

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

MISC. LAND APPEAL CASE NO. 30 OF 2020

*(Arising from the ruling of the District Land and Housing Tribunal for Tarime
at Tarime (Hon. Ngukulike, N.O.- Chairman) dated 20th December, 2019
in Appeal No. 7 of 2019*

1. AFANDE ONDITO 1ST APPELLANT

2. OKUMU OKONG'O 2ND RESPONDENT

VERSUS

SELEFINA OKUL RESPONDENT

JUDGMENT

24th August and 13th October, 2020

KISANYA, J.:

This is a second. It traces its origin from Land Complaint No. 64 of 2018 instituted before the Rabour Ward Tribunal by the respondent, Selefina Okul. She claimed that, the appellants, Afande Ondito and Okumu Okong'o had trespassed to her land. According to the evidence on record, Selfina married and found her late husband using the disputed land in 1959. She adduced further that, it was the appellant's father who put the boundary which the appellants decided to cross thereby trespassing to her land.

The appellants' defence was to the effect that, the disputed land belonged to their late father who showed them the boundaries with the respondent. They contended to have been using the disputed land from 1980s and after the demise of their late further in 1996.

Upon considering evidence adduced by the parties, the Ward tribunal decided in favour of the Selefina. Afande and Okumu unsuccessful appealed to the District Land and Housing Tribunal (the first appellate tribunal) which upheld the decision of the Ward Tribunal. Still determined to challenge the concurrent findings of the two tribunals, Afande and Okumu have preferred the present appeal on the following grounds of appeal, in verbatim.

1. *That the District Land and Housing Tribunal failed to observe the issue of quorum for each sitting. The Trial Tribunal did not record quorum of members for each sitting.*
2. *That the District Land and Housing Tribunal failed to observe whether the Trial Tribunal complied with the provision of section 17(3) of the Land Disputes Courts Act of 2002 as per Trial Tribunal's records the provision was not complied with.*
3. *That PW witnesses No. 2 and DW1, 2 and 3 were recorded at locus in quo were provision of Evidence Act not complied with.*
4. *That the District Land and Housing Tribunal failed to observe that this matter is time barred.*
- ~~5.~~ *That the respondent sued wrong parties-*
6. *That the District Land and Housing Tribunal failed to observe that the trial Tribunal failed to conduct proper proceedings as per evidenced by the opinion of the trial Tribunal's Chairperson.*

At the hearing of this appeal, both parties appeared in person, unrepresented. When asked to submit in support of the appeal, the appellants requested the Court to adopt their petition of appeal. However, the first appellant, Afande conceded that, he was not aware that some of the grounds were not advanced in the first appeal. On his part, the second respondent, Okumu argued that, their evidence was not duly considered by the first appellate tribunal. He

contended that, the suit before the trial tribunal was time barred. This contention was based the reason that, they had been using the disputed land since 1980s but the respondent claimed the land to be hers in 2017. Okumu argued further that, the respondent ought to have sued their mother who is the lawful owner of the land in dispute.

In response, Selefini submitted that, she could not sue the appellants' mother who did not trespass to her land. She contended that, it is the appellants who trespassed to her land. She asked the Court to adopt her reply to petition in which she disputed all grounds of appeal. That said, the respondent moved to consider and decide the appeal in accordance with the law.

I have dispassionately considered the submission by both parties and the grounds of appeal against the evidence on record. I will now proceed to consider the merit of this appeal.

It is pertinent to note that, the petition of appeal raises some matters which were not tested or determined by the first appellate tribunal. Only the fourth and sixth grounds were advanced in the first appeal. The law is settled that, the second appellate court cannot entertain a ground not raised and considered by the courts or tribunals below, unless it involves a point of law. See the case of **Mabula Makoye and Another vs R**, Criminal Appeal No. 227 of 2017 (unreported) where the Court of Appeal held as follows:

"We respectfully agree that these ground are new as they were not raised in the High Court. It is trite position that, unless it involves a point of law, a matter which was not raised and determined by the courts below cannot be entertained by this Court on second appeal."

Although the above principle was stated in criminal case, it applies to civil cases as well. In the present appeal, grounds no. 1, 2, 3 and 5 were not raised and determined by the first appellate tribunal. The fifth ground is based on point of facts. It is hereby discarded for the foresaid reason. On the other hand, the Court will consider the first, second and third grounds because they are based on points of law. Thus, although they were not raised in the first appeal, they are worthy of determination of this Court.

Further, I am alive to the principle that, on second appeal, the Court cannot interfere with concurrent findings of the two tribunals below on matters of facts. It can only interfere with the said findings upon being satisfied that, there are misdirection or non-direction by both tribunals. See for instance, **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149. This principle will also govern us in determining the merit of the appeal at hand.

Starting with the first ground of appeal, Afande and Okumu contend that, the proceedings of the trial tribunal were vitiated as the quorum of members for each sitting was not recorded. On her part, the Selefina contended that, the issue of quorum was duly observed by the trial tribunal.

Pursuant to section 11 of the Land Disputes Courts Act, Cap. 216, R.E. 2002 (the LCDA) read together with section 4 of the Ward Tribunal Act, Cap. 206, R.E. 2002, ward tribunal is properly constituted by not less than four nor are more than eight members of whom three must be women. It is the proceedings which can determine whether the ward tribunal was properly constituted by looking at the members present at each sitting.

Reading from the introductory part of the judgment of the trial tribunal, it is clear that the complaint was not heard on one day. However, the dates on

which the trial tribunal sat and the quorum thereto are not reflected in proceedings. Upon examining further, I have noted that every witness called by the either party was asked questions by not less than five trial members of the tribunal. The name of each member who put questions to the witnesses was recorded. This being a court of justice, it renders and administers justice in accordance with the law while taking into account equity as held by the Court of Appeal in **Musa Mohamed v. R**, Criminal Appeal No. 216 of 2005 (unreported) that:

"Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order."

The decision of **Musa Mohamed** (supra) was cited with approval in **Apolinary Matheo and 2 Others vs R**, Criminal Appeal No. 436 of 2016, CAT at Mbeya (unreported). In the latter case, the Court of Appeal was called on to determine the issue whether assessors who sat with the trial judge were selected as required by law. The record was silent on that fact. Upon noticing that, the assessors posed question to witnesses, the Court of Appeal was satisfied that they were selected. It went on to hold as follows:

"In view of the fact that the record shows that assessors asked questions, we take it that they were selected. We find fortification in this stance in the maxim of equity which says equity considers as done that which ought to have been done. (Emphasize supplied)

Guided by the above principle, and having considered that each witness was asked questions by not less than five members of the tribunal, I find that the omission to record the said members in the quorum did not cause injustice.

The principle of equity suggests that, the required quorum was met at the hearing of the matter before the trial tribunal. But, the Court reminds the trial tribunals that, it is necessary to record clearly members present on each date of sitting.

The second ground deals with non-compliance with the provision of section 17 (3) of the LDCA. This provision requires the Secretary of the Tribunal to put in writing the complaint received orally from the complainant and produce a copy for a complainant. The complainant's complaint is not in record at hand. However, I am of the considered view that this did not vitiate the proceedings of the trial Tribunal. I hold so basing on the fact that, in terms section 17(2) of the LDCA, the essence of the complaint is to enable the Secretary to be submit the said complaint to the Chairman of the ward tribunal for purposes of summoning members to mediate the parties. Pursuant to the judgment of the trial tribunal, the complaint was lodged on 13/11/2018 and the hearing commenced on 19/11/2018. This indicates that, the complaint was forwarded to the Chairman and members summoned as required by the law. Further, it is the complainant who is required to be supplied with copy of complaint and not the respondent before the trial tribunal. Even the appellants (the then respondents) have not stated how they were prejudiced by the fact that, the copy of complaint was not availed to the respondent. In that regard, I find no merit in this ground.

In the third ground of appeal the appellants fault the trial court for taking evidence of PW2 and DW1, DW2 and DW 3 at the locus in quo contrary to the Evidence Act. The appellants did not clarify on how the Evidence Act was not complied with. The records do not show that evidence of PW2, DW1, DW2 and DW3 was recorded at the locus in quo. Even if it was recorded at the locus in quo, having considered the provision of section 45

of the LCDA on substantive justice, I am of the considered view that, the proceedings of the trial tribunal were not vitiated.

I now move to fourth ground of appeal that, land complaint filed before the trial tribunal was time barred. This ground was also advanced in the first appellate tribunal. The appellants contend that they had been using the disputed land for more than twenty three years without being interrupted. The time within which to file a suit for land recovery is 12 years. In her evidence in chief, Selefina testified that, she married and found her late husband using the disputed land in 1959. Upon being cross examined by Afande, she deposed that, the appellants had used the land for three years. This is what transpired:

“Swali: Je hili shamba tumekwisha ilima miaka mingapi?”

Jibu: umekwishailima miaka mitatu (3)...

Swali: Na nilipolilima mwaka jana uliweza kwenda kunilalamikia

Jibu: Hapana ila ninyi ndiyo mlikwenda kunishtaki.”

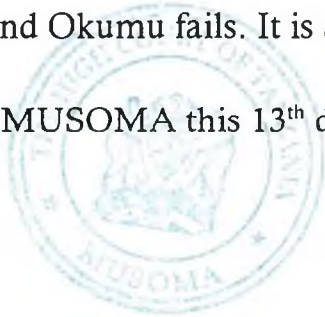
In view of the above evidence, I am of the firm view that the complaint lodged by the respondent was not time barred. The issue whether the appellants had used the disputed land for more than 12 years was an issue of fact which was decided in favour of the respondent by the lower tribunals.

Lastly, in relation to the sixth ground, the appellants challenge the first appellate tribunal for failure to observe that the trial tribunal failed to conduct proper proceedings. Although they did not substantiate on how the proceedings were not conducted properly, they contended in the first appellate Tribunal that, the Chairman participated in passing a verdict while he was did not hear the case. However, the first appellate tribunal did not pronounce itself on this issue. In this regard, I have stepped in the shoes of

the first appellate tribunal by examining the evidence on record. It reveals that, the Chairman participated in the hearing the case. He asked questions to witnesses paraded by the parties. It is true that some of the witnesses were not asked question by the Chairperson. Thus, even if the Chairperson was not present on some dates, the trial tribunal was entitled to proceed in his absence provided that the quorum was in order. It is my considered opinion that, failure to attend hearing for one day does not bar the member of tribunal to participate in subsequent proceedings. Further, it is on record that, five members decided in favor of Selefina while only two members voted for Afande and Okumu. Thus, even if the chairman's vote is not considered, the majority votes are still in favour of Selefina. It is for the foresaid reasons that, I find no merit in this ground of appeal.

In upshot, the Court finds no sufficient reasons to depart from the concurrent findings of the trial and first appellate tribunals. The appeal by the appellants, Afande and Okumu fails. It is accordingly dismissed with costs.

Dated at MUSOMA this 13th day of October, 2020.





E. S. Kisanya
JUDGE

Court: Judgment delivered this 13th October, 2020 in the presence of the second appellant and the respondent in person and in the absence of the first appellant. Bench Clerk, Ms Mariam present.

Right of appeal is well explained.




E. S. Kisanya
JUDGE
13/10/2020