THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT – LAND DIVISION

(MUSOMA SUB REGISTRY)

AT MUSOMA

LAND APPEAL No. 13 OF 2023

(Arising from the District Land and Housing Tribunal for Mara at Serengeti in Land Appeal No. 36 of 2021; originating from Majimoto Ward Tribunal in Land Dispute No. 6 of 2021)

CHENGE MAGWEGA CHENGE ..... **APPELLANT**

Versus

SPECIOZA MOCHUBI ..... **RESPONDENT**

JUDGMENT

29.09.2023 & 31.10.2023
Mtulya, J.:

On 15th April 2021, **Majimoto Ward Tribunal** (the ward tribunal) had registered **Land Dispute No. 6 of 2021** (the land dispute) between **Mr. Chenge Magwega Chenge** (the appellant) and **Mrs. Specioza Mochubi** (the respondent). It was the respondent who had initiated the records of the dispute in the ward tribunal against the appellant, complaining that:

> *Eneo langu la kilimo ambalo amevamia kwa kufyeka miti na kulima ndani ya eneo hilo bila idhini yangu. Mdaiwa amevamia eneo hilo mwaka 2021/2022. Ndani ya eneo hilo kuna miti ya asili.*

In replying the complaint levelled against him, the appellant had denied the allegation hence members of the tribunal had to convene a meeting for hearing and determination of the dispute. The parties were summoned to appear on 3rd May 2021 to register relevant materials in search of the truth of the matter. The testimony registered by the respondent in the ward tribunal shows the following materials, that:

> *Nakumbuka niliwahi kumlalamikia Nyanchange Mhoni mbele ya Baraza hili kwa ajili ya suluhu kuhusu eneo hilo la mgogoro. Ndani ya suluhu hiyo, ilionekana wazi kuwa eneo ni la kwangu. Kisha Nyanchage alihama kutoka ndani ya eneo hilo la mgogoro. Baada ya Nyanchage kuhama, mimi ndio nilikuwa mmiliki halali wa eneo hilo la mgogoro. Mnamo Mwaka 2019, nilienda Mwanza kwenye matibabu na eneo hilo nilimkabidhi Mnyera Gachibi kuwa mwangalizi kwa niaba yangu. Tarehe 12/02/2019, ndipo Mnyera alinipigia simu akinieleza kuwa mdaiwa amevamia eneo hilo kwa kukata miti ndani ya eneo hilo na kuchoma mkaa. Mnamo mwaka 2021/03 ndipo nilifika kwenye eneo hilo ili kuona uharibifu aliofanya mdaiwa. Baada ya hapo, nilimlalamikia mdaiwa katika Kituo cha Polisi na Kisha Mahakama ya Mwanzo Majimoto. Uamuzi ulitolewa kuwa shauri hilo linastahili kusikilizwa mbele ya Baraza la Kata...Kesi ni Namba 13/2021. Eneo hilo la Mgogogro* ***nilianza kumiliki tangu mwaka 1994/06/11 kwa kununua kutoka kwa Makuru Moturi. Eneo hilo***

tulinunua tukiwa na mme wangu enzi za uhai wake, *marehemu Fredrick Mnyera. Baada ya kununua tulikuwa tunalima ndani ya eneo hilo. Mashahidi walikuwepo...[mlalamikiwa] hajawahi kulima ndani ya eneo hilo enzi za uhai wa mume wangu...[mjumbe namba 2] eneo hilo lina ukubwa wa heka mbili na robo kwa makadirio. Suluhu katika eneo hilo imefanyika mara tatu (3). Mara 2 kati yangu na mdaiwa. Mdaiwa amevamia eneo lote akidai amepewa na Baba yake. Majirani wa eneo hilo ni Mosena, Nyakinga, Maro Matiko na Mdaiwa. Nimelima eneo hilo kwa muda wa miaka 27 tangu mwaka 1994 hadi 2021.*

During registration of materials in the dispute, the respondent had registered in the ward tribunal three (3) documents, namely: first, *Makubaliano ya Mauziano ya Shamba kati ya Makuru Moturi na Fredrick Mnyera ya Tarehe 11 Juni 1994* (exhibit A), which shows a sale of **Boka Saba (7)** kwa kiasi cha Shilingi 40,000 and the sale was witnessed by Maro Nyitonge, Mochubi Munyera, Nyamhanga Mago, Mwikwembe Kiteno and Balozi Nyamhanga; second, *Shauri la Suluhu kati ya Specioza Mochubi na Nyanchage Mhoni katika Baraza la Ardhi la Kata ya Majimoto* (exhibit B), which was resolved on 25th November 2019, and shows that Nyanchage Mhoni agreed to let the land in dispute to Specioza Mochubi on 1st July 2020; and finally, *Shauri Na. 13 la Mwaka 2021 katika Mahakama ya Mwanzo ya Wilaya ya Serengeti Kituo cha Ngoreme*

(exhibit C), which decided that: *shauri hili ni mgogoro wa ardhi unaostahili kutatuliwa mbele ya Mahakama ya Ardhi kwa kifungu cha 4(2) cha Sheria ya Mahakama ya Ardhi Sura 216 Marejeo ya 2019.*

The respondent also had marshalled neighbors and witnesses of exhibit A, namely: Maro Nyitonge and Mochubi Munyera. All two (2) witnesses had testified that the land is approximately two (2) acres bought by Fredrick Mnyera from Makuru Moturi in 1994 for Tanzanian Shillings Forty Thousand (40,000/=). Replying the materials brought by the respondent in the ward tribunal, the appellant contended that:

> *Nakumbuka eneo hilo nilianza kumiliki mwaka 1997 baada ya kukabidhiwa na Baba yangu mzazi aitwae Mabwega Chenge, marehemu. Eneo hilo nilikabidhiwa mbele ya familia ya Mzee Mabwega Chenge, bila maandishi. Baada ya hapo, ndipo nilijenga nyumba ya kuishi ndani ya eneo hilo tangu mwaka 1997 hadi hivi sasa 2021. Baada ya hapo, nilipanda katani kuonyesha mpaka wa eneo hilo. Pia kuna mtaro wa kuzuia maji upande wa mashariki kuelekea kusini na pia upande wa magharibi. Pia kwenye mtaro nimepanda katani kuzuia maji. Mnamo mwaka 1997 hadi 2013 nilikuwa nalima mazao ya chakula ndani ya eneo hilo kama vile mpunga, ulezi, mtama na viazi. Wakati nalima ndani ya eneo hilo marehemu Machugu Mnyera, mume wa mdai, alikuwepo*

na hakunizuia nisilime ndani ya eneo hilo. Nashangaa kuona mdai anadai eneo hilo kuwa ni la kwake. Mdai sijawahi kumuona kwenye eneo hilo la mgogoro tangu nikabidhiwe eneo hilo mwaka 1997 hadi 2021, sawa na miaka 24 ishirini na nne. Kwa muda wote mdai alikuwa wapi? ... [mlalamikaji] nilimruhusu Nyanchage Mhoni kujenga ndani ya eneo la mgogoro [mjumbe namba 1] nimejenga na kuishi jirani nae neo la mgogoro [mjumbe namba 2] ***sifahamu ukubwa wa eneo la mgogoro.*** *[mjube namba 5] mdai ana eneo jirani na eneo la mgogoro...sifahamu eneo ambalo mdai alinunua kutoka kwa Makuru Moturi [mjumbe namba 6] majirani wa eneo hilo ni Mosene Matwiga, Nyakonda Magacha Rhobi, Makore Saligoko Pamoja na Maro Nyitonge.*

In the cause of hearing the dispute, the appellant did not produce any exhibits, but had marshalled two (2) witnesses, namely: Maro Mabweiga and Wankyo Daud. According to Maro Mabweiga, the appellant's brother, the land in dispute initially belonged to Mkami Makori and after *Operation Vijiji in 1976*, it was taken by Mzee Mabweiga Chenge who in 1997 had given it to the appellant. Regarding neighbours, Maro Mabweiga cited the respondent, Maro Nyitonge, Maro Matiko, Nyakonga Magocha Mosena na Nyangoko. Regarding the size of the land in dispute, Maro Mabweiga, during cross examination from the respondent and members No. 4&5 of the ward tribunal stated that: *sifahamu ukubwa wa eneo la*

mgogoro...sifahamu eneo la mdai analodai.sina Habari kama mdai alinunua eneo hilo la mgogoro.

Wankyo Daud, the appellant's wife, on her part, had testified that the land in dispute belongs to the appellant and was given by his father in 1996 and started cultivating food crops in 1997 up to 2021, when the respondent appeared and claimed the land belongs to her. According to Wankyo Daud, the land in dispute is sized one point five (1.5) acres and neighbours are only two (2) persons, Nyakonga and Mosena. Finally, Wankyo Daud testified that: *mdai ana eneo jirani na eneo la mgogoro. Mdai alianza kudai eneo hilo baada ya mdaiwa kufyeka miti ndani ya eneo hilo la mgogoro.*

After registration of all relevant materials, the ward tribunal, on 13th July 2021, had decided to move and witness the scene of the land in dispute. At the *locus in quo*, the ward tribunal had summoned both parties and neighbors surrounding the land to assist the ward tribunal in search of the reality on ground. After visitation and participation of the parties and neighbors, the ward tribunal sketched the map of the disputed land and registered the sketch map into the records of the ward tribunal in the dispute.

On 25th October 2021, the members of the ward tribunal convened a meeting for opinions and decision. During opinions recording, all seven (7) members of the ward tribunal opined in favor

of the respondent each with his/her specific reasons. Following the opinions of the members, the ward tribunal drafted its decision duly signed by all members and produced three (3) reasons in favor of the respondent:

> *Baraza hili linakubaliana na maoni ya waheshimwa wajumbe kuwa eneo la mgogoro ni la mdai...kwa kuwa mdai amelimiliki kwa muda mrefu bila mgogoro wowote kutoka kwa mwaka 1994 hadi 2019, sawa na miaka 25 ishirini na tano mdai alipoondoka. Mdai alipoondoka kwenda Mwanza mwaka 2019 alimkabidhi Mnyera Gechibi (shahidi wake Na. 2) eneo hilo kuwa mwangalizi kwa niaba yake. Pili mdai alinunua eneo hilo la mgogoro kwa njia halali mbele ya mashahidi. Barua ya Mkataba wa Mauziano ya eneo hilo ya tarehe 11/06/1994 ni kielelezo A, suluhu kuhusu eneo hilo iliwahi kufanyika mwaka 2019/11/25 kati ya Mdai na Nyanchage Mhoni. Ndani ya suluhu hiyo Mdai ndio alipewa haki ya kumiliki eneo hilo. Barua hiyo ya suluhu ni kielelezo B. Tatu, Mdaiwa akuonyesha kielelezo chochote mbele ya Baraza hili kinachothbitisha kuwa eneo hilo alikabidhiwa na Baba yake Mabwega Chenge, mbele ya familia kama alivyodai. Mdaiwa pia amejenga na kuishi kwenye eneo lingine tofauti na sio kwenye eneo la mgogoro kama alivyodai mbele ya Baraza hili.*

The decision and reasoning of the ward tribunal was disputed at the **District Land and Housing Tribunal for Mara at Serengeti**

(the district tribunal) in **Land Appeal No. 36 of 2021** (the appeal) for seven (7) reasons, namely:

1. *Baraza la Kata lilijielekeza vibaya kisheria na kimantiki kwa kusikiliza shauri ambalo mrufaniwa hakuwa na miguu ya kisimama na kudai ardhi yenye mgogoro;*
2. *Baraza la Kata lilijielekeza vibaya kisheria na kimantiki kwa kutokuzingatia ushahidi wake, ushahidi ambao ulikuwa mzito zaidi katika kuthibitisha umiliki wa eneo la mgogoro;*
3. *Baraza la Kata lilijielekeza vibaya kisheria na kimantiki kwa kusikiliza mgogoro ambao thamani na ukubwa wa eneo linalobishaniwa haukubainishwa;*
4. *Baraza la Kata lilijielekeza vibaya kisheria na kimantiki kwa kusikiliza Shauri Namba 6/2021 bila kuwa na mamlaka kisheia ya kusikiliza na kuamua umiliki wa eneo linalobishaniwa;*
5. *Baraza la Kata lilikielekeza vibaya kisheria na kimantiki kwa kusikiliza shauri namba 6/2021 na kuamua umiliki bila shauri kupitia hatua ya usuluhishi;*
6. *Baraza la Kata lilijielekeza vibaya kisheria na kimantiki kwa kupokea na kusikiliza shauri namba 6/2021 bila kufuata utaratibu a kisheria wa kufungua shauri barazani; na*
7. *Baraza la Kata lilijiongoza kwa kusikiliza shauri bila ya akidi kukamilika kwa kila kikao, pia hakuna maoni ya mjumbe mmoja mmoja.*

The appeal in the district tribunal was argued by way of written submissions and after registration of all relevant materials,

the district tribunal on 16th February 2023 had resolved in favor of the respondent. The reasoning on each specific ground of appeal is displayed from page 7 to 11 of the judgment, and in brief shows that:

> *Baada ya mawasilisho hayo, wajumbe wa Baraza hili nilioketi nao katika Shauri hili Mzee Byabato B. Wencheslaus na Mzee Mang'oha N. Mugabo, walitoa maoni yao kila mmoja ingawa yalifanana na walishauri rufaa hii itupiliwe mbali kwa gharama na Mrufaniwa atangazwe mmiliki wa eneo la mgogoro na sababu ni kuwa, Mrufaniwa alithibitisha umiliki wake kwa kutoa kielelezo 'A' pamoja na mashahidi waliounga mkono maelezo ya Mrufaniwa...Nikianza na sababu ya kwanza, Mrufaniwa ametoa kielelezo 'A' kinachoonesha eneo hilo lilinunuliwa mwaka 1994 akinunua mume wake, Fredrick Mnyera toka kwa Makuru Moturi. Ushahidi unaonesha wakati wa ununuzi Mrufaniwa kama mke alikuwepo. Hoja kuwa Mrufaniwa si mke wa mnunuzi haikuibuliwa kafika Baraza la Kata na hivyo haiwezi kuibuka kwa sasa, hata hivyo mashahidi wa Mrufaniwa wamekiri Mrufaniwa ni mke wa mnunuzi. Hivyo, kwa mali iliyopatikana wakati wa ndoa, anapofariki mmoja wa wana-ndoa, anayebaki ana haki ya kudai au kutetea mali hiyo bila kuwa msimamizi wa mirathi... Mawasilisho ya Mrufani ni kuwa thamani ya eneo la mgogoro haijulikani. Mrufani hajaeleza kama eneo la mgogoro lina thamani kubwa kuliko uwezo wa Baraza la Kata. Pia, Mrufani hakupinga mbele ya Baraza la Kata kuwa Baraza*

hilo halina mamlaka na hivyo hawezi kuibua hoja hiyo hapa. Pamoja na hayo, Mrufani hajaeleza ameathirikaje kwa uwepo wa mapungufu hayo. Ukubwa na mipaka ya eneo hilo imetajwa kafika hukumu ya Baraza hilo...kuhusu sababu ya 4 na ya 5, zote zinakosa mashiko kwa vile wakati shauri limefunguliwa katika Baraza la Kata, Sheria Namba 3/2021 ilikuwa haijaanza kutumika, hivyo, Baraza lilikuwa sahihi na lenye mamlaka kusikiliza mgogoro wa Mrufani na Mrufaniwa ...nimesoma mwenendo wa Baraza la Kata ambapo shauri lilifunguliwa tarehe 15/04/2021 na lalamiko limeandikwa na pia Mrufaniwa amesaini. Aliyeandika (kurekodi) lalamiko ni Katibu wa Baraza, hivyo matakwa ya kifungu cha 11 (3) cha Sheria ya Mabaraza ya Kata yametimizwa. Pamoja na hayo, Mrufani hakueleza ameathirikaje kwa uwepo wa mapungufu aliyoeleza na pia sioni sababu ya mapungufu hayo (hata yangekuwepo) kubatilisha hukumu sawa na maelekezo ya kifungu cha 45 cha Sura ya 21 6 R.E 2109...ukurasa wa 53-57 wa mwenendo uliochapwa umeonesha maoni ya kila mjumbe, hivyo si kweli kuwa wajumbe hawakutoa maoni yao. Kuhusu akidi, wajumbe 7 wamehudhuria na kati yao wawili ni wa kike. Lengo la sheria kuweka wajumbe 4-8 na kati yao 3 kuwa wa kike ni kuweka uwiano wa 1/3 ya wajumbe kuwa wa kike ambapo katika wajumbe 8 ni sahihi 3 kuwa wa kike na kuwa idadi ya wajumbe 6 hadi 7, wajumbe wawili wa kike ni idadi sahihi. Pia, Mrufani hajaeleza alivyoathirika na mapungufu aliyoeleza. Kifungu cha 45 cha Sura ya 216 R.E 2019 kinarekebisha kasoro hizo ndogo na shauri

*la **Alliance One Tobacco Tanzania Ltd na Mwingine dhidi ya Mwajuma Hamisi na Mwingine**, Misc. Application No. 803/2018, ilieleza katika hukumu 'it is the current law of the land that courts should uphold the overriding objective principal and disregard minor irregularities and unnecessary technicalities so as to abide with the need to achieve substantial justice'. Kwa uamuzi huo wa Mahakama ya Juu na kwa sababu niliyoitoa, naikataa sababu ya 7 kuwa haina mashiko... Nikimalizia sababu ya 2 niliyoiacha kiporo, Mrufaniwa ndiye aliyekuwa mdai mbele ya Baraza la Kata. Alithibitisha walivyonunua eneo la mgogoro kwa kielelezo "A" na jinsi shahidi wa 2 Mnyera alivyokuwa mwangalizi wa eneo hilo. Mashahidi wa Mrufaniwa wote*

*wameunga mkono maelezo ya Mrufaniwa kuwa uvamizi umeanza 2021 baada ya Mrufani kuondoka 2019 kwenda kwenye matibabu. Mrufani alijitetea kuwa amejenga na anaishi katika eneo hila kama alivyoeleza katika ushahidi wake (ukurasa wa 19 wa mwenendo uliochapwa kwa mashine), ila ukurasa wa 21 wa mwenendo huo anakiri hana nyumba wala haishi eneo hila la mgogoro. Mashahidi wake wote wametoa ushahidi kuwa, Mrufani anaishi eneo la mgogoro. Baraza la Kata limetembelea eneo hilo na ramani imeonesha hakuna makazi ya Mrufani. Mrufani pia amekiri kuwa makazi yako pembeni mwa eneo la mgogoro. Kwa ushahidi wa Mrufani, naona ni wa uongo na una mkanganyiko, hivyo Baraza haliwezi kuupokea. Shauri la **Emmanuel Abrahamu Nanyaro dhidi ya Peniel Ole Saitabau** [1987] TLR 47 (CA) iliamua kwamba*

'Unreliability of witnesses, conflicts, inconsistency in their evidence entitle a judge to reject evidence'...Baraza la Kata limesikiliza wadaawa wote na mashahidi wao na limetembelea eneo la mgogoro. Sijaona sababu yoyote ya rufaa kutilia shako Baraza la Kata na hivyo ***nachukua*** *limetenda kwa weledi mkubwa na sina sababu ya kutoamini walichobaini na kuamua na hivyo sina cha kuingilia maamuzi yao huku nikielekezwa kufanya hivyo no Mahakama za Juu kwa hukumu ya Shauri la* ***Bwatumu Said dhidi ya Said Mohamed Kindumbwile,*** *Misc. Land Appeal No. 11/2011, iliamua kuwa 'the ward tribunal it was at best position to assess the evidence and visited the locus in quo and saw boundaries shown to it by parties....the practice has always been that the court at appellate level rarely interfered with the concurrent findings of the facts by two courts below'. Kufuatia hayo niliyoeleza kwa kila sababu ya rufaa na kuzikataa sababu zote, nakubaliana na maoni ya wajumbe wa Baraza hili kwa ushauri wao na kuwa ni kweli Mrufaniwa ndiye aliyethibitisha madai yoke hivyo, rufaa hii inatupiliwa mbali kwa gharama. Hukumu ya Baraza la Kata imethibitishwa, Mrufaniwa ni mmiliki halali wa eneo la mgogoro.*

The decision and reasoning of the district tribunal aggrieved the appellant hence approached this court in **Land Appeal No. 13 of 2023** (the land appeal) praying this court to intervene on the concurrent findings of the two (2) tribunals below, the ward and

district tribunals. In this court, the appellant had produced a total of seven (7) reasons, which in brief shows, that:

1) The respondent has no locus standi the dispute;

2) The appellate tribunal misapprehended the application of section 13 (4) of Cap. 216 R.E 2019;

3) The appellate tribunal misdirected in interpreting proper coram without signature of Mkami Siganka;

4) The appellate tribunal erred on point of facts in finding the appellant was not occupying the land in 1997;

5) The trial and appellant tribunals misdirected failed to consider the land in dispute belonged to the appellant's father and inherited by the appellant;

6) The appellate tribunal misdirected on point of law and facts to find that the map does not shows residential houses of the appellant; and

7) Both tribunals misapprehended and misapplied evidence on record leading to a miscarriage of justice.

In this court, the parties prayed to argue the land appeal by way of written submissions and the prayer was granted. During submissions in favor of the grounds of appeal, the appellant had abandoned to argue grounds number two and six, consolidated grounds number four, five and seven together and grounds one separately.

In the first ground of appeal, the appellant submitted that the respondent had no *locus standi* in the dispute as the land belongs to the late Fredrick Mnyera as evidenced by exhibit A registered in the dispute. According to the appellant, this is breach of section 71 of the **Probate and Administration of Estates Act [Cap. 352 R.E. 2002]** (the Probate Act) and precedents in **Malietha Gabo v. Adam Mtengu**, Civil Appeal No. 485 of 2022 and **Omary Yusuph v. Albert Munuo**, Civil Appeal No. 12 of 2018.

In replying the first ground of appeal, the respondent cited section 41 (1) and 45 of the **Land Disputes Courts Act [Cap. 216 R.E. 2019]** (the Act) contending that the appellant wants to alter the decision of the ward tribunal at the High Court on errors which have not occasioned any failure of justice. In substantiating her submission, the respondent cited precedents in **George Ntagera v. Shabani Madandi**, Land Appeal No. 2 of 2022 and **Pendo M. Iranga v. Kitama Elias**, Civil Appeal No. 44 of 2022.

In a brief rejoinder, the appellant contended that an appeal is statutory right under section 38 (1) of the Act and article 13 (6) (a) of the **Constitutional of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution) hence section 41 and 45 of the Act cannot bar the right, and that the indicated errors caused miscarriage of justice to the appellant.

In the submission of the appellant stated that, a point of law resisting jurisdiction may be raised at any point in time as is shown in the case of **Shose Sinare v. Stanbic Bank Tanzania Limited,** Civil Appeal No. 89 of 2020 and **Mukisa Biscuits Manufacturing Company West End Distributors Ltd** (1969) EA 696. The appellant in his rejoinder had declined to reply practice of this court in **George Ntagera v. Shabani Madandi,** (supra) and **Pendo M. Iranga v. Kitama Elias** (supra).

I have glanced page 3 of the ruling in a **George Ntagera v. Shabani Madandi,** (supra) which resolved that it is wrong to appeal against both decisions of the ward and district land tribunals and that section 38 and 42 of the Act do not include issues from the ward tribunals. This court also stated that appeals from the ward tribunal do not lie to this court. Finally, this court had struck out the appeal. The interpretation was borrowed in the precedent of **Pendo M. Iranga v. Kitama Elias** (supra) which held at page 4 of the decision that it was fault to lodge an appeal in High Court for wrongs committed by the Primary Court, while there is decision of the District Court.

The precedents are correct and may be cherished. However, the position may be invited and applied with reasonable care. It may decline substance of matters as is enacted in articles 13 (6)

(a) & 107A (2) (e) of the Constitution, section 3A (1) of the **Civil Procedure Code [Cap. 33 R.E 2022]** (the Code), section 45 of the Act and directives of the Court of Appeal (the Court) in the precedent of **Yakobo Magoiga Gichele v. Peninah Yusuph,** Civil Appeal No. 55 of 2017 and **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017.

The indicated enactments and precedents of the Court support substance of matters brought in our courts and discourage technicalities in search of justice of the parties. As I am not bound by the indicated precedents of this court and the Court, and considering the circumstances of the present case, the right of the parties must be determined to the finality, despite the indicated minor errors. The errors do not go into the root of the matter. The issue in the present dispute is: *who is a rightful owner of the disputed land based on the evidences registered on the record.* In that case, I will abide with the directives of our superior court, the Court in the precedent of **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra).

I am aware the respondent had submitted that points of law may be raised at any point of time. That is correct position of the law and cherished in a number of precedents (see: **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai,**

Civil Appeal No. 179 of 2016; **Meet Singh Bhachu v. Gurmit Singh Bhachu,** Civil Application No. 144/2 of 2018; **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999; **Tanzania Spring Industries & Autoparts Ltd v. The Attorney General & 2 Others,** Civil Appeal No. 89 of 1998; **Method Kimomogoro v. Registered Trustees of TANAPA,** Civil Application No. 1 of 2005; **Shose Sinare v. Stanbic Bank Tanzania Limited** (supra); **Mukisa Biscuits Manufacturing Company West End Distributors Ltd** (supra).

However, that line of thinking is followed by this court if the errors go to the merit of the case and occasioned a failure of justice. The current trend as witnessed in the precedent of **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra) is that:

> *With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice, section 45 of the Land Disputes Courts Act should be given more prominence to cut back on over reliance on procedural technicalities.*

The question this court is asked in the first ground of appeal, is whether the respondent is required to possess a letter of administration, or else the appellant is producing procedural

technicalities in the dispute to avoid substance of the matter. The Court has already stated that it is not about minor procedural technicalities in ward tribunals that has to be cherished, but substance of the matter. On substance of the matter, the guiding principle in civil or land disputes in highlighted by the Court in the precedents of **Hemedi Saidi v Mohamedi Mbilu [1984] TLR 113** and **James G. Kusaga v. Sebastian Kolowa Memorial University (SEKOMU)**, Civil Appeal No. 73 of 2022.

According to the Court, parties to a suit cannot tie their materials. A person whose evidence is heavier than that of the other is the one who must win. I will be inviting this directive of the Court in resolving the current dispute. I will do so in due course, as ground number four, five and seven resorted on weight of evidences produced on the record.

Regarding the first ground, apart from supporting the move taken by Court in the precedent of **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra), I think in my considered opinion, the issue of *locus standi* in the present case is a bit distinct with other cases regulating *locus standi*. In the instant dispute, the respondent was quoted in the ward tribunal to allege occupation of the land with his husband, the deceased Fredrick Werema and has been occupying the land without dispute for more than twenty-five

(25) years, save for interruption of **Mr. Nyanchage Mhoni** as displayed in exhibit B tendered in the dispute at the ward tribunal.

The current trend is that long stay in land gives ownership of land, despite legal interpolations and technicalities (see: **Shabani Nassoro v. Rajabu Simba** (1967) HCD 233 and **Mussa Hassani v. Barnabas Yohanna Shedafa,** Civil Appeal No. 101 of 2018). My thinking on justice tells me that a wife of the deceased who allege to have lived in a land of his deceased husband for a quarter of a century without intervention, she cannot be disputed ownership of stay in the disputed land on argument of *locus standi.*

That will be unfortunate part of humanity and rights of women in our societies. It will be cherishing the thinking that women are second class and cannot own land of their deceased husbands after long stay on lands. This is a court of justice with brain, eyes and ears. It can think, see and ear. It cannot cherish injustice against widows staying in their husbands' lands for a quarter of a century.

I am therefore of a considered view that, on a preponderance of probabilities, there was ample evidence to show that the respondent occupied the disputed land by virtue of her long occupation. In circumstances like the present one, courts have been reluctant to disturb persons who have occupied land and developed the same over a long period of time. That is why this

court in 1967, in the precedent of **Shabani Nassoro v. Rajabu Simba** (supra), had resolved that:

> *The court has been reluctant to disturb persons who have occupied land and developed it over a long period....the respondent and his father have been in occupation of the land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation.*

This move is well supported by the Court in the precedent of **Mussa Hassani v. Barnabas Yohanna Shedafa** in 2020. In my opinion, the issue of *locus standi* was brought in this dispute to defeat justice and long stay of the respondent in the disputed land. I think the move violates section 45 of the Act. This court shall resort to the directives of the Court in search of justice by scrutinizing the materials brought on record. In any case, this court is mandated under section 43 (1) (b) of the Act, and may not hesitate to invite the powers, as I hereby do so.

I am aware several complaints were registered in the land appeal regarding materials produced during the hearing of the dispute at the tribunal as indicated in the fourth, fifth and seventh grounds of appeal. According to the appellant, the tribunals below had declined analysis, examination and evaluation of materials on record. In substantiating his submission, the appellant stated that:

first, there is discrepancy on materials produced by the respondent during the hearing and exhibit A; second, the appellant's father occupied the land during *operation vijiji* in 1976 whereas the respondents testified to have bought in 1994; third, Mr. Makuru Moturi was not called to testify; fourth, the land previously owned by Mkami Makori before appellant's father; and finally, the appellants evidence was credible and reliable. In support of the complaints, the appellant cited decisions in **Juma B. Kadala v. Laurent Mnkande** [1983] TLR 103; **Christina Jalison Mwamlima v. & Another v. Henry Jalison Mwamlima & Others,** Land Case No. 19 of 2017; **Makubi Godani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019; and **Tanzania Ports Authority & Another v. Kabeza Multi Scrapper Ltd & Another,** Civil Appeal No. 72 of 2022; **Ramadhani Mbondera v. Allan Mbaruku & Another,** Civil Appeal No. 176 of 2020.

The second, third and fourth indicated complaints cannot detain this court. It is like asking all necessary parties who were mentioned in the dispute to be called to testify from Makuru Moturi and Mkami Makori, to the appellant's father. I am aware the record shows that the appellant's father had already expired during the hearing of the dispute at the ward tribunal, but the same record is silent on whereabout of the Makuru Moturi and Mkami Makori. I am

aware of the precedent in **Hemedi Saidi v Mohamedi Mbilu** (supra) which resolved that for undisclosed reasons, a party who fails to call material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.

However, in the present case, both parties have not disclosed where was Makuru Moturi and Mkami Makori and why they both declined to call them to justify their submissions. In such circumstances, a reply on proper course to follow is provided in the precedent of **Hemedi Saidi v Mohamedi Mbilu** (supra), where the Court stated that: *in measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence.*

This brings me back to the first and final indicated complaint which moves into the merit of the matter. In that case, the question before this court is: *who had produced better evidence for this court to decide in his/her favor.* In the present case, the appellant testified that he was given the land by his deceased's father in 1997 and has been occupied since then without any dispute and built a house in the land.

In order to substantiate his claim, he called DW2 and DW3. However, the appellant, DW2 and DW3 have testified that they do

not know the size of the disputed land. DW2 went further and testified that he does not know the location of the disputed land, which is unfortunate for the family land to be unknown to the brother of the appellant. Interestingly, the record shows that the appellant and DW3 testified that the respondent is their neighbour and the land was occupied by Mnyera Gachibi before the dispute arose.

The respondent on the other hand testified that herself and her deceased's husband had bought and occupied the disputed land since 1994 and produced sale agreement in exhibit A. In order to substantiate her allegation, she summoned two witnesses who had witnessed the sale agreement and Mnyera Gachibi who was occupying the land as caretaker.

The ward tribunal also visited the scene of the land and confirmed that the appellant had no any house on the land and his house was far away from the land, contrary to his evidence during the hearing of the dispute. Finally, the tribunal resolved the matter in favor of the respondent with three reasons based on long stay of the respondent in the disputed land, evidence of exhibit A and the appellant had declined to produce any exhibit to substantiate family meetings which have settled and resolved the land in his favor.

There are two principles in favor of the decision of the ward and district tribunals, namely: first, the ward tribunal was at the best position to assess the evidence and visited the *locus in quo* and saw boundaries shown by parties. It also noted absence of the house alleged by the appellant, which goes into his credibility and reliability; and second, the practice that courts at appellate level rarely interfered with the concurrent findings of two courts below (see: **Bwatumu Said v. Said Mohamed Kindumbwile,** Misc. Land Appeal No. 11 of 2011; **Amratlal Damodar & Another v. H. Jariwalla** [1980] TLR 31; and **Maulid Makame Ali v. Khamis Kesi Vuai,** Civil Appeal No, 100 of 2004).

I am conversant on the protest that the respondent is not displayed on exhibit A. The question cannot detain this court for two reasons: first, no complaint on whether the respondent was a wife to the deceased Fredrick Mnyera; and second, I indicated in this judgment that long stay in land for more than a quarter of a century itself gives ownership, let alone issues of a wife of the deceased. The reasoning is supported by the precedents in **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra) and **Shabani Nassoro v. Rajabu Simba** (supra).

I understand there is ground number three of appeal on want of section 11 of the Act, signature of a member of the ward

tribunal, Mkami Siganka and precedent in **Adelina Koku Anifa v. & Another v. Byarugaba Alex**, Civil Appeal No. 46 of 2019. I have read the original record of appeal and found that member of the ward tribunal called Mkami Siganka was present and signed the proceedings and decision of the ward tribunal on 25th October 2021 and she is reflected at serial number five of the signed chart. In those circumstances, the application of section 11 of the Act or precedent in **Adelina Koku Anifa v. & Another v. Byarugaba Alex** (supra) cannot be invited and applied. Even if it was correct, it could have been taken by section 45 of the Act and precedent in **Shabani Nassoro v. Rajabu Simba** (supra) and **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra).

The complaints which were registered by the appellant in the instant appeal are more or less similar to grievances lodged in the precedent of **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra) at this court. Page 9 of the judgment in the precedent of **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra), shows that the protests were on:

> *1) The district tribunal had relied on facts which were not part of evidence on record;*
> *2) The respondent had no letters of administration to sue on behalf of the estate of his late father;*

3) The respondent's claim at the trial ward tribunal over disputed land was time barred because the appellant was already in occupation for more than twenty years;

4) The district tribunal had relied on speculative evidence that the appellant's witness (SU2) unlawfully allocated the land white the owner was still on the same land; and

5) The district tribunal delivering a conflicting decision, on one hand finding that the disputed belonged to the respondent's family, while also saying that the land belonged to the respondent.

All the raised issues in five grounds of appeal, were condensed into one question to the appellant's learned counsel during the appeal hearing at the Court: *whether the provision of section 45 of the Act prescribing substantive justice will save the errors pointed out*. The reply from the appellant's learned counsel was that the errors could not be saved by the provision of section 45 of the Act. The Court on its part when replying the question, stated that:

> *With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice, section 45 of the Act should be given more prominence to cut back on over reliance on procedural technicalities.*

The reasoning of the Court is found at page 12 and 14 of the decision that:

we are of the decided view that the Court should not read additional procedural technicalities into the simple and accessible way Ward Tribunals in Tanzania conduct their daily businesses. The learned counsel for the appellant has conceded, rightly so, that section 4 (4) of the Wards Tribunal Act upon which he staked his proposition that the Ward Tribunal for Turwa was not properly constituted, does not prescribe that the record of the proceedings must show the member who presided the proceedings when the Chairman was marked absent...Section 13 of the Land Disputes Courts Act underscores the spirit of simplicity and accessibility of Ward Tribunals, by reminding all and sundry that the primary functions of each Ward Tribunal is to secure peace and harmony...that harmonious spirit cannot be attained if this Court accedes to the prayer of the appellant's learned counsel to prescribe judicially that record of proceedings should mention the member who presided the proceedings of the ward tribunal when the Chairman is absent for any reason.

Following the decision in **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra), **Shabani Nassoro v. Rajabu Simba** (supra) and **Hemedi Saidi v Mohamedi Mbilu** (supra), I am moved to think that the respondent had produced finest evidence to be declared a rightful owner of the disputed land than the appellant.

In the end, I invite the provisions of section 43 (1) (a) of the Act on the mandate of this court, section 45 of the Act and section

3A (1) of the Code for want of substantial justice and precedents in **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra), **Shabani Nassoro v. Rajabu Simba** (supra) and **Hemedi Saidi v Mohamedi Mbilu** (supra) to uphold the decision of the district tribunal. This appeal is hereby dismissed in entirety with costs.

It is so ordered.

Right of appeal explained.

F. H. Mtulya

Judge

31.10.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of the appellant, **Mr. Chenge Magwega Chenge** and in the presence of the respondent, **Mrs. Specioza Mochubi**, through teleconference attached in this court.

F. H. Mtulya

Judge

31.10.2023