

TANZANIA / JUDGMENT

# abbas kikunile vs fahim m saad

## 2020 tzhclandd 148 26 may 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 146 OF 2017 (Arising from the decision of the District Land and Housing Tribunal of Morogoro, in Land Appeal No. 129 of 2014; Originating from Kihonda Ward Tribunal in Land Case No. 53 of 2017) ABBAS KIKUNILE.....APPELLANT  
VERSUS FAHIM M. SAAD..... RESPONDENT Date of Last Order:  
11.05.2020 Date of Judgment: 26.05.2020 ^

### JUDGMENT

V.L. MAKANI, J The appellant in this case is ABBAS KIKUNILE. He is appealing against the decision of Morogoro District Land and Housing Tribunal at Morogoro (the District Tribunal) in Land Appeal No. 129 of 2014 (Hon. PJ. Makwandi, Chairman). The appeal originates from Kihonda Ward Tribunal whereby the Respondent successfully sued the Appellant for recovery of land that measures 5 acres at Kiegeya 'A' in Kihonda Ward. Aggrieved by the said decision, the appellant preferred an appeal to the District Tribunal whereby the decision of the Ward Tribunal was upheld. The appellant was again aggrieved by the decision of the District Tribunal and hence filed this appeal on the grounds reproduced hereinbelow:-

1. That the Tribunal erred in law and fact in deciding in favor of the respondent without any legal justification.
2. That the Tribunal erred in law and fact in making judgment and orders against the Appellant who is a wrong party to the suit from the first instance.
3. That the Tribunal erred in law and fact in making improper analysis as to the Appellants right of audience denied by the ward tribunal.
4. That the Tribunal erred in law and fact to appreciate the Ward Tribunal's jurisdiction while the value of the subject matter is over Tsh 3,500,000.
5. That the Tribunal erred in law and fact in failing to observe improper appearance of the Respondent at the ward tribunal.

6. That the tribunal erred in law and fact to appreciate misleading technicalities made by the ward tribunal in recording the Appellant's evidence.
7. That the Trial tribunal erred in law and fact to appreciate the respondent's ownership in the absence of the Municipal approval.
8. That the District Land and Housing Tribunal erred in law and fact in failing to distinguish the disputed land from undisputed land in decision making, thus creating opportunities to the respondent to trespass undisputed land on the Tribunal's assistance. 2 The Appellant appeared in person and the respondent enjoyed the services of Mr. Kambo, Advocate, The matter proceeded orally. Submitting in support of the first ground, the appellant said the suit land does not belong to him but to TUPOSE institution. He said that the claim was against the wrong party. That the institution has registered land said that there was no legal justification for him to be sued. On the fourth ground he said that the Ward Tribunal erred in law and fact in making improper analysis of the subject matter which is over Ths 3,500,000 because the suit land is about 5 acres. On the fifth ground he submitted that the respondent improperly appeared in the Ward Tribunal because the person who filed the application was his wife Yusra Kingalu and the signature is on the judgment. He added that the signature of the respondent is different as he received the summons from the court, that there is his signature in the Sale Agreement. On the sixth ground he stated that there are misleading technicalities made by the Ward Tribunal, that he could not have said that the suit land was owned by the institution and then gave 10 acres to the respondent. He added that the District Tribunal said that he had no exhibits while he had exhibits and witnesses. 3 On the seventh ground the appellant stated that there were no municipal approvals with regard to the respondent's ownership of the suit land both in the District and Ward tribunals. On the eighth ground he said that, the Tribunals failed to distinguish between the disputed land and the undisputed land and the trespass by the respondents. He prayed for the appeal to be allowed with costs. In reply, Mr. Kambo stated that the first ground is similar to the first ground that was raised in the District Tribunal. He said the appellant abandoned the said ground at the Tribunal. He added that it is improper to raise the same ground again at this stage while the same was not determined by the District Tribunal. He said further that the first ground is not supported by the records of the District Tribunal of which decision is subject of this appeal. Submitting on the second ground Mr. Kombo stated that, the District Tribunal decision stated that it did not see the name of TUPOSE in the decision of the Ward Tribunal neither did it see any documents of the said institution TUPOSE as regards the suit Land. Therefore, the District Tribunal was correct when it stated that the appellant was properly sued and not TUPOSE. He said even in the judgment of the Ward Tribunal there is no name TUPOSE, he concluded that the appellant's submissions had no support. 4 Submitting for the fourth ground, Mr. Kambo averred that the District Tribunal on jurisdiction stated that there were no records that the suit land was of the value over and above the jurisdiction of the Ward Tribunal. No valuation report was presented. Mr. Kambo said the appellant had the onus to prove the same by presenting the documents in support of his allegations. He added that in absence of valuation report the ground had no merit. On

the fifth and sixth grounds he said that, these grounds are the same as the fifth and sixth grounds at the District Tribunal which were abandoned by the appellant. There was therefore nothing that was submitted and therefore it is improper to raise them at this stage as they were not considered. He said the issue of municipal approvals is a new thing and it has no backing of the records of the lower Tribunals. He argued the same as regards to the eighth ground in that this ground was not raised at the Tribunal. In rejoinder the appellant reiterated his submission in chief and added that he had never abandoned any ground of appeal at the District Tribunal and that the issue of TUPOSE was mentioned at the Ward and District Tribunals even the value of the suit land was also discussed. He said further that though the grounds were abandoned but the Chairman discussed them. He further reiterated his prayers. I have listened to the submissions by the appellant and learned Counsel the main issue is whether this appeal has merit. 5 I have also gone through the records of the Tribunal specifically the appellant's written submissions only to note that the appellant stated at page 2 that he has decided to abandon the 1st, 5th, 6th and 7th. For the sake of clarity, I wish to quote: "Your Honor, basing on aforementioned grounds of Appeal, I am going to abandon ground number 1, 5, 6 and 7 then proceed to argue on the remaining grounds of Appeal." These grounds of appeal are similar to the 1st, 5th, 6th and 7th grounds of this present appeal. It is therefore clear that the aforementioned grounds of appeal were abandoned by the appellant at the District Tribunal and in that regard, the appellant is estopped from raising the same grounds at this stage (the second) appeal because they said grounds were not argued and decided upon. Subsequently, the 1st, 5th, 6th and 7th grounds cannot be argued at this stage and they are thus disregarded. As for the 2nd ground, the appellant claims that the Ward Tribunal's judgment was against the wrong party as the land belonged to TUPOSE institution and not him. It is logically clear that if the suit land did not belong to the appellant then he should not have bothered to appeal or even to appear at the Ward Tribunal for as he did not have any interest in the said suit land. Appearing at the Ward Tribunal and consequently preferring these two appeals means that the appellant has interest in the suit land, and the fact that from the Ward Tribunal to this appeal the said TUPOSE has never expressed any interest in the suit land means that it has no interest in the suit land. 6 From the above chain of events it is therefore evident that the appellant was rightly sued. The appellant did not submit on the third ground of appeal and therefore this court shall not labour on it as he has voluntarily abandoned it. On the 4th ground that the appellant said that the Tribunal erred in appreciating Ward Tribunals jurisdiction which is over TZS 3,500,000 because the suit land is about 5 acres. Mr. Kambo's response was that this matter was not raised at the Ward Tribunal and there was no proof that was brought to show that the suit property was above the pecuniary jurisdiction of the Ward Tribunal. He said there was no valuation report presented to show that the suit land was above jurisdiction of the Ward Tribunal. I am in agreement with Mr. Kambo's submission that as he who alleges must prove. The appellant raised this issue but there was no proof to the effect that the value of the suit land was beyond the pecuniary jurisdiction of the Ward Tribunal. In any case, the appellant did not raise this issue at the Ward Tribunal to substantiate this allegation. It is deemed that the Ward Tribunal which is the initial Tribunal was able to assess and agree on

the value of the suit land considering further that the suit land was a gift and not sale. So, the arguments by the appellant without substantial proof are of no merit and are disregarded. The 8th ground of appeal as well stated by Mr. Kambo is a new ground which was not raised nor discussed at the Ward and District Tribunals. 7 In the case of Hassan Bundala® Swaga vs. Republic, Criminal Appeal No. 416 of 2013 (unreported) it was held that: "It is now settled law that as a matter of general principle this Court will only look into the matters which came up in the lower Court and were decided, and not on new matters which were not raised nor decided by neither the trial Court nor the High Court on Appeal". Similarly, as the 8th ground is a new issue, this court shall not consider it or at all. Basing on the above, I find the appeal to have no merit and it is hereby dismissed with costs. It is so ordered. V. / JUDGE 26/05/2020 J 8

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Prepared on 14 October 2026 · Esheria