

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

**LAND APPEAL NO. 211 OF 2021**

(Arising from Kibaha District Land & Housing Tribunal in Land Application No. 59 of 2018)

**ELIZABETH KOMBA.....1<sup>ST</sup> APPELLANT**  
**HENDRICK J. MAMBWE.....2<sup>ND</sup> APPELLANT**  
**AMANA MTUMWA SEFU.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**MTUMWA RASHIDI MTENGWA.....1<sup>ST</sup> RESPONDENT**  
**JIHADHARI RASHIDI MTENGWA.....2<sup>ND</sup> RESPONDENT**

Date of Last Order: 04.07.2022  
Date of Judgment: 15.08.2022

**JUDGMENT**

**V.L. MAKANI, J**

This appeal is by the appellants herein. They are appealing against the decision of Kibaha District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 59 of 2018 (Hon. S.L. Mbuga, Chairperson).

At the Tribunal the respondents (then applicants) were claiming against the appellants ownership of 10 acres of land in Fukayosi Village, Fukayosi Ward, Bagamoyo District in Coast Region (the **suit land**). The respondents alleged that the suit land was inherited from

their father one Rashid Ali Mtengwa but in 2017 the respondents trespassed in the suit land and claimed ownership therein. The decision of the Tribunal was in favour of the respondents who were declared the lawful owners of the suit land. The Tribunal also nullified the sale between the 3<sup>rd</sup> appellant and the other two that is the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

Being dissatisfied with the decision of the Tribunal the appellants have filed this appeal with four grounds reproduced herein below as follows:

- 1. That the trial honourable District Land and Housing Tribunal erred in law and fact by failing to visit locus in quo which had a total area of 24.5 acres owned by the 1<sup>st</sup> and 2<sup>nd</sup> appellants hence failed to identify the demarcation of 5 acres of the area in dispute and its boundaries.*
- 2. That the trial honourable District Land and Housing Tribunal erred in law and fact by disregarding the uncontroverted sale agreement of the land in dispute between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants.*
- 3. That the trial honourable District Land and Housing Tribunal erred both by deciding against the weight of evidence and disregarding the evidence of DW3 in respect of her undisturbed ownership of the land to its disposition before the dispute arose and instead relying on the testimony adduced by the respondent and their witnesses that were contradictory, fabricated and uncorroborated.*

*4. That the trial honourable District Land and Housing Tribunal erred both in law and fact by granting reliefs of general damages in favour of the applicants in absence of any evidence and proof of such damages.*

The appellants prayed for the appeal to be allowed with costs, and the judgment and decree of the Tribunal be quashed and nullified, and the 1<sup>st</sup> and 2<sup>nd</sup> appellants be declared the lawful owners of the suit land.

With leave of the court the appeal was argued by way of written submissions. Mr. Godfrey Martin Silayo, Advocate drew and filed submissions on behalf of the appellants; and Mr. M.R. Kiondo drew and filed submissions on behalf of the respondents.

In arguing the appeal M. Silayo abandoned the first ground of appeal. As for the second ground, Mr. Silayo said in the proceedings, **PW1** and **PW2** did not object to the validity of the documents tendered by the appellants. He said the Sale agreement witnessed by the local government would have been considered by the Tribunal over the claim by the respondents who had no document from the local authorities. He said the Chairperson did not evaluate or scrutinize the validity of the Sale Agreement between the 3<sup>rd</sup> appellant in favour of

the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He said the fact that the respondents alleged that their father gave them the suit land would have been supported by a valid document justifying the nature of transfer of the said land in their favour. He said there ought to have been a document from the local government authority verifying that the land has passed on to the respondents and witnesses from the authority would have appeared in the Tribunal to give evidence.

As for the third ground, Mr. Silayo submitted that the 3<sup>rd</sup> appellant had been in undisturbed possession from the year 2012 to the date when she sold the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> appellants. He said in the course of her occupation there was no challenge of possession from the respondents. He said it took 5 years for the respondents to raise claims of ownership by causing chaos when the suit land was in peaceful possession of the 1<sup>st</sup> and 2<sup>nd</sup> appellants from 2012 to 2018 when the matter was filed in court.

Arguing the fourth ground, Mr. Silayo submitted that the Chairperson made an error by awarding general damages as reflected in the extracted decree whereas in item 5 it is stated: "*wadaiwa waamrishwe kulipa gharama ya maombi haya na madhara mengine*

*kwa ujumla Tshs. 10,000,000/=.*” that the appellants be ordered to pay TZS 10,000,000/= as costs and other damages. He said awarding the general damages in the absence of proof was unjustifiable and an error both in law and fact. To support his arguments Mr. Silayo cited section 110 of the Evidence Act CAP 6 E 2019 and the case of **Shomari Kalamba vs. Ally Mbwambo , Civil Appeal No. 19 of 2020 (HC-DSM)** (unreported) and **Rocky Beach Hotel vs. Tanzania Revenue Authority, Civil Appeal No. 52 of 2003 (CAT) (unreported)**. He concluded by praying for the appeal to be allowed with costs. and the decision of the Tribunal be set aside.

In his submissions in reply Mr. Kiondo prayed to submit on the second and third grounds jointly and the fourth ground separately. Regarding the second and third grounds, he said that the Tribunal rightly decided that the 3<sup>rd</sup> appellant did not have title to pass to the 1<sup>st</sup> and 2<sup>nd</sup> appellants. He said during trial the 3<sup>rd</sup> appellant failed to establish and prove her ownership over the suit land before disposing the same by way of sale to the 1<sup>st</sup> and 2<sup>nd</sup> appellants. He said the 3<sup>rd</sup> appellant said the suit land previously belonged to her father who abandoned it in 1979 and she re-occupied it in 2012 but she failed to call material witnesses such as neighbours or relatives to testify in her favour. He

said the appellants alleged to have transacted before the local government officers but they failed to call the people who witnessed the sale. He said since no title to passed from the 3<sup>rd</sup> appellant to the 1<sup>st</sup> and 2<sup>nd</sup> appellants, then the sale was void ab initio as was held in the case of **Farah Mohamed vs. Fatuma Abdallah [§1983] TLR 205.**

Mr. Kiondo pointed out that the respondents succeeded to prove title and ownership to the required standards of balance of probabilities as they brought to trial as witnesses their father **PW3** Rashid Ally Mjengwa who gave them the suit land, a witness of the disposition (**PW4**), a neighbour (**PW5**) and a relative of the 3<sup>rd</sup> appellant and they all testified in favour of the respondents. He said the Tribunal therefore correctly declared the respondents as the rightful owners of the suit land as the evidence was heavier than that of the appellants as in the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113.** He said the Tribunal rightly decided in favour of the respondents basing on the weight of the evidence and in accordance with the provisions of the law.

As for the fourth ground Mr. Kiondo stated that the appellants' submissions are misconceived and misdirected in that the respondents were not given general damages. He said the allegations are not supported by the record. In conclusion Mr. Kiondo prayed for the appeal to be dismissed with costs.

There was no rejoinder that was filed by the appellants.

I have gone through the submissions by Counsel for the parties and also the record from the Tribunal. The main issue for consideration is whether this appeal has merit. I will determine the second and third grounds together as they all fall within the weight and evaluation of evidence. The fourth ground will be determined separately.

It is the law that he who alleges must prove. This is according to section 110(1) and (2) of the Evidence Act where it is stated that 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 and the burden of proof lies on that person. Looking at the record of the Tribunal it is without doubt that the main issue for consideration was the ownership of the suit land

As correctly said by the Chairperson, the respondents (then applicants) who were the ones who alleged ownership of the suit land were able to prove that they inherited the said suit land from their father who was also a witness Rashid Ally Mjengwa (**PW3**) and his evidence was corroborated by the evidence of **PW4** and **PW5** the neighbour and the relative of the 3<sup>rd</sup> appellant who supported the evidence of **PW3** that he had been on the suit land ever since. The 3<sup>rd</sup> appellant herein who was allegedly said to have sold the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> appellants did not present evidence to show that indeed the suit land belonged to his father or otherwise if it was a family land and if she was permitted to sell the said suit land to the other appellants. This was clearly analysed by the Chairperson when she said:

*"Hapakuwa na ushahidi was nguvu was kuonyesha umiliki was eneo hilo kwa mdaiwa wa 3 au hao wazazi wake aliowataja zaidi tu ya kuwa na maelezo yaliyoonyesha waziwazi kuwa alivamia eneo la wadau na kuamua kuliuzwa kwa sababu hasa anazozijua yeye"*

It is clear therefore that there is no link connecting the 3<sup>rd</sup> appellant to the suit land to enable the passing of title from him to the 1<sup>st</sup> and 2<sup>nd</sup> appellants. In other words, the 3<sup>rd</sup> appellant did not have title to pass the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> appellants as correctly established by the Tribunal. In that respect the sale agreements that were



tendered did not have any evidential value for the Tribunal to consider as insisted by learned Counsel Mr. Silayo. It should be noted that a document may be admitted in evidence, but it is the evidential value emanating therefrom is what is important in the support of the case. In the present case and as correctly decided by the Tribunal the sale agreements admitted as exhibits did not have any evidential value having established that the 3<sup>rd</sup> appellant did not have title to pass to the other appellants. In view thereof, the Tribunal properly nullified the sale between the 3<sup>rd</sup> appellant and the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

Further, according to the evidence, the 3<sup>rd</sup> appellant and his family moved from the suit land more than 33 years, that is, from 1979 after his father's death until when she returned in 2012 and invaded the suit land and made the sale transaction. The time of absence from the suit land was more than 30 years while the law provides for 12 years as time limitation for recovery of land. Consequently, with the above explanations, there is nothing to fault the Tribunal as they properly analysed the evidence and decided on the strength and weight of the evidence which leaned in favour of the respondents. In the case of **Hemed Saidi vs. Mohamed Mbilu** (supra) which stated that:

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

For the reasons above, the second and third grounds of appeal therefore have no merit and are hereby dismissed.

Regarding the fourth ground of appeal, I agree with Mr. Kiondo that this ground is a misconception. The Tribunal did not order any damages and the judgment and decree are clear on this. The respondents sought for damages, but the Tribunal only ordered costs of the application and nothing else. This ground too has no merit.

In the result, I find no reason to fault the decision of the Tribunal. Consequently, the appeal is hereby dismissed with costs for want of merit.

It is so ordered.

*V.L. Makani*

**V.L. MAKANI  
JUDGE  
15/08/2022**

