

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

MISCELLANEOUS LAND APPEAL NO 32 OF 2020

(Arising from the decision of the District Land and Housing Tribunal in Land Appeal No 119/2018 and Originating from land Application No 2 of 2018 at Kenyamanyori Ward Tribunal)

CHACHA MTATIRO CHACHAAPPELLANT

Versus

BHOKE MGAYA NYAGASARA RESPONDENT

JUDGMENT

8th July & 14th August, 2020

Kahyoza, J

Mtatiro Chacha Magoko, the appellant's father sued **Bhoke Mgaya Nyagasara** in the Ward Tribunal of Kenyamanyori for trespass. **Mtatiro Chacha Magoko** was unable to prosecute the case due to his old age and appointed the appellant to represent him. **Mtatiro Chacha Magoko**, and **Bhoke Mgaya Nyagasara** are neighbours and residents two different streets or hamlets. **Mtatiro Chacha Magoko**, is a resident of **Chira street** while **Bhoke Mgaya Nyagasara** is a resident of **Kebaga street**.

It is unfortunate that while the record of the trial tribunal showed that it is **Mtatiro Chacha Magoko** who instituted the case, **he** does not appear as a party to the suit. Instead, his son **Chacha Mtatiro Chacha**, the appellant who prosecuted the case on behalf of **Mtatiro Chacha Magoko**, was made a party. The appellant raised this error as his first ground of appeal.

A brief background of this matter is that; **Mgaya, Bhoke Mgaya Nyagasara's** husband, owned the disputed land by **Operation of Vijiji** in 1975. Before that time, **Mgaya's** land and including the disputed land belonged to **Philipo Siong'o**. Later, **Mgaya** and **Philipo Siong'o** battled over Mgaya's land which ended in the High Court. **Bhoke Mgaya Nyagasara** tendered the High Court judgment as exhibit.

In 2010, Mgaya decided to distribute his land to his four wives. The distribution was witnessed by **Elias Machugu Kemaro**, the hamlet chairman. **Elias Machugu Kemaro** gave evidence before the ward tribunal and identified the document, which Mgaya signed during the distribution. He is the one who authored the document. The disputed land was part of the land allocated to **Bhoke Mgaya Nyagasara. She** deposed that she cultivated the land allocated to her including the disputed land from 1976 when she married **Mgaya**.

The appellant told the ward tribunal that the disputed land belonged to him. His father allocated it to him. The record showed that the appellant's father did not account how he got the disputed land. He did not describe the boundary between him and the respondent or the respondent's husband. He simply testified that-

"Mimi Mtatiro Magoko naelezo mbele ya Baraza kuwa kufuatia umri wangu, kuwa mkubwa na hari yangu ya kiafya sio nzuri ninapenda kumteua kijana wangu CHACHA MTATIRO kusimamia mgooro wa ardhi kati yangu na BHOKE MUGA YA NYAGASARA."

The appellant summoned **Magige Gichamu Makore** 50yrs who deposed that he once leased land from the Mtatiro Chacha Magoko and cultivated it including the disputed land in 2005. There was another witness for the appellant, **Mwita Mang'arichi Makore** who leased land from Mtatiro Chacha Magoko for two years from 2011 to 2012. He testified that the land he leased included the disputed piece of land. **Burure Matiko Manyanki** testified for the appellant that he once trespassed to the disputed land and cut a tree. Mtatiro Chacha Magoko stopped him for cutting the tree without his mandate as the disputed land belonged to him.

The ward tribunal decided in favour of **Bhoke Mgaya Nyagasara**, the respondent. Aggrieved, the appellant appealed to the District Land and Housing Tribunal (the **DLHT**), which upheld the decision of the ward tribunal.

Dissatisfied still, the appellant appeared to this Court. He advanced four grounds of appeal, which raised the following issues-

1. Are the proceedings and judgment of both the appellate and the trial tribunals null and void for want of proper parties?
2. Did the parties have *locus standi*?
3. Did the two lower tribunals award whole land to the respondent instead of determining what ought to be the boundary between them?
4. Was the ward tribunal biased?

The Court heard the appeal orally. The appellant prayed the proceedings before the ward tribunal to be quashed on the ground that the suit was instituted by his father but the ward indicated the

appellant was the applicant instead of his father. He also alleged that the respondent cannot defend the matter as she was not the administrator of her deceased husband's estate. He contended that the ward tribunal was not impartial. Its secretary was the respondent's brother in law's son and the respondent was a mistress of one of the members of ward tribunal. He concluded that he called three witnesses and the ward tribunal removed one of his witnesses' evidence from the record. The appellant alleged that the tribunal removed Matiko Mwandai's evidence from the record.

The respondent denied to have any marital relationship with any of the members of the ward tribunal. She stressed that the disputed land was part of the land her husband gave her in 2010 before his death. Her husband died in 2014. He explained that she cultivated the land from 1976. She contended that the appellant's father had no dispute with her. He knew the boundary.

Are the proceedings and judgment of both the appellate and the trial tribunals null and void for want of proper parties?

I will answer the issue whether the proceedings and judgement of the two lower tribunal was a nullity for want of proper party together with the issue whether the appellant and the respondent had *locus standi*. It is the position of the law that a suit shall not be defeated by reason of joinder or non-joinder of the parties, see rule 9 of **Order I** of the **Civil Procedure Code** [Cap. 33 R. E. 2019]. It provides that-

*"9. A **suit shall not be defeated by reason of the misjoinder or non-joinder of parties**, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."*

I am alive of the position of the law that the CPC does not apply in the ward tribunal where the matter commenced. However, I am permitted to borrow a leaf from that position of the law. Thus, the fact that the tribunal made the appellant a party to the suit, which his father him to prosecute, committed no fatal procedural error.

The above notwithstanding, the appellant told the tribunal that the disputed land belonged to him. He stated that his father allocated it to him in 1993. He was therefore suing as the owner of the disputed land. Thus, the Ward tribunal properly made him a party. The appellant deposed before the ward tribunal as follows-

*"Mimi **Chacha Mtatiro Chacha** naeleza mbele ya baraza kuwa **mnano tarehe 8/05/2018 eneo langu lililoko Nyangwe lilivamiwa na Bhoke Nyaghasara na eneo hilo niligawiwa na mzazi wangu ambaye ni Mzee Mtatiro Chacha**. Baada ya uvamizi huo nilikwenda kulalamika kwa mwenyekiti wa mtaa wa Chira na baada ya hapo mwenyekiti alifika katika eneo la mgogoro na baada ya kufika aliahidi atawasiliana na mwenyekiti wa Kebaga. Baada ya wenyeviti wote wawili kufika eneo la mgogoro hawakufanikiwa kutatua mgogoro huo na kutuagiza tuje katani, ndipo nikafika ofisi ya mtendaji kata.." (emphasis is added)*

Given the evidence on record, the appellant cannot be heard to complain that he was wrongly made a party to the suit instead of his father. There is also evidence that his father gave land including the disputed land in 1993. He cannot be allowed to retract his evidence that he was the owner of the suit land. **The appellant should endure pains of a self-inflicted wound.** The appellant had *locus*

standi to sue because he was the owner of the suit land.

There is ample evidence that the respondent was the owner of the suit land. Her late husband allocated the land to her in 2010 and died in 2014. Her late husband transferred land to her four wives by executing a document which was tendered to the ward tribunal. The hamlet chairman, Elias Machugu, the author of the document transferring ownership of land to respondent from her later husband, gave evidence. Given the evidence on record, I find it proved that the respondent had grounds to defend the suit. She defended the suit as the owner and a trespasser because she was in actual possession of the suit land.

Further, it is unprecedented for plaintiff to ask a court to quash the suit for reason that he sued a wrong party. One would ask why did he sue her if he knew she was not a proper party? The respondent had an interest to protect because the disputed land was part of the parcel land her husband gave her before his demise.

In the upshot, I find that the both parties had interest to defend. That is to say they had *locus standi*. I dismiss the first and second grounds of appeal for want of merit.

Did the two lower tribunals award whole land to the respondent instead of determining what ought to be the boundary between the parties?

The appellant submitted that the dispute was over the boundary and not over the whole area. He contended that the tribunals made a decision over the whole land.

The respondent did not dispute that the dispute was over the boundary. She contended that the appellant's father knew the

boundary well that is why there was no dispute between him and her late husband. She contended that beacons of sisals marked the boundary.

In his reply, the appellant contended that the sisal beacons marked the border between two villages, which are now streets or hamlets.

It is trite law that where there are concurrent findings of facts by two courts, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been a misapprehension of evidencing a miscarriage of justice or violation of some principle of law or procedure. (See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31.). The instant case both tribunals found for the respondent that the disputed land belonged to the respondent. I examined the evidence on record and formed an opinion that I cannot fault the two tribunals, for the following reasons: **one**, there is ample evidence prove that the respondent's husband was the owner of the disputed land; **two**, there is evidence that the disputed land was part of the land the respondent's husband defended in suit between him and Philipo Sion'go. The respondent's husband defended the land up to the High Court. A copy of the judgment between the respondent's husband and Philipo Sion'go was tendered as exhibit.

The Elias Machugu, who was once a hamlet chairman deposed that the disputed land belonged to the respondent's husband and that before Operation vijiji One Philipo Sion'go was the owner of the disputed land. Later, in 1975 the respondent's husband applied to the village land committee, which allocated him a piece of land, including

the dispute land. Elias's evidence was supported by Musa Matinde Kimito's evidence. Musa Matinde Kimito stated on being asked questions by the one of the members of the ward tribunal that -

Tribunal: *Mzee Mgaya aliamia hapa mwaka gani?*

Answer: *1975*

Tribunal: *Je huo mti ulipamdwa na nani?*

Answer: *Na Philipo.*

Tribunal: *Je huyo Philipo alikuwa na mahusiano gani na eneo hili?*

Answer: *Ndiye alikuwa mmiliki wa eneo hili kabla ya viijiji.*

Tribunal: *Je Mgaya alipataje eneo hili na lilikuwa la Philipo?*

Answer: *Mgaya alipewa na Kamati ya Ardhi Kijiji baada ya kuomba."*

The respondent's evidence was more convincing than the appellant's evidence. The appellant was not trust worth. He was changing posts now and then. He told the DLHT that the ward tribunal did not record the evidence of his witness **Burere Matiko Manyanki/Manyange**. The record showed that that person's evidence is on record. However, when he appeared before this Court he submitted that he called three witnesses and that one of witnesses' evidence was removed from the record. He mentioned the name of the witness whose evidence was not recorded as Matiko Mwandai.

The record shows that the appellant summoned three witnesses who were **Magige Gichamu Makore** 50yrs, **Mwita Mang'arichi Makorere** and **Burure Matiko Manyanki**. It is clear that the ward tribunal recorded the evidence of his three witnesses and that Matiko Mwandai was not one of his witnesses. The fact the he complained to the DLHT that the ward tribunal did not record the evidence of his witness **Burere Matiko Manyanki/Manyange** and when he

appeared to this Court changed that the tribunal did not record the evidence of his witness **Matiko Mwandai**, destroys his credence. The appellant's evidence is to be treated with caution.

Given the evidence on record, I am of the view that the tribunals were right to dismiss the appellant's claim. The ward tribunal declared the disputed land a property of the respondent. The DLHT upheld the decision of the ward tribunal. Thus, the both tribunals gave decision regarding the disputed piece of land and not the whole land. I dismiss the third ground of appeal for want of merit.

Was the ward tribunal biased?

The appellant contended that the ward tribunal was not impartial because its secretary was the respondent's brother in law's son and the respondent was a mistress of one of the members.

The respondent denied the allegations. She denied to be a concubine of one of the members of the tribunal and to be related to the secretary of the ward tribunal.

I examined the record and found that the appellant raised the complaint of the ward tribunal's impartiality for the first time before this Court. This Court is a second appellate court. It is settled that a second appellate court should not entertain matters not raised before the trial court or the first appellate court. See the case of **Farida and Another v. Domina Kagaruki**, Civil Appeal No. 136/2006 (CAT Unreported), where the Court of Appeal held that-

"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."

The appellant never raised the issue of impartiality before the

tribunal or before the district land. He is trying to impress on this Court that the ward tribunal decided against him because it was biased. I am unable to buy the submission. Had the ward tribunal been impartial, the appellant would have complained immediately to the district land and housing tribunal. I find no merit in the fourth ground of appeal. I dismiss it.

In the end, I uphold the decision of both tribunals that the respondent is the owner of the disputed land. Further, I find the border of the lands between the parties is marked by trees planted by Mzee Matiko, Mzee Mgaya (ndege chai trees) and a **Mnyegenyege tree** planted by Philipo Siongo, which was also, alleged to be the boundary between two streets or hamlets of Chira and Kebaga.

I dismiss the appeal for want of merit with costs.

It is ordered accordingly.



J. R. Kahyoza
JUDGE
14/8/2020

Court: Judgment delivered in the presence of the parties. Right of further appeal explained after obtaining a certificate of existence of a point of law from this Court. B/C Catherine Tenga present.



J. R. Kahyoza, J.
14/8/2020