

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**LAND APPEAL NO 100 OF 2020**

**MARO WAMBURA** \_\_\_\_\_ **APPELLANT**

**VERSUS**

**CHACHA NYAMAHEMBA** \_\_\_\_\_ **RESPONDENT**

*(Arising from the Decision and Orders of the District Land and Housing Tribunal for Mara at Musoma, Hon. Kitungulu Chairman, in Land Appeal No 139 of 2019 dated 29.06.2020)*

**JUDGEMENT**

*2<sup>nd</sup> & 20<sup>th</sup> November 2020*

**GALEBA, J.**

The land subject of this appeal is located at Nyamakobiti village which is in Majimoto ward within Serengeti district in Mara region. The appeal started as civil case no 15 of 2018 in Majimoto ward tribunal (the trial tribunal) where the appellant filed the land dispute alleging that the respondent had trespassed on his land and built three (3) houses in it without his consent. His case on ownership was that he had acquired it in 1989. The respondent's position was that he acquired the land in 1987 and in 1994 he built in the land and he has since been living in it up to 2018 when the dispute was filed in the ward tribunal. The respondent stated that in 2018 the land had a dispute with another person called **MGAYA MARO WAMBURA** but it was easily resolved as he is the owner of the land.

The ward tribunal heard the case and dismissed it on 27.05.2019 on grounds that, **first**, the respondent had substantially developed the land, **secondly** the appellant never complained before any authority for 25 years and **thirdly** the appellant has nothing on the land. As the appellant was dissatisfied with the dismissal of his case, he filed land appeal no 139 of 2019 in District Land and Housing Tribunal (the DLHT) at Musoma to challenge the decision of the trial tribunal. However like the ward tribunal, the DLHT dismissed his appeal with costs and confirmed the decision of the ward tribunal. The appellant has lodged this second appeal challenging the decision of the DLHT originally raising four (4) grounds of appeal.

When this appeal came up for hearing on 02.11.2020 Mr. Maro Wambura prayed to abandon the 2<sup>nd</sup> ground so that he would retain the 1<sup>st</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> grounds of appeal in challenging the decision of the DLHT.

In this appeal I will first resolve the 1<sup>st</sup> ground of appeal as that ground raises a point of law. That is so because the law requires the all issues of law to be determined first before getting to the substantive dispute between the parties, see **Thabit Ramadhani Maziku and Another v Amina Khamisi Tyela and Another**, Civil Appeal no 98 of 2011 (Court of Appeal unreported).

Arguing the 1<sup>st</sup> ground of appeal, Mr. Maro Wambura submitted that the chairman at the DLHT did not receive opinion of assessors before

he could compose the judgment now under scrutiny. He submitted that that was unlawful. In reply to that ground Mr. **Chacha Nyamahemba** submitted that the opinion was read by the chairman himself on 11.06.2020 but the assessors were not present, although the parties were present. It appears both parties are not at one with the proceedings on record. I will have the record speak for itself from 27.04.2020 to 11.06.2020. This is what transpired;

*"27/04/2020*

**Coram**

**Kitungulu, E. Chairman**

**T/ASS; Mr. Swagarya & Mr. Babere**

**Appellant-Present**

**Respondent- Present**

**C/K Pude**

**Ms. Mary Joachim**

*I am holding brief for Mr. Mahemba for the appalling (sic) he is appearing before the H/C.*

**Court: Matter be argued by way of written submissions**

**Order:**

**(i) Appellant to file submission on 11/05/2020**

**(ii) Reply on 25/05/2020**

**(iii) Reply (sic) 04/06/2020**

**(iv) Opinion on 11/06/2020**

**Kitungulu, E.**

**Chairman**

**27/04/2020**

**11/06/2020**

**Coram**

**Kitungulu, E. Chairman**

**T/ASS; Mr. Swagarya & Mr. Babere**

**Appellant-Present**

**Respondent- Present**

**C/K Pude**

***Court: Opinion read over this 11<sup>th</sup> June 22020 (sic) in the presence of the respondent. The appellant is absent without notice.***

**Order: Judgment on 29/06/2020.**

**Kitungulu, E.**

**Chairman**  
**11/06/2020"**

According to the above record, both parties are not right, on 11.06.2020 the assessors were there and the opinion was given to the chairman before he could compose and deliver the judgment on 29.06.2020. In the circumstances the 1<sup>st</sup> ground of appeal has no merit and the same is hereby dismissed.

The complaint in the 3<sup>rd</sup> ground of appeal was that the DLHT erred when it held that the respondent could not hold land in 1994, while at that time he was a standard six (6) pupil in primary school. He submitted that the issue was raised at the DLHT but the same was not considered. In reply to that ground the respondent submitted that, that complaint was a new issue altogether because the same was not raised in the DLHT and the same was an afterthought.

At the DLHT as indicated above the appeal was argued by way of written submissions, the issue that the respondent had no capacity to own land because of age, **first**, was not raised as one of the grounds of appeal before the DLHT for consideration and **secondly** the same issue is not one of the matters submitted upon in the written submissions by Mr. Mahemba in the DLHT. According to established court practice, an appellate court cannot set aside a decision of the court or tribunal from which an appeal arises basing on an issue that was not raised, considered and decided upon by that lower court. That principle is discussed in **Diha Matofali v the Republic**,

Criminal Appeal no 245 of 2015 and **Martine Masara v the Republic** Criminal Appeal no 428 of 2016 both decided by the Court of Appeal but not yet reported. In the circumstances, as the complaint in the 3<sup>rd</sup> ground of appeal was not raised in the grounds that were filed in the DLHT or submitted upon by counsel for the appellant before that tribunal, that ground is dismissed.

In respect of the 4<sup>th</sup> ground, the appellant's complaint against the decision of the DLHT is that the latter tribunal was wrong when it held that the respondent had stayed in the land from 1994 to 2018 while in fact he trespassed on the land in 2017. In the submission before me, the appellant stated that the respondent was not on the land from 1994 as alleged. In reply to that the respondent submitted that he has stayed on the land since 1994 adding that his case on that aspect was supported by two witnesses namely, **DEDAN GASPAR** and **BODEDE**.

Before getting to resolving this issue which needs examining the evidence, it is a principle of law in Tanzania that the second appellate court cannot interfere with two concurrent decisions of the lower courts unless it has been demonstrate that the two or either of the two judgments of the tribunals below were clearly unreasonable or their judgments were a result of a complete misapprehension of the substance or nature of the evidence or that the judgments were based on non-direction on the evidence. See **Wankuru Mwita v the Republic**, Criminal Appeal no 219 of 2012 and

**Mohamed China and 3 others v the Republic**, Criminal Appeal no 230 of 2004 (both unreported). In this case the evidence of both parties was appropriately analyzed by the trial tribunal and the DLHT agree that the evidence of the winning party was more credible. In the circumstances, I am satisfied that the 4<sup>th</sup> ground of appeal, is misconceived.

As all the grounds of appeal have been found to have no merit, this appeal stands dismissed with costs.

DATED at MUSOMA this 20<sup>th</sup> November 2020



Z. N. Galeba  
**JUDGE**  
**20.11.2020**