IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

MISCELLANEOUS LAND CASE APPEAL No. 19 OF 2018

(Arising from Land case Appeal No.95 of 2017 of District Land and Housing Tribunal for Tabora and Land case No. 18 of 2017 for Mtendeni Ward Tribunal)

SALAMA JUMA.....APPELLANT

VERSUS

HAWA ATHUMANI .....RESPONDENT

JUDGMENT

Date of Last Order: 28/07/2020

Date of Delivery: 18/09/2020

AMOUR S. KHAMIS, J.:

In this second appeal, Salama Juma challenges a decision of the District Land and Housing Tribunal for Tabora which declared Hawa Athumani as the lawful owner of a disputed parcel of land located at Kidatu B Street, Mtendeni Ward, Tabora Municipality.

The dispute originated from the Mtendeni Ward Tribunal wherein Hawa Athumani complained that Salama Juma had trespassed on her land.

The Ward tribunal decided in favour of Hawa Athumani resulting to Salama Juma's appeal to the District Land and Housing Tribunal for Tabora.

Salama Juma presented three grounds of appeal that can be conveniently rephrased as hereunder:

1. That the District Land and Housing Tribunal erred in law and in fact in failure to observe that the Ward tribunal's proceedings were void.
2. That the District Land and Housing Tribunal erred in law and in fact in failure to hold that the respondent had no lucus standi to sue over the suit land.
3. That the District Land and Housing Tribunal erred in law in failure to observe that the suit land belonged to the appellant since 1984 used it continuously for more than twelve (12) years and that the respondent was time barred to claim over it.

In this appeal, Salama Juma was represented by Mr. Samwel Ndanga, learned advocate while Mr. Kelvin Kayaga, learned advocate, acted for Hawa Athumani on legal aid basis.

The appeal was disposed of by way of written submissions and both sides adhered to a schedule set by the Court.

I have exhaustively read the rival submissions on the three grounds of appeal and I will endeavour to tackle them on seriation.

In support of the first ground of appeal Mr. Samwel Ndanga contended that Hawa Athumani failed to join one Mashaka Seif Ramadhani as administrator of the estate of the late Seif Ramadhani.

He contended that the late Seif Ramadhani had allocated the land to the appellant in 1997 and administrator of the estate was a necessary party.

The learned advocate relied on **Juma B. Kadala V. Laurent Mnkonde (1983) TLR 103 and Abdullatif Mohamed Hamis V Mahbob Yusuf Osman & Fatna Mohamed, Civil Revision No. 6 of 2017 – CAT** (unreported).

On the second ground of appeal, Mr. Ndanga contended that the evidence on record showed that the suit land belonged to the respondent's aunt which fact disqualified the respondent from capacity to sue.

On the third ground of appeal, the appellant's counsel asserted that the appellant owned the suit land since 1997 and developed it by planting various trees.

He submitted that on expiry of 12 years from date of occupation, the respondent was time barred from claiming ownership of the suit land.

On the other hand, Mr. Kelvin Kayaga faulted the appellant for advancing three (3) grounds of appeal whereas there was only one ground of appeal in the District Land and Housing Tribunal.

He contended that the appellant had no right to raise fresh grounds of appeal that were not entertained in the first appellate tribunal.

In support of the contention, he relied on **Elias Mosses Msaki V Yesaya Ngateu Matee (1990) TLR 90 and Melita Naikiminjal & Another V Sailevo Loibanguti (1998) TLR 20**.

On those basis, the respondent's counsel invited this Court to ignore the second and third grounds of appeal.

On the first ground of appeal, Mr. Kayaga contended that the appellant's argument was baseless and supported, decisions of the two tribunals below.

The learned advocate asserted that it was the respondent who licenced the appellant to cultivate on the disputed land for four (4) years and argued that the relationship did not involve any third party to qualify as a necessary party in the case.

Mr. Kayaga charged that the evidence revealed the respondent as a lawful owner of the disputed land and thus with a locus standi to sue on it.

On the third ground of appeal, the respondent's counsel conceded that the appellant was given a usufructuary right over the land in question by the respondent in 1997.

However, the learned counsel argued that vacant possession of the land was demanded a few months before the dispute was lodged in the trial ward tribunal.

Mr. Kayaga forcefully submitted that the cause of action arose at a time when the respondent demanded vacant possession of the disputed land and not otherwise.

This being a second appeal, I will start by restating the law that an appellate Court is not permitted to consider matters that were not pleaded by parties or not canvassed at the trial (See **HOTEL TRAVERTINE LTD & 2 OTHERS V NATIONAL BANK OF COMMERCE LTD (2006) TLR 133 and JAMES GWAGILO V THE ATTORNEY GENERAL, CIVIL APPEAL NO. 67 OF 2001** (unreported).

In **JUMA SAID & ANOTHER V REPUBLIC, CRIMINAL APPEAL NO. 114 OF 2005** (unreported) the Court of Appeal pointed out the duty of the Court in the second appeal thus:

> *"However, being a second appeal we will be cautions in re-evaluating the evidence on the concurrent findings of fact made by the Courts below. As stated in* ***AMIRATIAL DAMODAR'S MALTASE AND ANOTHER t/a ZANZIBAR SILK STORES VA.H. JARIWALA t/a ZANZIBAR HOTEL (1980) TLR 31****, that:*
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> *"In my respectful view, where, as in the first instant case, there are concurrent findings of facts by two Courts, this Court should as a rule of practice follow the long established rule repeatedly laid*

down by the Court of Appeal for East Africa, that an appellate Court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law or procedure."

The issue is whether the two tribunals below misapplied the evidence on record leading to a miscarriage of Justice.

Hawa Athumani testified that she licenced Salama Juma to cultivate the disputed land but did not authorize fabrication of bricks for construction thereon.

On cross examination by Salama Juma, she disclosed that the licence lasted four (4) years, thus:

*"**SWALI**: Jahilo shamba nililima kwa muda gani?*

***JIBU:** umelima miaka minne"*

Salama Juma did not question Hawa Athumani on allegation that she was given the farm by Ramadhani Seif or any other person.

The law on the party's failure to cross examine on an important point of fact was restated by the Court of Appeal in **JUMA KASEMA @ NHUMBU V REPUBLIC, CRIMINAL APPEAL NO. 550 OF 2016** (Tabora), thus:

"It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped asking the Court to disbelieve what the witness said, as the silence is tantamount to accepting the truth . . ."

On account of Salama Juma's failure to cross examine Hawa Athumani on the former's allegation that the land was given to her by the late Ramadhani Seif, I take it that introducing such allegation at the time of defence (by the appellant) was an afterthought and cannot be a basis to fault findings of the trial ward tribunal and the appellate tribunal.

For those reasons, I reject as unfounded the appellant's contention that the trial tribunal's proceedings were void.

Likewise, the evidence on record clearly show that the respondent owned the disputed land on her own right and not through an aunt, uncle or any relative.

As such, it was not proved that the respondent lacked a locus standi to institute the dispute. That assertion is rejected.

On the third ground of appeal, the trial Court's proceedings did not show any proposition by the appellant as regards to the respondent's stay on the land for over twelve (12) years.

To the contrary, records show questions and answers between the parties herein evidencing that the appellant was licenced to cultivate the farm for four (4) years.

Records further show that on examination by the trial tribunal's member, Salama Juma admitted that she was licenced to cultivate the farm as per the excerpts reproduced below:

"***SWALI***: *Shamba lako halali ni kiasi gani?*

JIBU: *Ni heka moja na robo tatu.*

SWALI: *Ulilokuwa umeazima ni kiasi gani?*

JIBU*: Sikulipimaga."*

Furthermore, contrary to the appellant's assertions, Mashaka Seif Ramadhani who testified in the ward tribunal did not state that he was an administrator of the estate of the late Seif Ramadhani.

This witness went on record saying that there was no written evidence to prove that Seif Ramadhan had gifted the disputed land to the appellant, Salama Juma.

In the circumstances, I find no compelling reasons to disturb the concurrent findings of facts by the two tribunals below.

In the upshot, the appeal is dismissed with no order for costs. It is so ordered.

AMOUR S. KHAMIS
JUDGE
17/09/2020

ORDER: Judgment delivered this 18th day of September, 2020 in the presence of Mr. Kelvin Kayaga, advocate for the respondent and also holding brief of Mr. Samwel Ndanga, advocate for the appellant who is also present in person.

Right of appeal explained fully.

B.R. NYAKI
DEPUTY REGISTRAR
18/09/2020