**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MTWARA**

**AT MTWARA**

**LAND APPEAL NO. 16 OF 2023**

*(Originating from Land Application No. 30/2021, the decision of the District Land and Housing Tribunal for Mtwara at Mtwara)*

**IDD ALLY KAMTAULE**

**(Administrator of the Estate of the Late**

**MKAELE NANYAKA KASEMBE) ..... APPELLANT**

**VERSUS**

**MARIAM JIA ..... 1ST RESPONDENT**

**SEFU JUMA MBANDE ..... 2ND RESPONDENT**

**MARY HATIBU ..... 3RD RESPONDENT**

**ASHA ALLY MPEJE ..... 4TH RESPONDENT**

**OMARY NASSORO ..... 5TH RESPONDENT**

**EDIGA LUKA ..... 6TH RESPONDENT**

**MOHAMEDI SELEMANI WADI ..... 7TH RESPONDENT**

**ALLY HASSAN ..... 8TH RESPONDENT**

**SOMOE WARD ..... 9TH RESPONDENT**

**DALIA MKUNDI..... 10TH RESPONDENT**

**ABDELHMAN LIWANDA ..... 11TH RESPONDENT**

# JUDGEMENT

*06th & 27th February, 2024*

**MPAZE, J.:**

The appellant who is the administrator of the estate of the late Mkaele Nanyaka Kasembe who died in 1974, sued the respondents, jointly and severally, in the District Land and Housing Tribunal of Mtwara (herein 'the DLHT') in Land Application No. 30/2021. The appellant claimed that the respondents are trespassers to their land measuring 8 acres (disputed land) situated at Mbalichila, Mkululu Ward in Masasi District which was acquired through inheritance. Therefore, he sought the following remedies;

1. A declaration that the applicant and his relatives are lawful owners of the suit land they inherited from the deceased.
2. The respondents are declared trespassers.
3. The respondents be ordered to vacate the suit land
4. The costs of the suit are borne by the respondents.
5. Any other relief that this honourable court deems fit to grant.

After hearing the evidence of both parties, the trial chairman concluded that the evidence of the respondents was heavier compared to that of the appellant. The respondents were declared the rightful owners of the disputed land. The Appellant was aggrieved with the said decision and thus lodged this appeal with 6 grounds of appeal which I paraphrase hereunder;

i. That, the trial tribunal erred in law and fact for declaring the disputed land belonged to the respondents.

ii. That, the trial tribunal erred in law and fact in considering that the disputed land was obtained during Operation Vijiji.

iii. That, the trial tribunal erred in law and fact in relying on the evidence of the respondents who had no locus stand.

iv. That, the trial tribunal erred in law and fact for failure to consider the number of years the appellant's father occupied and enjoyed the disputed land.

v. That, the trial tribunal decision was contrary to the evidence on record and against the laws of Tanzania.

vi. That, the trial tribunal erred in law and fact for failure to consider the appellant's claim as narrated in his application.

He thus prayed before this Court on the following orders;

i. To quash and set aside the decision of the district land and housing tribunal

ii. The appellant be declared the rightful owner of the disputed land

iii. Costs of this appeal; and

iv. Any other orders this court deems fit and just to grant

A brief fact of this matter as gathered from the DLHT record goes as follows;

The appellant has asserted that following the demise of Mkaele Nanyaka Kasembe, the disputed land was inherited by his children and grandchildren, which includes the appellant.

That, sometime between 2012 to 2018, the respondents on various occasions unlawfully trespassed into the disputed land and occupied it as their own without any color of right. Among the respondents, others also destroyed the crops and trees found in the disputed land.

The appellant's witnesses, George Kanyimbi (PW2), Maimuna Rashid (PW3), and Musa Mbotela Mambale (PW4). All of them testified to the effect that the owner of the disputed land is the late Emmanuel Kamtaule who

inherited the disputed land from his parents. (PW2) added that he was once told by the late Emmanuel Kamtaule that 8 people had trespassed the disputed land, unfortunately, he did not tell him the names of the trespassers.

On the other side the respondents who appeared before the tribunal testified on how they got their pieces of land and when they started to occupy the same.

Ally Hassan Masudi (DW1), the 8th respondent, refuted the claim of occupying one acre within the disputed land, asserting ownership of 5 acres. He informed the tribunal that he inherited the land from his grandmother, the late Somoe Wadi, who had occupied the land since his birth in 1978.

Mohamedi Selemani Wadi (DW2), the 7th respondent, testified that he acquired his piece of land in 2017 following the passing of his aunt 2016, who had been the original owner since 1990. The aunt also inherited the said land from her father, Mzee Wadi Lwali.

Mariam Jia (DW3), the 1st respondent, testified that she relocated from Dar es Salaam to Mkululu village in 1966. Upon her arrival, she found the

forest and, with her children, cleared it and planted cashew trees, which have remained to the present day.

Sefu Juma Mbonde (DW4), the 2nd respondent, stated that he was given the land by his grandfather in 2007 when he was in class six, and he has been occupying it since then.

Asha Ally Mpeje (DW5), the 4th respondent, testified that she has been the owner of the deputed land since 1994 when she began clearing the forest and planting cashew trees.

Dalia Mkundi (DW6), the 10th respondent, testified that she cleared the forest in 1979 and has occupied the land without any disturbance since that time.

The appeal was argued by way of written submissions, both parties complied with scheduling orders served for filing the rejoinder which the appellant waived his right to do so.

Before addressing the submissions made by the parties, let me express that I encountered difficulties in understanding the submissions of the appellant. However, after dedicating a considerable amount of time and

careful consideration, I can now clarify that the submissions of the appellant were as follows;

Concerning the first ground of appeal, I understood the appellant's complaint against the trial tribunal is that the DLHT erred both in law and fact by declaring the disputed land rightfully belonged to the respondents.

The appellant contends that the decision was reached without a proper examination of the compelling evidence presented on his behalf, instead, the tribunal gave weight to the respondent's evidence while they failed to provide supporting evidence to substantiate their claim to the disputed land.

As for the second ground of appeal, the appellant argues that the tribunal made errors in both law and fact when it determined the disputed land was acquired during Operation Vijiji. The appellant refutes this claim, asserting that after the demise of the original owner, Mkaele Nanyaka Kasembe, in 1974, the disputed land was passed on to the owner's children and other family members, including the appellant.

For the third ground of appeal, the appellant argues that the DLHT made errors in both law and fact by basing its decision on evidence submitted by respondents who lacked locus standi. However, the appellant

did not provide further clarification on this issue, aside from expressing concerns about unnamed respondents who, on different occasions, allegedly trespassed onto the appellant's farm and caused damage to crops and trees.

Concerning the fourth ground of appeal, the appellant expresses dissatisfaction with the tribunal's failure to consider the number of years during which the appellant's late father peacefully occupied and developed the disputed land without any disruptions. The appellant redirects the court's attention to Rashidi Bakari Mussa, who voluntarily surrendered a portion of the contested land under his occupation. In support of this argument, the appellant attached a copy of Rashidi Bakari Mussa.

As on the fifth ground of appeal, the appellant contends that the tribunal's entire decision goes against the evidence on record and violates Tanzanian laws by deciding the matter without visiting the locus in quo. The appellant further asserts that the respondents failed to produce any witnesses to substantiate their ownership of the disputed land.

The contention made in the sixth ground closely mirrors the argument presented in the first ground. In both instances, the appellant maintains that the respondents did not present compelling evidence to support their

ownership claim of the disputed land, especially when compared with the evidence provided by the appellant.

Concluding his submission, the appellant prays for the court to allow his appeal, set aside the tribunal's decision, and declare him the rightful owner of the disputed land.

In response to the appellant's written submission, the respondents collectively dispute the merit of the appellant's appeal, pointing out his submissions as baseless, warranting dismissal. They underscored the principle that he who alleges must prove, citing section 110 of the Tanzania Evidence Act Cap 6 RE 2022 to strengthen their argument.

The respondents further contended that the appellant failed to establish how and when his late grandfather, Mkaele Nanyaka Kasembe, acquired ownership of the disputed land. They maintained that the evidence presented by the appellant and his witnesses was contradictory and did not substantiate the appellant's claims before the trial tribunal.

To elucidate the inconsistencies in the appellant case, the respondents pointed out that the appellant's witnesses testified before the tribunal that the disputed land belonged to the late Emmanuel Kamtaule, while the

appellant himself claimed that the land belonged to his late grandfather, Mkaele Nanyaka Kasembe.

Moreover, the respondents highlighted their longstanding possession and development of the disputed farm without disturbance. They argued that the appellant did not provide convincing reasons to indicate that he had been unjustly dispossessed of the disputed land by the respondents. To support this assertion, the respondents referred the court to the precedent set in the case of **Masubo Karera v. Marwa Nyanokwa** [1967] HCD 436, where it was held that;

> *'The piece of land was not lying just vacant. The Appellant was in effective possession and had been developing the land for several years. There must be a very strong reason to justify his being dispossessed of the land by the village development committee.'*

In consideration of the entirety of the respondents' submissions, they earnestly request the court to dismiss the appeal and uphold the decision rendered by the DLHT.

I have carefully examined the rival submission of both parties about the grounds of appeal, the court is now placed to determine the appeal

where the central issue for consideration and determination is whether the appeal is meritious.

Before delving into the main issue of this appeal, I find it appropriate to make clear that written submissions do not constitute evidence. In paragraph 4 of his written submission, the appellant attached a copy of the surrendering letter from Rashidi Bakari Mussa and sought leave to the court for it to be considered as part of the appeal.

In the case of **Registered Trustees of the Archdiocese of Dar es Salaam v. The chairman, Bunju Village Government and 11 others**, Civil Appeal No. 147 of 2006 the Court had this to say;

> *'...submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.'*

Guided by the cited case above, the document provided by the appellant in his submission is deemed irrelevant. It is noteworthy that this document was already tendered during the trial as Exhibit P2, hence

attaching the same in his submission was superfluous as the same was already tendered during the trial.

That being said, and given its role as the first appellate court it is crucial to note that it is entitled to re-evaluate and consider the entire evidence on records subject it to critical scrutiny and arrive at its own independent decision. This has been stated in various cases including the cases of **Jamal A Tamim v. Felix Francis Mkosamali & The Attorney General** Civil Case No. 110 of 2012, and **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** Civil Appeal No. 45 of 2017 (Both unreported).

The Court of Appeal, in the matter of **Registered Trustees of Joy in the Harvest v. Hamza K Sungura** (Civil Appeal 149/2017), meticulously examined the concept of re-evaluating evidence. In its deliberations, the court articulated the following insights;

> *'The re-evaluation of evidence entails a critical review of the material evidence to test the soundness of the trial court's findings.'*

The Court of Appeal also emphasized that;

> *'Obligation imposed on the first appellate court in handling an appeal is not a light duty. It is a painstaking*

*exercise involving rigorously testing the reliability of the finding of the court below.'*

Relying on the cited case, the court now delves into the examination of the grounds of appeal, keeping in mind the standards expected of a first appellate court.

In resolving the grounds of appeal, the first, fourth and sixth grounds will be adjudicated collectively as they are intertwined, while the second, third and fifth grounds will be dealt with separately.

The appellant's main complaints, in the first, fourth, and sixth grounds of appeal, revolve around the trial tribunal's failure to consider the evidence supporting Mkaele Nanyaka Kasembe's ownership of the disputed land. The appellant also questions the tribunal's decision to declare the respondents as lawful owners of the disputed land, asserting that the respondents failed to provide sufficient evidence substantiating their claim to ownership.

According to the records, the appellant testified that the owner of the disputed land was his late father, Mkaele Nanyaka Kasembe. That after his demise he was appointed to administer his estate. He submitted Form No. IV admitted as Exhibit P1, which discloses that the appellant was appointed

on 15/03/2023 to administer the estate of the deceased, who passed away on 05/03/1974.

The appellant added that the dispute was once referred to the Ward Tribunal (WT) but only one Rashid Bakari Salumu agreed to vacate from the disputed land. He tendered an agreement to hand over the cashew farm which was admitted as Exhibit P2. The contents of Exhibit P2 shows that Rashid Bakari Musa willingly decided to hand over the cashew farm to the family of Mkaele Kasembe because it was unlawfully sold to him by Luka Juma and Luchia Juma Kamndaya.

During cross-examination, the appellant asserted that he is the son of the late Andrea Kamtaule, who, in turn, was the son of Beatrice Kasembe a daughter of the late Mkaele Nanyaka Kasembe. The late Mkaele Nanyaka Kasembe had three daughters: Beatrice Kasembe (the appellant's grandmother), Hadija Kasembe, and Edina Kasembe, all of whom are deceased. However, the appellant could not recall the specific dates of their passing.

Continuing with his testimony during cross-examination, the appellant mentioned that he was informed by the late Emmanuel Kamtaule that the disputed land was their inheritance.

Persisting in responding to questions during the cross-examination, the appellant stated that Mkaele Nanyaka Kasembe had borrowed the disputed land from Mzee Mtolilo and Mzee Msungila, who have been managing it. He additionally claimed that the respondents currently have control of the disputed land, having trespassed onto it four years ago.

Based on the information revealed during cross-examination, it can be inferred that the late Mkaele Nanyaka Kasembe was indeed the appellant's great-grandfather and not his father as he submitted in chief. Additionally, the appellant testified that he was informed by his late uncle, Emmanuel Kamtaule, that the disputed land rightfully belonged to them by way of inheritance.

In addition to the appellant's testimony, George Kanyimbi (PW2), Maimuna Rashid (PW3), and Musa Mbotela Mambale (PW4) provided their accounts. They all testified that the late Emmanuel Kamtaule inherited the disputed land from his parents.

George Kanyimbi (PW2) added that on one occasion, Emmanuel Kamtaule informed him that eight people had encroached upon his land. Unfortunately, he did not disclose the names of these trespassers. Later, Kamtaule reported the matter in the WT.

PW2 continued to say that the tribunal ruled in favour of the late Kamtaule, declaring the disputed land as his property. The trespassers appealed, and shortly after Emmanuel Kamteule died, they convened a meeting and appointed Idd (the appellant) as the administrator of Emmanuel Kamtaule's estate.

During cross-examination, PW2 stated that nine people who had trespassed onto the disputed land, one of them withdrew from the dispute.

Maimuna Rashid (PW3), when questioned in cross-examination, stated that the late Emmanuel Kamtaule informed her about the respondents trespassing on his land but did not provide the names of those respondents. Similarly, Musa Mbotela Mambale (PW4) testified that the disputed land was occupied by nine trespassers, one of whom later vacated the area. However, he also did not specify the names of the trespassers.

Upon examining this piece of evidence, I noted contradictions within it. Through various decisions of this court and Court of Appeal, it has been stated that where the testimonies of witnesses contain inconsistencies and contradictions, the court must 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. See the case of **Mohamed Said Matula v. Republic**, [1995] TLR 3.

The court is aware that, not every contradiction can fetter a case for prosecution unless it goes to the root of the case see the case of **Ally Ismail v. Republic,** Criminal Appeal No 249 of 2008 CAT(unreported).

Upon careful consideration of the aforementioned evidence excerpt, it is clear that the noted contradiction is fundamental to the core of the case, adversely affecting the appellant's case, as I will illustrate shortly.

In this matter, the applicant (appellant) filed Land Application No. 30 of 2021 as the Legal Administrator of the estate of Mkaele Nanyaka Kasembe. This indicates that he applied to represent the interests of the deceased in contesting the disputed land.

However, upon examining the application filed by the applicant, it becomes apparent that he was seeking a declaration that both the applicant and his relatives are rightful owners of the disputed land through inheritance. Furthermore, in his testimony, the applicant consistently maintained that the disputed land is rightfully theirs by way of inheritance.

If this is the case, one might argue that there was no need to file the case in the capacity of an administrator of the estate. Instead, the applicant should have initiated the case as the rightful owners of the property acquired through inheritance after the demise of the original owner.

I express this viewpoint because the acquisition of land in Tanzania can occur through various means, including government allocation, purchase, gift, or inheritance. In the case of inheritance, it can be through customary administration of the estate or by obtaining letters of administration or probate.

Since the appellant claimed ownership of the land through inheritance, it was essential for him to prove the method through which he inherited it. If it was through the issuance of letters of administration of the estate or probate, Form VI should have been presented as evidence.

On the other hand, if the inheritance was through customary practices, there should have been evidence demonstrating that after the death of Mkaele Nanyaka Kasembe, the family convened a meeting to distribute the deceased's property. This form of inheritance, without the opening of a formal probate or letters of administration, is recognized. See The Local Customary Law(Declaration) Order (193) GN 273 of 263.

My brother Mlacha J(as he then was) in the case of **Edward Ntinkule v. Evarist Ntafato,** Misc. Land Appeal No. 11 of 2022 had this to say;

> *'The court recognizes ownership of land under customary law through inheritance. The title of the appellant was recognized even though he did not go through the probate.*

He went further;

> *In land matters, people may get title or ownership of the land through inheritance under customary law. That is where a person dies; the clan or family may sit and make decisions customarily vesting the land to the clan or family generally or giving it to a person directly...title may pass directly to the son even though he did not get it from the administrator. In fact, in reality, the majority of people in this country own their land through inheritance under customary law.'*

By stating this, it is evident that a person can inherit land through customary law and become an owner without necessarily going through the probate court. Therefore, since the appellant's claims was related to the ownership of the land through inheritance, he was required to provide evidence demonstrating how ownership transferred from the deceased to him through inheritance. Instead of filing the case as the administrator of

the estate of Mkaele Nanyaka Kasembe, the appellant should have presented evidence of how the ownership transitioned through inheritance.

Additionally, I have observed that in the DLHT, the applicant sought relief to be declared a lawful owner along with other relatives, yet these specific relatives were not named. There is no evidence that these relatives were present at the tribunal to support the applicant's claims. Furthermore, there is no proof showing that the applicant obtained the necessary leave to represent them in these proceedings.

The relevant order guiding such representation is Order 1, Rule 8 of the Civil Procedure Code, Cap 33 R.E 2019, wherein Section 51(2) of the LCDA empowers the DLHT to apply the CPC in cases where there is inadequacy in the Regulations. Order 1, Rule 8 provides;

> '***Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit,*** *on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is*

*not reasonably practicable, by public advertisement, as the court in each case may direct*'.

In the case of **Bernard Masaga, Merchant K. Ikungura and Others v. National Agricultural and Food Corporation and 2 Others**, Civil Application No. 177 of 2006, when the court was discussing the failure to disclose the names of another applicant in the application, had this to say;

'*As it is, no information was forthcoming to show who those others are, and whether there was leave granted to Ikungura to represent them. In the light of the failure to disclose who those others are, it will be fair to say that; strictly speaking, there is no proper application before the Court...*'

Considering that the term '***relative***' encompasses a broad range of individuals, including parents, siblings, uncles, aunts, grandparents, cousins, nieces, and nephews, the lack of specificity could lead to an ongoing conflict. Even if the applicant was to win the case, the execution of the decision could become challenging. This is because anyone falling under the definition of a relative might emerge and raise complaints, resulting in a prolonged and unresolved dispute.

In the realm of evidence, a significant inconsistency arises between the applicant's evidence during the trial and the claims made in the application before the tribunal. This inconsistency is fundamental, addressing the very essence of the case, and it cannot be ignored.

On top of that, despite the appellant's repeated insistence that the original owner of the disputed land is Mkaele Nanyaka Kasembe, his witnesses consistently testified that Emmanuel Kamtaule was the rightful owner of the disputed land who inherited it from his parents.

While the appellant asserts that immediately following Mkaele Nanyaka Kasembe's death in 1974, the disputed land was inherited by the deceased's children, including the appellant, during cross-examination, the appellant stated that he was informed by Emmanuel Kamteule that the disputed land is part of their inheritance.

With this evidence, there appears to be a contradiction regarding the true owner of the disputed land. It raises questions about whether it belongs to Mkaele Nanyaka Kasembe, the children of Mkaele Nanyaka Kasembe, or Emmanuel Kamtaule.

The court also went through Exhibit P2, which is titled '***Makubaliano ya Kurudisha Shamba la Mikoroshо***', the contents of the document reads;

> '...*Rashidi Bakari Musa kwa hiari yake ameamua kurudisha shamba la Mikorosho kwa familia ya Mkaele Kasembe alilo uziwa kimakosa na Luka Juma na Luchia Juma...*'

The relinquishment of the land by Mr. Rashidi Bakari Mussa, in itself, does not provide conclusive evidence to establish that the piece of land owned by the respondents is also an integral part of Mkaele Kasembe's family estate.

During cross-examination, the appellant claimed that Mkaele Nanyaka Kasembe had temporarily entrusted the disputed land to Mzee Mtolilo and Mzee Msungila in the year 1974. Simultaneously, he asserted that Mkaele Kasembe died in 1974. He added this information was communicated to him by Emmanuel Kamteule.

This assertion by the appellant and that of Emmanuel Kamtaule informed him that the disputed land being their inheritance constitutes hearsay evidence. Section 62 of the TEA explicitly states the evidence can

only be admissible if the same is direct and whatever else that is not direct is hearsay and inadmissible.

Given these facts, it would be incorrect to assert that this specific piece of evidence successfully validates the appellant's claims at the DLHT.

On top of that, the appellant alleged the respondents encroached upon the disputed land from 2012 to 2018. On the contrary, the respondents who appeared before the tribunal offered their testimonies detailing the acquisition and occupation of their respective pieces of land in the years 1966, 1978,1979, 1994, 1990, 2007, 2016 and 2017.

Upon completing their testimony, the appellant was allowed to cross-examine the respondents. Remarkably, the appellant did not dispute or challenge the timelines asserted by the respondents regarding their occupation of the disputed land.

It is the position of law that failure to cross-examine a witness on a particular important point entails acceptance of that witness's evidence as it was held in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** Civil Appeal No 45 of 2017 (Unreported). See also: **Bomu Mohamedi vs Hamisi Amiri** Civil Appeal No. 99 of 2018.

Therefore, the appellant's failure to cross-examine the respondents, on several years they have been occupying the disputed land, implies an acknowledgement that the respondents began utilizing the area well before the contested period of 2012 to 2018, during which the appellant claims the invasion took place.

The trial tribunal, based on the presented evidence, concluded that the respondents had a stronger case than the appellant and declared them as the rightful owners of the disputed land.

It is trite law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. The position is well laid down under Sections **110 (1) and (2) of the Law of Evidence Act** Cap 6 RE 2022 which state *inter lia*;

> *'1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'*
>
> *2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'*

This position is articulated in various decisions of this court and the Court of the Appeal, where in the case of **Antony M Masanga v. Penina**

**(Mama Mgesi) & Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 (Unreported) the Court stated that;

> *'Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour.'*

The Court went further that,

> *'It is a common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden, and the standard in each case is on the balance of probabilities.'*

In the instance case, the appellant who was claiming ownership of the disputed land against the respondents had an obligation to prove he is a lawful owner in exclusion of others, the duty which according to the discussion above has failed to establish, as a result, the court finds the first, fourth, and sixth grounds of appeal have no merits.

Regarding the second ground of appeal, the appellant criticizes the trial tribunal for allegedly making a decision based on the assertion that the

disputed land was acquired during Operation Vijiji. Upon careful examination of the entire contested decision, the court has thoroughly reviewed it but found no instance where the trial chairman explicitly determined that the disputed land was obtained during Operation Vijiji.

The trial chairman indicated clearly that he considered the evidence in its totality to conclude that the respondent's evidence was lawful owners of the disputed land by way of adverse possession.

Given that the issue of Operation Vijiji was neither raised during the trial proceedings nor discussed in the decision of the DLHT, the appellant should not have included it as a ground for appeal. It was stated in the case of **Farida and Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) that;

> *'It is a general principle that the appellate court cannot consider or deal with the issues that were not canvassed, pleaded and or raised at the lower court. For that reason, they are dismissed.'*

For that reason, I also find the second ground of appeal is devoid of merit and I proceed to dismiss it.

As regards the third ground of appeal, the appellant complained that the trial tribunal erred in law and fact for hearing and deciding the matter in favour of the respondents who had no locus stand.

It is noteworthy that this issue was neither discussed nor contested in the trial tribunal; it has emerged as a new matter. It is a legal stance that a matter not addressed during the trial cannot be raised on appeal unless the argument raised is legal. The court concedes the legal merit of this argument and will proceed to adjudicate upon it.

The Court of Appeal in the case of **William Sulus v Joseph Samson Wajanga** Civil Appeal No 193 of 2019, has provided the meaning of locus stand as follows;

> *'Essentially, locus stand is the legal capacity or competency to bring an action or to appear in court. It is a long-settled principle of law that* ***for a person to institute a suit, he/she must have locus stand.'***

See also the case of **Lujuna Shubi Balonzi v. Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203.

In the case of **Madam Mary Silvanus Qorro v. Edith Donath Kweka and Wilfred Stephen Kweka** Civil Appeal No 102 of 2016, the Court stated;

> *'The question of locus stand on the part of the respondents was not at issue.... One of the reasons is the respondents were just dragged to the court by the appellant and hence, they did not bear the duty to establish their status in the suit.'*

Given that the appellant is the one who initiated the proceedings against the respondents, it was incumbent upon him to assess whether the respondents warranted legal action. Rather than complaining to the tribunal about apparent errors in their hearing, the appellant should have exercised due diligence in determining whether the respondents were justifiably subject to legal proceedings before filing his application in the DLHT.

In the final analysis of this ground of appeal, I also discern that the third ground of appeal lacks merit, and consequently, I dismiss it.

Moving on to the fifth ground of appeal, alongside other concerns, the appellant faulted the DLHT for not conducting a visit to the *locus in quo.*

Usually, the court does not need to visit the locus in quo. Such visits are earmarked for exceptional circumstances, as they carry the risk of the

court inadvertently taking on the role of a witness rather than maintaining its role as an impartial adjudicator. See the case of **Kimonidimitri Mantheakis v. Ally Azim Dewji & 7 others** Civil Appeal No. 4 of 2018.

Also, in the case of **Joyce Christopher Massawe ( Legal representative of the late Frida Waraskawa) v. Amphares Geofrey Naburi**, Civil Appeal No 231 of 2020 the court stated;

> *'We should start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or the tribunal to conduct a visit at the focus in quo, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial.'*

Similarly, in the case of **Avit Thadeus Massawe v. Isidory Assenga**, Civil Appeal No. 6 of 2017 (unreported), when addressing the propriety of visiting the locus in quo, the reference was made to the Nigerian case of **Akosile v. Adeye** (2011) 17 NNWLR (Pt 1276) p.263, where it was determined;

> *'The essence of a visit in locus in quo in land matters includes the location of the disputed land, the extent, boundaries and boundary neighbour, and physical features on the land. The purpose is to enable the Court*

*to see objects and places referred to in evidence physically and to dear doubts arising from conflicting evidence if any about physical objects.'*

In light of the cases cited, it can be stated that the rationale behind conducting visitation of a *locus in quo* is to authenticate the previously presented evidence. In circumstances where it is deemed essential and possible, such visits provide a firsthand visual inspection, akin to a court scrutinizing a plan, map, or any tangible object introduced or discussed during the proceedings.

In this case, upon careful examination of the provided evidence, I find no fault with the DLHT for not undertaking a visit to the locus in quo. The dispute over land ownership did not hinge on boundary issues that would necessitate a site visit for observation and mapping, especially when considering the evidence already presented. Consequently, I find this ground of appeal to lack merit, and therefore, I dismiss it.

Before I conclude, I would like to remind the Chairpersons of the DLHT that when they are dealing with an application of this nature, it is imperative to carefully go through the claims and the replies of the parties, considering that the parties are bound by their pleadings. Issues are formulated based

on the claims and replies pleaded in the application and written statement of defence.

For instance, if the applicant prays to be declared the lawful owner of the disputed land, and the respondent, in his reply, does not seek the same relief, then the issue to be determined should be '***whether the applicant is the lawful owner of the disputed land.***' However, if both pray to be declared the lawful owners, the issue would be '***Who is the lawful owner of the disputed land***', and if a claim is made in the capacity of the legal administrator of the estate, the issue would revolve around establishing ***whether the deceased was the rightful owner of the disputed land.***

Formulating precise issues is paramount as it greatly assists the parties involved in understanding the nature of the dispute and the evidence needed to substantiate their claims. This process ultimately paves the way for fair and just decisions.

All said and done, and based on the above findings, the appellant's appeal is unmeritorious. I therefore dismiss it in its entirety with costs.

Ordered accordingly.

**Dated** at Mtwara this 27th February 2024.

**M.B. MPAZE**

**JUDGE**

**Court**: Judgment delivered in Mtwara on this 27th day of February, 2024 in the presence of the appellant Idd Ally Kamtaule and Ally Hassan 7th respondent but in the absence of 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th and 11th Respondents.

**M.B. MPAZE**

**JUDGE**

**27/02/2024**