

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND APPEAL NO. 186 OF 2021**

*(Originating from the decision of the District Land and Housing Tribunal of  
Temeke at Temeke in Land Application No. 339 of 2018)*

<b>EMANUELA KAGANDA .....</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>MAGRETH NGODA .....</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>GODWIN KAGANDA .....</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>IDDI OMMARY .....</b>	<b>4<sup>TH</sup> APPELLANT</b>
<b>RAMADHANI HASSANI .....</b>	<b>5<sup>TH</sup> APPELLANT</b>
<b>JUMA KILONGOZI .....</b>	<b>6<sup>TH</sup> APPELLANT</b>
<b>VERSUS</b>	
<b>MUSTAFA HARUNA KIGUFA .....</b>	<b>RESPONDENT</b>

*Date of last Order: 27/05/2022*

*Date of Judgment: 17/06/2022*

**JUDGMENT.**

**I. ARUFANI, J**

This appeal originated from the decision of the District Land and Housing Tribunal of Temeke at Temeke (hereinafter referred as the tribunal) in Land Application No. 339 of 2018. The appellants were dissatisfied by the decision of the tribunal and decided to appeal to this court basing on the following grounds:

- 1. That the honourable chairperson erred in law and fact by holding that the appellant invaded the land plots in dispute*

*while the respondent failed to tender any legal document identifying the invaded plots.*

- 2. That the honourable chairperson erred in law and in fact by failing to recognise and holding that the disputed land is at Kizito Uonjwa Village, Kimbiji Ward, Kigamboni District Dar es Salaam, while Appellants' lands are located at Muhimbili street Pemba Mnazi Ward Kigamboni District, Dar es Salaam.*
- 3. That the honourable chairperson erred in law by failing to visit the locus in quo that resulted into failure to ascertain the proper location of the land in dispute.*
- 4. That the honourable chairperson erred in law and fact by admitting and relying on the respondent's lease agreement which was otherwise inadmissible for lack of stamp duties as required by law.*
- 5. That the honourable chairperson erred in law and fact by grossly failing to properly analyse the evidence tendered before it hence arriving at wrong evidence.*

When the appeal came for hearing, Mr. James Marenga, learned advocate appeared for the appellants and the respondent appeared in person. The counsel for the appellants prayed the appeal to be argued by way of written submission because the respondent is unrepresented. As the prayer was not objected by the respondent the court granted the prayer and ordered the appeal be argued by way of written submission.

In supporting the appeal, the counsel for the appellants argued the first ground separately but consolidated the second and third grounds and also consolidated the fourth and fifth grounds. He argued in relation to the first ground which is about failure to tender documentary evidence before the trial tribunal that, the tribunal failed to take note that the respondent who was applicant at the tribunal failed to tender legal document which would have justified his ownership to the plots of land he claimed were invaded by the appellants.

He argued that, the respondent stated that he surveyed his land and obtained 76 plots which were invaded by the appellants but when he was asked to produce documentary evidence which show his ownership to the land in dispute, he produced none but the tribunal entered judgment in his favour without justifiable cause. He referred the court to the case of **Ismail Rashidi V. Mariam Mlali** Civil Appeal No.75of 2015 which referred to the case of **Shemsa Khalifa & 2 Others V. Suleiman Hamed**, Civil Appeal No 82 of 2012 CAT (unreported) where it was held that, judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all.

He argued in relation to the second and third grounds which states the tribunal failed to visit the Locus in quo that, the respondent claimed the land which was invaded by the appellants is located at Kizito Huonjwa

Village, Kimbiji Ward, Kigamboni District in Dar es Salaam Region while the appellants' land as per their sale agreements are located at Muhimbili Street, Pemba Mnazi Ward, Kigamboni District in Dar es Salaam Region which are two distinct locations. He argued that, the tribunal's chairperson relied on oral evidence adduced by the respondent with regards to the geographical location of the land in dispute without taking trouble to visit the locus in quo to ascertain the proper location of the land in dispute.

He referred the court to the case of **Avit Thadeus Massawe V. Isidory Assenga**, Civil Appeal No. 6 of 2017 where it was stated that, where the witnesses differed as to where exactly the suit property is located the court cannot rely only on the evidence available before the court but is required to visit the locus in quo so as to clear the entertained doubt of the location of the suit property. He also referred the court to the Nigerian High Court decision made in the case of **Evelyn Even Gardens NIC Ltd V. The Hon. Minister, Federal Capital Territory & Two Others**, Suit No. FCT/HC/CV/1036/2014 Motion No. FCT/HC/M/5468/2017 where various factors to be considered before visiting the locus in quo were enumerated. He submitted that, failure by the tribunal to visit the locus in quo is open and clear that the tribunal's Chairperson relied on the evidence adduced by the respondent which was referring to a totally different plots other than those of the appellants.

He argued in relation to the fourth and fifth grounds of appeal which are in respect of admissibility of sale agreement which was lacking stamp duty and failure to analyse the evidence tendered before the tribunal that, the sale agreement tendered before the tribunal did not meet the requirements of the law as it lacks legality for not being chargeable with the duty. He referred the court to section 39 (1) (a), (b), (c) and (d) of the Stamp Duty Act, [Cap 189 R.E 2019] which provides for instruments which are required to be charged with duty and section 47 (1) of the same law which states instrument which has not been charged with duty shall not be admitted as evidence for any purpose by any person having authority to receive it.

To support his argument, he referred the court to the case of **Josephat L. K. Lugaimukamu V. Father Canute J. Mzuwanda** [1989] TLR 69 where it was emphasized that, under no circumstances may an unstamped instrument which is required to be stamped shall be admissible in evidence. He argued that, the sale agreement being instrument required to be charged with duty it was supposed to be stamped under section 42 of the Stamp Duty Act.

He argued that the respondent's sale agreement admitted by the Ward Tribunal missed the requirement provided under section 39 of the Stamp Duty Act and as provided under section 47 of the same law the

decision based on it is fatally defective. He submitted that the tribunal failed to analyse the evidence adduced by the respondent with regards to the ownership of the land in dispute and arrived to a wrong decision. At the end he prayed the appeal be allowed and the decision of the tribunal be quashed with costs.

In his reply the respondent stated in his submission in relation to the first ground of appeal that the records are clear that he tendered the sale agreement (exhibit MHK - 1) to the tribunal to prove his ownership to the land in disputed. He argued that, whoever alleges must prove and stated he proved his ownership to the land in dispute and called witnesses who were present during the purchase of the land in disputed. He stated he called Mwinyimvua Mgwali Mwinyimvua and Kondo Abdul Khatibu who were present during the purchase of the land in dispute and stated that proved his ownership to the land in dispute as provided under section 119 of the Evidence Act Cap 6 R.E 2019.

He submitted that shows he proved his ownership to the land unlike the appellants who neither called the vendor nor the local leaders to prove their ownership to the land in dispute. He referred the court to section 110 of the Evidence Act, Cap 6 R.E 2019 which states to whom burden of proof lies. He stated the cited provision of the laws states whoever desires any court to give judgment in his favour as to any legal right or liability

dependent on existence of a fact which he asserts must prove that those facts exist. He stated it was the duty of the appellants to prove their ownership to the land in dispute.

He submitted that the judgment of the tribunal shows at its page 15 that his sale agreement was verified by the Village Council of Kizito Huonjwa. He cited in his submission the case of **Bakari Muhando Swanga V. Mzee Mohamed Shelukindo & Others**, Civil appeal No.389 of 2019 TZCA where it was held that, in looking into the validity of a sale agreement the court may also see if it was approved by the Village council. He submitted that shows his sale agreement was stamped as a proof of verification unlike that of the appellant which was not supported by his vendor and the local authority.

As for the issue of visiting the locus in quo raised in the second and third grounds of appeal the respondent argued that, the same is exercised under the discretion of the court. To support his argument, he referred the court to the case of **Sikuzani Said Magambo & Another V Mohamed Roble**, Civil Appeal No. 197 of 2018 [2019] TZCA 322 where it was state visit of a locus in quo is done at the discretion of the court or tribunal particularly when it is necessary to verify evidence adduced by the parties. He also referred the court to the case of **Bomu Mohamed V. Hamisi Amiri**, Civil Appeal No. 99 of 2018 [2020] TZCA 29 where it

was stated when the High Court is exercising its appellate jurisdiction is not mandated to visit locus in quo.

He argued that, the land in dispute was situated at Kijaka area of Kizito Huonjwa Village at Kimbiji Ward within Kigamboni District but due to changes of administration of the area a new Ward of Pemba Mnazi was established. He stated that Muhimbili Street and Pemba Mnazi Ward came into existence after the changes of administration made in 2004. He stated the tribunal found it was not necessary to visit the locus in quo to make finding which were already confirmed by the appellants themselves. He submitted that, from the above stated reasons and cited authorities it was not necessary for the tribunal to visit the locus in quo to verify the evidence while the appellants had failed to prove their vendors had legal title to transfer ownership of the land in dispute to them.

He argued further that, the first appellant who claimed to have purchased 10 acres from Ibrahim Kingwila and Sudi failed to bring them to the tribunal to prove they had legal title to transfer ownership of the stated land to her. He stated the first appellant brought only Abdallah Hassan Kindinda (DW2) who failed to prove his legality to the transfer of ownership of the stated land to the first appellant. He stated that situation applies also to the rest of the appellants as they failed to bring their



venders to prove they had good title to transfer ownership of the land in dispute to them.

The respondent cited in his submission the case of **Farah Mohamed V. Fatuma Abdallah** [1992] TLR 205 where it was stated he who does not have legal title to land cannot pass good title over the same to another. He argued that, the appellants have miserably failed to prove the legality of their ownership to the land in dispute. He stated the first appellant tendered a receipt from Tanzania Revenue Authority to prove her ownership to the land in dispute while the stated receipt cannot prove ownership to the land. To support her submission, she referred the court to the case of **Kalenga Leonard Alexander V. Kanji Lalji Limited & Another**, Civil Appeal No. 91 of 2012 where it was stated receipts of that nature cannot prove ownership of a property like land.

He argued further that, his evidence was heavier than that of the appellants and referred the court to the case of **Ally Abdallah Rajab V. Saad Abdallah Rajab**, [1994] TLR 132 where it was stated that, where the decision of a case is wholly based on credibility of evidence it is the trial court which is better placed to assess their credibility than an appellant court which merely read the transcript of record. At the end he prayed the court to dismiss the appeal and uphold the decision of the tribunal by declaring him the lawful owner of the land in dispute.

In his rejoinder the counsel for the appellants argued that, although the respondent stated he made a survey to the land in dispute and divided the same into 76 plots and alleged the appellants removed the beacons but he didn't identify before the tribunal which plots were invaded by the appellants. He stated that although the respondent stated the appellants failed to call their vendors but the first appellant called Abdallah Hassan Kindinda (SU2) and fifth appellant called Masud Athumani Mrisho (SU5). He said the rest of the appellants had no any interest to the land and the respondent failed to state before the tribunal any claim against them and why he joined them in the matter.

He argued that, although the respondent stated the appellants failed to verify their sale agreement with any local authority but the sale agreements tendered before the tribunal by all five appellants were prepared by the office of Muhimbili Street and witnessed by the Street Chairman. He argued that the respondent's argument that the appellants failed to call Ibrahim Kingwila and Sudi to testify before the tribunal but their names did not appear anywhere in the sale agreements as vendors but the names appear in the sale agreements of the appellants are Abdallah Hassan Kindinda who represented other vendors.

He stated the argument that the land in dispute was at Kijaka area of Kimbiji Ward within Kigamboni District and the appellants purchased

the land in another ward of Pemba Mnazi which was formed in 2004 is not true as Pemba Mnazi Ward was in existence from 2000. He disputed the submission that the appellant adduced TRA receipts to prove their ownership to the land in dispute and stated the appellants adduced the sale agreement to prove their ownership to the land in dispute. He based on the above stated arguments to reiterated his prayer for the appeal to be allowed and the judgment of the tribunal be quashed with costs.

After carefully going through the record of the matter and after considering the submission from both sides the court has found proper to determine this appeal by being guided by the way the counsel for the applicants argued the grounds of appeal raised in the appeal at hand. I will start with the first ground which states the tribunal erred in holding the appellants invaded the land in dispute while the respondent failed to tender any legal document to identify the invaded plots. The court has found that, although the counsel for the appellants argued the respondent failed to produce any legal document to the tribunal to prove his ownership to the land in dispute but the record of the tribunal shows the respondent tendered sale agreement, he used to purchase the land in dispute and it was admitted in the matter as exhibit MHK - 1.

Tendering and admissibility of the said sale agreement as an exhibit in the matter can be seeing in the hand written testimony of the

respondent recorded on 11<sup>th</sup> March, 2020 where the counsel for the appellants prayed the respondent to be required to tender the sale agreement, he used to purchase the land in dispute so that he can be able to proceed to cross examine him. The admissibility of the said sale agreement can also be seeing at page 3 of the typed judgment of the tribunal where the tribunal stated the sale agreement was admitted in the matter as exhibit MHK – 1. The said sale agreement was also referred at page 19 of the judgment of the tribunal when the tribunal was making comparison of the sale agreements tendered in the matter by the parties.

Although it is true that the respondent said he surveyed his farm and obtained 76 plots and he didn't tender any document to show the surveyed plots which he claimed were invaded by the appellants but to the view of this court the sale agreement tendered and admitted in the matter as exhibit MHK – 1 is a legal document which would have been used to prove ownership of the land in dispute to the respondent. The question as to whether the said sale agreement was properly admitted in the case and the tribunal Chairman was right or wrong to rely on the same to find the respondent is the lawful owner of the suit land will be taken care of at the time of dealing with the fourth and fifth grounds of appeal.

Coming to the second and third grounds of appeal which relates to the tribunal's failure to visit the locus in quo the court has found it is true

as argued by the counsel for the appellants that the respondent said in his testimony that the land in dispute is located at Kizito Huonjwa Village, Kimbiji Ward, Kigamboni District in Dar es Salaam Region and the appellants' sale agreements shows their lands are located at Muhimbili Street, Pemba Mnazi Ward, Kigamboni District in Dar es Salaam Region. The court has also found the counsel for the appellant argued those are quite different locations.

He cited the cases of **Avit Thadeus Massawe** and **Evelyin Even Gardens** (supra) where it was stated that, when it is not known exactly or there is a doubt as to where the suit property is located, the court is required to visit the locus in quo to get clearance of the entertained doubts. The court has also found it was stated in the case of **Sikuzan Said Magambo** (supra) cited in the submission of the respondent that there is no law which forcefully and mandatorily requires the court or tribunal to visit the locus in quo which means it is done at the discretion of the court or tribunal when it is necessary to verify evidence adduced by the parties during trial.

That being the position of the law with regards to visitation of a locus in quo the court has found the question to determine here is whether the tribunal erred in not visiting the land in dispute in the matter at hand. The court has found that, although the respondent stated his land is located

at Kijaka area of Kizito Huonjwa Village, Kimbiji Ward, within Kigamboni District, in Dar es Salaam Region but the appellants stated and is indicated in their sale agreement that their lands are located at Muhimbili street, Pemba Mnazi Ward, Kigamboni District, in Dar es Salaam Region.

The court has also found the respondent stated in his testimony that the land in disputed situated at Kijaka area of Kimbiji Ward but due to changes of administration of the area there is a new street of Muhimbili which is in a new Ward of Pemba Mnazi which were formulated from Kimbiji Ward in the changes of administration of Kigamboni District which took place in 2004. The court has found as rightly stated by the tribunal's Chairman the said changes were also confirmed by the appellants' witnesses.

The court has found when Abdallah Hassan Kindinda (DW2) was being cross examined by the respondent he said he is the one sold the land to the first appellant on 16<sup>th</sup> October 2010 and stated Pemba Mnazi Ward was born from Kimbiji Ward. The similar evidence was given by the sixth appellant, Juma Abdallah Kilongozi, (DW4) who stated in 1999 Mhimbili street was at Kimbiji Ward but now is at Pemba Mnazi Ward from 2005.

The above stated evidence makes the court to find there was no doubt in relation to the location of the land in dispute which would have

compelled the tribunal to visit the land in dispute for the purpose of being able to determine the issue of ownership of the land in dispute between the parties as the appellants' evidence confirmed Muhimbili street and Pemba Mnazi Ward was formulated after the respondent acquired the land in dispute. The court has arrived to the above finding after seeing that, as rightly argued by the respondent the difference of the name of the area where the land in dispute is located stated by the parties in the evidence was caused by changes of administration of the area where the land in dispute is located.

That makes the court to find there is no doubt about the location of the land claimed by the respondent as the respondent stated the appellants decided to go to prepare their sale agreement in the new street of Muhimbili while in actual fact the location of the land is the same land stated by the respondent is at Kijaka area of Kizito Huonjwa street at Kimbiji Ward. The above finding makes the court to come to the settled view that, the argument by the counsel for the appellants that the area the respondent claimed was invaded by the appellants is a distinct area from the area where the appellants claimed their lands are located is unfounded. In the premises the court has failed to see any merit in the second and third grounds of appeal raised by the appellants.

As for the fourth and fifth grounds of appeal which on the first part is challenging admissibility of the sale agreement of the land the respondent claimed is his property on the ground of lacking stamp duty the court has found that, it is true that the sale agreement tendered before the tribunal by the respondent was not charged with duty as required by section 39 of the Stamp Duty Act. The court is also in agreement with the counsel for the appellants that as provided under section 47 (1) of the Stamp Duty Act and stated in the case of **Josephat L. K. Lukaimukamu** (supra) such a document is inadmissible as evidence in a court of law.

However, the court has found this is a new issue which was not raised at the tribunal by the appellants so that the tribunal could have made a decision as to whether the said sale agreement was admissible in the case as evidence or not. To the contrary the court has found as stated earlier in this judgment the record of the tribunal shows the counsel for the appellant is the one prayed the sale agreement of the respondent in respect of the land in dispute be admitted in the case so as to be able to cross examined him. To raise the stated issue at this stage is to go contrary to what was stated in the case of **Elisa Mosses Msaki V. Yesaya Ngateu Matee**, [1990] TLR 90 where it was held issue which



was neither raised nor decided by the trial court cannot be raised on appeal.

The court has found that, if it will be accepted the tribunal erred in admitting the respondent's sale agreement on ground of not being charged with duty as required by the law its consequences is to expunge the same from the evidence adduced before the tribunal. If it will be expunged the question will be whether the remaining evidence sufficiently established the finding reached by the tribunal that the respondent is the lawful owner of the land in dispute. In determining the above question, the court will also deal with the second part of the fourth and fifth grounds of appeal which states the tribunal failed to analyse the evidence adduced before it properly.

The court has found after expunging the respondent's sale agreement from the record of the tribunal the remaining evidence on the part of the respondent is that of the respondent who testified as PW1 and the evidence of his witnesses namely Mwinyimvua Mgwali Mwinyimvua who testified as PW2 and Kondo Abdul Khatibu who testified as PW3. The court has found the respondent and his two witnesses stated the respondent purchased the land from Abdul Khatibu and they witnessed the sale of the land to the respondent.

The court has found the first appellant namely Emmanuela Mtatifikolo Kaganda testified as DW1 and called Abdallah Hassan Kindinda who testified as DW2 and said is the one sold his land to the first appellant. The court has also found the fifth appellant namely Ramadhani Hassan Kurunzi testified as DW3 and said to have purchased his land from Elias Petro and Masudi Athumani. On the other hand, the sixth appellant namely Juma Abdallah Kilongozi testified as DW4 and said he witnessed sale of the land to some of the appellants and Masudi Athumani Mrisho testified as DW5 and said he sold his land to DW3.

The court has found that, after the tribunal's Chairperson analysed the evidence of the said witnesses together with the exhibits tendered before the tribunal, he came to the conclusion that, the respondent was the lawful owner of the land in dispute as he was the first person to acquire the land in dispute from 1992 after purchasing the same from Abdul Khatibu while the appellants claimed to have acquired the land after purchasing the same from various sellers between 2009 and 2011.

The court has seen the stated finding of the tribunal was based on credibility of evidence of the witnesses testified before the tribunal and as it was held in the cases of **Ali Abdallah Rajab** (Supra) and **Omari Ahmed V. R**, [1983] TLR 52 the trial court finding as to credibility of witnesses is usually binding on an appeal court unless there are

circumstances on an appeal court on the record which call for a reassessment of their credibility. The court held in the case of **Ali Abdallah Rajab** that:-

*"Where the decision of a court is whole based on the reliability of the witnesses, then it the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcripts of the record."*

Although this court is dealing with this matter at the stage of appeal which is not required to reassess credibility of evidence of the witnesses testified before the tribunal but the court has gone through the evidence adduced before the tribunal together with the judgment of the tribunal and find there is no any circumstances which is making it to differ with the finding of the tribunal that the respondent is the lawful owner of the land in dispute.

The court has arrived to the above finding after seeing that, as rightly argued by the respondent in his submission even DW2 who said to have sold his land to the first appellant did not adduce clear and sufficient evidence to establish how he acquired ownership of the land he stated to have sold to the first appellant. The court has found that, although DW2 said he was allocated the said land by the Street Government Authority but he didn't know when he went to Muhimbili Street. Although he said it

was in 2007 during El Nino rain but that shows it was after the respondent acquired the land from 1992.

Although the tribunal relied not only on oral testimony of the witnesses testified before the tribunal but also on documentary evidences adduced before the tribunal by the parties the court has found it is true that, the appellants tendered their sale agreements to show how they acquired ownership of the land they claimed is their properties. The documentary evidences adduced by the appellants and admitted in the case as exhibits were EK – 1, EK – 2, EK – 3, R – 1, R – 2 and M1. The court has found after the tribunal analysed the said documentary evidence it came to the finding that the respondent was the lawful owner of the land in dispute as there was sufficient evidence to prove he was the first person to purchase the land in dispute when compared with the documentary evidence of the appellants. The stated finding caused the court to come to the view that the fourth and fifth grounds of appeal are also devoid of merit.

In the light of all what I have discussed hereinabove the court is agreement with the respondent that the appellants have not managed to satisfy the court the tribunal erred in declaring the respondent is the lawful owner of the land in dispute. Consequently, the appeal of the appellants is hereby dismissed in its entirety with costs. It is so ordered.

Dated at Dar es Salaam this 17<sup>th</sup> day of June, 2022



*I. Arufani*  
I. Arufani

**JUDGE**

17/06/2022

**Court:**

Judgment delivered today 17<sup>th</sup> day of July, 2022 in the presence of Mr. James Marenga, advocate for the appellants and in the presence of the respondent in person. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*  
I. Arufani

**JUDGE**

17/06/2022