

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

LAND APPEAL NO.09 OF 2020

(Originating from the Decision of the District Land Housing Tribunal of Songea at Songea in Land Application No. 237 of 2016)

ALLY BURHAN MAPUNDA..... APPEALANT

Versus

LAZARUS ELENZIAL CHUMA..... 1ST RESPONDENT

LUCIA HERBERT NYONI..... 2ND RESPONDENT

JUDGMENT

Date of Last Order: 23/03/2021.

Date of Judgment: 22/04/2021.

BEFORE: S.C. MOSHI, J.

The respondents successfully instituted a land case at the District Land and housing Tribunal of Songea at Songea against the appellant, he claimed that the respondent trespassed to their land measuring $\frac{3}{4}$ acre located at kidugalo, Lumecha Namtumbo District. After a full trial the trial Tribunal allowed the application without cost and declared the respondent to be the owner of the suit land. Aggrieved by the decision the appellant has filed this appeal on the following grounds: -

- 1. That the trial Tribunal erred in law and facts for entertaining this matter relying only on mere words without any proof with regard to*

the value of disputed land hence uncertainty with regard to the pecuniary jurisdiction of the trial Tribunal.

- 2. That the trial tribunal erred in law and fact for failure to consider that the late father of the first respondent did not oppose the ownership of the late Mbaraka Mohamed Fussi.*
- 3. That, the trial Tribunal erred in law and in fact in its decision by admitting the customary right of occupancy of respondents while there is an issue concerning the illegality on the procedure for acquiring the said customary right of occupancy.*

During the hearing of this appeal the appellant was represented by Mr. Augustino Mahenge, Advocate whereas the respondents were represented by Mr. Zuberi Maulid, Advocate.

On the first ground Mr. Mahenge submitted that, there was no proof of the value of the disputed land. He said that the court's jurisdiction is a legal issue, the court has to satisfy itself on its jurisdiction. In the pleadings they stated that the value of the land was Tshs 4 million. The appellant objected the value, he demanded the respondents to bring an evaluation report instead of verbal assertion. He said that he expected the court to halt entertaining the matter and require the respondents to bring the report. In support of the argument he cited the case of **Fanuel Mantiri Ng'unda vs. Herman Mantri Ng'unda and two others** (1995) TLR 159, where it was held that it is risk for a court to proceed

with the case while assuming its jurisdiction without satisfying itself. He added that the $\frac{3}{4}$ acre of land at Lumecha, Namtumbo can't have such value.

On the second ground, he argued that the trial tribunal erred for not considering evidence which showed that Mbaraka Mohamedi Fuss used the land uninterrupted for his life period.

On the third ground regarding customary right of occupancy, he said that there are three procedures of obtaining it. There ought to be Village development Committee and other meetings which are relevant. He argued that the respondents ought to have attached all necessary minutes of the relevant meeting, since he did not do that, there are possibilities of having obtained the same through illegal ways.

In the end he prayed the court to allow the appeal and reverse the decision and set aside the decree.

In reply Mr. Zuberi submitted that the issue of the value of subject matter was not in dispute, it is a new issue raised by the appellant's advocate. It was pleaded in the 4th paragraph of the amended application, that estimated value was T.shs four million, hence the trial Tribunal had jurisdiction to try the matter. Since it was the appellant who disputed the value, then he was the one who was supposed to tender the evaluation

report, it was not the tribunal's duty to force the respondent to bring the evaluation report.

Mr. Zuberi argued further that the second ground is also a new fact as it was not raised during the trial neither in examination in chief nor during cross examination.

On the third ground that relates to the legality of customary right of occupancy, he said that there was no illegality. The appellant did not call witnesses to testify on the alleged irregularity. He argued that the customary right of occupancy is conclusive proof of ownership. He prayed the appeal to be dismissed with costs.

In rejoinder Mr. Mahenge reiterated his submission in chief in respect of the first ground of appeal. He also said that the second ground is not a new fact and in respect of the third ground he said if customary right of occupancy certificate is conclusive (i.e. can't be questioned) it will leave leeway to fraudsters.

The issue to be determined is whether this appeal has merit.

Having perused through the grounds of appeal I readily agree with the respondent's advocate that the memorandum of appeal contains a new issue which was not considered or determined in the trial Tribunal. The law is well settled that, the court will not entertain an issue that was not decided by the lower court. See the case of **Diaka Brama Kaba and**

others Vs. R, Crim. App 211 of 2011 Court of Appeal at Dar es salaam (Unreported), **Melita Naikiminjal Luishalaan Nakiminjal Vs. Sailevo Loiba Njuti** (1998) TLR 120, **Elisa Moses Msaki Vs. Yesaya Ngateu Natee** (1990) TLR 90.

The appellant didn't raise the issue of jurisdiction at the commencement of the trial. However, I am alive that the issue of jurisdiction can be raised at any time. Mr. Mahenge while submitting on the first ground of appeal cited the case of **Fanuel Mantiri Ngúnda vs. Herman Mantiri Ngúnda and two others** (supra) in support of his submission that the trial tribunal assumed jurisdiction in trying the case. However, this case is distinguishable from the case at hand. In the cited case the jurisdiction of the court was not included in the plaint whereas in the case at hand the jurisdiction of the trial tribunal was pleaded at paragraph four in the amended application.

Second ground of appeal. This ground revolves around analysis of evidence. Whether the trial tribunal failed to consider that the father of first respondent did not oppose the ownership of late Mbaraka Mohamed Fusi. The respondent said that he is administrator of estate of late Mbaraka Mohamed Fussy who died in 1991 July, 5th. He was appointed administrator in August, 1991. According to him, suit land was part of the deceased's estate. He said that the land was acquired by one Laurent

Chuma who is uncle of the first respondent, Laurent Chuma gave land to Mussa Likomelimuno who raised Mbaraka Mohamed Fussy.

However, there is no evidence to show how the land passed through one hand to the other i.e from Laurent Chuma, then to Musa Likomelimuno and lastly to Mbaraka Mohamed Fussy. Also, there is no evidence to show that applicant's father didn't dispute the said transactions. Furthermore, the appellant didn't say how he became aware of those deals while he was not part of them. He became involved in the estate of Mbaraka Mohamed Fussy in 1991 as administrator.

That said I am inclined to hold that the trial Tribunal did correctly decide as it did because there is no scintilla of evidence indicating that the late father of the first respondent did not oppose the ownership of land by the late Mbaraka Mohamed Fussi.

The third ground of appeal is about legality of respondent's certificate of customary right of occupancy. The record shows that it was admitted as exhibit P1 as the appellant didn't challenge its admission. However, when the appellant challenged it when he was testifying, he said it is a forged document praying the same to be nullified and legal proceedings be taken against those who issued it. However, I noted that having being admitted as exhibit P1, the document was not read over in the tribunal. Failure to read an admitted document denies the other party, appellant

an opportunity to know its nature and contents and to use it in his defence. Furthermore, the right of occupancy certificate was tendered by an advocate instead of the witness. This is a fatal irregularity, hence the exhibit is expunged from the record. See the case of **Rasul Amir Karan @Jua and Others vs. R**, Crim App 368 of 2017 Court of Appeal at Dar es salaam.

Exhibit P1 being expunged what remains is oral evidence of the respondent and the witnesses. In the case of **Hemed Said vs. Mohamedi Mbilu** (1984) TLR 113, It was held thus a person whose evidence is heavier than that of the other is the one who must win.

In the case at hand, I find that the respondent's evidence is heavier than that of the appellant and his witnesses. Evidence on the part of the respondent showed how he has been occupying the suit land undisturbed until when the appellant trespassed into it the version which was supported by PW2 and Pw3.

Furthermore, another crucial piece of evidence, is about description of the suit land. All the witnesses on the respondent's side gave the same description and the size of the suit land, that the suit land is bordered by Sakina Hassan Ngunga on the East, west there is a water source, south there is a road from Songea and the river on the other side the size of the suit land being $\frac{3}{4}$ acres compared to the appellant side where witnesses

differed on the description of the suit land and size of the same. The appellant didn't say about the size of the suit land while DW2 said it is 3 acres and she again said is 3 ½ acres while DW3 said 3/4 acres. On the issue of borders there were inconsistencies too, DW1's and DW2's testimonies were similar but DW2 who is the wife of the late Mbaraka Mohamedi Fussi gave a different version whereas DW1 described the borders to be thus, East-both child of Lazarus Chuma, North, a road called Mtwara corridor, west, there is Sakina Sanga and South there is water source, DW2 described their land to have the following boundaries, West- Kalimu, East -Kafuku, South -a road.

Evidently, the evidence of the respondent was heavier than that of the appellant.

In the upshot, the appeal has no merits and it is consequently dismissed with costs.

Right of Appeal Explained


S.C. MOSHI

JUDGE

20/4/2021

