

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT IRINGA

MISCELLANEOUS LAND CASE APPEAL NO. 1 OF 2014

(From the Decision of the District Land and Housing
Tribunal of Njombe District at Njombe in Land Case
Appeal No. 27 of 2013 and Original Ward Tribunal
of Mang'oto Ward in Application No. 42 of 2011)

ESTER MSIGWA APPELLANT

VERSUS

MELINA SANGA RESPONDENT

06/11/2014 & 03/03/2015

JUDGMENT

P. F. KIHWELO, J.

This appeal is against the decision of the District Land and Housing Tribunal at Njombe (District Land and Housing Tribunal) which upheld the decision of the Mang'oto Ward Tribunal delivered on 30th September, 2011 and in which the present Respondent successfully won the land dispute against the Appellant.

Aggrieved by the said decision the present Appellant preferred this appeal with five grounds which in their summary read. One the District Land and Housing Tribunal erred in law and facts for failing to consider the issue of adverse possession. Two the District Land and Housing Tribunal erred in law and fact when it relied on the evidence adduced by the respondent. Three the District Land and Housing Tribunal improperly allowed the respondent's daughter to represent the respondent. Four it was improper for the District Land and Housing Tribunal to consider that the disputed land was nearby the appellant's land and Five the District Land and Housing Tribunal erred in law and fact for failure to consider that it was not a court of technicalities but rather to facilitate the administration of justice.

When this matter came for mention on 6th November, 2014 the court directed that the appeal should proceed by way of Written Submission something which was complied with by both the appellant and respondent.

The appellant argued in her Written Submission in support of the appeal that her entire clan and herself have been using the suit land with the same boundaries for quiet long and this fact was clearly testified during the trial hence it was not proper for the

District Land and Housing Tribunal to hold that the issue of adverse possession was new.

The appellant further submitted that the District Land and Housing Tribunal was not right when it failed to consider that in the evidence given by the respondent there were some contradictions which could prove the case to the contrary. The appellant forcefully argued that there was no any respondent's witness who testified about the real owner of the land in dispute and if both the Ward Tribunal and the District Land and Housing Tribunal could have carefully gone through the respondent's evidence they would have come to a different conclusion.

The Appellant went further to fault the District Land and Housing Tribunal for allowing **Violet Msigwa** to take part in the proceedings on behalf of her mother. The appellant went on to state that it was necessary for **Violet Msigwa** to enter appearance on behalf of her mother through Power of Attorney. Finally the appellant faulted the District Land and Housing Tribunal for dismissing the appeal on the grounds that the appellant's appeal raised some new issues.

On his part the respondent contended in reply that the law is very settled and clear that matters not pleaded or taken at the trial

can not be raised on appeal. She cited Order XXXIX Rule 27(1) of the Civil Procedure Code Act Cap 33 RE 2002 and stated that raising the issue of adverse possession at the appellate stage was a misnomer and invited the court to refer to the case of **Hotel Travertine Limited and 2 Others Vs National Bank of Commerce Limited** (2006) TLR 133, where the court had the following to say;

“Acceptance by conduct is matter that could not be raised on appeal as it was not pleaded or argued in the High Court.”

The respondent went further to submit that there was no contradiction on evidence in any circumstances and that the tribunal dully considered the evidence tendered before it by both parties to the dispute prior to reaching at its verdict. She went on to argue that the testimony given by one **Charles Msigwa** was misconceived by the appellant because it did not touch on ownership and was never meant to entail ownership of the suit property but rather it merely referred to use of the said suit property. In any case use of the said suit property does not confer title over ownership.

Arguing on the point of appearance and representation, the respondent submitted that the District Land and Housing Tribunal

Was right in allowing **Violet Msigwa** to appear and represent her mother as there was a letter seeking for leave and the same was granted by the District Land and Housing Tribunal and that is as per the dictates of the law. She referred to Section 30 of the Land Disputes Courts Act, Chapter 216 RE 2002 as well as Order III Rule 2(a) of the Civil Procedure Code Act Chapter 33 RE 2002.

Further the respondent pointed out that the assertion that the dismissal of the appeal was wrong in law as it was based on technicalities of law was baseless and unfounded. The respondent submitted that the Honourable Chairman touched the merit of the appeal and that the decision of the District Land and Housing Tribunal did not solely base on technicalities. The respondent finally submitted that all the grounds of appeal filed by the appellant are baseless and lack merit hence prayed that the same should be dismissed with costs.

Having carefully considered the grounds of appeal and the submissions made by both parties the central issue for determination is whether the current appeal is meritorious.

A cursory perusal to the records of the District Land and Housing Tribunal as well as the Ward Tribunal speak loud and clear that the appellant filed a case against the respondent on the

ground that the respondent had trespassed the appellant's suit premise by unlawfully cutting down some trees the property of the appellant.

On the strength of the evidence adduced by both the appellant and the respondent the Ward Tribunal found out that the appellant had failed to prove her case. Consequently the appellant appealed to the District Land and Housing Tribunal which also upheld the decision of the Ward Tribunal on the grounds that the appellant's grounds of appeal were based on new issues which were never raised at the Ward Tribunal as a result the appeal was once again dismissed hence this present appeal.

Admittedly, the appellant raised new issues at the District Land and Housing Tribunal which were neither pleaded nor argued at the Ward Tribunal. This is an anomaly as stated in the cited case of **Hotel Travertine Limited and two others Vs National Bank of Commerce Limited (supra)**.

I am also inclined to agree with the respondent that there is no where in her evidence which indicates contradiction and that the issue of the respondent being represented by her daughter is devoid of merit since the provision of Section 30 of the Land Disputes Courts Act, Cap 216 RE 2002 is very clear as it reads;

“Proceeding of the District Land and Housing Tribunal shall be held in public and a party to the proceedings may appear in person or by an advocate or any relative or any member of the household or authorized officer of a body corporate.”

The respondent on 8th July, 2013 wrote a letter to the chairperson of the District Land and Housing Tribunal seeking permission to be represented by her daughter **Violet Msigwa** therefore the appellant's assertion are groundless and devoid of merit.

In relation to the issue of technicalities as alleged by the appellant, I am of the considered opinion that the appellant is seriously misguided and misconceived by failing to distinguish between technicalities and legal requirements. The District Land and Housing Tribunal at no point in time did it evolve any legal technicality in the disposition of the appeal before it.

This is a second appeal. The appeal is therefore on a point of law. This court can only fault the concurrent findings of facts by the two tribunals below where there is a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law. This is the long established principle of law as clearly stated in

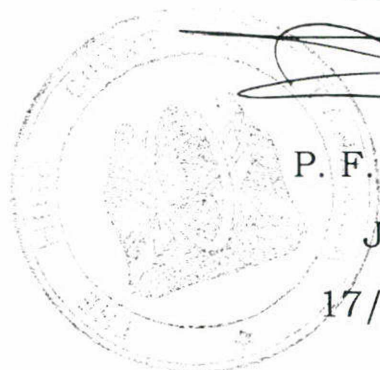
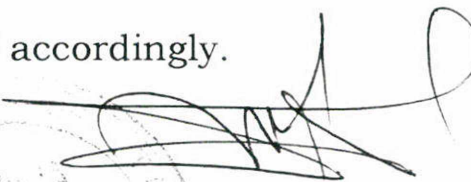
Musa Mwaikunda Vs Republic [2006] TLR 387 where the court had the following to say;

“In the second appeal the court rarely interferes with concurrent findings of fact by the courts below. Only where there are misdirection’s or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact.”

After carefully reviewing the evidence on record, the Memorandum of Appeal and the Written Submissions filed by the appellant and the respondent I am of the strong opinion that in the present appeal there were neither misdirection nor misapprehension of evidence to warrant this court interfere with the concurrent findings of the two tribunals below.

In the final result the appeal is dismissed with costs.

It is so ordered accordingly.



P. F. KIHWELO
JUDGE
17/03/2015