

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPEAL NO. 43 OF 2020

(C/F: Land Appeal No. 30 of 2018 in the District Land and Housing Tribunal for Manyara at Babati, Land Case No. 91 of 2017)

MARIA GIRUANA GASEMBA.....APPELLANT

VERSUS

KRISTINA HANGO DONGU.....RESPONDENT

EXPARTE JUDGMENT

7/9/2021 & 5/11/2021

GWAE, J

This is an ex-parte judgment arising from the non-filing of the written submission by the respondent. It has been the position of the law that where an order for filing written submissions has not been complied with, the non-compliance shall be regarded as non-appearance or failure of that party to prosecute his/her case.

Dissatisfied with the decision of the District Land and Housing Tribunal for Manyara at Babati (DLHT), the appellant has filed this appeal with three grounds as follows;

- i. That, the first appellate tribunal failed to properly entertain the appeal institute before it.
- ii. That, the first appellate tribunal erred both in law and fact over the matter by passing a judgment that lacks salient features of a valid judgment.
- iii. That, the first appellate tribunal erred both in law and in fact in granting costs of the appeal without appreciating the fact that the appeal before it was purely a family related matter.

Initially, the appellant filed a suit at the Gehandu Ward Tribunal alleging the respondent to have trespassed into her land measuring 56 acres. After hearing of the parties' evidence, the ward tribunal gave its judgment in favour of the appellant on reasons that, the appellant has been using it for 23 years without any disturbance.

Aggrieved by this decision, the respondent filed an appeal to the DLHT which reversed the Ward tribunal's decision. In its Judgment, the District Land and Housing Tribunal held that, the dispute between the parties was a marriage conflict and not a land dispute, and therefore the ward tribunal erred in entertaining the dispute. The appellate tribunal went on quashing and set aside both the proceedings and judgment of the Ward Tribunal. In the meantime, the DLHT ordered the respondent to continue using the Suitland.

The appellant in this appeal was represented by the learned counsel, Mr. L. Kilusu whereas the respondent appeared in person unrepresented. With leave of the court, this appeal was disposed of by way of written submission, the respondent did not file her submission.

Arguing on the grounds of appeal, the appellant submitted as follows; on the first ground of appeal the appellant submitted that, the DLHT failed to properly entertain an appeal before it for its failure to direct itself to the grounds of appeal submitted before it. Furthermore, the composed judgment did not abide to the requirements provided under rule 20 (1) of the Land Disputes Regulations G.N 174 2003 which provides for contents of a judgment. According to the appellant, the Chairman composed a very short judgment which lacked requisite analysis of the grounds of appeal presented to him.

Submitting on the third ground of appeal Mr. Kilusu submitted that, the parties herein are co-wives thus have a relationship as they are both married to the same man. Therefore, it was his view that, the appellate tribunal ought to have refrained from awarding costs to the appellant considering that, the parties are co-wives.

Before I start determining the appellant's appeal, I find it apposite to have the appellant's grounds of appeal filed in the DLHT reproduced herein under;

1. That, the trial ward tribunal erred in law and fact for failure to consider the stronger evidence adduced by the appellant and hence reached to erroneous and unjust decision.
2. That, the trial ward tribunal erred in law and fact by delivering the biased judgment to the reasons that the record was not well recorded from the appellant's witnesses to testify the truthiness about the appellant's rightfulness on the said property.
3. That, the ward tribunal erred in law and fact by entertaining the land matter without the proper constituted coram of the members of the ward tribunal contrary to the law rendering the said decision of the ward tribunal to be a nullity or nugatory.
4. That, the trial tribunal erred in law and fact for having secretary ~~signing in the coram as the member of the ward tribunal.~~
5. That, the trial ward tribunal erred in law and fact by delivering the biased judgment to the reasons that the respondent and Samwel Bajuta are related.
6. That, the trial tribunal erred in law and fact by failure to consider the limitation of claims of ownership and its subsequent duration that the appellants' used and developed the disputed land since 1991 up to 2017 without any disturbances from the respondent.

Having listed the grounds of appeal as appearing in the memorandum of appeal that was filed at the DLHT, it is now time to inquire as to whether

the chairperson determined the appeal before him. I have keenly read the judgment and noted two anomalies in the said judgment, **firstly**, as rightly complained by the appellant, the Chairman did not determine the grounds of appeal as listed in the memorandum of appeal and **secondly**, that, the DHLT's Chairman framed his own issue which led to quashing and setting aside of the judgment of the Ward Tribunal nor did he re-evaluate the evidence on record to ascertain as to whether the trial tribunal's decision was correct.

In determination of any appeal, it is expected for the grounds of appeal to be addressed either separately or if convenient the grounds of appeal may be discussed generally. This legal position was judicially demonstrated in **Malmo Montagekonsult AB Tanzania Branch vs. Margret Gama, Civil Appeal No. 86 of 2001 (Unreported)** where it was stated inter alia;

"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or

address the decisive ground of appeal only or discuss each ground separately."

Unfortunately, this was not the case in our case, perhaps part of the judgment should be reproduced for easy of clarity;

"Let me point out that, I differ with assessors as well as parties in this appeal. The reason is that, parties are co-wives as all (sic) are wives of one Habari Lyohe Mwajalda. Since their husband is still alive marriage is still existing it is not right to determine ownership of the land which a husband also has his interest. I find the dispute is not land perse but conflict in the marriage. So, the ward tribunal erred to determine this dispute as land matter and declare the respondent the owner of such land in dispute. So, I allow this appeal by quashing and setting aside proceeding and judgment of the ward tribunal."

From the above quoted part of the judgment, it is apparent that, the learned chairperson did not determine the grounds of appeal before him but framed his on issue and he finally concluded that, the matter before the ward tribunal was not a land matter but rather a marriage dispute and therefore, according to him, the trial tribunal lacked jurisdiction to entertain it.

It has always been the position of the law that, a judge, magistrate, or chairperson or any other person vested with adjudicative functions is

bound to decide on the issues that were placed before him (See the decision of the Court of Appeal in the case of **Scan Tours Ltd. vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (Unreported). However, this principle does not bar an adjudicator from deciding on any new issue that he/she has discovered and he thinks fit to be addressed provided that, he or she accords the parties an opportunity to address the court on such new issue. In the absence of doing so, the parties will be denied their fundamental right to be heard on that particular issue, the denial which always vitiates a decision or order of the court or tribunal on appeal or revision (**VIP Engineering and Marketing Limited and Others vs. City Bank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006).

In the matter at hand, since the question of whether the matter before the trial tribunal was a land matter or a marriage conflict was a very new issue which was neither raised by the parties at the trial court nor at the appellate stage. Therefore, the appellate chairman if at all was of the view that, the noted issue was a very significant one to be addressed as it concerned the question of jurisdiction of the trial tribunal, it ought to have called the parties or their representatives to address the tribunal before

reaching to its decision or before taking any adverse decision against either of the parties.

The learned appellate tribunal chairman having determined the issue which he raised suo motto without affording the parties their fundamental right to be heard constituted a violation of the principle of natural justice as earlier explained. Therefore, I find myself obligated to invoke the revisional powers under section 43 of the Land Disputes Courts Act Cap 216 R.E 2019 to nullify the proceedings and judgment of the DLHT.

For the reasons I have assigned, I am constrained to allow this appeal on the strength of the first ground of appeal. The decision of the DLHT is hereby quashed and set aside. I therefore order that the record be remitted to DLHT for proper determination of the appeal and still of the same observation, let the parties or their advocates address it. I further order that each party shall bear its own costs in this appeal.

It is so ordered.




M. R. GWAE
JUDGE
05/11/2021