**Ali v Salumu**

**Division:** High Court of Tanzania at Dar Es Salaam

**Date of judgment:** 19 February 1973

**Case Number:** 36/1972 (49/74)

**Before:** Mfalila Ag J

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*[1] Land – Boundary – River bank – Change of course – Rights of owners of riparian land.*

*[2] Land – Customary law – Rights of occupation between Wakutu occupying public land – Wakutu customary law to be applied – Land Ordinance* (*Cap.* 113), *s.* 3 (1) (*T*)*.*

**JUDGMENT**

**Mfalila Ag J:** This is an appeal against the decision of the District Court of Morogoro allowing the present respondent’s appeal in a case concerning the moving boundary of the appellant’s shamba which is situated on the banks of the Ruvu river. It appears that for some unexplained reason the Ruvu river changed its course leaving a patch of dry land adjacent to the appellant’s shamba. The Primary Court hearing this case held and found that the dry land so left by the river when changing its course augmented the appellant’s shamba area and that therefore it became part of his shamba and was awarded this piece of dry patch. On appeal the District Court reversed these findings holding that as all land in Tanzania is public land, anybody has a right to any undeveloped and unclaimed land. In so holding the district magistrate equated the patch of dry land so left by the moving river course with a piece of uncleared and unclaimed bush land which can be claimed by whoever is first to clear it. But this view is quite clearly erroneous both in fact and in law. It is erroneous in fact because a river bed which is subject to changes cannot be equated with uncleared bush which is static. If a river changes its course it will necessarily affect the riparian farms, hence the need to have definite rules in any community governing such eventualities. But on the other hand a piece of uncleared bush land by its static nature cannot affect adjoining farms.

It is erroneous in law because although under s. 3 (1) of the Land Ordinance (Cap. 113) all land in Tanganyika is declared public land and is vested in the President in trust for the entire population of Tanganyika, yet in the exercise of any powers under the Ordinance, the President is required by s. 5 of the same Ordinance to have regard to the native laws and customs existing in the district in which such land is situated, so that the right of any member of the public to public land is in every appropriate case, this one being one of them, subject to native laws and customs of the district in which such land is situated.

Therefore since, as I have said, there must be definite native laws and customs regulating the rights of owners of riparian farms, the right of the respondent to enter and cultivate a patch of dry land left by the moving river bed was subject to local rules governing such lands.

It is on this basis that at the close of the hearing of this appeal in August last year I directed specific questions to the original Primary Court regarding the customary laws of the Wakutu tribe regarding riparian lands. The following questions were framed:

(*a*) What is the Wakutu customary law regarding the boundaries of shambas lying on river banks?

(*b*) What is the position in Wakutu customary law when the river changes its course and in so doing leaves a dry patch on one side thereby augmenting the surface area of that shamba?

(*c*) What is the position in Wakutu customary law when a river erodes an area from someone’s property and deposits it on another’s property, can the former follow his land?

(*d*) In the present case was the area left dry by the moving Ruvu river said to have been formed by the soil eroded from the respondent’s land, if any, so that he can be said to have followed his land?

The Primary Court on the receipt of the record took further evidence and forwarded the following answers:

(*a*) That in the Wakutu customary law the effective boundary of riparian farms are the river banks.

(*b*) In Wakutu customary law if a piece of dry patch is left by a moving river it is regarded as part of the farm on which such dry patch is left, which is to say the new dry land is regarded as augmenting the shamba on that side.

(*c*) The soil deposited on somebody else’s farm by the moving river expands the area of that farm and the owner of the previous farm from which the soil is taken cannot follow it.

(*d*) And lastly, that in this particular case the soil forming the new dry patch deposited by the Ruvu River did not come from the respondent’s land.

With these clear answers the result of this appeal is obvious. I think that there is a lot of common sense in these Wakutu regulations governing riparian farms, because if the river is the effective boundary, and if such a river can by changing course i.e. in a flood, take away part of the farm on which the river has flooded, it follows and it is equitable that the same owner should stand to gain should a river in changing course for some other reason leave dry ground on his side, and this should not be regarded, as suggested by the district magistrate, as new unclaimed land to be taken by whoever is first to put his hoe on it. For these reasons and in accordance with Wakutu customary law the piece of dry land which was left by the Ruvu river near the appellant’s land became thereby part of his shamba. The respondent has no claim on it. I would therefore allow this appeal, but since the respondent had bona fide made considerable improvements on this piece of land, I would restore the order for compensation made by the Primary Court in favour of him.

*Order accordingly*.

The parties appeared in person.