

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

LAND APPEAL NO. 375 OF 2023

(Arising from Land Application No.122 of 2018, of the District Land and Housing Tribunal for Ilala)

**HEMED MUSTAFA (As legal representative of the late
MUSTAFA SALEHE).....APPELLANT**

VERSUS

**FADHIL MFAUME YANGE.....1ST RESPONDENT
IDD MFAUME YANGE.....2ND RESPONDENT**

J U D G M E N T

*Date of Last Order:18.10.2023
Date of Judgment:20.11.2023*

T. N. MWENEGOHA, J.

The appellant, Hemed Mustafa, as a legal representative of the late Mustafa Salehe, sued the respondents above named, jointly, seeking for a declaration among others that, he is a rightful owner of the suit land, measuring $\frac{3}{4}$ acres, located at Vikindu Village, Chanika Area originally owned by the late Mustafa Salehe. The case was instituted before Ilala District Land and Housing Tribunal, herein after called the trial Tribunal, vide Land Application No.122 of 2018. The decision of the trial Tribunal came in favour of the respondents. Aggrieved by the impugned decision, the appellant sought the instant appeal, basing on the following grounds:-

- 1. That, the trial Tribunal erred in law and facts by assuming without strong evidence and sufficient proof that there was**

- no village at Chanika by the name of Vikindu village rather than generalized is at Pwani region;**
- 2. That, the Chairman of trial Tribunal erred in law and facts when misdirected himself that the respondents are lawful owners of the suit premises without proving to that effect;**
 - 3. That, the Chairman of the trial Tribunal erred in law and facts by relying on less sufficient evidence which does not prove ownership in terms of inheritance or given by the appellant's father adduced by the 2nd respondent;**
 - 4. That, the Chairman of the trial Tribunal erred in law and facts for failure in disregarding the weight and substance of grounds advanced and evidence adduced by the appellant together with the witnesses in the trial Tribunal;**
 - 5. That, the Chairman of trial Tribunal grossly erred in law and facts for failing to give strong and sufficient grounds made the trial Tribunal to decide the dispute in favour of the respondents.**

The appeal was heard through written submissions. Advocate Hussein Hashim Msekwa, appeared for the appellant, while the respondents were represented by Advocate Daibu Kambo.

Submitting on the 1st ground, Mr. Msekwa was of the view that, the testimony of PW1, who is the Administrator of the estate of the late Mustafa Salehe stated that, the suit premise is located at Vikindu Village in Chanika, Ilala District and Dar es Salaam Region. The same was previously owned jointly by Mustafa and Jamila, both deceased. His evidence was supported by Exhibit P2. On the other hand, the

respondents' testimonies showed that the suit premise was given by the late Mustafa Salehe and the same is not located at Vikindu village in Chanika. The decision of the trial Tribunal relied on the respondents' testimonies and agreed that the Vikindu village is not found at Chanika, rather in Pwani Region. Therefore, it was wrong for the trial Tribunal to agree with the testimonies of the respondents, especially on the location of the suit land without even visiting the locus in quo as required under **Order VIII Rule 13 of the Civil Procedure Code, Cap 33 R. E. 2019** and the case of **Registered Trustees of Theal-Dwil Masjid Madrassatul & 3 Others versus Commissioner for Lands, Ministry of Lands, Housing and Human Settlements & Another, Land Case No. 370 of 2016, High Court of Tanzania**, which quoted the case of **Avit Thadeus Massawe versus Isdory Assega, Civil Appeal No. 6 of 2017, Court of Appeal of Tanzania at Arusha, (unreported)**.

He went on to argue the 2nd and 3rd grounds together that, the appellant proved that, the suit land belonged to Mustafa Salehe, his late father as shown by Exhibit P2. That, the respondents relied on Exhibit D1 which is just a copy of proceedings of what happened in the administration of the estate of the late Mustafa Salehe. That, there was nowhere in Exhibit D1, showing that the suit premise was bequeathed to the respondents. Therefore, it was wrong to rule in their favour in absence of sufficient evidence as stated under **Section 64(2) of the Land Act, Cap 113 R. E. 2019**.

On the 4th ground, it was argued that, in deciding in favour of the respondents, the trial Tribunal did not give strong evidence to support its position as to why it gave the ownership of the suit premises to them.

That, the decision of the trial Tribunal is against the rules given in the case of **Hamis Rajabu Dibagula versus the republic, Criminal Appeal No. 53 of 2001.**

In reply, Mr. Kambo for the respondents, contended on the 1st ground of appeal that, under **Sections 110 and 111 of the Law of Evidence Act, Cap 6 R. E. 2019** the one who alleges must prove. That, the appellant failed to prove that there was a village in Chanika, called Vikindu in 2018. Therefore, the trial Tribunal was right to decided against him as there was no need to visit the *locus in quo*.

On the 2nd ground, it was argued that, what the appellant is doing is just attempting to shift the burden of proof from him to the respondents. That, this is contrary to **Sections 110 and 111 of the Evidence Act, Cap 6, R. E. 2019.** The appellant was the one with the onus of proving the case. He failed to discharge his burden; he cannot blame the respondents for winning the case.

As for the 3rd ground, the arguments of Mr. Kambo were that, there was no evidence to prove that the suit land was owned by the late Mustafa Salehe. The document tendered by the appellant showed the buyer to be Mustafa Mkewe Jamila Yange. There was no evidence to show that Mustafa Salehe and Mustafa Mkewe Jamila Yange is the same person. Lastly on the 4th ground, the respondents counsel maintained that, given the nature of the case, the trial Tribunal gave the reasons for its decision, hence, decided in favour of the respondents.

I have considered the submissions of both parties. Also, I went through the records from the trial Tribunal. The issue for determination is whether the appeal has merits or not.

I will start discussing the 1st ground. On this ground of Appeal, the appellant faulted the trial Tribunal for deciding the matter in favour of the respondents, without giving sufficient and strong proof that there was no village in Chanika which goes by the name of Vikindu Village. The appellant's counsel insisted in his submissions that, the findings of the trial Tribunal were wrong, owing to the fact that, the same did not visit the locus in quo to satisfy itself if the description of the suit land in terms of its location exists.

Indeed, I went through the impugned decision of Hon. A.R Kirumbi, the learned trial Chairperson, dated 20th March, 2023. At page 5, paragraph 3, the last three sentences, the learned trial Chairman appears to conclude that, the exhibit as to the purchase of the land in dispute(M2), has nothing to do with the appellant's father, the late Mustafa Salehe. He went further to find that, the same exhibit does not relate to the land in dispute which is in Chanika, within Ilala Municipality, as Vikindu is in Coast Region.

Having so read the findings of Hon A. R. Kirumbi, I decided to go through the case file, trying to find out if the trial Tribunal visited the locus in quo before making its decision. I did so, because the learned trial Chairman, made a conclusive remark in his findings showing that, the description of the suit land, is not located at the place where the appellant, then applicant claims to be. These findings can only be given by a person who has full knowledge that the said land is not in the place/area, it is said to be.

The records show that, the respondents' case was closed on the 12th December, 2022. The orders that were given by the Tribunal were that, on the 5th of January the case was to be mentioned, for fixing the date

for Judgment and reading the opinions of assessors to parties. The same are silence as to the visit of the locus in quo. That is to say, the appellant's claims are correct, the trial Chairman reached a conclusion touching the location of the suit property, without satisfying himself if the said description was property or not.

In that footing, I join hands with the appellant's counsel when he claimed that, under these circumstances, it was necessary and important to have a site visit. The purpose among others was for the trial Tribunal to satisfy itself as to where exactly the suit land is located. This fact would have helped the Tribunal to know if it has the jurisdiction (territorial jurisdiction) to hear and determine the dispute before it. In this case, the suit land was described to be located at Vikindu Village, Chanika, within Ilala and Dar es Salaam Region. The conclusion of the Tribunal is that, Vikindu is in Pwani Region and not in Chanika area. These findings could have been meaningful, if the trial Tribunal would have been at the site and verify the name and place of the area to which the land in question is located.

In determining land disputes, the rules are settled, that, visiting a *locus in quo* is not mandatory but necessary depending on the circumstances of the case. In the case at hand, based evidence on records, as I have pointed out herein above visiting the locus in quo was necessary. **see Avit Thadeus Massawe versus Isdory Assega**, (supra). Failure to do so has impaired the decision of the trial Tribunal, as the same is purely rooted on the description of the suit land, focusing on where it is located. Therefore, I find the 1st ground to have merits and the same is allowed.

On the basis of the findings on the first ground above, I see no reasons to continue with the discussion of the remaining grounds of appeal, the 2nd to 4th; as the appellant abandoned ground number 5 during his submissions.

In the end, and for the reasons I have given herein above, I nullify the whole proceedings of the trial Tribunal, quash the Judgment and set aside the orders that followed. I further order an immediate retrial of the case, before a new Chairperson with a set of assessors.

The appeal is allowed with costs.




T. N. MWENEGOHA

JUDGE

20/11/2023