IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MISCELLANEOUS LAND APPEAL NO 139 OF 2020

(Arising from Land Appeal No. 2/2019 in Tarime Distirct Land and Housing Tribunal, Originating from Land Case No 38/2018 at Kyangombe ward)

FESTUS NYAMHANGA KIBIRO .....APPELLANT

VERSUS

MUSA WAMBURA NYAKYUMA .....RESPONDENT

JUDGMENT

26th May & 29th July, 2021

Kahyoza, J

Festus Nyamhanga Kibiro (Festus) sued Musa Wambura Nyakyuma in the ward tribunal for trespass. Festus lost the case. He appealed to the District Land and Housing Tribunal (the DLHT) where he lost the appeal. Still aggrieved, Festus has appealed to this Court. the issues raised by the grounds of appeal are as follows:-

1. Are the parties had separated by the river?
2. Has the appellant occupied the land for a period of more than 30 years?
3. Was the land in disputed allocated to the appellant by the village authority?
4. Did the evidence at the *locus in quo* show that the respondent trespassed to appellant's land?

5. (a) Did the tribunals ignore the opinion of village authority?
   (b) If yes, what is the consequences?
6. Did the tribunal fail to analyze the evidence?

The background is that Festus alleged that the village authorizes allocated a piece of land to him in 1978. Later, Musa trespassed into his land and occupied a piece of the land 72 footsteps and planted maize and bananas. Musa contended that the disputed land be longed to him. It is part of the land his mother gave him. Musa's land measured 490 X 75 footsteps. Both tribunals found for Musa.

I will commence with the six ground of appeal, which covers issues of evidence. Also, it is general; it covers almost all grounds of appeal.

Did the tribunal fail to analyze the evidence?

This is a second appeal. It settled that during a second appeal only matters of law are to be considered unless the courts or tribunals below misapprehend the substance, nature, and quality of the evidence. See the case of **Michael Elias v R.** Criminal Appeal No. 243/2009 (CAT unreported), where the Court said-

> *"On the second appeal, we are supposed to deal with questions of law. But this approach rests on the premises that the findings of fact are based on a correct appreciation of the evidence. If both courts completely misapprehend the substance, nature, and quality of the evidence, resulting in an unfair conviction, this Court must, in the interest of justice, interfere*

I will review the evidence to find out whether the findings of the two tribunals properly appreciated the substance, nature, and quality of the evidence.

Festus and Musa own adjacent pieces of land. The disputed hinges on the boundary between their two plots. I have examined he record and found that Festus alleged that the village authority gave him land part of which is the subject of dispute. He did not tender any document to prove that the village authorities allocated him land. Had he done, this dispute would have arisen, as the village authority must have defined the boundaries of the land it allocated to him. Festus is the claimant. He had a duty to establish his claim.

It is trite law that generally in civil cases, **the burden of proof lies on the party who alleges anything in his favour**. See the case of ***Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)*** Civil Appeal No. 118 of 2014 CAT (Unreported) and ***Sections 110 and 111 of the law of Evidence Act, [Cap. R.E. 2002]***. **Festus** had a duty to prove on balance of probability the boundaries of the land the village authorities allocated to him and that Musa trespassed to his land.

Festus did not give description of the boundaries of the land the village authority allocated to him. He stated that when the dispute over the boundary first emerged in 2013, the village authority decided that the boundary between them should be canyon (Korongo). Mussa described the boundary of his land as two anthill and trees traditionally refereed as "*Mikuyu* and *Msarwa*". Musa provided the distance from one tree to another. Musa summoned witnesses to support his position regarding the

boundary. Both parties gave evidence without documents. Festus summoned two people who were members of the village land committee. These two people took part in settle the dispute over the boundary when it rose for the first time. Festus did not produce the decision of village land committee before the ward tribunal. It is clear that the village land committee's role is advisory one. Section 8(4) of the **Village Land Act**, [Cap 114 R.E 2019], states that the land Committee shall not makes decision concerning the management of village land.

The village organ mandated to make decision over land disputes is the village land council and not the land committee. The two organs are different. The organ entrusted to make a decision has a duty to write down its finding. Thus, Festus was bound to produce the decision of the village land council, which he did not. It was hard to rely on Festus' evidence.

As to Musa's evidence, I found it more convincing that Festus's evidence; there was a reason to give it more weight. Musa described the boundary and when the wart tribunal visited the *locus in quo* found the tress described by Musa. This was a case which visiting the *locus in quo* was inevitable. It was very vital to establish the boundaries as the parties described. The Court of Appeal discussed the purposes of visiting the locus in quo in the **Avit Thedeus Massawe v. Isidory Assenga** Civil Appeal No. 6/2017, where it stated that

> *"Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the*

dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the locus in quo. The factors include:

1. Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see ***OthinielSheke V Victor Plankshak*** *(2008) NSCQRVol. 35, p.*

2. The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see ***Akosile Vs.Adeyeye*** *(2011) 17 NWLR(Pt. 1276) p.263.*

3. N/A

4. N/A"

The ward tribunal visited the *locus in quo* and after considering the evidence, it established the boundary. The DLHT did not see any reason to interfere with the findings of the tribunal. I am of the view that the ward tribunal and DLHT made the concurrent findings on the boundary of the lands the parties occupied. This Court being a second appellate court, finds

no reason to interfere. There is no misapprehension of evidencing, a miscarriage of justice or violation of some principles of law or procedure, which may call this second appellate court to interfere with the findings of the two lower tribunals. It is trite law that where there are concurrent findings of facts by two courts, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been a misapprehension of evidencing, a miscarriage of justice or violation of some principle of law or procedure. (See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla tla Zanzibar Hotel** [1980] T.L.R 31.)

I therefore find no merit in the six ground of appeal. The ward tribunal did consider the evidence on record and analyze the evidence. I dismiss the six ground of appeal.

The findings to the six ground of appeal answer the remaining issues. I will not answer those issues specifically. Not only that but also all the remaining grounds of appeal are new grounds. Festus did not raise them before the first appellate tribunal. It is settled position of law that issues matter not raised and canvassed by the first appellate court or tribunal cannot be considered by the second appellate court. The Court of Appeal in the case of **Farida and Another v. Domina Kagaruki,** Civil Appeal No. 136/2006 (CAT Unreported), where the Court of Appeal held that-

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

The Court of Appeal also, in **Simon Godson Macha** (Administrator of the late Godson Macha) v **Mary Kimaro** (Administrator of the late Kesia Zebadayo Tenga) Civil Appeal No 393/2019 reiterated its stance in the case of **Juma Manjano v R**., where it had held that-

> *"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court. The record of appeal at page21 to 23 shows that this ground of appeal was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athumani v. R*** *[2004] TLR 151 the issue of whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore struck out."*
>
> *"the Court has repeatedly held that* ***matters not raised at the first appellate court cannot be raised in the second appellate court****" (emphasis is added)*

Festus tendered to this Court the decision of the village authority. This appellant court does not take fresh evidence. It only refers to the evidence given before the trial tribunal. That evidence had no weight. Festus ought to have tender it before the ward tribunal.

I find no reason to consider the first, second, third, fourth and fifth grounds of appeal as after determining the six ground of appeal, the remaining grounds have no ground to stand on. Further, Festus raised the said grounds of appeal for the first time before this second appellate court.

In the end, I dismiss the appeal for want of merit and uphold the decision of DLHT and the ward tribunal. The boundary between Festus's land and Musa's land is the boundary prescribed by the ward tribunal.

The respondent is awarded costs of this appeal.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
29/7/2021

Court: Judgment delivered in the presence of the parties. B/C Mr Makunja present. Right of appeal explained.

J. R. Kahyoza
JUDGE
29/7/2021