

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 393 OF 2019

SIMON GODSON MACHA (*Administrator of the
Estate of the late GODSON MACHA*)**APPELLANT**

VERSUS

MARY KIMAMBO (*Administratrix of the
Estate of the late KESIA ZEBEDAYO TENGA*)..... **RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Tanga)**

(Aboud, J.)

dated the 7th day of October, 2016

in

Land Appeal No. 08 of 2016

JUDGMENT OF THE COURT

24th & 28TH February, 2020.

KEREFU, J.A.:

This is a second appeal. Initially, Kesia Zebedayo Tenga, the respondent unsuccessfully instituted a land suit via Land Application No. 79 of 2011 before the District Land and Housing Tribunal (the DLHT) of Korogwe at Korogwe, against Simon Godson Macha (Administrator of the estate of the late Godson Macha) for trespass into her land (the suit land) located at Kerenge Vibaoni, (Kwamchaga) Korogwe Tanga seeking a declaration that she is the lawful owner of the suit land. It is noteworthy

that, in 2011 prior to the conclusion of the trial, Kesia Zebedayo Tenga passed away and Mary Kimambo was appointed an Administratrix of her estate.

The essential facts of the dispute as obtained from the record of appeal indicate that, originally the suit land, an unsurveyed farm belonged to the late Juma Msabaha, who was said to be the uncle of the late Kesia Zebedayo Tenga. It was alleged that, Kesia started to live with his uncle on the suit land from 1970s, taking care of him as he was sick until he died in 1979. That, prior to his death, the late Juma Msabaha surrendered the suit land to Kesia Zebedayo Tenga who took physical occupation, utilized it and took charge of the deceased's widow until she also died in 1982. Thus, Kesia Zebedayo Tenga claimed that the suit land belongs to her, as it was given to her by his uncle the late Juma Msabaha out of natural love and affection and she has been in physical occupation of it for about forty (40) years, uninterrupted.

On his side, Simon Godson Macha, the appellant, alleged that the suit land belongs to his late father who inherited it in 1979 from his uncle the late Juma Msabaha. That, upon the death of his father Godson Macha in 2011 the appellant was appointed an administrator of his estate and he

started to claim the suit land that it forms part of his late father's estate. Thus, in 2011 he trespassed into the suit land, hence the suit instituted by the late Kesia Zebedayo Tenga before the DLHT, as indicated above.

After consideration of evidence adduced before it, the DLHT decided the suit in the favour of the appellant. Dissatisfied, the respondent successfully preferred an appeal before the High Court (Aboud, J). Aggrieved, the appellant decided to lodge this appeal. In the Memorandum of Appeal, the appellant raised the following seven grounds:-

- 1. The High Court erred in law in holding that the right of beneficiary over the estate of the deceased are extinguished by failure to file an application for administration of the estate;*
- 2. The High Court erred in law by failure to hold that the claim of ownership of land by adverse possession cannot be instituted and adjudicated by the District Land and Housing Tribunal;*
- 3. The High Court erred in law by holding that the time limit for application of letters of administration is twelve years starting to run from the date of death of the deceased;*
- 4. The High Court erred in law by having the view that it is mandatory to institute probate application in case of a sole heir;*
- 5. The High Court erred in law by holding the view that a licensee can claim ownership under adverse possession;*

6. *The High Court erred in law in holding that hearing by a disqualified chairperson does not vitiate the proceedings; and*
7. *The High Court and the trial Tribunal erred in law by adjudicating on probate matter contrary to the law.*

When the appeal was placed before us for hearing, both parties were represented. The appellant was represented by Mr. Patrick Paul, learned counsel, while the respondent was represented by Mr. Philemon Raulencio, also learned counsel. The said learned counsel had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal as required by Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended by GN No. 344 of 2019 (the Rules).

Mr. Paul commenced his submission by fully adopting the contents of his written submissions lodged on 11th December, 2019 to form part of his oral submissions. He then prayed to be allowed to argue ground six separately, the first and fourth grounds jointly and the second, third, fifth and seventh grounds jointly. However, for reasons which will be apparent herein, we do not intend to consider the submissions made by the counsel

on the grounds of appeal, but we will only need to consider the submissions he made on the six ground of the appeal.

On the sixth ground of appeal, Mr. Paul faulted the High Court Judge for failure to find that it was improper for the chairperson of the DLHT to disqualify himself from the hearing of the case *suo motu* without according right to the parties to address the Tribunal on that matter and then unprocedurally proceeded with the hearing of the case. He contended that, a disqualified person or authority cannot make a legally binding decision as has no jurisdiction to proceed with the matter. He argued further that it was improper for the High Court Judge to bless such an act and find that the proceedings of the DLHT were not vitiated, while had already found *suo motu* that the trial started with a different chairperson and ended with another chairperson without there being reasons in writing for such a change. To buttress his position he cited the case of **National Microfinance Bank v. Augustine Wesaka Gidimara T/A Builders Paints & General Enterprises**, Civil Appeal No. 74 of 2016 (unreported) and he thus invited us to nullify the entire proceedings and decisions of both, the DLHT and the High Court and order for the suit to start afresh before a different chairperson.

In reply, Mr. Raulencio resisted the appeal. He also adopted the contents of his written submissions lodged on 12th February, 2020 to form part of his oral submissions. Adverting to the appellant's grounds of appeal Mr. Raulencio submitted that all seven grounds of appeal which are now being raised in this second appeal were not subjected to the proceedings and subsequent decision of the first appellate court. He submitted that the position of this Court with regard to the appellant bringing up new matters which were neither canvassed nor deliberated on in the first appellate court and the decision made thereon, is reflected in so many decisions. He clarified that, before the DLHT and even the first appellate court the central issue of controversy was the ownership of the suit land, but not probate and administration of the estate of the deceased or even adverse possession. He referred us to pages 91 and 92 of the record of appeal and argued that issues of probate and administration together with adverse possession were not part of the grounds submitted before the first appellate court. Mr. Raulencio also referred us to page 112 – 116 of the record of appeal and argued that the first appellate court was satisfied that the lawful owner of the suit land was the late Kesia Zebedayo Tenga who was given the suit land by her uncle the late Juma Msabaha during his

lifetime after she stayed and took good care of him and his wife for about forty years. He argued further that the first appellate court based its judgement on the testimonies of PW1, PW2, PW3, PW4 and PW5 together with the testimonies of the appellant's himself (DW1) and his witnesses DW2, DW3 and DW4. He thus urged us to reject the appellant's grounds of appeal because they were neither raised, nor decided upon by the two courts below.

Despite his prayer, Mr. Raulencio referred us to page 38 of the record of appeal and argued that, the issue of recusal or disqualification of the chairperson was not raised by the parties during the trial, but it was only a remark made by the chairperson himself. It was his strong argument that since neither of the parties raised it as an issue during the trial or even at an appeal, it is obvious that they were not prejudiced. He said what is currently being done by Mr. Paul before this Court is only an afterthought. To support his position he cited cases of **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) and **Melita Naikiminjal and Another v. Sailevo Loibanguti** [1998] TLR 120. He finally prayed for the entire appeal to be dismissed with costs.

In a brief rejoinder, Mr. Paul reiterated what he submitted in chief and referred us to pages 91, 92, 110 and 112 of the record of appeal and submitted that both parties claimed to have acquired the suit land through inheritance and that is why he based the grounds of appeal on those matters. Upon being probed by the Court as whether the DLHT has jurisdiction to determine probate or issues of administration of estate of the deceased, Mr. Paul conceded that, the DLHT has no such jurisdiction. He however invited us to consider grounds of appeal and allow the appeal with costs.

On our part, having carefully considered the rival arguments advanced by the counsel for the parties and examined the record of appeal before us, the main issue to be considered is whether the appeal by the appellant is founded.

At the very outset, we would like to agree with Mr. Raulencio that apparently, all seven grounds of appeal raised by the appellant herein are on new issues which were neither raised nor discussed in the first appellate court. There is a long chain of authorities which have taken the stance that matters not canvassed by the lower courts cannot be raised in this Court. See for instance cases of **Juma Manjano v. Republic**, Criminal Appeal

No. 211 of 2009, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 and **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 (all unreported). In **Juma Manjano** (supra) the Court held that:-

*"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of **Abdul Athumani v. R.** [2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore struck out."*

*“The Court has repeatedly held that **matters not raised at the first appellate court cannot be raised in a second appellate court.**” [Emphasis added].*

In this regard, and on the basis of the above cited authorities, we do not find difficulty in agreeing with Mr. Raulencio and we decline to deal with those grounds of appeal as the Court would not have jurisdiction to entertain them in terms of section 5 (1) of the Appellate Jurisdiction Act, Cap. I41 R.E 2002 empowering us to hear appeals from the High Court.

Adverting to the sixth ground of appeal we wish to state that we have decided to briefly articulate on this matter because, though it was not raised as an issue before the High Court it touches on the procedure and was as well observed by the High Court Judge as an anomaly which, she said, did not prejudice the parties.

It is also on record that, while submitting on this ground Mr. Paul urged the Court to nullify the entire proceedings and decisions of the two courts below and order for the matter to start afresh. With due respect, we are unable to agree with Mr. Paul on this matter on the following reasons,

One, the issue of recusal of the chairperson was not raised by the parties to the case, it was only a remark made by the chairperson himself. Even when he resumed the hearing after making that remark, both parties agreed to proceed with the trial without any objection, **Two**, Despite the fact that Mr. Paul was the one who represented the appellant before the DLHT and the first appellate court has not raised the said issue at both levels. **Three**, in his submission before us, apart from asking the Court to nullify the entire proceedings and decision of the two courts below due to that anomaly, Mr. Paul has completely failed to state on how the appellant was prejudiced. In the case of **Melita Naikiminjal and Another** (supra) referred to us by Mr. Raulencio, this Court when faced with an akin situation stated at page 125 that:-

*"Obviously, the appellants cannot be heard to complain against the first appellate judge, as that judge was not bound to decide the appeal on issues or matters not raised by the appellants. After all, **both appellants were represented by experienced counsel** and the judge was entitled to assume that **any apparent error which has***

been omitted by the counsel has been omitted for good reason."

The Court emphasized that:-

"...It must be remembered that the same counsel represented the appellants at the trial. He also submitted a lengthy written submission in the first appeal. Counsel for the appellants had therefore every opportunity to raise the issue concerning the judgement of the trial court not being delivered, but in fact it was not. Bearing in mind the experience and ability of counsel for the appellants, we think it would be most unfair to the respondent to decide this case on this issue, when it was not raised in the first appeal." [Emphasis added].

Similarly, in the case at hand, since Mr. Paul represented the appellant before the DLHT and also at the first appellate court and he never complained on that issue, it would be unfair to the respondent, if we agree with him and nullify the entire proceedings and decisions of the two

courts below. In the circumstances, we are in agreement with the submissions made by Mr. Raulencio, that what is being done by Mr. Paul at this stage is only an afterthought.

In view of the aforesaid, we find the entire appeal to be devoid of merit and it is hereby dismissed with costs.

DATED at **TANGA** this 27th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2020 in the presence of Mr. Simon Godson Macha, appellant in person and Hassan Kilule, learned counsel holding brief for Philemon Raulencio, learned counsel for the Respondent is hereby certified as a true copy of the original.




H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL