

**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**MISC. LAND APPEAL No. 84 OF 2018**

(Arising from the judgment and decree of the District Land and Housing Tribunal for Geita in Land Appeal No.8/2017; this originated from Nyakamwaga Ward Tribunal Case No.6/2016)

**CHARLES NGALULA .....APPELLANT**

**VERSUS**

**MAYALA PASHINGE..... RESPONDENT**

**JUDGMENT**

08<sup>th</sup> September & 18<sup>th</sup> December, 2020

**TIGANGA, J**

Before the Ward Tribunal of Nyakamwaga in Geita District, Charles Ngalula the appellant sued the Respondent Mayala Pashinge for trespassing into his land. He sued through Land Case No. 06/2016, before that Tribunal. In its findings after hearing both parties, the Ward Tribunal



found for the appellant and against the respondent, that the respondent trespassed the land of the appellant.

Dissatisfied by that decision Mayala Pashinge, the respondent, appealed to District Land and Housing Tribunal for Geita, in Appeal No. 08/2017 which after hearing both parties, the District Land and Housing Tribunal held that the suit land belongs to the appellant, as the respondent failed to show the area in dispute and its boundaries. The District Land and Housing Tribunal decided so after it had moved to the locus, where it found that the respondent failed to show the boundaries, between the parties.

Dissatisfied by the decision of the District Land and Housing Tribunal, the appellant filed six grounds of appeal which reads as follows;

1. That the District Land and Housing Tribunal erred in law and in fact for not considering the fact that the appellant was allocated the land in dispute by the village council of Kashishi since 1974 and has been holding the same since now (sic).
2. That the Tribunal erred in law and facts to rule in favour of the respondent while the respondent had a dispute with the appellants



son one Donya Charles in 2008, and not the appellant over a piece of land located adjacent to the respondents piece of land. The copy of Judgment attached to the petition of appeal.

3. That the Tribunal erred for not considering the evidence by the appellant that the respondent unlawfully trespassed against the appellant's piece of land measuring two and half acres and destroyed the appellants sisal used as a mark for demarcation following the judgment of the dispute between the respondent and the appellant's son one Donya Charles in 2008.
4. That the trial chairperson erred in law, procedure and fact for not giving opportunity to her all assessors to give opinions. Notwithstanding that the assessors who accompanied the chairperson to view the land were not the assessors who sate with the chairperson in hearing of the appeal.
5. That the Tribunal erred in law and fact to conclude in that the appellant filed to show the boundaries of his piece of land, whilst both parties and their witnesses were present at the site and each party showed the real boundaries of his piece of land demarcated with sisal plant there to.

6. That the decree and judgment of the tribunal are collectively marked C2 forming the part of this appeal.

He prayed the appeal to be allowed, the judgment of the Ward Tribunal be restored, the appellant be paid compensation of the sisals which were destroyed when the respondent unlawfully trespassed against the appellant piece of land. This court is also asked to give any order as it deems fit.

Although the respondent was served with the petition of appeal and was aware of the appeal according to the proof of service filed by the appellant, having the summons indorsed by the harmlet chairman of Darajani in Kashishi Village, in Geita District, he did not appear to defend the appeal.

Following his nonappearance, the appeal was heard exparte. At the hearing, the appellant had nothing to add, he asked the court to adopt his ground of Appeal and decide on that base.

Now for easy flow of the Judgment, I will discuss one ground of appeal after another. Starting with the first ground of appeal which raises a complaint over the Ward Tribunal's failure to consider the appellant's evidence that he was allocated that land in the year 1974 by the village council, looking at this ground I find the findings over the same should



base on record of the trial tribunal. Having passed through the evidence on record before the trial tribunal, I find no evidence lead to prove that the appellant was allocated that land by the village authority in 1974. This evidence is new as this issue has been raised before this court. It was neither raised before the trial tribunal nor the District Land and Housing Tribunal. It is the law that no new facts should be raised in appeal, for that reason the first ground is a blame without base as the 1<sup>st</sup> appellate tribunal had nothing to consider in as far as the facts alleged is concerned. The firsts ground of appeal fails for the reasons given.

Reading between lines, the second and third grounds may be discussed and resolved together as they all raises the complaints that the tribunal erred to rule in favour of the respondent while the land in dispute belonged to the respondent because it was the son of the appellant one Donya Charles who had dispute with him.

These grounds are built on the decision of the same District Land and Housing Tribunal made in Appeal No. 121/2008 in a case between **Mayala Pashinge vs Donya Charles** the later being the son of the appellant. In that case, the dispute ended by declaring the demarcation of the land in dispute to be the historical road separating the lands of the parties to that

case. In my opinion, that dispute ended, the dispute at hand is a new one as it ensued almost eight years later. However, it is in the evidence before the tribunal that, when the tribunal visited the locus in quo, the appellant failed to show boundaries of his land, that is why the tribunal ended up to uphold the appeal by the appellant before it who is the respondent in this appeal.

It is the principle of law, that the trial court is better placed to ascertain the factual evidence, and where the findings is reached by the trial court (the court which collected the evidence) then the court sitting on appeal should not interfere the concurrent finding of facts, See the case of **Buruhani Hawezi Vs Republic**, Criminal Appeal No.51 of 2012 CAT, Mtwara.

In this case the record shows before the Ward Tribunal two areas were shown, the one which had a land dispute in 2008 which involved the respondent and the son of the appellant where Tshs. 900,000/= was paid as compensation. The Ward Tribunal was also shown the new area in dispute between the parties which was distinct to that in the former dispute where after receiving the evidence and after hearing witnesses at the locus in quo, the Ward Tribunal concluded that the respondent invaded



the land which belonged to the appellant and declared the appellant as the lawful owner of the land.

In that case the tribunal made it clear that, its decision was not reversing the decision of the District Land and Housing Tribunal, but the order is in respect of the new land in dispute. The Ward Tribunal went as far as drawing the sketch map of locus in quo, that sketch map went as far as identifying the land which was involved in the dispute which was decided by the District Land and Housing Tribunal in the years 2008 and distinguished it with the land in dispute in this matter. For that reason, the District Land and Housing Tribunal, though has powers to visit locus in quo and receiving additional evidence, but with all due respect that powers is invoked is where there is a gap in the evidence recorded in the proceedings before the tribunal and the reasons for recording additional evidence must be recorded.

In this case, there is no concrete reason as to why the District Land and Housing Tribunal did not believe the evidence recorded by the Ward Tribunal especially the sketch map, that being the case, and taking into account the fact that it was in appellate capacity, it was therefore not justified for it to neglect the evidence recorded by the trial ward tribunal

without legal justification, and instead take new evidence thereby disregarding the already recorded evidence by the trial tribunal without giving reasons for such act. That said, the second and third grounds of appeal are hereby found to have merit they are allowed for the reasons given herein above.

Regarding the fourth ground of appeal which raises two complaints, one, that the District Land and Housing Tribunal, did not receive opinion of assessors, two, that the assessors who visited the locus in quo are different from those who presided over the appeal. Resolving the first complaint in this ground, with due respect to the appellant, this complaint has no merit because the judgment which is appealed against contains the opinions of assessors.

Regarding the second limb of the ground of appeal, I entirely agree with the appellant that assessors who presided over when the appeal was heard, were Mabula and Salome, and on the date of visitation of the locus in quo, there was only Mabula, who presided over the appeal, the second assessor was Kinuno, who seems to be stranger to the proceedings as was not one of the assessors who presided over the appeal. However, as I have already declared that the evidence on visitation was not good at all, as the



appellate tribunal was not justified to do so, then the evidence so recorded have no effect to the appeal.

Regarding the fifth ground of appeal, I find it to have already resolved when resolving ground number 2 and 3 of this appeal. That said and as the foundation of the decision of the District Land and Housing Tribunal based on the evidence collected at the locus in quo when it visited and having declared the said evidence to be collected without legal and factual justification. I thus find the appeal to have merit, the same is allowed, on that ground, the decision of the District Land and Housing Tribunal is quashed and orders given there at are set aside, the decision of the Ward Tribunal is restored and upheld.

It is so ordered.

**DATED** at **MWANZA**, this 18<sup>th</sup> December 2020



**J. C. TIGANGA**

**JUDGE**

**18/12/2020**

