

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

(APPELLATE JURISDICTION)

LAND APPEAL NO. 3 OF 2016

(Arising from Land Appeal No. 24 of 2015 of Maswa District Land &
Housing Tribunal (M.T. Ilanga, Chairman); Original Land Application No. 44 of 2015 of Lamadi Ward
Tribunal)

GEORGE O. BUTURI.....APPELLANT

VERSUS

ZAWADI MAIGA.....RESPONDENT

Date of Last Order: 16.10.2018
Date of Ruling: 14.12.2018

JUDGMENT

V.L. MAKANI, J

The appellant in this case is GEORGE O. BUTURI. He is appealing against the decision of Maswa District Land and Housing Tribunal in Land Application No. 03 of 2016 (M.T. Ilanga, Chairman). The case originated from Lamadi Ward Tribunal in Land Application No. 44 of 2015.

The dispute between the parties is on boundaries. The parties are living adjacent to one another at Lukungu village Iseni "B" Ward. The appellant said his plot of land measured 30 paces running from West to the East and 28 paces from the North to the South (**suit land**) The appellant said the respondent had extended the boundary into his plot by two paces. On the other hand, the respondent stated that her land measured at 28 and 24 paces. The Ward Tribunal found that

the evidence by the appellant was strong and the appellant was declared the owner of the suit land including six mango trees that were in the said suit land. The appellant had two witnesses and an exhibit which was Sale Agreement of the suit land between him and the sellers Mzee Kayuga and Iddi Kayuga. The respondent had one witness Shadrack Okungu/Obonyo and there was no exhibit.

The respondent was dissatisfied with the decision of the Ward Tribunal and filed her appeal to the District Land and Housing Tribunal Maswa where the Chairman reversed the decision of the Ward Tribunal on the basis that the Ward Tribunal failed to consider the Sale Agreement of the respondent (then appellant).

The appellant was dissatisfied with the decision of the District Tribunal hence this appeal with two grounds of appeal as follows:

- 1. That the trial chairperson erred in both law and facts for failing to evaluate evidence correctly thereby arriving to a wrong finding.*
- 2. That the trial chairperson erred in law by contravening the provision of section 24 of the Land Disputes Courts Act, 2002 [Act No. 2 of 2002]*

At the hearing of the appeal the parties appeared in person. The appellant submitted that at the Ward Tribunal the Respondent did not have any exhibit. She said the seller had the exhibit but when the seller came to court to testify he said he never showed the suit land and its boundaries to the respondent because he was sick. He said at the District Tribunal he was surprised that the respondent had an exhibit while at the Ward Tribunal she had nothing. He said before

the delivery of the judgment of the District Tribunal the respondent cut down his fence and the damage was even seen by the local Chairman, he said he did not know how the respondent came to know about the contents of the judgment of the District Tribunal before the delivery of the judgment. He said he bought the suit land in 2003 and planted trees. He adopted the grounds of appeal and prayed the court to allow his appeal and restore the decision of the Ward Tribunal.

The respondent said the appellant moved the boundaries by claiming 7 paces of her plot. She said the mango trees belonged to her and the boundaries are known and she said the appellant moved the boundaries when she was not present and he did so with his tenants. He said he gave the exhibit to the Ward Tribunal but they refused it and so she left it at the Ward Tribunal. She prayed that the appeal be dismissed, as the decision of the District Tribunal was proper.

In rejoinder the appellant said he did not move the boundaries because she found him in his plot in 2003 and he had already planted the fence and mango trees. He said he did not ask for compensation but what he was asking the court is that the respondent be told not to cut his trees. He said the Ward Tribunal gave time to the respondent to bring her exhibit but she could not do so. He was surprised how the exhibit was brought to the District Tribunal. He said the respondent at the Ward Tribunal claimed he had moved the boundaries by two paces but at the District Tribunal she said seven paces. He said he has not moved any boundaries or taken any piece

of land from the respondent. He reiterated his prayers in the main submission.

I have heard the parties herein and I have gone through the record of the Ward and District Tribunals and also the judgments thereof. The main issue is whether the appeal herein has merit.

The judgment by the District Tribunal relied on an exhibit by the respondent namely the Sale Agreement between the respondent and one Shadrack Okungu. This exhibit was not tendered at the Ward Tribunal and the record is silent on whether or not this exhibit was admitted as an additional exhibit by the District Tribunal.

The Land Disputes Court Act CAP 216 RE 2002 does not have a provision for additional exhibits on appeal and in such instances the Civil Procedure Act CAP 33 RE 2002 (**CPC**) comes into play. The modality of receiving additional evidence in civil appeals under the CPC is regulated by Order XXXIX rules 27, 28 and 29 of the CPC as follows:

Rule 27(1) states:

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court but if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted/ or

(b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce

judgment, or for any other substantial cause the Court may allow such evidence or document to be produced, or the witness to be examined"

Under Rule 27(2), wherever the Court allows evidence or document to be produced, the Court shall record the reason for its admission.

Rule 28 states:

"Wherever additional evidence is allowed to be produced, the Court may either take such evidence or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it, when taken to the court".

Rule 29 says:

"Where additional evidence is directed or allowed to be taken, the Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified".

Conditions to be fulfilled to justify receiving additional evidence on appeal were stated in the case of **Ismail Rashid vs. Mariam Msati, Civil Appeal No. 75 of 2015 (CAT-Dar es Salaam)**(unreported) where the court quoted with approval **Sarkar Law of Evidence 16th Edition 2007** at page 2512 where grounds upon which additional evidence may be given and the related restrictions were discussed as follows:

"The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is required for a proper decision of a case. The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent; and not where discovery is made outside the court of the fresh

evidence and the application is made to import it. The rule is not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal."

In the present case, the Chairman had no justification to look into and act upon additional evidence at the hearing of the first appeal because, firstly, the Sale Agreement between the respondent and one Shadrack Okungu was not produced in evidence during trial and rejected so as to necessitate its re-admission on appeal under Order XXXIX rule 27(1) of the CPC. Secondly, it was not established during trial that the documentary evidence could not have been obtained with reasonable diligence for use at the trial. In fact, the respondent at the Ward Tribunal said she did not have the Sale Agreement and her witness who was the seller one Shadrack Okungu also said he did not have the Agreement or it was lost. There was no record that the Chairman had admitted an additional exhibit or an exhibit at all. It is apparent that the respondent who was not successful during the trial utilized the opportunity on appeal to patch up weak parts and fill in the gaps of her case, which is impermissible. Definitely the appellant was condemned without a hearing for not being availed opportunity to cross examine the respondent on the Sale Agreement it being new evidence which was presented at the hearing of the appeal. This evidence before the District Tribunal was therefore not proper evidence. The reliance by the District Tribunal of the improper evidence to determine the right of the respondent against the appellant was irregular; and it affected the merits of the case and the jurisdiction of the District Tribunal considering that it determined the

rights of the parties on the basis of evidence, which was not admitted at the trial. In the case of **Ismail Rashid** (supra) the court stated:

"We wish to reiterate what we stated in SHEMSA KHALIFA AND TWO OTHERS vs. SULEMAN HAMED, CIVIL APPEAL NO. 82 of 2012 that, it is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. As the decision of the High Court is grounded on improper evidence, such a decision is a nullity".

In a similar vein the decision of the District Tribunal is a nullity for relying on documentary evidence that was not adduced in the Ward Tribunal.

In the normal course the probable remedy for the irregularity observed would be rehearing of the appeal. However, as earlier said, having gone through the record of Ward Tribunal the respondent failed to substantiate that the appellant moved the boundary by two paces. Even her witness admitted that he did not show her the boundaries during the time of the sale, as he was sick. And the fact that it was the appellant who was within the area before the respondent purchased her plot, means he was the one who knew the boundaries. Further, Jacob Nyandiga, the appellant's witness explained to the Ward Tribunal that he witnessed the sale between the appellant and Kayuga and his son Iddi and the boundaries of the appellant's plot were measured at 28 x 30 paces and at the time of the sale there were six mango trees. It is clear that the appellant did not move the boundaries and in essence if the District Tribunal had directed and properly evaluated the evidence it would have arrived at

a different decision. Subsequently, this is not a fit case for re-hearing of the appeal.

The appellant also raised the ground that the District Court contravened section 24 of the Land Disputes Court Act, however he did not submit on it. In any case the said section deals with opinion of the assessors which opinion was duly given. Though the assessors were of a different opinion from that of the Chairman, but their opinion does not bind the Chairman. This ground therefore had no merit.

Having established that the decision of the District Tribunal is a nullity and that this was not a fit case for re-hearing of the appeal, the judgment of the District Tribunal in Land Appeal No. 24 of 2015 is hereby quashed and set aside. The appeal is hereby allowed with costs and the decision of the Ward Tribunal is hereby restored.

It is so ordered.



V.L. MAKANI
JUDGE
14/12/2018