

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

**LAND APPEAL NO. 369 OF 2023**

(Originating from Application No. 23 of 2019, Mkuranga District Land and Housing Tribunal)

**SALAMA MIRAJI FUNDI.....APPELLANT**

***VERSUS***

**MARIAM YASSIN.....1<sup>ST</sup> RESPONDENT**

**RASHIDI ATHUMANI.....2<sup>ND</sup> RESPONDENT**

**FATUMA ABDALLAH.....3<sup>RD</sup> RESPONDENT**

**SAID CHINDEMA.....4<sup>TH</sup> RESPONDENT**

**JAMILA MFAUME.....5<sup>TH</sup> RESPONDENT**

**IMAN LEZILE MPALILA.....6<sup>TH</sup> RESPONDENT**

**JEMA JUMA.....7<sup>TH</sup> RESPONDENT**

**ISMAIL HAMODRICK SIMAI.....8<sup>TH</sup> RESPONDENT**

**JUDGMENT**

3<sup>rd</sup> to 19<sup>th</sup> April, 2024

**E.B. LUVANDA, J**

The Appellant named above sued the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents above mentioned for trespassing her land measuring one and half acres located at Kamegele, Vikindu Village, Mkuranga District Pwani Region alleged to have inherited from her father the late Miraji

Fundi Kondo @ Adam Miraji Fundi who passed away on 28/06/1978 (as per the evidence of Mbaraka Miraji Fundi (PW2). According to the Appellant who testified as PW1 at the Tribunal, at the time when her father met the demise in 1978, she was aged fifteen years old.

On defence, Jamila Mfaume Abdallah (DW1) who appeared on behalf of the First Respondent (who was said to be sick, attacked by stroke, paralyzed, unable to walk or lack speech/alogia) asserted that the First Respondent was allocated the suit land by the Village Council in 1996 in a status of bush land, and commenced developing it in 2003. According to DW1, one Rukia Fundi Humbwaga was compensated by the First Respondent a sum of Tsh 12,000 in respect of the suit farm. A fact that the First Respondent was allocated land by the Village Council and paid compensation, was supported by Rajabu Yusuf Mede (DW4) who was the Village Chairman in between 1998 to 2015, who asserted to had allocated land to the First Respondent and others at large through the fiat of the District Commissioner Capt. Mwabeza. DW4 tendered a letter from Vikindu Village Council dated 20/01/2003 exhibit D1 and a document for compensation exhibit D2. The title of the Second, Third, Fourth, Sixth and Eighth Respondent was derived from the First Respondent. The Fifth and Seventh Respondent alleged to own nothing.

The Tribunal dismissed the Appellant's claim for reason that the Appellant failed to prove her claim regarding ownership of the suit land.

In the memorandum of appeal, the Appellant grounded hat: One, the Chairperson erred in law and fact by relying on fabricated evidence from the proclaimed village chairman from the year 1998 to 2015; Two, the Chairperson erred in law and fact by relying on the defective document from the village chairman through the order of the District Commissioner; Three, the Chairperson erred in law and fact by relying on the weak and contradictory evidence; Four, the Chairperson erred in law and fact by disregarding the customary right(s) of a customary owner of land upon the death of the original customary owner merely for failure to prove in writing and failure to bring a neighbour or local leader; Five, the Chairperson erred in law and fact in finding that the suit land was abandoned and it was a bush; Six, the Chairperson erred in law and fact by for failure to call important witnesses to prove the matter accordingly; Seven, the Chairperson erred in law and fact by for relying on the evidence of the Respondents to reach into the judgment and ignoring the evidence of the Appellant completely; Eight, the Chairperson erred in law and fact by deciding the matter without visiting the *locus in quo*, which could help to identify the disputed land and reach into fair and just decision.

The Appellant submitted that the purported letter from the village council to allocate the bush land is a fabricated document and the trial Tribunal ought not to decide the case relying on it, for reason that since 1998 to 2015 as per DW4, the said letter was signed by Digeru as the village chairman at Vikindu, arguing the Chairman decided on the matter based on fabricated evidence.

Ground number two, the Appellant submitted that the document tendered by DW4 to wit ID-1 and ID2 are photocopy, arguing the original was not tendered to support the case, arguing the Appellant cross examined on them but was disregarded. He submitted that exhibit D1 was not signed by the First Respondent who was purported to have been allocated the land in dispute.

Ground number three, the Appellant submitted that DW2 asserted to have witnessed when the First Respondent was compensating Rukia Fundi over the suit land. She submitted that DW2 when was cross examined, he stated that he don't know the size of the land, arguing it was contradictory, for reason that during the examination in chief DW2 adduced evidence that he know the disputed area.

Ground number four, the Appellant submitted that historically the Appellant occupied the suit land through inheritance from her father the late Miraji Fundi Kondo @ Adam Miraji Fundi who occupied it under customary. She submitted that it was wrong for the Tribunal to demand the Appellant to prove the matter

in writing while the ownership was under customary, arguing there was no need to produce documentary evidence. She submitted that the First Respondent who was a village secretary invaded the disputed land in collaboration with DW2.

Ground five, the Appellant submitted that it was wrong for the Tribunal to hold that the land was abandoned and it was a bush, arguing it was neither abandoned nor a bush land, rather it was owned by the original proprietor one Miraji Fundi Humbwaga who after his demise the Appellant was appointed as administrator and apportioned the deceased's property to the heirs or beneficiaries of the late father, arguing the disputed land was handed over to the Appellant.

Ground number six, the Appellant submitted that exhibit D1 which was tendered by DW4, was signed by one Digeru the Village Chairman of Vikindu. She submitted that she demanded the Tribunal to call the alleged Digeru as key witness, but it was ignored. She submitted that failure to call Digeru raise doubt as to why did not testify.

Ground number seven, the Appellant submitted that she tendered letters of administration of estate dated 14/12/2000 and affidavit dated 14/12/2000 attached to her submission for reference, arguing these documents were

disregarded by the Tribunal and instead the Tribunal relied on the Respondents evidence which was weak.

Ground number eight, the Appellant submitted that it was wrong for the Tribunal to determine the matter without visiting the *locus in quo* so that could identify properly the land in dispute, for reason that the purported land which the First Respondent alleged to had compensated Bi. Rukia Fundi Humbwaga is quite different from the disputed land, arguing they are two distinct arears. She submitted that failure to visit the *locus in quo* led to unfair decision.

Mr. Venance Victor learned Counsel for the Respondents, submitted that the documents attached to the Appellant's submission was not part of record, arguing cannot be considered. He submitted that the Appellant who was represented, had a chance to tender them at the trial. He submitted that the Appellant sued the Respondents for trespassing Appellant's father land, arguing the Appellant neither tendered document nor material witness were summoned to testify how the late father got the piece of land in dispute. He submitted that the Appellant neither testified nor exhibited how she got possession or ownership of the disputed land. He submitted that the Appellant lost her case after she failed to prove on the balance of probability ownership of the suit land either to herself or to her father on which she claim to be the source of her ownership of the suit land. He submitted that witnesses testified how the First

Respondent got the land in dispute, and tendered documentary evidence to prove possession and ownership. He submitted that the First Respondent obtained the suit land after she paid compensation to Bi. Rukia Fundi Humbwaga who was owning the suit land customarily and abandoned it, arguing thereafter the First Respondent got customary title over the suit land which from the village council. He submitted that DW4 testified how the First Respondent was allocated the disputed land (bush land) by the village council, and tendered exhibit D1 and D2. He submitted that the Appellant failed to show how the evidence of DW4 was fabricated, arguing fabrication is a serious offence punishable by criminal law. He submitted that a party is at liberty to bring witnesses who will testify in his/her favour, citing regulation 14 of G.N. 174. He submitted that exhibit D1 and D2 were tendered by DW4 and were not objected, arguing the issue of admission cannot be raised at this stage.

Ground number three, the learned Counsel submitted that the contradiction of DW2 in cross examination does not go to the root of dispute. He submitted that DW2 adduced evidence that the land neither belong to the Appellant or Appellant's father. He submitted that the Appellant is the one who was duty bound to call her material witness to prove her case, arguing the prosecution cannot win the case on weakness of defence side.

Ground number four, the learned Counsel submitted that there is no evidence that the customary ownership of land was disregarded by the Tribunal in its judgment. He submitted that PW2 did not tender any documentary evidence nor any other evidence to prove that the disputed land was owned under customary tenure by her late father. He submitted that there is no any inventory was tenderd to support that the suit land was part of the estate of the deceased. He submitted that no documentary evidence was tendered to prove that the suit land was transferred to the Appellant by way of inheritance.

Ground number five, the learned Counsel submitted that exhibit D2 show that it was a bush and abandoned land by the customary owner who accepted compensation, arguing the suit land was lawfully allocated to the First Respondent.

Ground number six, the learned Counsel submitted that it is a duty of parties to call their witnesses to prove the main issue or issues of the case, citing regulation 14 of GN 174 of 2003. He submitted that there is no good reason why the Appellant failed to call one Digerro as her witness during trial, and shifts that burden to the Tribunal.

Ground number seven, the learned Counsel submitted that the evidence of PW1 and PW2 was considered by the Tribunal, citing page 2,3 and 8 of the impugned judgment. He submitted that the Appellant failed to prove her case on the



probability, arguing her evidence was weak. He submitted that the Respondents tendered documentary evidence to prove their ownership.

Ground number eight, the learned Counsel submitted that no injustice occurred due to omission by the Tribunal to visit the disputed land. He submitted that both parties know the boundary of the disputed land. He submitted that the Respondents are living in the suit land since then to the present. He submitted that the Appellant was claiming ownership of a known area. He submitted that visiting the suit land was not material evidence to either party to prove ownership of the suit land.

On rejoinder, the Appellant submitted that the land owned by Binti Rukia Fundi Humbwaga which is purported to have been compensated by the First Respondent, is a different from the land of the Appellant's father which the Appellant was administering. She submitted that there is no reasons as to why Binti Rukia Fundi Humbwaga was compensated for an area which was declared as a bush land, arguing it mean it is not owned by any person.

On my part, regarding ground number one, I lean to the argument of the learned Counsel for Respondents that the Appellant did not demonstrate facts and particulars of the said fabricated evidence exhibit D1. Above, when exhibit D1 was tendered it was received without objection or reservation from Ms. Shamim Kikoti learned Counsel who was representing the Appellant at the

Tribunal. Indeed, on cross-examination, no question was forthcoming on that angle of fabrication of exhibit D1. In fact, no question was asked at all in respect of exhibit D1. Therefore, the argument of the Appellant is unmerited.

Ground number two, according to the records of the Tribunal depict ID1 and ID2 were merely received by the Tribunal for identification purpose, were not admitted as exhibit. Importantly, ID1 and ID2 were not referred anywhere in the Tribunal's findings, rather were captured at page five of the impugned judgment when the learned Chairman was just prefacing as to who said what during trial. Therefore, the Appellant is faulting the Tribunal for nothing. Regarding a complaint that exhibit D1 was not signed by the First Respondent who was purported to have been allocated the land in dispute, to my view this argument has been raised as an afterthought. This is because at the time when exhibit D1 was tendered such argument was not raised and no objection was taken that it was not signed by the First Respondent and during cross examination no question was asked on this aspect. Therefore, the argument is unmerited.

Ground number three, going by the testimony of DW2 both his testimony in chief, cross-examination, re-examination nowhere adduced evidence regarding facts of witnessing compensation or knowing the suit land. The testimony of DW2 was brief and simple that he purchased his piece of land from the First

Respondent on 3/09/2014 for a consideration of Tsh. 1.5 million and constructed a house of two rooms, period. Therefore, this argument is misplaced.

Ground number four, I go along the argument of the learned Counsel for Respondents that nowhere the Tribunal ignored the testimony of the Appellant for reason of owning land under customary tenure. At page seven third paragraph, the Tribunal said,

*"PW1 na PW2 waliyoa ushahidi wao kuwa mdai ni mmiliki wa eneo hilo ambalo asilia lilikuwa la marehemu baba yao. Lakini hakuna uthibitisho wowote uliotolewa kuonekana kwamba eneo hilo bado ni mali yao au liliwahi kuwa mali yao. Wadaiwa na. 3, 4, 6 na 8 walitoa ushahidi wa kunnuua eneo hilo kutoka kwa mdaiwa namba 1"*

A mere fact that at a certain point the Tribunal made an obiter that apart from failure of the Appellant to prove by documentary regarding ownership of that land, to my view that version cannot be taken as a serious concern that the Tribunal called the Appellant to prove with documentation her alleged customary tenure. This is for reason that in the findings above the Tribunal ruled generally that the Appellant failed to prove her title. Above all, the facts that the Appellant have no documentary evidence to prove ownership of one and half acre, was born out of evidence in records from the cross-examination

mounted by the Counsel for the Respondents to PW1, who in the handwritten proceedings (some wordings were omitted in the typed proceedings), page nine second paragraph, second line), was recorded to had said,

*"I don't have document to prove ownership of one and half acres"*

Therefore, even if I fault the version of the Tribunal where it introduced elements of proof of customary tenure by documentary evidence in its findings, of which I do, but still it cannot change the conclusion reached by the Tribunal for reasons I have explained above.

Ground number five, to my view the Tribunal is faulted for nothing. The Appellant who testifies as PW1 at the Tribunal, on cross-examination stated that it was a bush land. Mbaraka Miraji Fundi who is a young brother of the Appellant, on cross-examination, at page fourteen of typed proceedings, stated that,

*"The suit land was a bush after the death of our father in 1978.  
Nobody was taking care of it"*

Therefore, the argument of the learned Counsel for Respondents that exhibit D1 suggest the suit land was a bush land at the time of allocating to the First Respondent, is a valid argument.

The argument that after the demise of the Appellant's father, the Appellant was appointed as administrator of the estate of the late Miraji Fundi Humbwaga,

was not supported by any documentation for letter of appointment. Equally an argument that the disputed land was handed over to the Appellant, was just introduced as a new fact in the Appellant's submission in support of this appeal. At the trial Tribunal, when PW1 was asked questions by the learned Chairperson, she was recorded to have said,

*"I'm administrator of estate. I divided four acres to all heirs. I got one and half acres which was for me, my late sister and mother"*

PW2 asserted that,

*"My father left seven acres. I was given one and half acres as my share and the applicant took one and half of the land as her share which is not in dispute. The suit land is supposed to be allocated to our relatives who are not here. The suit land was not given to anybody"*

No wonder, at a certain point the learned Counsel for Respondents was querying as to whether the suit land indeed formed part of the deceased estate.

Therefore, ground number five is without substance.

Ground number six, I ascribe to the argument of the learned Counsel for Respondents that the Appellant shifted that burden to the Tribunal to call one Digeru. To my view it was the duty of litigants to summon the alleged Digeru who purported to sign exhibit D1. To my opinion, it appears the line of cross examination on this fact missed a target. This is for reason that DW4 who

tendered exhibit D1 cling to a fact that he was a very long serving village chairperson at Vikiindu Village from 1998 to 2015. Exhibit D1 was executed on 20/01/2003, at a signature of the purported Digerro (I say the purported Digerro, because the said name it appears was deduced from his/her signature appended into exhibit D1, but in actual fact did not disclose his/her name), reflect was signed by the village chairman. But going by a rubber stamp stamped over the signature depict it belong to hamlet chairperson for Kamegele Hamlet within Vikiindu Village. Contextually, exhibit D1 was not signed by DW4. Ground number seven, the argument of the Appellant that she tendered letters of administration of estate dated 14/12/2000 and affidavit dated 14/12/2000 which were disregarded by the Tribunal, is misleading. Those documents did not form part of the Tribunal records. The said documents were introduced by the Appellant by way of attaching to her submission in chief in this appeal, which is irregular. This is because submissions are not evidence.

The argument of the Appellant that the Tribunal relied on the Respondents evidence which was weak, was not supported by any explanation or facts as to which particular facts adduced or document tendered by the Respondents was weak. In fact, as by my recap at the outset, the Appellant had a very weak case compared to overwhelming evidence tendered by the Respondents.

Grounds number eight, the Appellant is faulting the Tribunal for not visiting the *locus in quo*. However, the Appellant was unable to tell as to when she formed an intention or opinion for visitation or when she requested to the Tribunal for visitation, neither stated if the Tribunal refused. Rather the Appellant is heaping blame to the Tribunal that it denied them visitation while none among the litigants had posed such a demand. The records of the Tribunal reflect that on 18/08/2020 the learned Counsel for Appellant closed her case without reserving a prayer for visiting *locus in quo* neither recalling witnesses for that purpose. Equally on 6/10/2021 the learned Counsel for Respondent closed their case and asked for a date of judgment. Therefore, introducing a call and need of visiting the *locus in quo* while at appeal stage, is out of context and misconception. Above all, visiting the *locus in quo* is discretionary depending on the circumstances of each case. Herein I not found any pressing reason for visiting the *locus in quo*. The argument by the Appellant that the land which the First Respondent claimed to have compensated Binti Rukia Fundi Humbwaga is quite different from the suit land, is a concocted fact not supported by evidence on records.

I will reproduce some portion of testimony showing that parties were litigating on the same land which First Respondent claimed to have compensated Binti

Rukia Fundi Humbwaga. Instance, PW2 on cross-examination was recorded to had said, at page fifteen of the typed proceedings,

*"In 2012 we were given back our land by Nolic Tribunal Broker. In 2016 I started to construct a house on the suit land. In 2017 the respondents were not there though there were some structures. There is a grave on the party of the suit land. The child of 1<sup>st</sup> respondent was buried there. In 2015 I saw the grave of the child of the 1<sup>st</sup> respondent. We did not take any action"*

A fact that the child of the First Respondent was buried on the suit land was also adduced by DW1 who at page eighteen of the typed proceedings, she was recorded to had said,

*"I have nine children. Seven of them were born on the suit land. In 2006 my brother passed away. He was buried on the part of the suit land. His grave is still there"*

Therefore, ground number eight is unmerited.

The appeal is dismissed. However, I spare the Appellant to foot costs.



E.B. LUVANDA  
**JUDGE**  
19/04/2024