

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPEAL NO.1 OF 2021

(Arising from Land Appeal No. 13 of 2019 of the District Land and
Housing Tribunal for Geita at Geita, originating from Kanyala Ward Tribunal in
Land Case No. 09 of 2018)

**MHOJA OMARY (An Administrator of the Estate of the late
Omary Simba) APPELLANT**

VERSUS

TATU MADAMA RESPONDENT

JUDGMENT

Date of last order: 13.04.2021

Date of Judgment: 15.04.2021

A.Z.MGEYEKWA, J

This is the second appeal. At the centre of controversy between the parties to this appeal is a parcel of land. The decision from which this appeal stems is the judgment of the Ward Tribunal in Land Case No.09 of 2018. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the respondent filed a land suit at Kanyala Ward Tribunal claiming for land ownership. The appellant claimed that the disputed plot belongs to his late father, Omary Simbi thus the respondent has trespassed her piece of land. The appellant claimed that his late father obtained the disputed plot during *Operesheni Vijijini*. The Ward Tribunal determined the matter in favour of the respondent. Dissatisfied, the appellant filed an appeal to the District Land and Housing Tribunal for Geita at Geita in Land Application No.13 of 2019. The first appellate court found nothing faulty with the decision of the trial court. It dismissed the appeal and upheld the trial court's decision.

Undaunted, the appellant found his way to this Court through the instant appeal. He has coined four grounds of appeal which are reproduced hereunder:-

1. *That the Honourable Chairperson of the Tribunal erred in law and fact by contending that the Appellant is not the Administrator of his late father OMARY SIMBI.*
2. *That the Honourable Chairperson of the Tribunal erred in law to decide in favour of the Respondent while she had no locus stand, she is not the Administratrix of the Estates in particular.*
3. *The Honourable Chairperson of the Tribunal erred in law and facts when failed to rule out that the Trial Ward Tribunal was not properly composed since 90% of the Trial Ward Tribunal members were Respondent's relatives.*
4. *That the Honourable Chairperson of the Tribunal erred in law and facts by failure to set aside the decision of the Trial Ward Tribunal which holds that the Respondent is the lawful owner of the suit land.*

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the hearing was conducted via audio teleconference, the appellant appeared in person, unrepresented while Mr. Mtete, learned counsel represented the respondent.

The appellant started his onslaught by claiming that the chairman erred in law by deciding that the appellant is not an administrator of his

late father; Omary Warioba Simbi. He stated that his late father passed away on 08th November, 2015 and then on 4th February, 2016, he was appointed by the Primary Court of Nyankumbu at Geita to be the administrator of the estate of the late Omary Warioba Simbi. To fortify his submission he referred this court to a Form No.14 which confirms that he was appointed as an administrator of the estate of the late Omary Warioba Simbi.

Arguing on the second ground, the appellant contended that the Chairman erred in law to decide in favour of the respondent since the appellant was not appointed as an administrator of the estate, therefore in his view, the respondent had no *locus standi* to lodge the case at the Ward Tribunal.

With respect to ground three of the appeal, the appellant's contention is that the appellate tribunal erred in law for failure to rule out that the trial Ward Tribunal was not properly composed. He valiantly argued that 90% of Ward Tribunal members were related to the respondent including the Chairman, the Secretary, and the Deputy Secretary. He lamented that the respondent gave all members a portion of plots.

Submitting on the fourth, the appellant had not much to say he insisted that the respondent was not an administrator of estate therefore, she had no *locus standi* to institute the said case at the Ward Tribunal.

On the strength of the above submission, the appellant beckoned upon this court to quash the decision of both tribunals and allow the appeal.

The respondent's reply was vociferous. It was Mr. Mtete's contention that the appeal has no merit. He stated that the appellate tribunal reached the right decision since the appellant is not an administrator of the estate of the late Omary. The learned counsel for the respondent further contended that the appellant did not tender any documentary evidence to prove his claims. Mr. Mtete argued that the appellant has submitted that Form No.14 was issued but he did not tender the said document at the Ward Tribunal. It was his further contentious that the appellant's claims that the Village council allocated him the said plot has no any supporting document. To support his argumentation he referred this court to the trial tribunal judgment.

On the second ground, Mr. Mtete argued that the respondent's clan held a meeting and the respondent tendered the minutes of the meeting to prove that she was appointed as an administrator of the estate while

the appellant did not tender any documentary evidence to prove his allegations.

As to the third ground, Mr. Mtete strongly opposed that the members of the trial tribunal are related to the respondent. He added that the appellant failed to prove his allegation. Insisting, Mr. Mtete stated that the respondent is a lawful owner of the disputed plot as it was decided by the Ward tribunal.

Concluding his argument, Mr. Mtete urged this court to strike out the trial tribunal decision for the main reason that both parties had no *locus standi*. Mr. Mtete stated that in order to do justice, parties should be ordered to institute a fresh case.

In his brief rejoinder, the appellant insisted that he was appointed as an administrator of the estate of the late Omary Warioba, and his documents were admitted at the trial tribunal while the respondent had no any documentary evidence to prove her claims. The appellant strongly opposed the learned counsel's submission by stating that the case cannot start afresh because the matter was in court since 2018 and he has proved that he is the administrator of the estate of the late Omary Warioba while

the respondent is waiting to be appointed as an administrator of the estate. He urged this court to allow the appeal and quash the tribunal's decision.

After a careful perusal of the record of the case and the final submissions submitted by both parties, I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113, which requires, "*the person whose evidence is heavier than that of the other is the one who must win*". In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Geita.

I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, see **Salum Mhando v Republic** [1993] TLR 170. See also the decision of the Court of Appeal of Tanzania in **Nuridin**

Mohamed @ Mkula v Republic, Criminal Appeal No. 112 of 2013, Court of Appeal of Tanzania at Iringa (unreported).

However, this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

"An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."

In my determination, I will consolidate the first, second, and fourth grounds because they are intertwined and the third ground will be determined separately. On the first, second, and fourth grounds of appeal, the appellant is complaining that the first appellate court erred in law and facts by holding that the appellant was not an administrator of the estate of his later father, Omary Simbi. The circumstance of the case, facts, and evidence will lead this court to determine the matter before it. It is in the record that at the trial tribunal both parties testified to the effect that they were not the direct owner of the disputed plot.

The respondent instituted the case in her own capacity while her evidence points towards the fact that the disputed land belonged to her

father. On his side, the appellant testified to the effect that the disputed land belongs to his late father. He added that his father obtained the disputed land during *Operation Vijiji*. In his testimony, the appellant neither mentioned that he was appointed to administer the estate of his late father nor did he tender any document to prove his ownership over the disputed land. The appellant was not appointed as administrators of the estate to administer the estate of their relatives. Reading section 100 of the Probate and Administration of Estate Act, Cap. 352 [R.E 2019] it states that:-

*"An executor or **administrator has the same power to sue in respect of all caused of action that survives the deceased, and may exercise the same power for the recovery of debts due to him at the time of his death, as the deceased had when living.**"*

[Emphasis added].

Equally, section 71 of the Probate and Administration of Estate Act, Cap. 352 [R.E 2019] state that:-

"After any grant of probate or letters of administration, no person other than the person to whom the same shall have been granted shall have the power to sue or prosecute any suit, or otherwise act as a representative of the deceased,

until such probate or letters of administration shall have been revoked or annulled.” [Emphasis added].

Applying the above provisions of law, it is crystal clear that a person duly appointed to administer the estate of the deceased is the only competent person to file a case. Therefore, as long as the appellant and the respondent were not administrators of the estate that means that they had no power to sue and recover the landed property of their late relatives.

Concerning the third ground that the Chairman failed to rule that the trial tribunal was not properly composed since 90% of the trial tribunal members were related to the respondent. At the trial tribunal, the appellant has not raised this concern therefore raising the same at the appellate tribunal was a new issue and an afterthought. Hence the lower court did not decide on it. A first appellate court is restrained to determine a new issue that was not pleaded in the first place. The same was observed in the case of **Juma v Manager PBZ Ltd and others** [2004] I EA 62 Court of Appeal Tanzania at Zanzibar, held that: -

“...the first appellate Judge, therefore, erred in deliberating and deciding upon an issue which was not pleaded in the first place”.

Guided by the above authority, the appellant has introduced a new issue therefore the same is disregarded. Therefore this ground is a demerit.

For the reasons given above and as stated earlier, one of the canon principles of civil justice is for the person who alleges to prove his allegation. The same was held in the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Applying the above authority of the law, I have to say that I do not think the appellant proved his claims to the required standard of the law. Thus, I do not have any flicker of doubt that the evidence of the appellant was considered to the hilt but he failed to prove his ownership over the disputed plot.

For the aforesaid reasons, I am satisfied that, in the instant case, there are no extraordinary circumstances that require me to interfere with the trial tribunal findings. As per the trial tribunal records and as rightly pointed out by Mr. Mtete, learned counsel for the respondent that the appellant failed to prove his claims that he was appointed as administrator

of the estate of the late Omary Simbi. Likewise, the respondent was not appointed as administrator of estate. Therefore, both parties had no *locus standi* to lodge, appear and defend their case.

In the upshot of the above, I find and hold that this appeal was lodged with no iota of merit. It stands dismissed. I proceed to quash the proceedings and decisions of both tribunals. Parties are at liberty to file a fresh case. Each party to bear its own costs.

Order accordingly.

Dated at Mwanza this date 15th April, 2021.




A.Z.MGEYEKWA

JUDGE

15.04.2021

Judgment delivered on 15th April, 2021 via audio teleconference whereby the appellant and Mr. Mtete, learned counsel for the respondent were remotely present.


A.Z.MGEYEKWA

JUDGE

15.04.2021

Right of Appeal fully explained.