IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 32 OF 2018

(Arising from DLHT for Kagera at Bukoba , Land Appeal No. 07 of 2017, Original Land case No.83 of 2016 of Kashai Ward Tribunal)

KENNEDY MUGALULA..... APPELLANT

VERSUS

SYMBERT KABINGWA ..... RESPONDENT

JUDGMENT

27 /08/2021 & 10/09/2021

NGIGWANA, J.

This is a second appeal. It traces its origin in the Ward Tribunal of Kashai at Bukoba in Land Case No.83 of 2016 whereby the respondent herein above successfully sued the appellant for trespass into piece of land located at Mafumbo Street, Ward of Kashai within Bukoba District in Kagera Region.

Aggrieved by the decision of the trial tribunal, the appellant appealed to the DLHT for Kagera at Bukoba. The appeal was argued by way of written submission. Eventually, the appellant lost the case for the second time.

Dissatisfied with the decision of the DLHT, he has knocked the doors of this court while armed with the following grounds of appeal drawn and filed by Mr. Eliphazi Bengesi, learned counsel.

1. That the trial tribunal misdirected itself in law as it was not seized with jurisdiction to try the suit worth beyond three million.

2. That the trial tribunal and the 1st appellate tribunal erred in law and facts in deciding the matter in favor of the respondent while the vendor was not joined by the respondent as a necessary party.

3. That the trial tribunal erred in law in admitting, proceeding and admitting the respondent allegation which was based on suing the wrong party to the suit premises.

4. That the trial tribunal erred in law by determining the suit which is statutorily time barred by 22 years.

5. That the trial tribunal erred in law and fact by refusing the appellant to call his witnesses.

6. That the trial tribunal erred in law in admitting, proceeding and deciding on the respondent hearsay claims.

Wherefore, prays for this court to allow the appeal with costs and declare the appellant as the lawful owner of the disputed land.

The respondent filed the reply to the petition of appeal whereas he disputed the 1st, 2nd, 5th and 6th grounds of appeal, but also disputed and attacked the 3rd ground that it was never raised in the 1st appellate

tribunal, and 4th ground that it was neither raised in the trial tribunal nor in the appellate tribunal. Wherefore prays for the dismissal of this appeal with costs for being devoid of merit.

At the hearing of this appeal the appellant had the services of Mr. Eliphazi Bengesi, learned counsel while the respondent had the services of Mr. Innocent Bernard, learned counsel.

Upon reading the grounds of appeal, together with the records the appellate tribunal and the trial tribunal I agree with Mr. Bernard, learned advocate for the respondent that that the 3rd ground of appeal was neither raised in the 1st appellate tribunal while the 4th ground that was never raised in the trial tribunal nor in the appellate tribunal, therefore cannot be entertained at this stage. In the case of **MELITA NAIKIMINJAL & LOISHILAARI NAKIMINJAL VERSUS SAILEVO LOIBANGUTT** (1998) T.L.R. 120, the Court of Appeal as per Lubuva, JA (as he then was) was of the view that;

"An issue not raised before the first appellate court cannot for the first time be raised and entertained by the second appellate court"

Furthermore, upon reading the remaining grounds of appeal, together with the records the appellate tribunal and the trial tribunal, I find that the **fifth ground** of appeal is sufficient to dispose the matter, and that being the case, there is no need to waste time addressing the rest of the grounds of appeal, as it will be for academic purposes only.

The complaint that the appellant was not afforded the right to be heard was raised in the appellate tribunal, and the appellate tribunal ruled in its judgment at page 8 as follows;

"***On the contention that the appellant was not heard, the judgment shows that that he refused to testify at the ward tribunal, therefore having abandoned his rights, he cannot claim the same at this stage. The right to be heard is available to a person who wishes to exercise it*** "

It was the argument of the learned counsel for the appellant that the appellant was not afforded the right to be heard as required by the law.

Mr. Bernard on his side supported the finding of the appellate tribunal. That, the appellant was afforded that right but he refused to exercise it, and therefore the path which was taken by the Trial tribunal and confirmed by the Appellate tribunal was very proper.

Upon my careful perusal of the of the record of the trial tribunal, I found the two hand written proceedings. In the proceedings which is in the original case file of the tribunal, there nothing showing that the appellant refused to bring his witnesses or exhibits. The same just shows that the respondent was to submit to the tribunal the original purchase deed in respect of the land in dispute before the appellant is called upon to make his defense and call witnesses. The same further shows that on 02/11/2016, the appellant did not bring witnesses and exhibits. Then, the case was adjourned until 04/11/2016. Let the record speak for itself;

"..... *SMI ametoa nakala ya hati ya kumiliki kiwanja hicho. Title No.19474.Shauri limeahirishwa mpaka tarehe 26/09/2016.Tarehe 26/09/2016 Mdai SM1 hakuleta barua ya kununulia kiwanja hicho. Shauri limeahirishwa mpaka tarehe 03/10/2016.Tarehe 03/10/2016 SM1 hakuleta nakala halisi ya barua ya kununulia. Shauri limeahirishwa mpaka tarehe 02/11/2016.* ***Tarehe 02/11/2016 Mdaiwa hakuleta mashahidi wala vielelezo. Shauri limeahirishwa mpaka tarehe 04/11/2016.***

SU1 KENNEDY MUGALULA, UMRI"

The said proceedings of the trial court ended that way. However, the second proceedings of the same tribunal in respect the same case and parties which was found in the appellate tribunal's file is conveying a different message Part of it reads;

".... Tarehe 02/11/2016 *SM1 alileta nakala halisi ya barua ya kununulia,* ***lakini mdaiwa alikataa kutoa maelezo yake kwa kudai kuwa hakuleta mashahidi wake wala vielelezo****. Kutokana na mdaiwa Kennedy Mugalula kukataa kutoa maelezo yake barazani kwa makusudi baraza liliahirisha shauri hilo hadi tarehe 14/12/2016 ili aweze kutoa maelezo yake.Tarehe 14/12/2016 Mdaiwa Kennedy Mugalula alikataa kutoa maelezo yake .Shauri liliahirishwa mpaka tarehe 16/12/2016 kwa uamuzi. Baraza lilitembelea eneo la mgogoro na kukuta kuwa mdaiwa anaendeleza kilimo cha mchicha ndani ya eneo hilo"*

Relying on the second proceedings, the exparte judgment was entered in favor of the respondent.

Now, the question is which proceedings should be trusted or believed? Another question is that can it be said there was a fair trial?

It is a cardinal principle of natural justice that a person should not be condemned unheard. In our jurisdiction, the said principle is not merely a principle of common law, it is a fundamental Constitutional right stipulated under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977.Let the same speak for itself;

"*Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kingine kinacho husika, basi mtu* ***huyo atakua na haki ya ya kupewa fursa ya kusikilizwa kwa ukamilifu***"

The Court of appeal of Tanzania in the case of **Deo Shirima and Two Others v. Scandinavian Express Services Limited,** Civil Application No. 34 of 2008 (unreported) had this to say;

"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is common knowledge" See also the case of **Christain Makondoro versus The Inspector General of Police and Another**, Civil Appeal No.40 of 2019 CAT (Unreported)

It has to be noted that the record of the proceedings in court or tribunal is of cardinal importance. As such, the credibility of the record is very

important, because it is one of the guarantees to a fair hearing on review and appeal. The same helps the appellate court to see exactly what transpired in the trial court or tribunal.

In our case, as pointed out earlier there are two conflicting proceedings, one showed that the appellant was afforded the right to be heard but opted not to exercise that right as he refused to testify and call witnesses. The second hand written proceedings which is in the file of the trial tribunal does not show that the appellant ever opted not to exercise that right. No explanation offered neither by the trial tribunal nor by the appellate tribunal as regards to the existence of the conflicting proceedings.

This court is alive with the common principle that a second appellate court can interfere with the concurrent findings of the two lower court/tribunals only if those courts/tribunals apprehended the evidence or misapplied the law or where there was violation of the principles of natural justice. See **Peters versus Sunday Post Ltd** [1958] E. A 424 and **Amrathlar Damadar and Another versus A. H. Jariwalla [**1980]TLR 31 and **DPP Versus Jaffar Mfaume Kawawa** [1981]TLR 49.

This court is also alive of section 45 of the Land Disputes Courts Act Cap 216 R: E 2019 provides as follows;

"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper

admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice"

Moreover, the court is alive of the Overriding objective principle which require courts to deal with cases justly, expeditiously, and to have regard to substantial justice instead of prioritizing procedural technicalities.

However, taking into account the existence of the two conflicting proceedings touching the question of fair trial which is the fundamental principle of natural justice and this court being a temple of justice it is my firm view that the same can neither be cured by overriding objective principle nor by section 45 of the Land Disputes Courts Act, Cap 216 R: E 2019. Under the circumstances, it is not certain as to whether the appellant refused or opted not to exercise his right or that he was denied that right by the trial tribunal. The proceedings are not credible to resolve those uncertainties, and for that matter interference by this court is necessary. In the administration of justice, it is very important to always remember the well-known maxim that;

"*Justice should not only be done but should manifestly and undoubtedly be seen to be done*". What transpired in this case, evidence that the maxim was far away from both lower tribunals.

In the event, I allow the appeal, nullify the proceedings and quash the judgment and orders of the Kashai Ward Tribunal in Land Case No. 83 of 2016 and the District Land and Housing Tribunal for Kagera at Bukoba in Appeal No. 07 of 2017. For the interest of justice, I order an expedited

retrial before new members of the Kashai Ward Tribunal. Since the anomaly was not caused by the parties, I order each party to bear its own costs.

It is so ordered.

E. L. NGIGWANA

JUDGE

10/09/2021

Judgment delivered this 10th day of September, 2021 in the presence of both parties in person, and Mr. E.M. Kamaleki, Judges' Law Assistant.

E. L. NGIGWANA

JUDGE

10/09/2021