

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

**LAND APPEAL NO. 268 OF 2020**

*(Arising from Land Application No 180 of 2016 District Land and Housing Tribunal for Morogoro)*

**SADIKI ALLY MAGONA.....APPELLANT**

**VERSUS**

**MAULIDI SALUM MBEGA (administrator of the  
estate of late Salumu Ally Mbega..... RESPONDENT**

**JUDGEMENT**

*Last Court Order on 29/4/2022  
Judgement date on 03/6/2022*

**P. J. NGWEMBE, J.**

The appellant after being aggrieved by the decision of the District Land and Housing Tribunal for Morogoro in Land Application No. 180 of 2016 preferred an appeal to this court. After instituting this appeal, the appellant sought assistance from advocate Erasmus D. Buberwa from Kazi Attorneys, while the respondent procured legal assistance from Delphinus Mushumbusi, of RM Law Officers.

The appellant is challenging the decision of the District Land and Housing Tribunal for Morogoro, which decision ended up in dividing

equally, that is, 25 acres to each party out of 50 acres of land. Such equitable decision offended the appellant, hence exercised his right of appeal to this court.

Briefly, I may recap the genesis of this suit as originals from the alleged ownership of 50 acres of land. One side alleges the suit land was founded by Salum Ally Mbega in year 1954 who died interstate in year 1959, leaving behind children and the suit land, including 20 acres, which was sold by his family in year 2011, thus remained with 50 acres of land. The other side, (appellant) stood firm to allege that, in year 1987 he acquired such land by clearing a thick forest, turned it in a farm land and planted some permanent crops.

On the selling of 20 acres of land, the appellant had a different story that, the 20 acres originally, was owned by Kibinda which same was sold by himself in year 2006, after demise of the original owner.

Due to that diverse stories of ownership, the trial tribunal raised fundamentally one issue for determination, which same is an issue hereto, that is, *who is the lawful owner of the suit land between the disputants?*

Even the appellant, though raised five grounds of appeal, yet the core dispute is on who is the lawful owner of the suit land between the disputants? However, the appellant preferred five grounds of appeal which all clock around the above issue. Those grounds are quoted hereunder:-

1. *The District Land and Housing Tribunal erred in law and in fact by dispossessing half of the land in dispute that is 25 acres from the*

*Appellant and distributing it to the respondent in disregard of the evidence of ownership, continuous use, development and possession of the whole land for almost 30 years.*

- 2. The trial Tribunal failed to assess, evaluate and analyse the evidence which was tendered thus, arrived at a wrong decision;*
- 3. The trial Tribunal erred in law and in fact by dividing the land to the respondent including the unknown heirs;*
- 4. The tribunal erred in law and in fact by regarding the appellant as a care taker of the land in dispute as opposed to a lawful owner through self-acquisition; and*
- 5. The proceedings of the tribunal are irregular as there was a change of chairpersons' contrary to law and procedure governing civil proceedings and without reasons being assigned thereof.*

In arguing these grounds, both parties exhaustively filed their written arguments as summarized herein. The appellant's advocate repeated with clarity all grounds of appeal, but opted to abandon the fifth ground. Also summarized the whole evidences adduced during trial by both parties and their witnesses. Rightly, referred this court to the case of **Yusufu Same and Another Vs. Hadija Yusufu [1996] T.L.R. 346** where the Court held that the right of action for recovery of land when the owner is deceased, the period of twelve years runs from the death of deceased irrespective of when letters of administration was granted. Then proceeded to urge this court to be guided by that authority.

Insisted that if the original owner died in year 1959 and the letters of administration were obtained in year 2016, that is equal to 57 years,

it means the respondent had no right over the suit land, and that right expired after lapse of 12 years.

Above all, he referred this court to many other useful precedents including the case of **Balikuliye Mpumagi Vs. Ngwili Mashingu [1968] HCD 20, Laurent Ochola Vs. Tembo Odoyo [1968] HDC 19;** and **Scandinavian Enterprises Vs. Hassan M. Jemadari & Others [2002] TLR 177**

At the end, the learned advocate urged this court to revisit the whole evidences of the trial tribunal as per the case of **Ndizu Ngasa Vs. Masisa Mugasha [1999] TLR 202, and Martha Michael Wejja Vs. Attorney General & 3 others [1982] TLR 35.**

After citing several useful precedents, the learned advocate rested his argument by inviting this court to declare the appellant as rightful owner on the suit land and costs be awarded.

The learned advocate for the respondent counted all grounds of appeal by arguing that, the trial tribunal was right on equitably division of the suit land among the disputants. The respondent was satisfied by that decision due to the fact that, the appellant though lived with Zaina (deceased) in concubinage system, yet there is evidence that he cultivated the suit land for some time.

Insisted that, the one who owned the suit land by inheritance was Zaina Mbega who lived with the appellant in a concubinage system for some times. Added that, the late Zaina Mbega sold part of that land (20 acres) after obtaining consent from her family members of the late

Mbega. Rested by distinguishing all precedents cited by the appellant as irrelevant to the appeal at hand. Thus, be dismissed with costs for being vexatious, frivolous and lack of merits.

In rejoinder, the appellant discussed at length the arguments of learned advocate for the respondent by justifying his submission in chief.

In this appeal, much as I would agree with both parties' length submissions, yet there are certain issues, which are neither disputed nor contradicted by both parties. For instance, it is undisputed fact that the late Salumu Ally Mbega died in year 1959. Another fact is that the respondent Maulid Salum Mbega on 11/08/2016 was appointed by Mikese Primary Court as an administrator of the estate of Salum Ally Mbega who died in year 1959. In fact, I would understand that the respondent herein obtained letters of administration over the estate of Salum Ally Mbega in order to claim the suit land from the appellant. That the respondent did so after demise of his sister Zaina who was a wife of the appellant.

Another important factor which is undisputed is the relationship between the late Zaina and the appellant, that they cohabited as husband and wife until death of Zaina Mbega. Above all, part of the suit land, that is 20 acres were sold, remaining with only 50 acres. In this point, the area of controversy is, who sold such piece of land, though the fact that 20 acres were sold is not disputed, the dispute is on who sold it between the appellant and the late Zaina Mbega?

Since this is the first appellate court, I find it settled in our jurisdiction that, it has uncompromised duty to treat the evidences adduced during trial as a whole and scrutinize them exhaustively. In law, it is not enough only to summarize those facts, but evaluate it objectively and weight it against the evidences of each party. This position was pronounced by the Court of Appeal in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226.**

In the same vein it was repeated in several other cases, including in the case of **Martha Michael Wejja Vs. Attorney General & 3 others (Supra)** where the court held:-

*"In a first appeal the court is entitled to look at and evaluate evidence afresh and come to its own conclusion, particularly where the learned trial judge adopts a wrong approach in evaluating the evidence or omits to evaluate some of the witnesses or to consider some vital piece of evidence"*

Accordingly, this court being a first appellate court, is determined to execute that duty of evaluating the whole evidences exhaustively. To begin with, Maulid Salum Mbega being 62 years old and child of Salum Ally Mbega, testified that, he was born in year 1954 and his father died in year 1959, thus when he was about five (5) years old his father died. That they used to cultivate maize, millet, paddy and fruits in the suit land. However, he admitted that the appellant followed his sister in that farm and together had four (4) children. Added that, in that farm there are permanent crops like coconuts, mangoes and oranges. Her sister planted those permanent crops.

On selling of piece of that land, he testified that 20 acres were sold by the later Zaina remained with 50 acres. The proceeds of the 20 acres built a family house.

Rashid Benjamin Boa aged 67 testified that he knew the appellant for they schooled together. Added that the deceased Ally Mbega owned about 3000 acres of land at Kwa stima area. Mentioned even the neighbors around that land. Admitted that the appellant started living with the deceased in year 1987 where after the appellant assured them that the land belongs to the deceased.

The last prosecution witness was Abasi Chihonda, son of the late Zaina Mbega and the appellant is his step-father. Admitted that the appellant had four children to the late Zaina who are his young children for they share one womb, but the land in dispute does not belong to the appellant, rather to his grandfather.

In defense side, the appellant was the first witness aged 68 years old, that he personally found the land in year 1987 and started farming over that land, and that he built a house. Started living therein with his wife and continued cultivating such land and planted permanent and seasonal crops. Added that his uncle Kibanda acquired 20 acres of land along the same area. Distinguished that the respondent being his brother in law, never visited them in their farm and never disclosed if such land belongs to his father.

Further testified that upon death of Kibinda in year 2001, he sold his farm of 20 acres in year 2006. Added that his wife died in November 2011, but the dispute commenced on April 2015. Since he acquired that

land in year 1987 to 2015 is more than 28 years. Thus, rested by asking the tribunal to declare him as a lawful owner of the whole land.

The second defence witness was Said Issa Lyambaku who is 76 years old. Testified confidently that the suit land belongs to the appellant, he found him in his land in year 1990. Added that there are 3 coconut trees and mangoes in the suit land planted by the appellant herein. Added that the dispute arose after death of the appellant's wife.

The 3<sup>rd</sup> witness was Juma Suleiman Mgunda of 62 years old who testified that, in year 2001 when was in the village he found the appellant occupying the suit land together with his wife. Added that being a village chairman, in year 2010/2011 the appellant went to the village leaders seeking to sale a piece of land. Later they went to his office together with his wife who consented to that sale and his office approved the sale of 20 acres. Explained that before, Villagization in year 1974 to 1978, there was no procedure of involving village leaders in private lands. The land was owned by clan and one may acquire land on self-acquisition.

The last defense witness was Athuman Adeid Kipalo aged 60 years who at one time was hired by the appellant to clear the suit land in year 1987. That he new the appellant who was residing with his wife therein.

Having summarized the relevant evidences of both parties, I find the same question remains, who is a lawful owner of the suit land? The evidence on record, is clear that the appellant was married to Zaina Mbega and out of their marriage they were blessed with four children. The question of whether they were formally married or otherwise, is not



for this court to decide. Rather, it is evident that they lived jointly in the suit land since 1987 to the date of dispute that is in year 2016, equal to 29 years.

I would agree with the appellant that in Tanzania, land has undergone several reforms until 1999 when the Village Land Act was enacted (Village Land Act Cap 114 R.E. 2019 and surveyed land best known as Land Act Cap 113 R.E. 2019. Prior to it, acquisition of land by clearing a none owned piece of land was possible.

The evidences on record is quite clear that the appellant started living and using the suit land in year 1987 together with his wife. All along the respondent never inquired anything and or demanded ownership of the suit land or claimed that same was owned by their late father who died in year 1959. I think, justice demand the one who has been using it all along need to be protected, unless there are strong evidences in the contrary.

Another serious contentious issue is who sold the 20 acres of land? The evidence of DW3 Juma Suleiman Mgunda, while was a village leader, in year 2010/2011 clearly testified that the appellant went to the village leaders and sought consent to sale that piece of land. In the presence of his wife, consent was issued and such land was sold. The law demand that every witness should be trusted, unless there is good reason to disbelieve him. In this appeal, this witness being a village leader ought to be trusted and his evidence be considered as reliable.

I don't see any contradiction on this point, because, the assertion of the respondent that the family agreed to sale 20 acres and same was

sold by the wife of appellant has no supporting evidence and no independent witness who testified on it save only on the side of the appellant herein.

I am inclined to adopt the reasoning in the case of **Yusufu Same & Another Vs. Hadija Yusufu (Supra)** that time to claim landed property of a deceased person is within twelve years counted from the date of demise of the original owner. This position is in line with the Law of Limitation Act, otherwise, claims of this nature will never come to an end, it can be claimed by one generation to another generation. Therefore the position alluded in the above case is a good law.

In respect to this appeal, assuming it is true, that the original owner died in year 1959, since then to 2016 is equal to 57 years, his estate was unattended. I think it is only logical that one cannot be justified to claim such land after all that long time.

The circumstance of this appeal and bearing in mind the available evidences as recapped hereinabove, I think the holding in the case of **Justine Paul Makabi & 50 Others Vs. Nyaso Enterprises Co. Ltd & Another, Land Case No. 128 of 2012** (unreported) may help as quoted hereunder:-

*"In addition to that section 119 of the Evidence Act, states clearly that, when the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner. Since the plaintiffs asserted in the plaint are the rightful*



*owner of the land in dispute it was their duty to prove the first defendant is not the owner of the land".*

In this appeal, the respondent had a burden to prove ownership of that land and or ownership of same by the deceased Salum Ally Mbega. However perusing inquisitively on the judgement of the trial tribunal, I find three issues are quite clear, that the respondent/applicant had a duty on balance of probability to prove his case, that in fact the deceased Zaina sold part of the suit land in the presence of the appellant, instead the tribunal shifted such burden to the appellant herein.

Second both parties failed to produce any documentary evidence to support the sale of the alleged 20 acres. Therefore, in the absence of documentary evidences, obvious reliable witnesses should be called to testify on same. The appellant managed to prove sale of 20 acres by calling village leader who consented such sale.

Third, the tribunal misdirected in dividing the suit land into two, while the respondent failed to prove ownership on same. The conclusion arrived by the tribunal was contrary to the precedent in the case of **Sokwo Vs. Kpongbo 2008 & NWLR PT 1086 P 342 at P 344** where the court held:-

*"It is a cardinal principle of Law that he who asserts must prove his case with credible and unchallenged evidence. In civil case, a party who wishes to succeed in obtaining judgment in his favour must adduce such credible evidence for such cases are decided on preponderance and balance of*

*probability. It is after a plaintiff has proved his case in this manner that the burden of proof shifts”.*

In view of the aforesaid and for the reasons so stated, I would safely, conclude that the respondent preferred his dispute before, the District Land and Housing Tribunal totally, out of time that is after 57 years from the date of death of the alleged original owner. Second, even without time limitation, yet the respondent had no cogent evidence to claim ownership of the suit land. In this appeal the whole evidences is in favour of the appellant.

Another equally important legal issue to remember is, justice is not one sided, the winner and the loser have equal rights before the law and justice is done and seen to be done to both. The winner takes all and to the loser losses all. This is the position of law in adversarial system as was rightly considered in the case of **Hemedi Said Vs. Mohamedi Mbilu [1984] TLR 113**, where the court held:-

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

These principles of law are applicable in this appeal as well as in many cases be it civil or land dispute like this one. Since this is an appeal, usually on appeal we rely on recorded evidences during trial and on parties' submissions. On appeal the court does not hear fresh evidences, only on rare occasion, otherwise, the court relies on the evidence on record. In this appeal, obvious the evidence on record do favour the appellant who proved ownership on balance of probabilities.

In totality and for the reasons so stated, this appeal is meritorious same is allowed. I proceed to dismiss the judgement and decree meted by the District Land and Housing Tribunal. The appellant is the lawful owner of the whole land of 50 acres. Costs of this appeal is granted to the appellant.

**I accordingly order.**

**Judgement:** delivered in chambers this 03<sup>rd</sup> day of June, 2022



**P.J. NGWEMBE**

**JUDGE**

**03/6/2022**

**Court:** Judgement is delivered at Morogoro in Chambers on this 3<sup>rd</sup> day of June, 2022 in the presence of both parties in persons.

**Right to appeal to the Court of Appeal explained.**



**P.J. NGWEMBE**

**JUDGE**

**03/6/2022**