THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MOROGORO

LAND APPEAL No. 24 OF 2021

(Arising from the Decision of the District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara in Land Appeal No. 30 of 2020 which originated from the Decision of Kalengakelu Ward Tribunal in Land Case No. 87 of 2019)

HENRY KAOZYA .....APPELLANT

VERSUS

ZAKIA MSELEMO ..... RESPONDENT

JUDGMENT

12th Dec, 2022

CHABA, J.

Before Kalengakelu Ward Tribunal within Mlimba District, at Malinyi, as a trial tribunal, Zakia Mselemo, the respondent herein successfully sued Henry Kaozya, the appellant herein via Shauri Na. 87 of 2019 for trespassing into her land measuring two acres without her permission. After a full trial, the trial tribunal delivered its judgement in favour of Zakia Mselemo. Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara where he lost. Still aggrieved, he has come to this court armed with five grounds of appeal.

The background and essential facts of this case as gathered from the records indicates that: The respondent filed a land matter before Kalengakelu Ward Tribunal claiming that the appellant trespassed into her land without her own permission. She asserted that, she and her husband has been lawfully owning the land in disputes from the year 1978 and since then have been utilizing/using/cultivating/tilling the parcel of land peaceful till 2010 when the dispute over her parcel of land arose. Though the disputed land being part and parcel of the areas that were declared by the Kalengakelu Village Government to have been designated and planned for building a school, all original owners were compensated and re-allocated to another areas called Ngwasi and Uga as agreed, except the respondent whose request was disregarded by the village authority, as a result she, has found herself in a persistent litigation claiming for her rights from the appellant.

On the other hand, the appellant's version is that, he was legally allocated ten (10) acres of parcel of land by so-called Serikali ya Kijiji cha Kalengakelu (Kalengakelu Village Government) in the year 2010 upon adhering to all relevant steps and procedures in respect of possession of the village parcel of land. He said, the respondent herein emerged upon seen that the appellant was developing the disputed land and claimed that it was her property. After a full trial, the trial Ward Tribunal delivered its judgment in favour of the respondent. Aggrieved, the appellant appealed before the District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara via Land Appeal No. 30 of 2020, but again he lost, hence this appeal.

The appellant's petition of appeal consists of five (5) grounds of appeal as follows: -

1. That, the Appellate District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara erred in law and fact by declaring the respondent as the lawful owner of the land in dispute, while the said land was allocated to the appellant by the relevant Authority after prompt and fairly compensating the respondent,
2. That, the Appellate District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara erred in its decision by not declaring the appellant as lawful owner of the land in dispute.
3. That, the Appellate District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara erred in law and fact by failure to examine properly contradictory evidence adduced by the respondent hence erroneously confirming the decision of the Ward Tribunal in favour of the respondent.
4. That, the Appellate District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara erred in law and facts for holding that the village council did not compensate the respondent while the evidence on records shows that the respondent was compensated.

5. That, the Appellate District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara erred in law and fact for holding that the respondent was co-owner of the land in dispute and that she had the power to institute a legal proceeding in absence of her spouse.

At hearing, both parties were represented by the learned counsels. Ms. Kay Zumo, learned counsel appeared for the appellant whilst Mr. Hassan Nchimbi, assisted by Ms. Upendo Nakilo Mtebe, both learned counsels entered appearance for the respondent. With the parties' consensus, it was agreed that the appeal be disposed of by way of written submissions.

Onset, Ms. Kay Zumo prayed to combine and argue jointly grounds 1 and 4, for a reason that these grounds are inter-twined, and preferred to argue grounds 2, 3, and 5 singly. To kick the ball rolling, the learned counsel submitted that, the respondent was compensated by the Village Council since it is the one which allocated the disputed parcel of land to the appellant for the purpose of constructing a secondary school. She asserted that, the owners of the disputed parcel of land including the respondent were consulted prior to the said re-allocation. She highlighted that, it was mandatory for the Village Council to obtain prior consent by consulting the original owners before re-allocating them. To reinforce her argument, Ms. Kay Zumo cited the case of **KCU Mateka Vs. Anthony Hyera [1988] TLR 188,** wherein this Court (Kazimoto, J., As he then was) made a lucid decision by stating that; *"common sense and equity forbids*

the land allocating authority to re-allocate land within its jurisdiction which is under the possession and development of another without prior consultation to the person in possession of the said land".

She underlined that, the testimonies of Gasimosi Ngatungwa (DW.2) and Ramadhani (DW.3) before the trial Ward Tribunal shows that the original owners were compensated through replacement of other parcel of lands at Uga and Ngwasi areas. However, the respondent refused to be re-allocated to the planned areas (Uga and Ngwasi). According to Ms. Kay Zumo, the respondent was duty bound to make follow ups to the Village Council for re-allocation and not to institute a case against the appellant.

She continued to argue that, since the Village Council (as per DW.3's testimony) was a controlling authority, in the eyes of the law it was supposed to be joined as a necessary party to this suit as provided by the law under Order 1, Rule 3 of the Civil Procedure Code [CAP. 33 R. E, 2019] (the CPC). To buttress her contention, the counsel invited this Court to refer to the case of **Abdi M. Kipoto Vs. Chief Arthur Mtoi,** (Civil Appeal No. 75 of 2017) [2020] TZCA 26 (28 February 2020); extracted from tanzlii.org.tz., (unreported), wherein the Court held that; *"a party becomes necessary to the suit if its determination cannot be made without affecting the interests of that necessary party".* She said, in this regard, in absence of the necessary party the Court cannot be in a position to pass an effective decree as it was expounded in the case of **Benares Bank Ltd Vs. Bhagwandas, AIR (1947) ALL 18.**

Arguing on the 2nd ground, Ms. Kay Zumo submitted that the evidence given by Ramadhan (DW.3) who by then was one among the members to Village Council, told the trial Ward Tribunal that the appellant made an application to the Village Council and requested for allocation of a parcel of land to build a school. Since the disputed plot was planned as area for erecting a government school, it was found reasonable to allocate the appellant ten (10) acres to build a school for the public interest.

In respect of the **3rd ground,** Ms. Kay Zumo accentuated that, the evidence adduced by the respondent and its witnesses are contradictory to each other. She said, at first, the respondent alleged that she cultivated the disputed land until 2012, while PW.2, Mosesi Ngatunga stated that the appellant trespassed into the respondent's land in the year 2011, whereas the appellant was allocated the disputed parcel of land in 2010 by the Village Council after following all the legal procedures. This piece of evidence is uncertain because none of the respondent's witnesses addressed the trial Ward Tribunal whether were consulted and consented to the Village Council for re-allocation of their original land.

The 5th **ground** touches the issues of locus stand. Ms. Kay Zumo highlighted that, the respondent had no power to institute legal proceedings against the appellant on behalf of her husband for lacking locus stand as it was held in the case of **Lujuna Shubi Ballonzi, Senior Vs. Registered Trustee of Chama Cha Mapinduzi [1996] TLR 203.** She contended that, the record

is clear that, her husband called the Village Chairperson and informed that his farms land could be cultivated by his wife, respondent herein. This indicates that, the respondent had only the right to utilize the farms but not to institute the case on behalf of her husband. After all, there is no evidence to prove that the disputed land was jointly owned, or her husband is dead or alive. In addition, the respondent did not produce any document to show or prove that at the material time had power of attorney or had been appointed as an administratrix as it was emphasized in the case of **Omari Bakari Vs. Zalika Mwalimu,** Misc. Land Appeal No. 35 of 2021 HCT (unreported).

She concluded that, the first appellate tribunal erred in law to entertain this matter on the ground that it was instituted by a person that had no locus stand.

Hence, on the strength of the above submission, she prayed this Court to allow the appellant's appeal with costs and set aside the decisions of both lower tribunals and declare the appellant as the lawful owner of the disputed parcel of land.

In reply to the appellant's submission, Ms. Upendo Mtebe commenced to argue on the first ground. Onset, she drew the attention of this Court regarding the principle of law that, he who alleges must prove, citing the provisions of sections 110 (1) and (2) of the Evidence Act [CAP. 6 R. E, 2022] and the famous case of **Hemed Said Vs. Mohamed Mbilu [1984] TLR 113.** She stressed that, the Kalengakelu Village Council had no duty to prove whether the

respondent was compensated to a nearest place or otherwise. The appellant ought to brought cogent evidence before the trial Ward Tribunal or first appellate tribunal to establish his allegation, such as documentary evidence or even attach such relevant records to prove that the respondent was compensated and not to rely on bare words. She averred that, due to her health conditions, she was unable to move by far distance for agricultural activities. This is why she asked the allocating authority to compensate her and her husband to the rearrest places as reflected on the testimony of DW.3 one Ramadhan Kazi ya Reli and conceded by the Village Council, but in vain. She said, mere arrangements for re-allocation of land and compensation does not justify that the respondent's right over ownership of her suit land was automatically ceased or extinguished.

It was her argument that, from the beginning the appellant had the obligation to satisfy himself that the parcel of land which was allocated to him was free from any encumbrances. Though she admitted that the respondent was consulted by the allocating authority, but her client took personal initiatives to convey her concern to the allocating authority and expressed her view in respect of a great distance from her village to Ngwasi and Uga areas. This shows that, the respondent strived to seek for an alternative to be allocated another parcel of land nearby due her heath condition, but it appears that the allocating authority disregarded her concern, while the truth depict that she is the lawful owner of the disputed land. In this regard, Ms. Upendo stressed that, the alleged prior consultation was incomplete and against the principle enunciated in the

case of **Village Chairman KCU Mateka Vs. Anthony Hyera (1988) TLR 188.**

To bolster her contention, Ms. Upendo referred this Court to Article 24 (2) of the Constitution of the United Republic of Tanzania, 1977 (As amended from time to time) which provides that compensation has to be fair and adequate. The Article read:

> *"Article 24 (1) - Every person is entitled to own property and has a right to the protection of his property held in accordance with the law.*
>
> *(2) Subject to the provisions of sub-article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation".*

She went on highlighting that, section 3 (1) (h) of the Village Land Act [CAP. 114 R. E, 2019] also carters for the principle of compensation. It read, I quote:

> ***"Section 3 (1)** - The fundamental principles of National Land Policy which are the objectives of the Land Act, to promote and to which all persons exercising powers under, applying or interpreting this Act are to have regard to are:*
>
> ***(h) to pay full, fair and prompt compensation to any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their***

detriment by the State under this Act or is acquired under the Land Acquisition Act". *[Bold is mine].*

Linking the above provisions of the law and what transpired before the trial tribunal, the learned counsel emphasized that, the first appellate tribunal considered this aspect of evidence by stating that; "*Kuhusu sababu ya sita, maelekezo ya Baraza yalikuwa kwa mujibu wa sheria kwamba kama Serikali ya Kijiji inahitaji kutwaa eneo la Mrufaniwa ii kumpatia mtu mwingine lazima kwanza illipe fidia kwa Mrufaniwa. Uratatibu huo ni wa Kisheria. Hivyo, maelekezo ya Baraza la Kata yalikuwa kwa mujibu wa sheria".* In another case of **Jumanne Rashid & Two Others Vs. Abdallah Luhanga and Another** (Land Appeal No. 30 of 2019) [2021] TZHC 2320 (12 February 2021); (tanzlii.org.tz.,) (unreported), this Court (Mdemu, J.) stressed that; *"unless prompt compensation is paid to the possessor, the village may not allocate the parcel of one villager/person to another villager/person. The village council cannot exercise such powers in whichever manner it wants. It has to act in compliance with the law".*

To end her submission on this point, the counsel insisted that, the first appellate tribunal was right to analyze and state that, "*Hivyo, basi ushahidi uliotolewa na pande zote mbili umeweka wazi kwamba eneo gombaniwa ni mali ya Mrufaniwa (Zakia Mselemo) kwani hakuwahi kufidiwa eneo linguine linalokidhi mahitaji yake".*

As to the question why the respondent did not join the Kalengakelu Village Government as necessary party, Ms. Upendo had the view that, the respondent

was right because the one who trespassed her suit land is none other than the appellant. She was however, of the view that, since the appellant did not raise this point as ground of appeal, to discuss it, is equivalent to wastage of time.

Responding to the 2nd **ground**, Ms. Upendo vehemently disputed the ground and asserted that, the first appellate tribunal did not err in law by failure to declare the appellant as the lawful owner of the disputed land. She submitted that, part from the appellant's allegation that he acquired and became the lawful owner of the disputed land upon followed all relevant procedures in obtaining and owning the village land, but the records from the trial Ward Tribunal and first appellate tribunal does not suggest to that effect. She said, nowhere in the records indicates that the appellant tendered in evidence any documentary exhibits (minutes of the village assembly meeting or decision of the village council) to prove that he was allocated legally the allocating authority the disputed land. Also, the appellant failed to establish and prove that he once applied to the allocating authority to be allocated the disputed land as required by the law. She said, the law is clear that, a Village Council shall not allocate land or grant a customary right of occupancy without a prior approval from the village assembly. **[See: Section 8 (5) of the Village Land Act [CAP. 114 R. E, 2019 and Sections 12 (2) and 24 (1) of the same Act].** Ms. Upendo averred further that, the provision of section 8 (5) of the Village Land Act (supra) has been interpretated in various decisions including the cases of **Mary Lema Vs. Stephano Stey Olesunguyai Makuyuni,** Land Case No. 57 of 2017 and **Udwagweha Bayai & 16 Others Vs. Halmashauri ya Kijiji Cha Vilima**

Vitatu and Another, Civil Appeal No. 77 of 2012 (Both unreported). For instance, in **Mary Lema's** case (supra), the Court held inter-alia that:

> *"Allocating of village land has to be accomplished by the Village Council and the Village Assembly in accordance with section 8 (5) of the Village Land Act. Proving that the land was allocated to the applicant by the village, he has to produce minutes of both the Village Council and the Village Assembly and their resolutions allocating the land. This is the requirement of law.*

Guided by the law and precedents, Ms. Upendo asserted that, in absence of the relevant documentary evidence / exhibits such as certificate of customary rights of occupancy, certificate of customary title, minutes of resolution, minutes of the village council or village assembly, exchequer receipts, at rate the appellant cannot be believed because he has failed, not only to demonstrate and establish that he acquired the disputed land, but also to prove that he followed all the relevant procedures to obtain and own legally the disputed land as required by the law. She insisted that, to end up the ongoing litigation, the appellant must compensate the respondent like what he did to other original owners in the village, as she is still the lawful owner of the said two acres of parcel of land. She said, by so doing, the principle of open justice will be adhered to, to wit; *"justice should not only be done but should manifestly and undoubtedly be seen to be done"*. This ground must fail, she so submitted.

Concerning the allegation of contradictory evidence of the respondent (PW.1) and her witnesses, the counsel briefly submitted that, the appellant's request to obtain a village land couldn't stop the respondent to continue using and cultivating her land. Her evidence before the trial Ward Tribunal was in line to what her witnesses observed. The most important thing is that, the records are certain that the dispute arose in 2010.

Regarding the 5th **ground,** Ms. Upendo accentuated that the respondent had all legal rights to sue the appellant. To support and strengthen her contention, she underlined that, the first appellate tribunal fully considered this point when it observed that; I quote:

> *"Kuhusu sababu ya tatu ya rufaa kwamba Mrufaniwa (Zakia Mselomo) hakuwa na mamlaka ya kufungua shauri kwa kuwa kwenye ushahidi alisema eneo lilikuwa ni mali ya mume wake. Katika Ushahidi uliotolewa Baraza la Kata Mrufaniwa ameweza kuthibitisha kwamba yeye na mume wake walipata eneo hilo mwaka 1978. Hivyo, kwa mujibu waw a Ushahidi wake Mrufaniwa hakuhitaji ridhaa ya mume wake maana naye ni mmiliki mwenza, hivyo alikuwa na mamlaka ya kufungua shauri kwenye Baraza la Kata".*

To cement her argument, the counsel stressed that since the respondent told the trial Ward Tribunal that she acquired the disputed land while living/staying with her husband (as husband and wife) both were legal owners of the suit land. She submitted that, in several cases, this Court and the Court of Appeal

of Tanzania has made a thorough pronouncements through various decisions expressing the definition of matrimonial properties. Basically, matrimonial properties include all properties acquired during substance of marriage or those acquired before but developed during the parties' marriage. [See: **Editha Samwel Ngayda vs Modest Antony Deli,** Civil Application No. 30 of 2021 (unreported)].

Based on the above extensive submission, Ms. Upendo prayed the Court to uphold the decisions of both lower tribunals and declare the respondent as the rightful owner of the disputed suit land.

To rejoin, Ms. Kay Zumo reiterated what she submitted in chief and insisted that, the appellant's appeal be allowed with costs, the decisions of the trial ward tribunal and first appellate tribunal be set aside, and the appellant be declared as the lawful owner of the disputed suit land.

Having summarized the rival submissions advanced by the counsels for the parties in support of their standpoints, and upon carefully examining the records of the trial Ward Tribunal and the first appellate tribunal in line with the fronted grounds of appeal, the issue that needs consideration, determination and decision thereon is, whether this appeal by the appellant is meritorious or not.

Before going any further, I find it apt to lay a foundation by looking at the guiding principle in handling this appeal as the same stemmed from the Ward Tribunal. It is well-established principle that a Court of the second appeal will

not routinely interfere with the concurrent findings of facts made by the two lower tribunals or courts below except where they completely misapprehended the substance, nature, and quality of the evidence, or where there are misdirection or non-directions on the evidence or when it is clearly be shown that there is a miscarriage of justice or a violation of some principle(s) of law or practice (**See: Director of Public Prosecutions Vs. Jaffari Mfaume Kawawa** (1981) T.L.R. 149 at 153; **Salumu Mhando Stores Vs. R.** (1993) T.L.R. 170; **Amratlal D. M. t/a Zanzibar Silk Stores Vs. A. H. Jariwala t/a Zanzibar** Hotel (1980) T.L.R. 31).

In view of the above position of the law, I am now able to delve in determining this appeal. From the records of the trial Ward Tribunal and first appellate tribunal, it is an undisputed fact that the appellant applied for a parcel of land measuring 10 acres from Serikali ya Kijiji Cha Kalengakelu (Kalengakelu Village Government) on 27/04/2010 for the purposes of constructing a Secondary School. This is exhibited by the testimonies of both parties and their respective witnesses, and so-called MUHTASARI WA MKUTANO WA WANANCHI WA KIJIJI CHA KALENGAKELU TAREHE 27/04/2010 (MINUTES OF THE VILLAGE ASSEMBLY DATED 27/04/2010) coupled with MAHUDHURIO YA MKUTANO WA HADHARA KIJIJI CHA KALENGAKELU DATED 27/04/2010. However, the records are silent as to whether these documents were tendered in evidence and admitted as exhibits. I say so because, none of these documentary evidence indicates that upon its admission, they were marked as exhibits so and so for purposes of identification.

Further, it is evident from the trial Ward Tribunal's record that, when the appellant applied for a parcel of land (though no letter or any application was tendered in evidence), few days letter was informed by the Village Council to report in the village. He reported on 27/04/2010. On that particular date he was informed by the Village Authority that they convened a meeting constituted by the Village Assembly and his application was due for discussion and consideration as well. His testimony shows that, he presented his application for a parcel of land before the Village Assembly / Mkutano wa Kijiji on 27/04/2010 and after a long discussion, it was deliberated and resolved that, the appellant had to be allocated 10 acres of land from the indigenous or original owners / villagers including the respondent herein. The allocation was approved by the Village Assembly on the same day / date. To materialize the resolution made by the Village Assembly, the village authority reduced all discussion and documented / recorded into a Minute of the Village Assembly, though there is no cogent evidence to prove that the appellant was issued with an official letter informing him that his application was approved by the Village Assembly. When the meeting of the Village Assembly was closed, the land allocating authority (Kamati ya Ardhi ya Kijiji), Mwenyekiti wa Kijiji (VEO), and the appellant's wife, Sofia they all went to visit the respective areas. Hi evidence shows that, while at the areas, the respective measurements were taken and upon satisfying that the proposed ten (10) acres were complete, he was accordingly allocated and proceeded with next steps including notifying the Land Authority within the District and surveyed the area.

According to the said MUHTASARI WA MKUTANO WA WANANCHI WA KIJIJI CHA KALENGAKELU TAREHE 27/04/2010 (MINUTES OF THE VILLAGE ASSEMBLY DATED 27/04/2010), the total numbers of all villagers was estimated to be 8431, and the villagers who attended the meeting of the Village Assembly were 607 (Male - 337 and Female - 270), and the villagers who had the requisite qualification to attend the meeting were about 1100. This means that, two-third (2/3) of all villagers having qualification to attend the meeting of the Village Assembly had to reach 733 or so.

Eight (8) months later or so, (from 27/04/2010 to 13/01/2011), the appellant through a Letter with Ref. No. KB/LD/8247/3/HVK from the District Executive Director's Office, Kilombero District Council dated on 13/01/2011, he paid to the relevant authority a total of TZS. 34,285.00/= being premium, fees for certificate of occupancy, registration fees, deed plan fees, stamp duty on certificate and duplicate and land rent. On scrutiny of this letter, I noted that the names of the maker were not disclosed. He only appended his signature and stamped - Authorised Officer, Kilombero District. In my considered opinion, however, this is in divergence with the normal letters where the maker of a document must write or display his/her names and append his/her signature.

Apart from the above analysis, the dispute arose in the year 2010. At first, the village authority planned to acquire some parcels of lands from the original owners for injecting new development plans for better use of the village land including building schools. The Wananchi who are the original owners of the eye

marked parcels of lands in the village were fully engaged and consulted accordingly. As a matter of procedures, it was mandatory for the village council to obtain prior consent by consulting the original owners before executing re-allocation of lands to the respective original owners. In this regard, the respondent was one among the villagers who were consulted prior to the re-allocation. But due to (bad) health conditions and her husband, she was unable to obtain a new parcel of land at Uga and Ngwasi areas. Therefore, she immediately communicated to the allocating authority and notified them to find another area which is not far from her residence. The respective committee within the village council considered her health conditions and her husband as well, and agreed to look for another place which is nearby. But to-date the respondent had never been re-allocated any parcel of land by the village government authority or allocating authority in the village, nor compensation had been paid. This piece of evidence got support from the appellant himself (DW.1), the respondent's witnesses namely, Mosesi Ngatunga (PW.2) Nurdini Mselemo (PW.3), Mesitina Kanyika (PW.4) and the appellant's witnesses namely, Gasimo Ngantunga (DW.2) and Ramadhani Kazi ya Reli (DW.3).

Again, the record transpires that on the 24th December, 2019 the trial Ward Tribunal visited the disputed suit land before making her verdict. Both parties were present and other people. The respondent was able to identify her area/land and mentioned the names of her neighbours'. She said, on East - Meter 135 borders Chogwa, North - Meter 93 borders Moto and West - Meter 135 borders Road. On the other hand, the appellant told the members of the

Ward Tribunal that the disputed suit land was allocated to him by Kalengakelu Village Government and had no ideas of his neighbours. After a full trial, the trial Ward Tribunal held:

> *"..... Hivyo Baraza tumeona kuwa kutokana na Ushahidi uliotolewa Barazani mdai arudi kwenye eneo lake mpaka Serikali itadkapomtafutia sehemu nyingine.*
>
> ***HUKUMU.***
>
> *Kwa kufuata muongozo wa sheria ya Ardhi, Baraza linatamka kuwa mmiliki wa eneo lenye ukubwa wa ekari 2 ni la Mdai, Zakia Mselemo na Mdaiwa, Henry A. Kazya aliache mara moja kuanzia leo tarehe 21/01/2020. Hukumu hii imetolewa leo tarehe 21/01/2020. Asiyeridhika na hukumu hii siku 45 zipo wazi kukata rufaa Kwenda Baraza la Ardhi na Nyumba la Wilaya ya Kilombero...".*

On appeal to the District Land and Housing Tribunal for Kilombero/Ulanga, at Ifakara vide Appeal No. 30 of 2020, the appellant lost, hence this appeal. In totality, from the above pieces of evidence, it is undeniable fact that the respondent has never been re-allocated a new parcel of land and compensated. It is also clear that, her rights has never automatically ceased or even extinguished when the alleged arrangements for re-allocation was mounted.

Now, reverting to the matter at hand, the appellant on grounds 1 and 4 is complaining that, the first appellate tribunal erred in law and fact by declaring the respondent as the lawful owner of the land in dispute, while the said land

was allocated to the appellant by the relevant authority after prompt and fairly compensating the respondent. These two grounds of appeal have no merits, and I have the reasons.

As correctly submitted by the learned counsel for the respondent, the allocating authority did not comply with the provisions of sections 3 (1) (h) of the Village Land Act [CAP. 114 R. E, 2019] which carters for the principle of compensation by emphasizing that same must be paid full, fair and prompt. There is no even a single piece of evidence suggesting that the respondent was compensated. Even the provision of section 8 (5) of the Act (supra) which provides that, a village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly was violated. As I said earlier on, the record of the trial Ward Tribunal is silent whether the documentary evidence purported to be the minutes of the village assembly was tendered in evidence and accordingly marked as an exhibit(s). In similar way, there are no other documentary evidence to prove that the village council acted within the ambit of section 8 (5) of the Village Land Act.

Moreover, the powers of both Village Council and the Village Assembly to allocate land to either villagers or investors, are subject to conditions laid down under section 23 (3) (a) (i) of the Village Land Act. The law says, a village council shall after considering application in accordance with sub-section 2 (a) grant in respect of all or part of the land applied for subject in conditions which are set out in section 29 or which may be prescribed. Other conditions are

creatures of the law, such as payment of fees, charges, rent and taxes, keeping and maintaining the land in good state and so forth. I have further indicated that, even the Letter with Ref. No. KB/LD/8247/3/HVK from the District Executive Director's Office, Kilombero District Council dated on 13/01/2011 showing that the appellant paid to the relevant authority a total of TZS. 34,285.00/= found itself in the trial Ward Tribunal's record without complying with the rules of procedures.

For ease of refence, let me display the testimony of Ramadhan Kazi ya Reli (DW.3) who by then, was one among the members of the Village Government) (Alikuwa Mjumbe wa Serikali ya Kijiji cha Kalungakelu) His evidence read, I quote:

> ***"JINA: RAMADHANI KAZI YA RELI.***
>
> ***UMRI: 52***
>
> ***KABILA: MNGONI***
>
> ***DINI: ISLAMU***
>
> ***MAKAZI: K/KELU***
>
> ***KAZI: MKULIMA***
>
> ***MAELEZO: 17-12-2019***
>
> *Nakumbumbuka mdaiwa aliomba eneo la kujenga shule katika Kijiji cha K/Kelu. Serikali ya Kijiji K/Kelu alimijadili baada ya kumjadili walikubaliana wote kwa pamoja na kumpatia eneo la kujenga shule. Baada ya hapo waliitisha Mkutano wa hadhara wa Kijiji kizima walijulishwa walikubali wananchi wote apewe eneo la kujenga Secondary. Ni kweli wananchi walikubali lakini maeneo yalikuwa ya watu. Watu hao waliitwa na*

Serikali ya Kijiji cha K/Kelu waliambiwa haya maeneo sasa hivi siyo mashamba ni viwanja. Waliambiwa watapewa maeneo mengine, maeneo ya Ngwasi na Uga wote walikubali. ***Kuna mtu mmoja alisema ambaye ni mdai mimi kule ni mbali ninaomba mnitafutie sehemu nyingine. Serikali ilikubali ombi lake. Serikali ilituma Kamati ya Kwenda kumpimia mdaiwa. Alipimiwa eneo la ekari 10. Waliopewa Uga ni Chogwa, Kisoma. Mdai hakupewa kule yeye alisema atafutiwe sehemu nyingine. Mpaka tumemaliza/nimemaliza muda wangu wa ujumbe ndiyo leo namuona hapa Barazani na maelezo yangu ndiyo hayo". [Bold is mine].***

From the above excerpt of the evidence adduced by Ramadhan Kazi ya Reli (DW.3) which is material particulars to all testimonies offered by the witnesses from both sides before the trial Ward Tribunal, it is my considered opinion that, the appellate District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara did not err in its decision when it uphold the decision of the trial Ward Tribunal and declared the respondent as the lawful owner of the land in dispute. In this respect, grounds 1, 4 and 2 lacks merits.

As regards to the 3rd ground, the appellant's complaint is that the first appellate tribunal erred in law and fact by failure to examine properly contradictory evidence adduced by the respondent hence erroneously confirmed the decision of the trial Ward Tribunal in favour of the respondent. I have painstakingly gone through the records of the trial Ward Tribunal and first appellate tribunal and found that, in essence the respondent instituted the matter at hand against the appellant on allegation of trespass over her parcel

of land measuring 2 acres. Her evidence was backed up by the testimonies of her witnesses namely, Mosesi Ngatungwa (PW.2) who explained that since 1978 had been the respondent's neighbour at East-North borders. He said, had no idea of the size of the disputed land, but was astounded to see the appellant trespassing the respondent's suit land in 2011. Nurdini Mselemo (PW.3) told the trial tribunal that the size of the respondent's suit land is 1 acre, whereas Mestina Kanyika (PW.4) said the disputed land has the size of 3 acres. Looking at these pieces of evidence and the surrounding circumstances, it is obvious that the respondent's witnesses could not testify similar evidence in respect of the size of the disputed land as the same was/is a farm/shamba while its measurements were uncertain.

As a matter principle, it is generally accepted that even where an event occurs in the presence of several people, the testimonies of the witnesses in court is susceptible to normal discrepancies. In the eyes of the law, this is normal for there are errors of observation, memory failures due to time lapse from the time the event occurred to the time of testifying, or even panic and horror associated with the incident (**See: Dickson Elia Nsamba Shapwata &another Vs. Republic,** Criminal Appeal No. 92 of 2007 (unreported)). It is for this reason that not every contradiction affects the case. Only material and relevant contradictions adversely affect the credence of the witnesses and hence cause the prosecution (claimant/plaintif's) case to flop. This principle of law was underscored by the Court of Appeal of Tanzania in the case of **Said Ally Ismail**

Vs. R, Criminal Appeal No. 249 of 2008 (unreported), wherein categorically stated that: -

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

I another case of **Mohamed Said Matula Vs. R [1995] TLR 3**, the Court held, *"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter".*

In the present appeal, I subscribe to Ms. Upendo's submission that at the material time it was hard to know and understood as well, all details associated with the disputed land. Importantly, the respondent was identified onset until to-date that she was/is the original owner of the disputed suit land, and the discrepancies did not go to the root of the matter at hand or even vitiates the testimonies advanced by the witnesses called by the respondent to strengthen her evidence.

On the 5th ground, the appellant is complaining that the first appellate tribunal erred in law and fact for holding that the respondent was co-owner of the land in dispute and that she had the power to institute a legal proceeding in absence of her spouse. From the record of the trial ward tribunal, I have no doubt that the respondent explained and demonstrated how she acquired the

disputed land together with her husband in 1978. As correctly submitted by the counsel for the respondent, it is settled that matrimonial properties include all properties acquired during substance of marriage or those acquired before but developed during the parties' marriage. Again, this ground is lacking merit.

Having found that all grounds of appeal are non-meritorious, I would like to join hands with the submission advanced by the counsel for the respondent that, allocating of village land has to be accomplished by the Village Council and the Village Assembly in accordance with section 8 (5) of the Village Land Act read together with section 3 (1) (h) of the Act. Further, as rightly submitted by the counsel for the appellant, I also agree that, common sense and equity forbids the land allocating authority to re-allocate land within its jurisdiction which is under the possession and development of another without prior consultation to the person in possession of the said land and effecting compensation to the original owner in accordance with the law. The cases referred to me emphasizing the needs to comply with the rules of procedures are relevant in this case as they assisted this court to shed lights in arriving to a fair and just decision of this appeal.

Having so said and done, it is my holding that Serikali ya Kijiji cha Kalengakelu erroneously exercised its powers upon allocating the respondent's suit land to the appellant without considering her concern in respect of her health conditions and her husband as well, and deliberately disregarded to compensate her as the original owner of the disputed suit land. Undaunted, the

findings of the trial Ward Tribunal and first appellate tribunal were fair and sound.

In the final event, this appeal has no merits. I thus, uphold the judgment and decree of the first Appellate District Land and Housing Tribunal for Kilombero/Ulanga, at Ifakara and the trial Ward Tribunal at Kalengakelu in Mlimba. The appellant's appeal is hereby dismissed in its entirety with costs. **I so order.**

DATED at **MOROGORO** this 12th day of December, 2022.

M. J. CHABA

JUDGE

12/12/2022