make any findings on the issues and questions raised by the appellants.

Regarding the case of ***Paulo Antony vs Republic*** (supra), she said the same is distinguishable to the case at hand because in that case a party failed to cross-examine a witness, in the case at hand the appellants questioned on the genuineness of the sale agreement.

Thus, the appellants prayed to this Court to nullify the proceedings, quash judgment and set aside the orders of the trial tribunal.

Having carefully read the respective submissions by the parties and having passed through the trial tribunal records, the crucial issue to be determined here is whether this appeal has merit.

Before going to determine the grounds of appeal let me discuss albeit briefly on the issue raised by the Counsel for the respondent.

The first issue is that, the 5<sup>th</sup> appellant ought to be represented by the State Attorney and not a private Advocate as Magoda Village Council is a local Government Authority thus contrary to the provisions of section 15 and 16 of the office of the Attorney General (Discharge of Duties) Act. There is a legal requirement for local Government Authorities to be represented by the Attorney General as provided by section 15 and 16 of the Office of the Attorney General (Discharge of Duties) Act. However, it was rightly submitted by the learned counsel for the appellants that the law with such requirement was brought in through amendment of the Government Proceedings Act through Miscellaneous Amendments Act No. 1 of 2020 which amended section 6 of the Government Proceedings Act. As this case was filed way back on 9/2/2017, that legal requirement cannot bind the appellants because that amendment has no retrospective effect. Even if that would be the position of the law, initially the respondent had sued only first four appellants excluding the Magoda Village Council. But in the amendment of the application made on 14/7/2017, the respondent joined her. Since then all respondents have been represented by an advocate, there was no any objection raised throughout the trial. The act of the respondent challenging her joinder as a party, tantamount to

challenging the decision of the trial Tribunal which was rendered in his favour. With regard to the allegation that, the matter proceeded ex-parte against the 4<sup>th</sup> respondent, but having perused the trial tribunal proceedings speak louder than that though, the 4<sup>th</sup> respondent did not file his defence but he gave his defence before the trial tribunal as R.W.4 as can be seen at page 31 of the trial tribunal proceedings. Thus, this allegation has no merit.

With regard to the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, the complaint here is that, the respondent sued the wrong person. Ms. Theresia was of the view that, as the disputed land belonged to the Magoda Village Council, 1<sup>st</sup> appellant acted as a Village Chairman, and 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were mere members of Magoda Village Council. She contended that, the respondent ought to have sued Magoda Village Council and not suing them in their personal capacities. Mr. Kibadu on his part submitted that, the suit against the parties was proper as in their defence they did not tender in evidence as to how they acted as Village Council, and the trial Tribunal determined properly the preliminary objection raised by the appellants and ordered the respondent to amend the application in which he had to disclose the cause of action against the appellants and join the Magoda Village Council as a necessary party to the suit.

Having read the arguments by the parties with regard to the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal the same has no merit, I think the respondent sued the proper person and the issue of suing wrong person was correctly determined by the trial Tribunal. In the course of hearing at the trial

Tribunal the Tribunal Chairman saw it important for the Magoda village council to be joined in the suit so that all questions involved in the suit can be determined conclusively as provided under Order I Rule 10(2) of the Civil Procedure Code. The Magoda Village Council was in my view properly joined. Even if the respondent would have sued the wrong party as contended by the appellants, but as long as the proper parties were joined, it would not change anything. It is my opinion that, the respondent sued a proper party. Thus, ground of appeal No.1 and 2 have no merit the same are disregarded.

With regard to the 3<sup>rd</sup> ground of appeal the main complaint here is that, the trial Tribunal erred both in law and fact by deciding in favour of the respondent basing on weak and biased evidence adduced by the respondent and his relatives.

This ground in my opinion has no merit because the respondent managed to bring heavier evidence to prove his ownership by bringing witnesses as well as sale agreement that was admitted in evidence, but the appellants whom they claimed that, the late Johnson Malipula to be the tenant on the disputed land they failed to bring documentary evidence i.e lease agreement to prove the same, It is trite law that he who alleges must prove, see the case of ***Barelia Karangirangi versus Asteria Nyalwambwa***, Civil Appeal No. 237 of 2017 (unreported), Court of Appeal at Mwanza at page 13. Thus, this ground is baseless.

With regard to the 4<sup>th</sup> ground of appeal the complaint is that, the trial tribunal erred in law and facts by deciding the matter in favor of the

respondent basing on the sale agreement which not witnessed by the village government, also contradictory as the Applicant stands as the seller and witness at the same time.

Ms. Theresia submitted that, the sale agreement which was the main piece of evidence the Tribunal Chairman used it to give title of land to Maurus Msigwa but which lacked authentication from the street leader as the sale was not endorsed by the administrative authority and the seller to be the witness at the same time.

Mr. Kibadu on his side submitted that, the suit land was of Johnson Malipula which was sold between individuals and not between the respondent and Magoda Village Council, to him the approval of the Village Council was not mandatory

After careful consideration of the rival arguments by the learned counsel, I agree with Mr. Kibadu that, as the sale of Land was between the respondent and the late Johnson Malipula, that is, between individuals, there was no need of the approval by the Village Council or street leader. Even the appellants' counsel did not cite any provision of the law with such a requirement. The circumstances involved in the cited case ***of Bakari Mhando Swanga vs. Mzee Mohamed Bakari and Others*** (supra), are different. This is because in the cited case the respondent claimed to be allocated the land by the village council the position which is different to the case at hand. This ground in my opinion has no merit.

Regarding the 5<sup>th</sup> ground of appeal, the complaint is that, the trial Tribunal erred in law and facts by applying the principle of adverse possession where it is not applicable.

Ms. Theresia argued that, the evidence adduced by both respondent, appellant and appellants' witnesses show clear that the respondent has not been in possession of the disputed land for more than twelve years, as the second farm sale was executed on 2008 while the dispute arose late in 2016, also even the respondent's claim of adverse possession in this case cannot succeed because his claim is in pursuant to an agreement for sale.

Mr. Kibadu on his side conceded that, an adverse possession cannot stand as there was interruption in between, he argued that, in the instant case the appellants neither proved ownership of the suit land nor claim of occupancy prior the sale of the suit land to the appellant by the late Malipula. I agree with both learned counsel in respect of the issue of adverse possession. The principle cannot apply here as there was interruption in between regarding possession of the suit land. The respondent used the same from 2000 to 2008 when he purchased the same. The trial Tribunal was not correct to invoke the principle of adverse possession. This ground has merit.

As to the 6<sup>th</sup> ground of appeal that, the trial tribunal erred in law and facts by failing to consider the weight of the evidence adduced by the appellants herein before deciding in favor of the respondent. The argument here is that the appellants evidence was rejected without reasonable grounds to be admitted to form part of the evidence by the trial tribunal i.e the list of defaulters which shows that the seller one Johnson Malipula from whom the respondent alleges to have purchased the said disputed land had a debt of Tshs 145,000/= owed by the 5<sup>th</sup> appellant for leasing the village farm.



Mr. Kibadu on his side submitted that, the allegations are unfounded. He submitted that, their document was rejected on the ground that they are certified copies and the appellants ought to produce the original. The argument that, the original is lost or not seen in the office, is an afterthought as no loss report was not tendered in evidence. And a doubt as to how copies could be certified in absence of lost original was obvious.

Upon going through the evidence from both sides it is my considered opinion that, the trial tribunal was correct to decide the matter in favour of the respondent because the evidence of the respondent was heavier than that of the appellants. The respondent managed to prove his ownership by bring witnesses who testified on his side and their testimony was corroborated by sale agreement that was tendered and admitted in evidence to show that the respondent bought the disputed land from the Johnson Malipula. The question that the appellants' documents were unreasonably rejected does not hold water as the same were photo copies which could not be admitted without being there the original copies or evidence of their disappearance such as police loss report.

In the case of ***Generoza Ndimbo versus Blasidus Yohanes Kapesi [1988] TLR 73***, the court held that, *"it is a duty of the parties to suit to prove their claim"*.

This ground is baseless.

With regard to the 7<sup>th</sup> grounds of appeal, the complaint here is that, the assessors were not accorded with an opportunity give opinion in

writing and cause the same be read in the presence of the parties, so as to enable the parties to know what assessors have opined.

It is apparent on the trial Tribunal's record at page 40 of the typed proceedings that, the presiding chairman immediately after the defense case was closed neither invited the assessors to give opinion nor scheduled the date for assessors to give opinion, the chairman proceeded to schedule the date on which the judgment will be pronounced. In his reply submission Mr. Kibadu learned counsel maintained that the assessors gave opinion in the presence of the parties. He said the typed proceedings are prone to distortion but the hand written proceedings are clear. I have gone through both hand written and typed proceedings, I was unable to see where recorded that assessors aired their opinion in the presence of the parties leave alone that they gave their opinion. It is my considered opinion that, the conduct of the trial Tribunal was in violation to the provisions of the law. Regulation 19 (2) of the Land Dispute Courts (The District Land and Housing Tribunal), Regulations 2002, imposes a duty on the Chairman to require every assessor present at the conclusion of the hearing to give his/her opinion in writing before making his judgment.

In the case of ***EDINA ADAM KIBONA V ABSOLOM SWEBE (SHELI)*** (supra), in which the Court referred its previous decision in the case of ***Tubone Mwambeta v Mbeya City Council*** Civil Appeal No. 287 of 2017 (Unreported) among other things emphasized at page 4 and 5 that:-

*"In view of settled position of the law, where the trial has to be conducted with the aid of the assessors...**they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed...**since regulation 19 (2) of the regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion..."* (Bolding supplied).

It is not enough for the assessor's opinion to be included in the judgment only but the same should be given in the presence of the parties but that was not done in this case.

Upon careful reading the trial tribunal judgment, the trial Tribunal's chairman while composing the said judgment he acknowledged that, the assessors have given opinion. At paragraph 3 of page 4, the Tribunal Chairman said:-

*" In this application I sat with two assessors, Mr. Ngwinamila and Madam Grace Mbwilo. These two advised me to allow the application for the applicant proved his case".*

At the 1<sup>st</sup> paragraph he concluded:-

*" From what endeavored above I agree with opinion given by assessors. The application is allowed with costs.....".*

It is my considered view that this is not sufficient to conclude that the mandatory requirement of inviting assessors to give opinion was complied. Failure to comply with such mandatory requirements of the law vitiated the proceedings as such procedural irregularity is fatal which renders the

judgment and proceedings thereof a nullity. The same cannot be saved by section 45 of the Act. It follows that, acting on powers conferred upon this court under section 43(1) and (2) of the Act, by way of revision, the proceedings of the District Land and Housing Tribunal and the judgment thereof are quashed. I order the case to be heard *de novo* before the District Land and Housing Tribunal before a different chairperson and a new set of assessors.

**DATED at IRINGA, this 8<sup>th</sup> day of April, 2022.**



  
**F.N. MATOGOLO**  
**JUDGE.**  
**08/04/2022**

Date:	08/04/2022
Coram:	Hon. F. N. Matogolo – Judge
L/A:	B. Mwenda
1 <sup>st</sup> Appellant:	} Present
2 <sup>nd</sup> Appellant:	
3 <sup>rd</sup> Appellant:	
4 <sup>th</sup> Appellant:	
5 <sup>th</sup> Appellant:	
Respondent:	Present
C/C:	Grace

**Mr. Leonard Sweke – Advocate:**

My Lord I am appearing holding brief for Ms. Theresia Charles advocate for the Appellants. The matter is for judgment we are ready.

**Respondent:**

I am also ready.

**COURT:**

Judgment delivered.



*F. N. Matogolo*  
**F. N. MATOGOLO**

**JUDGE**

**08/04/2022**