

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO 54 OF 2020

MARWA KUBOKO_____ **APPELLANT**

VERSUS

JOSEPH MAHINDI_____ **RESPONDENT**

(Arising from the decision and orders of the district land and housing tribunal for Mara at Musoma, Hon. Kitungulu Chairperson, in land appeal no. 185 of 2019 dated 04.03.2020)

JUDGEMENT

Dates; 3rd & 25th September 2020

GALEBA, J.

In this appeal, the land in dispute is located at Isaba village in Buruma ward which is part of Butiama district within Mara region. **MR. MARWA KUBOKO**'s position as to ownership of the land is that in the 1970's he found the land vacant, occupied and settled on it; so according to him the disputed land is his lawful property. As for **MR. JOSEPH MAHINDI** his argument was that he acquired the land with her mother in exchange for two herds of cattle which they gave to **MR. WASAGA KIZAMI** who gave them the land. According to him the land is his. Following the above dispute, in 2019, **MR. MAHINDI** filed civil case no 4 of 2019 in Buruma ward tribunal (the trial tribunal) claiming that **MR. KUBOKO** had trespassed on his land. The ward tribunal heard the case and finally declared **MR. MAHINDI** the lawful owner of the property. **MR. KUBOKO**, filed land appeal no 185 of

2019 to the District Land and Housing Tribunal (the appellate tribunal), to challenge the decision of the ward tribunal. At the appellate tribunal **MR. KUBOKO** was unsuccessful as his appeal was dismissed. This appeal is seeking to set aside the decision of the appellate tribunal.

In this appeal **MR. KUBOKO**'s complaints are reflected in the 3 grounds of appeal after abandoning the 4th ground. According to the grounds of appeal, his complaints are that; *first*, the appellate tribunal failed to consider the fact that **MR. MAHINDI** had no *locus standi* to sue **MR. KUBOKO** in the ward tribunal. *Secondly*, that the appellate tribunal erred because it disregarded the evidence of **MR. KUBOKO** and his witness, who proved to the required standard that he was in occupation of the land in dispute and *thirdly*, that the appellate tribunal erred for not nullifying the decision of the trial tribunal because the secretary of the ward tribunal's name was not disclosed in its proceedings.

Arguing the above grounds **MR. MASOUDI HAMISI** learned advocate for **MR. KUBOKO** submitted in respect of the 1st ground of appeal that **MR. MAHINDI** had no *locus standi* to sue because, at page one (1) of the proceedings of the trial tribunal, it is recorded that the land was acquired by his mother who is now deceased. He submitted that there is no evidence that the land was granted to him or that he is the administrator of his late mother's estate. In reply to that submission, **MR. MAHINDI** submitted that the land was his because

he acquired it with his mother as earlier indicated, in exchange for cattle. This ground of appeal is misconceived. It is misconceived for two reasons, one procedural and another substantive. **First**, this ground was not an issue raised not only in the trial tribunal, but the same was not raised or argued in the appellate tribunal. As a matter of practice, it is now part of our law that an appellate court cannot deal or decide on a matter that was not a complaint in the court from which the appeal arises; see **Abdul Athuman versus Republic** [2004] TLR 151 and **Sadick Marwa Kisare versus The Republic** Criminal Appeal No 83 of 2012; (Unreported). In the latter case, the Court of Appeal held that;

"The Court has repeatedly held that matters not raised in the first appellate court cannot be raised in the second appeal."

Secondly, even if the matter would have been raised before the first appellate court, the argument of counsel would still be substantively erroneous. At page 5 of the typed proceedings of the trial tribunal it is recorded thus;

".....Mzee Wasaga alitukatia eneo kama heka (8) chini yake kwa thamani ya ng'ombe wawili (2), dume moja (1) na koo mmoja (1). Wakati tunaanza kuishi pale kusini magharibi yetu alikuwepo mama mmoja aitwaye Bangi akiwa na vijana wawili....."

The above quotation shows that **MR. MAHINDI** participated in the acquisition of the land and it is not true that he has no **locus standi** to sue on a piece of land he participated in acquiring. Based on the above reasons, the 1st ground of appeal is dismissed.



In respect of the 2nd ground of appeal, Mr. Hamisi submitted that the appellate tribunal did not accord appropriate weight to the evidence of **MR. KUBOKO's** side on the issue of long stay in the land. Mr. Hamisi interwove this argument still with a new ground of appeal which no one was aware of before the hearing commenced. He submitted that the appellate tribunal erred in law because it did not hold that the matter in the ward tribunal was time barred. In reply to this ground **MR. MAHINDI** submitted that he became aware of the trespass in 2015, so filing the matter in 2019, he was still in time. To start with, I must hold that an appellate court has no jurisdiction to deal with a ground of appeal not raised or decided upon by a tribunal or a court below see **Jacob Mayani versus The Republic** Criminal Appeal no 558 of 2016 (Unreported), at page 12 of the typed judgment. The issue of time bar was not raised neither raised at the trial nor at appeal. This court cannot therefore assume roles of the trial or the appellate tribunals see **ABDUL ATHUMAN** and **SADICK KISARE** (supra). As for the issue of evidence complained of in this ground, it is the position of this court and of the law as established that, for the second appellate court to interfered with concurrent decisions of two courts below which dealt with the evidence several matters must be demonstrated **first**, that there was complete misapprehension of the substance, nature and quality of the evidence resulting in an unfair decision or **two** there should be clear misdirection and or non-direction on evidence. See **Salum Mhando**



VS R [1993] TLR 170, Omari Mohamed China and 3 Others Versus the Republic Criminal Appeal No 230 Of 2004 (unreported) and **Wankuru Mwita Versus the Republic** Criminal Appeal No 219 Of 2012 (unreported). For instance in **Wankuru Mwita** it was held that;

"...The law well is settled that on second appeal, the court will not readily disturb the concurrent findings of facts by the trial court and the first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

In like manner, this court is not prepared to undo or to interfere with the two concurrent decisions of the tribunals below declaring **MR. MAHINDI** a winner, because it has not been shown that the decisions were a result of complete misapprehension of the substance, nature or non-direction on the evidence or that there was a violation of some principle of law or procedure which has occasioned a miscarriage of justice in this case. In the circumstances, the second ground of appeal is dismissed for want of merit.

The 3rd ground of appeal was to the effect that, there is no evidence that the proceedings of the ward tribunal were recorded by the secretary of the tribunal. In support of that ground Mr. Hamisi referred me to **Adelina Koku Anifa and Joanitha Sikudhani Anifa Versus Byarugaba Alex** Civil Appeal no 46 of 2019 CA (unreported), submitting that although the point was not raised in the 1st appellate tribunal, but the matter being a matter of law, the same must be entertained. In reply to that ground **MR. MAHINDI** moved the court



to call all persons who participated in the tribunal so that amongst them the one who participated as a secretary can identify himself to the court. In the appellate tribunal **MR. KUBOKO**'s complaint was that a secretary participated in determining the matter as if he was a member. That ground was however not argued by **MR. KUBOKO** so that the appellate tribunal could understand and make a decision on it, so because the ground was abandoned although not expressly, the appellate tribunal did not consider the ground. That is one aspect of it. The other side of it is that although in the appellate tribunal **MR. KUBOKO** was complaining of the secretary participating in the hearing of the matter as a member, this time, he is charging his position that it is not clear if the secretary recorded the proceedings of the trial. Mr. Hamisi submitted that, the fact that the name of the secretary is not mentioned prejudiced his client, stating that the proceedings could have been recorded by another person who is unqualified. To the court that was speculation and it was not demonstrated that **MR. KUBOKO** was in any way prejudiced, despite his changing positions on the same subject.

In the case of **Adelina Koku Anifa (supra)** the ward tribunal was manned by 3 members contrary to section 11 of the of the **Land Disputes Courts Act [Cap 216 RE 2019] (the LDCA)** where it was held as correctly held by Mr. Hamisi that a matter of law may be dealt with even where the same is not raised in the courts below. The point is; is a complaint in this case a point of law? In the appellate tribunal records have it that the secretary recorded the proceedings but his name is not identified. In the high court, the allegation has changed;

that the proceedings in the ward tribunal were not recorded by the secretary. It is the holding of this court that that is a matter of fact, and not of law. That is why **MR. MAHINDI** called upon me to call all persons who participated in the ward tribunal so that they can tell the court as to who among the 6 members was the secretary. As submitted by Mr. Hamisi, section 24 of the **Ward Tribunals Act [Cap 2016 RE 2002]** provides that the proceedings of the tribunal shall be recorded by the secretary. In this case Mr. Hamisi was not able to argue convincingly that the proceedings were not recorded by the secretary. Although he submitted that the proceedings could have been recorded by another person who was not the secretary, but the advocate was not certain. It needed some proof. Although his client was there during the proceedings but he was not briefed as to who, other than the secretary recorded the proceedings. In other words, to find out as to who recorded the proceedings was the secretary or not is a matter of fact. For the above, I am of the position that the point raised is not a pure point of law, and accordingly the 3rd ground of appeal is hereby dismissed.

Based on the above discussion, this appeal is dismissed for want of merit.

DATED at MUSOMA this 25th September 2020



Z. N. Galeba
JUDGE
25.09.2020

Court; THIS JUDGMENT has been delivered before Z. N. Galeba **JUDGE**, today the 25th September 2020 in the absence of parties but with leave not to attend. Mr. Jovian Katundu, RMA is present.

A party aggrieved has a right of appeal, subject to the law, to the Court of Appeal of Tanzania.



Z. N. Galeba
JUDGE
25.09.2020