

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUGASHA, J.A., GALEBA, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 384 OF 2019

HADIJA ALLY APPELLANT

VERSUS

GEORGE MASUNGA MSINGI RESPONDENT

**[Appeal from the Decision of the High Court of Tanzania, Dar es Salaam
District Registry at Dar es Salaam]**

(Mwandambo, J.)

dated the 24th day of August, 2017

in

Land Appeal No. 15 of 2016

JUDGMENT OF THE COURT

3rd & 22nd May, 2023

GALEBA, J.A.:

The subject matter in this appeal, is a house erected on a parcel of land known as Plot No. 20 Block 'P' Konga Street in Morogoro Municipality, (the disputed property). Its original owner was Mwajabu Bao (the deceased), who passed away in 1965, leaving behind seven children surviving her. It is on record, that in 2007, six of those children had also passed away, and the only surviving child, Kibibi Hamis, was appointed administratrix of her estate. In exercise of her mandate as such, on 14th April, 2007, she sold the disputed property to George Masunga Msingi, the

present respondent at a consideration of TZS. 7,000,000. Subsequent to the sale, and having perfected all registration formalities with the land authorities, on 10th January, 2014, the respondent was granted Certificate of Title No. 130823 over the disputed property, thereby further enhancing his title to the property.

However, as all that was happening, Hadija Ally, the appellant in this appeal, was residing in the disputed property, occupying one of its rooms. The justification of the appellant's occupancy of the room, according to her, was that she was entitled to inheritance of a share in the house because her mother was one of the seven children of Mwajabu Bao, the original owner of the disputed house.

As attempts by the respondent to achieve vacant possession of the house peacefully from the appellant proved ineffectual, the respondent filed Land Application No. 138 of 2014, in the District Land and Housing Tribunal at Morogoro (the DLHT). He was praying for several reliefs, but of relevance to this judgment, is that he was praying to be declared a lawful owner of the disputed property, and that the appellant be declared a trespasser. In response, the appellant filed a written statement of defence disputing the respondent's claim, but also raising a counter claim, praying,

inter alia; **first**, that the Certificate of Title issued to the respondent be revoked, and; **second**, that together with other heirs, the appellant be permitted to redeem the house by repaying TZS. 7,000,000 to the respondent. After a full hearing, the DLHT dismissed the application in its entirety.

That decision aggrieved the respondent who lodged Land Appeal No. 15 of 2016 to the High Court. In that appeal, he raised five grounds of appeal, two of them being; **first**, that the DLHT erred in law for failing to determine a major issue in the application, of who between the parties was the lawful owner of the disputed property, and; **second**, the DLHT did not resolve any of the issues it had framed. The other three grounds were dismissed but the above two succeeded. The respondent's appeal was thus allowed and the decision of the DLHT was accordingly, set aside. It is this decision of the High Court that is challenged by the appellant before us.

When the appeal was called on for hearing, the appellant was represented by Mr. Mluge Karoli Fabian, learned advocate and the respondent had the services of Mr. Evold Mushi, also learned advocate. Initially, the appeal was based on four grounds, but prior to commencement of hearing, Mr. Fabian abandoned grounds one, two and

three, thus retaining only the fourth ground of appeal which was a complaint that:

"The High Court Judge erred in law in disregarding the right of redemption to the appellant indicated in the counter claim."

In arguing this ground of appeal, Mr. Fabian submitted that the administratrix of the deceased's estate sold the disputed property without consulting the beneficiaries of the estate, the appellant being one of them. That omission, he contended, tainted sale of the property such that the appellant was entitled to redeem the house by repaying to the respondent the purchase price which the latter had paid to Kibibi Hamis. In so arguing, he cited to us, this Court's decisions in **Joseph Shumbusho v. Mary Grace Tigerwa and Two Others**, Civil Appeal No. 183 of 2016; and **Abbas Ally Athuman Bantulaki and Another v. Kelvin Victor Mahity (Administrator of the estate of the Late Peter Walcher)**, Civil Appeal No. 385 of 2019, (both unreported). Mr. Fabian was however candid; he honestly admitted that there is no statutory provision which compelled the administratrix to consult beneficiaries before she could exercise her mandate.

In reply, Mr. Mushi strongly objected to the submissions by his learned colleague. He argued that this appeal is not maintainable at law, as this Court has no jurisdiction to determine it. In supporting his point, counsel contended that at the High Court, the issue of exercising the appellant's right of redemption was not raised as a ground of appeal and the same was neither addressed nor determined by the court. Mr. Mushi's reasoning was that, as the issue was raised in the counter claim and the DLHT having refused to grant the prayer, had the appellant been aggrieved by that refusal, she ought to have lodged an appeal on that point before the High Court first. In other words, Mr. Mushi's argument was that the ground concerning the appellant's right of redemption is being raised for the first time in this appeal, and therefore, an afterthought. Accordingly, learned counsel implored us to hold that this Court has no jurisdiction to entertain that ground of appeal, and urged us to dismiss it with costs.

Next, arguing in alternative to the above submission, Mr. Mushi maintained the position that, if the alleged right of redemption of the appellant is pegged on the fact that no beneficiary of the estate was consulted before the administratrix sold the disputed property, no statute or case law that makes such a mandatory requirement. To buttress his position, Mr. Mushi relied on our decision in the case of **Dativa Nanga v.**

Jibu Group Company Limited and Another, Civil Appeal No. 324 of 2020 (unreported). He submitted that the cases of **Joseph Shumbusho** (supra) and **Abbas Ally Athuman Bantulaki** (supra) are distinguishable, for they have nothing to support Mr. Fabian's position. Thus, learned counsel beseeched us to dismiss the appeal with costs.

On our part, we have duly considered the positions of counsel for the parties as well as their rival contentions, and we propose to start with the issue whether, this Court has jurisdiction to entertain the ground of appeal raised, in the context of Mr. Mushi's argument that the issue of equitable right of redemption was not formally a complaint before the High Court. To do that, our starting point will be a brief discussion of this Court's jurisdiction, in terms of the Constitution of the United Republic of Tanzania 1977 (the Constitution), as well as the Appellate Jurisdiction Act (the AJA). Article 117 (3) of the Constitution provides that:

*"(3) The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from **the judgment or other decision of the High Court or of a magistrate with extended jurisdiction.**"*

[Emphasis added]

In the same breath, section 4 (1) of the AJA, mirrors and reflects the above constitutional provision. It provides:

*"4 (1) The Court of Appeal shall have jurisdiction to hear and determine **appeals from the High Court and from subordinate courts with extended jurisdiction.**"*

[Emphasis added]

The import of the above two complementary provisions, is that a matter or an issue of fact not formally raised before the High Court, cannot be raised before this Court as a ground of appeal. The major reasons for this principle, are mainly two; **firstly**, if this Court deals with a matter not raised before the High Court and determined there first, the Court would not be able to fault the High Court on such a matter, which is the sole purpose of any appeal to this Court. **Secondly**, this Court would be executing a function of the High Court, thus exercising the mandate not conferred to it within the scheme of the above provisions of the Constitution and of the AJA. This Court has pronounced its position on this aspect repeatedly, and on countless occasions. Such decisions include; **Hassan Bundala @ Swaga v. R**, Criminal Appeal No. 416 of 2013; **Yusuph Masalu @ Jiduvi v. R**, Criminal appeal No. 163 of 2017 and **Nasib Ramadhani v. R**, Criminal Appeal No. 168 of 2018 (all

unreported). We are fully alert of the fact that the decisions above arise from criminal proceedings, but that notwithstanding, the principle is the same, that is, unless and until a factual complaint is first made to the High Court and determined there first, this Court has no jurisdiction to entertain the substance of that complaint.

With the above concept in mind, we will now turn to expound whether indeed, the complaint of the appellant was legally presented to the High Court for determination, before the same was to be presented to us in the form of the above quoted ground of appeal. To that end, we will start with the law.

The law applicable in appeals challenging decisions of the DLHT, as was the case between the parties, is mainly the Land Disputes Courts Act, (the LDCA). In terms of that law, whereas section 38 (1) of the LDCA provides for the High Court to be the only forum to which an appeal from the DLHT is to be presented for determination, section 38 (2) of the same Act, provides for the manner in which a party aggrieved by the decision of the DLHT may present his appeal to the High Court. Those provisions are to the effect that:

"38 (1) Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in

*the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, **appeal to the High Court....***

*(2) **Every appeal to the High Court shall be by way of petition** and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought."*

[Emphasis Added]

In the case before us, although the appellant's prayer for redemption of the disputed property was not granted by the DLHT, she did not appeal to the High Court to challenge that refusal. On this aspect, Mr. Fabian submitted that, as the appeal was argued by way of written submissions, he raised the issue when replying to the respondent's written submissions, but the learned High Court Judge, did not consider it. Indeed Mr. Fabian is right, at the very foot of the written submissions opposing the appeal, at page 30 of the record of appeal, this is what learned counsel stated when concluding his written submissions before the High Court;

*"My Lord, it is our humble submission and prayer that all grounds of appeal filed by the appellant hold no water. And the respondent prays further for an order that the Applicant's Title over the suit property be revoked. **And if the court finds that***

there is any justifiable right to the appellant in respect of the suit land, then the respondent is ready to redeem the property by paying the small money paid by the appellant to the late Kibibi Hamis."

[Emphasis added]

So, according to Mr. Fabian, that submission was a proper complaint (ground of appeal) challenging the order of the DLHT capable of being determined by the High Court. Nonetheless, with respect to the learned counsel, we do not at all agree with him, and here are our reasons. **One**, we are not aware of, and Mr. Fabian did not cite to us, any law by which a respondent may challenge a decision of a trial court or tribunal, when replying to the grounds of appeal of the opposite party who challenged the decision of the court or tribunal. **Two**, in the High Court, before the appeal was to be set for hearing, the appellant did not have on record, any ground of appeal, either by way of appeal or cross appeal. **Three**, whereas parties were ordered to argue the appeal by way of written submissions on 11th May, 2017, the complaint of the appellant was raised by way of her written submissions which were filed on 5th June, 2017. In other words, the order of 11th May, 2017 to argue the appeal, cannot be extended to include arguing complaints which would come later on 5th June, 2017 by way of

written submissions. In our view, the order to argue the appeal by way of written submissions, related only to the grounds of appeal that were on record as at the date of the order, that is 11th May, 2017. In a nutshell, written submissions cannot be used as a forum for raising new complaints.

In view of the above, it cannot lawfully be held that there was presented any proper complaint or ground of appeal of the appellant before the High Court challenging the decision of the DLHT on the issue of the appellant's right of redemption. In the circumstances, we agree with Mr. Mushi, that the issue of the equitable right of redemption was not a ground of appeal properly presented before the court in terms of section 38 (2) of the LDCA. It means therefore that; the issue has come direct from DLHT to this Court without first being properly placed before the High Court for consideration and determination. Briefly, this Court has no jurisdiction to entertain the only ground of appeal raised.

As to the way forward, this Court, when faced with an akin situation in **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2018 (unreported), held as follows:

*"... we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, **we cannot look at them.** In*

*other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence, **we refrain ourselves from considering them.***

Thus, following the above authority, we hereby disregard the sole ground of appeal in this matter and refrain ourselves from entertaining it. In light of that, the decision of the High Court remains undisturbed, and this appeal is hereby struck out with costs.

DATED at DAR ES SALAAM, this 19th day of May, 2023


S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

Judgment delivered on this 22nd day of May, 2023 in the presence of Mr. Mluge Karoli Fabian, the counsel for the Appellant and Mr. Mluge Kalori Fabian, Holding Brief for Mr. Evod Mushi, counsel for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL