

TANZANIA / JUDGMENT

# MARRY MUGISHAGWE scanned

COURT  
TANZLIIDECIDED  
18 March 2025

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 31442 OF 2024 (Originating From Application No. 126/2022, Kigamboni District Land and Housing Tribunal) MARY BEATRIX MUGISHAGWE..... APPELLANT VERSUS LOYCE KAGALI PETRO..... RESPONDENT

## JUDGMENT

05th to 18th March, 2025 E.B. LU VAN DA, J At the Tribunal, the Respondent above mentioned sued the Appellant mentioned above for a claim of encroaching boundary of her land. According to averments in the pleadings suggest that the Respondent purchased a land measuring one and quarter acre (located at Mjimwema) from Abdalla Ally Mnende and Chiku Abdallah, on 26/06/2007. Abdallah Mnende appeared at the Tribunal and testified as PW3. PW3 asserted to have purchased the said land of one and quarter acre from Abdul A. Abdul, in 1999, where he demarcated the same by using pole of sea-trees not attacked by ants, surrounding the whole land. According to PW3, upon purchasing, it is when he introduced himself to his neighbour who are the Appellant and an Indian. PW3 asserted that the farm of one and quarter acre do not share border with the i Appellant's farm, on the explanation that there is a public road in between, which is located on the western side of the Appellant's land. This argument was nearly supported by all the Respondent's witnesses, to wit: Iddi Shomar (PW2), neighbour and familiar to the suit land since he was born there, all along to the event of 1977 operation vijiji, also drafted a sale agreement for the Appellant by virtue of being Village Secretary by then; Abdallah Muenda (PW3) vendor to the Respondent; Abdul Omari Mohamed (PW4), son of Omari Mohamed Ahmed (vendor to the Appellant) and Muharami Bakari who is a senior brother to Omari Mohamed Ahmed (the latter was also a vendor to the Appellant); Gilly Simiyu (PW5), Authorized Land Officer at Kigamboni Municipal Council; Mwinyi Maya Baishe (PW6) neighbour and familiar to the suit land since he was born there, all along to the event of 1977 operation vijiji. According to the Respondent who testified as PW1, when the Appellant was surveying Plot No. 185 and 187 Block A Mjimwema, she encroached about 873 square meters into the Respondent's land also encroached public road which has been in existence since 1975. This fact was supported by PW2; PW3; PW4, save for Mwinyi Maya Baishe (PW6) who alleged that the beacons of the Appellant are planted on the public road and not in the Respondent's land. The Respondent did not specify a size of a portion of public road alleged the Appellant encroached along her land measuring 873 square meters. In the 2 application, the Respondent did not plead a fact that the Appellant

encroached a portion of public road. The Appellant's story was brief that, she purchased her land from Muharami Bakari Mazongela and Omari Mohamed Ahmed on 26/06/1990, located at Mjimwema Area, as per a sale agreement exhibit KU1. According to the Appellant (who testified as DW1), after purchasing, she sought and was granted to join Mjimwema Village, as per the approval by the village assembly vide minutes dated 19/11/1991, exhibit KU2. DW1 asserted that, thereafter she embarked into developing her land by initiating procedures for survey in 1991 vide site plan (Refer Plan No. E'33011) dated 22/11/2001, exhibit KU5, with eventuality of being granted certificates of occupancy in respect of Plot No. 185 and Plot No. 187 Block A, Mjimwema Area, title No. 199840 and 199839, registered on 2/05/2002, as per exhibit KU3 and KU4, respectively. DW1 asserted that in 2009, resurfaced someone anonymous who erected fence wire inside her plots, which necessitated her to engage Temeke Municipal Council who carried out boundary recovery, as per letter Ref. DSM/TM/LS/GEN/VOLIII/173 dated 23/06/2009 along attachments showing the extent of encroachment, exhibit KU6. The Respondent's case was armed with a sale agreement dated 20/06/2007 exhibit KM1; application for surveying her land dated 29/04/2021 exhibit KM2; 3 minutes for reconciliation proceedings dated 03/03/2022, along a follow up meeting dated 13/04/202 exhibit KM4 and KM5, respectively, where the Appellant was being solicited to accede an option for resurveying of her plots to accommodate existing structures along a road; Mjimwema residential layout plan exhibit KM7; survey plan drawing exhibit KM3, which was not approved after it was revealed there was an existing survey by the Appellant. In the application, the Respondent pleaded to had purchased a land measuring one and quarte acre, also reflected in exhibit KM1. However, in her testimony in chief PW2 stated that during survey, in a preliminary drawing depicted the size of her land to be 3223 square meters. During cross examination, PW1 stated that immediately after purchasing, she enclosed her land by constructing a fence. During re-examination, PW1 asserted to had constructed a fence in 2013. As stated above, the size of the farm purchased by the Respondent, in exhibit KM1 reflect one and quarter acre, which if converted into square meters will be a total of 5,058.57 square meters. In a preliminary survey, PW1 asserted to have established her fenced land to be 3223. It is unknown whether the suit land measuring 873 square meters alleged encroached by the Appellant, fall within the fenced land. But at any rate, it is less than the land described in 4 exhibit KM1. It was not pleaded if the alleged public road (subject of this dispute) form part of the land subject for encroachment or not. Irrespective of the above observation, the Tribunal ruled in favour of the Respondent to have proved her claim and declared her as the lawful owner of the suit land, and faulted the Appellant to have encroached the Respondents land by overcrossing the road and extending to the Respondents land. The Tribunal nullified the survey done by the Appellant and ordered resurvey. And condemned the Appellant to pay costs to the Respondent. In the memorandum of appeal, the Appellant grounded that: One, the learned Chairman erred in law and fact for failure to find and hold that the application filed by the Respondent herein was hopelessly time barred; Two, the learned Chairman erred in law and fact for failure to find and hold that the application filed by the Respondent herein was bad in law for failure to join the necessary party in the trial proceedings; Three, the learned Chairman erred in law and fact for failure to find and hold that the Tribunal had no requisite jurisdiction to adjudicate on the matter on the ground that the land in dispute was surveyed and had certificate of titles issued to the

Appellant herein; Four, the learned Chairman erred in law and fact to find and hold that the disputed land is the property of the Respondent herein without considering that the Appellant had surveyed her land long before the Respondent herein came in to purchase her 5 piece of land; Five, the learned Chairman erred in law to order re-survey of the disputed land without considering that there are existing certificate of titles for the Appellant herein that have not been revoked; Six, the learned Chairman erred in law and fact to order re-survey of the Appellant's land without stating who should re-survey the said land considering the fact that the responsible authorities were not parties to the proceedings. Mr. Abubakar Salim learned Counsel for Appellant submitted that when presenting the written statement of defence, the Appellant raised a notice of preliminary objection premised on two grounds, arguing that these grounds form the first two grounds of appeal in the present appeal. He submitted that it was his argument before the Tribunal that the application filed by the Respondent was hopelessly time barred. He submitted that, the Appellant attached to her written statement of defence a sale agreement, exhibit KU-1, arguing it proves that the Appellant purchased the disputed Plots in 1990, the same were surveyed from 1991 and later was issued with certificates of titles in 2001. He submitted that, on the other hand, the Respondent herein tendered the sale agreement, exhibit KM-1 showing the Respondent purchased her piece of land on the 26/06/2007. He submitted that by simple arithmetic, from the date the Appellant herein purchased her land to the date the Respondent herein instituted the case is more than thirty-two good years. He submitted that for 6 the sake of argument however, the Respondent came into existence on the 26/06/2007, arguing that from 2007 to 2022 when the Respondent herein instituted her claim before the tribunal is fifteen solid years well beyond the time limit prescribed by law. He submitted that the learned Chairman agreed with the Respondent that she discovered that her land has been trespassed into in 2021, arguing this was a misdirection by the Tribunal, for explanation that it is not in dispute that when the Appellant was granted the certificates of titles for Plots No 185 and 187 Block A, in 2001 the Respondent herein was even not in existence, she emerged later in 2007 by purchasing the Appellants plots that had been already surveyed and issued with the certificates of titles. He submitted that suing someone who has been in occupation and use of land for more than thirty-two years is beyond imagination and particularly someone who has valid certificates of title. He submitted that had the learned Chairman considered all these he would not have come up with the finding that the Respondent discovered the trespass in 2021, arguing he would have dismissed the case basing on the provisions of section 3 (1) and Part 1 to the Schedule, item 22 of the Law of Limitation Act, Cap 89 RE 2019, also cited *ASoyisius Benedicto Rutaihwa Vs Stanslaus Mutahyabarwa & 7 Others*, Land Appeal No 22 Of 2020, [2021] Tzhc 6161 7 and *Tanzania Electric Supply Company Limited Vs Hellen Byera Nestory*, Land Appeal No 113 Of 2020, [2021] Tzhc 5817. He submitted therefore that, in terms of section 3(1) Cap 89 (supra), read together with Part 1 item 22 of the Schedule of the same Act, the case before the Tribunal was incompetent for the good reason that it was brought after the period of twelve years. For ground number two, the learned Counsel submitted that, this ground was raised as preliminary objection, arguing the same was wrongly decided by the Tribunal. He submitted that their argument was that looking at the prayers made in the application, the Tribunal could not effectively and completely adjudicate the matter. He submitted that after the closure of the hearing, he raised the same concern and

cited Nestory Msoffe & 5 Others Vs The Registered Trustees Of Catholic Archdiocese Of Arusha, Civil Appeal No 254 Of 2019, [2024] Tzca 536 (10 July 2024). Also cited Double Diamond Holdings Limited vs East African Spirits (T) Limited and Another, Civil Appeal No 63 of 2021, [2024] Tzca 535 (9 July 2024). He submitted that the learned Chairman agreed with their argument, but went ahead deciding the dispute on the ground that his hands were tied on account of the doctrine of *res judicata*. He submitted that had the learned Chairman considered their arguments in the preliminary objection he would have not reached at the decision he made. He submitted that the orders from the decision are basically not in the domain of the Appellant, for explanation that the Appellant cannot on her own conduct a survey of the land that has already been surveyed and certificates of title been issued. In reply, Mr. Henry Paradise Kauki learned Counsel for Respondent, for ground number one, submitted that the same is misplaced and unmerited, for an argument that exhibit KM2, the Respondent stated and proved when she discovered the complained survey. He submitted that exhibit KM2 clearly shows that it was in 2021 when the Respondent requested her property to be surveyed, where the Respondent was informed by Land Officers of Kigamboni Municipality that part of her land was already surveyed by the Appellant. He submitted that, in determining whether the suit is time barred the Court normally looks at the plaint to see when the cause of action is alleged to have accrued, citing Maigu E.M. Magenda vs Arbogast Mango Magenda, Civil Appeal No. 218 of 2017, [2018] TZCA 214 (5 October 2018) and Bhoke Kitang'ita Vs Makuru Mahemba, Civil Appeal No. 222 of 2017, [2020] TZCA 666]. He submitted that the testimonies and exhibits on record reveals that the Respondent discovered the complained survey in the year 2021, and that the 9 application was filed in the Tribunal in 2022, arguing therefore that, the application was filed well within time prescribed by the Law of Limitation Act. For ground number two and three, the learned Counsel submitted that they are misplaced and unmerited too for explanation that they all faults the jurisdiction of the Tribunal to determine the dispute between the Respondent and the Appellant. He submitted that the case laws relied upon by the Appellant in support of the said ground are irrelevant and distinguishable. He submitted that the Respondent and PW5 testified and through exhibits KM4 and KM5 proved the steps taken by the Respondent after she discovered that the suit premise was surveyed by the Appellant. He submitted that the Respondent and PW5 testified how the office of the Commissioner for Lands was engaged and how the said office dealt with the Respondents complaint against the Appellant's survey. He submitted that after the Respondent tabled the complaint against the Appellant, the office of the Commissioner for Lands summoned the Appellant to attend the meeting regarding the complaint by the Respondent, where after- two meetings, the office of the Commissioner for Lands found and directed the Appellant to submit her title deeds for re-survey and correction of the errors made during the survey of exhibit KU-3 and KU-4 in which part of the Respondent's property was incorrectly surveyed. 10 It was the Respondent's Counsel submission that the office of Commissioner for Lands and Registrar of Titled did no wrong to the Respondent, all the time the office of the Commissioner for Lands was active and willing to have the mistake made during the survey of the Appellant's land, corrected. He submitted that the Respondent had no claim against the office of the Commissioner and Registrar of Titles for explanation that the suit property was privately surveyed by the Appellant. He submitted that after the Appellant refused to abide to the directives of the office of

Commissioner for Lands, she was advised to complain to court and that the office of the Commissioner for Lands would comply with the decree if the same will be in the Respondent's favour. He cited Victor Robert Mkwavi vs Juma Omary, Civil Application No.34/01/2023, CAT (unreported), for a proposition that the Court has recently held that the party whom the Plaintiff has no claim against should not be joined as the part to the case, where in an application for review, the Court of Appeal found that even though the parties had dispute over the registered land, there was no need of joining the Commissioner for Lands, Registrar of Titles and the Attorney General as the Plaintiff had no claims against them. He submitted that it is undisputed fact that the Tribunal, in its judgment, acknowledged the absence of necessary parties and explicitly noted that such parties should have been joined, citing page fifteen of the impugned judgment. He submitted that a mere acknowledgment of the omission does not, in and of itself, render the trial court's decision invalid or erroneous, especially if the failure to join the parties did not cause any prejudice to the parties. He submitted that the orders granted by the trial Tribunal were specific to the parties that were before it, and the trial court did not issue orders that would directly affect the absent parties. He submitted that in fact, PW5 (the Officer from the office of the Commissioner for Lands) specifically testified that after going through the documents presented by the Respondent and the Appellant and visiting the site, the office of the Commissioner for Lands directed the Appellant to agree to the intended re-survey of exhibits KU-3 and KU-4 and the said directives were not heeded to by the Appellant, consequently the office of the Commissioner for Lands, advised the Respondent to commence legal action against the Appellant. He submitted that it should be noted that the Respondent had no claims against the Commissioner for Lands and the Registrar of Title for explanation that the office of the Commissioner found irregularity on the survey conducted by the Appellant and that the said office was ready to rectify the irregularity done during the survey of exhibit KU-3 and KU-4. 12 He submitted that the circumstances in the case laws cited by the Appellant in support of the ground of nonjoinder of the parties and jurisdiction of the Tribunal are different and distinguishable, for explanation that in the present appeal the Respondent had no claims against the Commissioner for Lands and the Registrar of Titles. On rejoinder, the learned Counsel for Appellant submitted that the Appellant was in undisturbed long occupation and use of the disputed land even before the Respondent herein came to be known. He submitted that the Appellant purchased her parcel of the land in 1990, surveyed the plots from 1991 till 2001 when she got the certificates of title. He submitted that the Respondent purchased her piece of land in 2007. He submitted that the Appellant was in occupation of the disputed land for over eighteen years. He submitted that the argument that the Respondent discovered the survey in 2021 is under any circumstances an under-statement. He submitted that whether or not the Respondent discovered in 2021 the survey that was made way back in 1991 can not change the fact that the Respondent purchased the disputed land while it had been for long surveyed and the Appellant issued with certificates of title that were admitted in evidence and marked as exhibits KU 3 collectively. 13 For grounds number two and three, the learned Counsel queried if there was a mistake made, as to who made that mistake, who authorised the survey and issuance of certificates of title, who registered the said certificates of title, arguing that the two offices were and still are the necessary parties and ought to have been joined in the proceedings. He queried whether the land was privately

surveyed, privately issued certificates of title and privately registered the said certificates of title. He submitted that hiding on the farfetched fact that PW5 testified before the Tribunal does not in anyway exonerate the Respondent that the two offices of the Commissioner for Lands and Registrar of Titles participated in the proceedings. He submitted that PW5 testified privately and at any rate was not a party to the proceedings. He cited Mr. Hassan Ally Warsama (Administrator of the Estate of the Late Ally Warsama) vs Mr. Haibe Ahmed Dudeh (Administrator of the Estate of the Late Ahmed Haji Mohamed), Civil Appeal No 518 Of 2020)

[2024] Tzca 1193 (26 November 2024), for a proposition that there was no wrong committed by the Commissioner for Lands and the Registrar of Titles but the Court of Appeal in both cases found and held that the nonjoinder of the two was an infringement and quashed the proceedings. He submitted that there is no difference in the present matter. 14 On my part, I will start with ground number one. It is true that according to the evidence presented by both parties suggest the Appellant purchased the suit land on 26/06/1990, exhibit KU1; initiated process of survey in 1991 after her request of joining Mjimwema Village in 1991, was formerly approved by the village assembly, as per exhibit KU2; procured drawings or site plan for survey on 22/11/2001, exhibit KU5; erected beacons on the suit land; procured certificate of occupancy registered on 2/05/2002, exhibit KU3 and KU4. Seven years later post grant of right of occupancy, to wit on 23/06/2009 the Appellant engaged professional survey from Temeke Municipal Council, who carried out physical boundary recovery on the suit land, where in the report exhibit KU6 the surveyor reported that all beacons on the suit land (subject for these proceedings) were tempered with and missing, and the surveyor recovered the boundary by replacing/re-planting beacons, and established the extent of encroachment committed by the Respondent. It is to be noted that at the time of conducting boundary recovery in 2009, the Respondent was on the suit land with effect from 20/06/2007 when she purchased it, as per exhibit KM1. For this narration, I am prepared to hold a view that the Respondent suit filed thirteen years later on 19/09/2022, is time barred. Section 5 of the Law of Limitation Act, Cap 89 R.E. 2019, provides, I bold a portion of interest, 15 'Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises' At paragraph 6(f) and (g) of the application filed at the Tribunal, the Respondent's complaint is hinged on the legality of survey conducted by the Appellant, alleging it is null and void, on account that it was done on her land. At paragraph 4(b) and (c) of the written statement of defence filed by the Appellant at the Tribunal, pleaded that the survey complained of was done the way back in 2001 prior even the Respondent had purchased the suit land. Now as hinted above, boundary recovery was done in 2009 post purchase by the Respondent, where the professional surveyor replaced the tempered beacons. In that way, a complaint by the Respondent is long over due and barred by limitation. The learned Counsel for Respondent was bringing in an argument as to when the cause of action was discovered by the Respondent (mentioned it being in 2021), when her application for survey bounced. To my respective view, this argument would be valid else where while seeking appropriate redress to remedy the situation. My undertaking is

grounded on the fact that the law above cited strictly preclude court to entertain the matter sued based on the cause of action which is time barred. Unfortunately, the learned Counsel for Respondent 16 was unable to cite any provision which accommodate the question of knowledge or discovery of cause of action. For ground number two, I will pick from where the learned Chairperson had ruled at page sixteen of the impugned judgment, I quote, 'Niwe mkweli kuwa hoja aliyoitoa wakili msomi Abubakar Salim ni mzito (sic) na yenye mashiko kwa kuzingatia nafuu anazoomba mwombaji ukioanisha na vieieiezo vya utetezi yaani had miiiki KU3 na KU4. Ni wazi mamiaka ziiizotoa nyaraka/hati hizo ni mdaawa muhimu kwenye mgogoro huu na anastahiii (sic) kupewa haki ya kusikiiiizwa. Ha kwa upande wangu ni kama aiivyowasiiiisha wakili msomi Herry Kauki kuwa baraza hili iimeshaamua hoja hiyo tarehe 22/02/2023 na hivyo baraza hili Hmetekeieze wajibu wake (functus officio) baada ya kuona kuwa mwombaji ameeleza hana madaiyeyote na taaisi/ mamiaka hizo' Having ruled as above, the learned Chairperson proceeded to grant reliefs in favour of the Respondent to have proved her claim and declared her as the lawful owner of the suit land, and ruled the Appellant to have encroached the Respondents land by overcrossing the road and extending to the Respondents land, and nullified the survey done by the Appellant and ordered resurvey. 17 As alluded by the learned Counsel for Appellant, such reliefs (specifically re- survey) could not be issued in the absence of the authority which conducted survey and issued exhibit KU3 and KU4. In Nestory Msoffe & 5 Others (supra), the apex Court ruled, 77; the premises, in view of the state of the pleadings and the stated position of the law, it is incumbent on the High Court to be keen enough and require the parties to amend the pleadings and join the Registrar of Titles who is alleged to have registered the respondent's property in question held under Certificate of Title...., the non joinder offer in the suit before the High Court it means that the Registrar was not heard which occasioned a miscarriage of justice which cannot be condoned by the Court in hearing and determining the present appeal. In the result, we have no option but to annul the trial proceedings and the impugned judgment' Therefore, the argument by the learned Counsel for Respondent that the survey complained of was privately done, or else that the relevant authorities had issued a go ahead for either party to sue in their absence for allegedly will be awaiting to comply with the court decree or directives, or that the Respondent has no claim against the necessary parties, is a misplaced idea. Regard being a fact that even the Respondent herself was not focused and certain as to what she is complaining for: whether recovery of her suit land measuring 873 pleaded at paragraph 6(f) of her application, or the entire one and quarter acre 18 purchased vide exhibit KM1, or 3223 square meters alleged fenced as put in her testimony in chief or access road alleged to be a public road towards the beach or enforcement of Mjimwema Residential Layout Plan dated 13/12/2013, exhibit KM7. My undertaking for drawing this long chain of arguments and proposition, is in a bid to showeth that the obiter dictum by the learned Chairperson and argument by the learned Counsel for Appellant, is valid, that joinder of necessary parties to this dispute was something inevitable. Having adumbrated on ground number one and two above, the same suffices to terminate this matter. I will therefore not dwell on discussing on other grounds touching the merit of the docket. With the above

remark, the decision of the Tribunal is quashed and award set aside. Equally an order imposing costs to the Appellant is abrogated. The appeal is allowed. I make no order for costs. 19

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

|                 |                                                                                                                                                                                                                                                                                                                   |
|-----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ORIGINAL SOURCE | <a href="https://media.tanzlii.org/media/judgment/341083/source_file/e08992f3ae1eb1ca/MARRY_MUGISHAGWE_scanned.pdf">https://media.tanzlii.org/media/judgment/341083/source_file/e08992f3ae1eb1ca/MARRY_MUGISHAGWE_scanned.pdf</a>                                                                                 |
| CASE PAGE       | <a href="https://chat.esheria.ai/case-law/tanzania/mary-beatrix-mugishagwe-v-loyce-kagali-petro-LimitationofActions-tanzlii-2025--6a3ea5243b1caa912981a540">https://chat.esheria.ai/case-law/tanzania/mary-beatrix-mugishagwe-v-loyce-kagali-petro-LimitationofActions-tanzlii-2025--6a3ea5243b1caa912981a540</a> |

Prepared on 14 October 2026 · Esheria