

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**MISC. LAND APPEAL NO. 06 OF 2018**

*(From Land Appeal No. 12 of 2017, District Land and Housing Tribunal of Shinyanga, Original  
Masengwa Ward Tribunal, Land Appl.No.11 of 2016 )*

**PALULA MANILIZU.....APPELLANT**

**VERSUS**

**KASHINJE KASEMA.....RESPONDENT**

**JUDGMENT**

5/3& 17/4/2020

**G. J. Mdemu, J.**

This is a second land appeal. On 26<sup>th</sup> of January 2017 in Masengwa Ward Tribunal, the Appellant one Palula Manilizu lost in a claim over ownership of land insitituted by the Respondent in Land Application No. 11 of 2016. His appeal No.4 of 2017 to the District Land and Housing Tribunal of Shinyanga was dismissed on merit on 14<sup>th</sup> of September 2017. He thus preferred this second appeal as he considers himself the rightful owner of the suit land.

Brief facts of this land dispute are that, in the Ward Tribunal of Masengwa, the Respondent sued the Appellant for encroachment into his piece of land. On 01/10/2016 the Respondent found the Appellant cutting trees in the suit land. The Appellant claimed that, the trees and the plot of land belong to him. The Respondent on the other hand stated that, he purchased the land from Yusuph Ngwandu in 1994. This land was allocated by the Village

Authorities in 1998 to Yusufu's father under the chairmanship of one Zablon Zakaria.

On those facts, and as stated above, Masengwa Ward Tribunal determined the land dispute in favour of the Respondent who was the complainant. The Appellant was not satisfied. As observed earlier on, his appeal to Shinyanga District land and Housing Tribunal was dismissed on merits, hence this appeal on the following grounds of appeal;-

- 1. That, the learned chairman erred in law and fact in entering judgment in favour of the Respondent without considering that the seller of the suit to the Respondent one Yusuph Mwandu was not joined as a necessary party Respondent. It is trite law that non joinder of necessary party to a suit makes the whole proceedings to be fatal.*
- 2. That, the learned chairman erred in law and fact in failing to analyse the evidence tendered at the Ward tribunal of Masengwe which proved on balance of probability that the land in dispute is the property of the Appellant's father one Manilizu Bafuna and he was the one to be sued.*
- 3. That, the learned chairman erred in law and fact in failing to consider that despite the Appellant informing the Tribunal that the land in dispute is not his land, but the same belongs to his father, where he prayed that he be joined as a necessary Respondent, his prayer was denied without due cause and the said father was also denied to testify.*

Arguing this appeal on 5<sup>th</sup> of March 2020, both the Appellant and the Respondent appeared in person. Along with his grounds of appeal, which he prayed to be adopted forming part of his submission, the Appellant added that, he was given the land by his father and that, the person whom the Respondent stated to have purchased the land was not called. He therefore prayed that, the matter be remitted to the Village Authority so that his father

be involved. It is on those premises the Appellant prayed that this appeal be allowed.

In resisting the appeal, the Respondent told the court that, the land in dispute belongs to him because he purchased the same on behalf of one Yusuph Mwandu. He also faulted the Appellant that, it is not correct that, his father was not involved in the dispute because the Appellant himself testified that his father should not be involved. He could therefore find no any merit to the prayer of the Appellant to have the matter remitted to the tribunal. To him, the available record be considered by the court in determining the appeal. the Respondent concluded that, the appeal has no merit and be dismissed.

In a brief rejoinder, the Appellant concluded that, the Respondent submission should not be trusted because he did not submit in evidence any document proving the sale transaction in disposing the said piece of land. This was all from the parties to this appeal.

In addressing the controversy as coached in the grounds of appeal, the major contention by the Appellant is that, there is no evidence on record to prove ownership of the disputed land to the Respondent. What have to be resolved therefore is who is the rightful owner of the Suitland? To answer this question, the evidence as was in the trial tribunal's record remain of relevance.

In essence, the evidence of the Appellant, who was the Respondent in the trial tribunal has the following evidential value: **One**, that the land in dispute is his property because was bequeathed to him by his late father .At page 4 of the typed proceedings of the Ward tribunal it is recorded as follows:

*"Eneo hilo ni langu kutoka kwa Baba mzazi.Nina miaka mingi nalifanyia kazi na humo kuna nyumba ya Kashinje Kasema.Hizo zipo hazina eneo kwa hiyo nyumba hizo ukitaka kufanya kazi unafanya tu kwa sababu nyumba hizo hazina eneo na kwa kweli nilikuwa nafanyia kazi tu mpaka tarehe 1/10/2016 nikapata kukatazwa....."*

**Two**, that, on the evidence as quoted above, the Appellant conceded that in the disputed plot of land, the Respondent has elected a house and in fact is living in the suit premises for quite some time. This was the case when examined by the Respondent, the Appellant made the following version:

*(iii) Nyumba hizo zina miaka mingapi zimejengwa hapo?*

*Jibu ;miaka mingi sijui ni mingapi.*

**Three**, that, the Appellant was merely using then land and that he doesn't know the size. When examined by Members of the Ward Tribunal, the Appellant on this testified as hereunder:

*(iii) Palula wewe unajua ploti yako ina ukubwa kiasi gani?*

*Jibu:Mimi najua eneo langu tu kusema kwamba ni ploti sijui.*

**Four**, at page five of the proceedings, the Appellant conceded that the Respondent purchased that land. To this,when examined by a member of the tribunal one Peter J.Ngude, the Appellant testified:

*(iv)Kashinje alifikaje pale au ndugu wa huyo Mwanangeka?*

*Jibu: Kashije alinunua kwa Mwanangeka.*

From that evidence of Appellant at the trial tribunal, it is clear that, the Appellant did not prove the case contrary to what is complained in the second ground of appeal. It is also clear from the Respondent's evidence and that of the Appellant that, the Respondent purchased the suit land. This was also revealed when the trial tribunal visited the suit land in which those in attendance testified that the Respondent purchased the suit land. In this regard, the argument of the Appellant that the Respondent did not tender in evidence any documentation proving the purchase transaction is unfounded in two fold; **One** that, it was not in evidence and never considered by the two tribunals below. **Two**, that it has been raised at this second appeal, thus legally is untenable.

Apart from that, the Appellant besides his admission that the Respondent purchased the suit land, he also conceded that, the Respondent is living in the suit premises and has elected the house therein. To me, this is clear evidence that, the Respondent is the owner of the suit land as elsewhere in the record of trial tribunal, the Appellant categorically testified that, he was just using that land. This latter alone is not evidence as to ownership. It cannot discredit the evidence of the Respondent, specific of one Yusuph Ngwandu at page two of the trial tribunal's record that:

*"Maelezo yangu sahihi ilikuwa siku na mwaka 1988 Baba yangu mzazi aliamia kijiji cha Ilobashi Kitongoji cha Mwajilembe kutoka Ishinabulandi. Alipofika huko akapewa ploti ya kuishi na Kijiji. Kipindi hicho Mwenyekiti ni Zabroni. Mwaka 1994 Baba yangu alianza kuugua mwaka huohuo alifariki. Kulikuwa na wadogo zangu wawili wakawa wamesema hawawezi kuishi huko. Nikawakusanya wote mimi nikiwa mjini Shinyanga na wakasema tuuze hiyo ploti na tukauza kwa Kashinje Kasema 1994. Basi sisi tukawa tumehama kabisa mpaka leo na gharama tuliyouza ni Tsh.20,000/=*"

In particular, this is the evidence on how the Respondent acquired the suit land. That evidence is corroborated particularly by the Appellant and also one Seni Kulula who by then was a ten cell leader and profoundly witnessed the Respondent purchasing the suit land in 1994. In light of that position, it is not correct that both the trial and Appellate tribunals did not analyse the evidence of the Appellant properly. This is to say that the Appellant failed to prove that he is the rightful owner of the land in dispute. The law under the provisions of **section 110** of the **Evidence Act, Cap. 11** clearly states that:

*"Whoever desires any court to give a judgment as to any legal right or liability, dependent on the existence of facts which he asserts must prove those facts exist."*

With this provision, and as I said before, no tangible evidence on the Appellant's side to establish ownership and how he acquired that land.

Regarding proof of ownership, this court in **Justine Paul Mukabi and 50 Others vs. Coast Auction Mart Co. LTD and Court Brokers, Land Case No. 128/2012** (unreported) at page 22 stated that;

*“When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is the owner is on the person who asserts that he is not the owner”*

The Respondent at the trial tribunal who asserted ownership of the suit land, discharged that burden. As noted above, the issue of ownership was not determined by the Appellate tribunal. The Appellate tribunal cannot therefore be blamed on this because it only considered one ground of appeal regarding non joinder of parties. Other grounds, specific on ownership, got withdrawn by the Appellant. In the judgment regarding this point, the learned chairman made the following findings as at page 2 of the judgment:

*“On the hearing date, the Advocate of the Appellant, for reasons best known to himself, decided to abandon the first and second grounds and remained with only the third ground.*

The abandoned and the remaining grounds were reproduced at page one of the judgment of the Appellate Tribunal as hereunder:

- 1. That, the Masengwa Ward Tribunal erred in law and facts when it failed to evaluate properly the evidence which were adduced by the Appellant during hearing.*
- 2. That, the Masengwa Ward Tribunal erred in law and facts when it failed when it was biased against the Respondent*
- 3. That, the Masengwa Ward Tribunal erred in law and facts when it decided in favour of the Respondent in a case which the seller of the disputed property was not joined.*

As noted in the withdrawn grounds, much as I deliberated generally on the evidence as adduced for the sake of substantive justice, the Appellant was not supposed to reintroduce grounds which he withdrawn in the first appeal.

As to non joinder of parties, I think, much as the learned Appellate Chairman labored much on the same, he was not supposed to consider for one reason that, throughout the trial tribunals proceedings, there is nowhere the Appellant raised this fact. This is to say, the ground of appeal relating to joinder of parties is not backed by the record. This is not legally acceptable. It is on that understanding I find it of no merit to labour on the question of joinder of parties as raised in the first ground of appeal.

As to the complaint raised by the Appellant in the third ground of appeal that he was wrongly sued and that his father who is the owner of the suit property was neither called in evidence nor sued in person, again this should be borne by the record. My perusal to the record noted that, all through, the Appellant maintained to be the owner of the land. He did not raise this argument at the trial tribunal. In the trial tribunal, as I quoted above, the Appellant stated to be the owner of the suit land. For clarity, I re-quote as hereunder:


***“Eneo hilo ni langu kutoka kwa Baba mzazi.Nina miaka mingi nalifanyia kazi na humo kuna nyumba ya Kashinje Kasema.Hizo zipo hazina eneo kwa hiyo nyumba hizo ukitaka kufanya kazi unafanya tu kwa sababu nyumba hizo hazina eneo na kwa kweli nilikuwa nafanyia kazi tu mpaka tarehe 1/10/2016 nikapata kukatazwa.....”(emphasis mine)***

As that is what transpired, there is no where that the Appellant, who was duty bound to assemble any witness of his choice, chose to call any. In this therefore, the tribunal cannot be blamed and that, would not also have deliberated on joinder or non joinder of parties, matters which were not placed before it. I also resolved that complaint in the first ground of appeal. Even the question of calling that father of his in evidence was not raised.

Raising this argument at this point of second appeal indeed is an afterthought. This ground of appeal is also unfounded.


It is from those observations the Appellant failed to prove the ownership of the suit land and as such, the Ward Tribunal was justified to declare the Respondent a rightful owner of the land. As noted, both tribunals below had a concurrent view or position on matters of facts/evidence regarding ownership of the suit property to the Respondent. It is trite law that, the Appellate court should not disturb a concurrent finding of the two tribunals/courts below unless there is misinterpretation or misapprehension of the facts ahead of them of which, in the instant appeal, I have found none.

Having said so, there is no merit in the present appeal and is accordingly dismissed with costs. It is so ordered.

  
**Gerson J. Mdemu**  
**Judge**  
**17/4/2020**

**DATED at SHINYANGA this 17<sup>th</sup> day of April, 2020.**



  
**Gerson J. Mdemu**  
**Judge**  
**17/4/2020**