IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND APPEAL 09 OF 2020

GEREAD LETEMA .... APPELLANT

VERSUS

JOHNSON KASALULA .... RESPONDENT

(Appeal form the decision of the District Housing and Land Tribunal for Kilosa district at Kilosa (Hon. R.S. Mnyukwa, CM.))

dated the 13th day of July, 2017

in

Land Appeal No. 100 of 2018

JUDGMENT

Date of Last Order: 19/11/2021 &
Date of Judgement: 26/11/2021

S.M. KALUNDE, J.:

This is a second appeal. In 2018 the appellant filed **Case No. 03 of 218** against the respondent before the Chagongwe Ward Tribunal **("the trial tribunal")**. The appellant contended that the respondent had trespassed into his land and harvested part of his trees. After hearing evidence from both parties and their witnesses; and upon conducting a visit to the **locus in quo** the trial tribunal dismissed the appellants claim and resolved that the disputed land

was the property of the respondent having built a house **("Hema")** therein and having harvested the trees without any complaint on previous occasions without any complaint. Further to that, relying on trial proceedings and site visit observations, the trial tribunal observed that the appellant did not properly understand the boundaries of his acreage.

The decision of the trial tribunal did not rhyme well with the appellant. He logged **Land Appeal No. 100 of 2018** with the District Housing and Land Tribunal for Kilosa district at Kilosa **("the DLHT")**. The appeal at the DLHT was based on the following grounds:

> "1. That, the trial ward tribunal erred in law and in fact by deciding in favour of the respondent basing on his weak evidence and ignored the appellant heavy evidence tendered before the ward tribunal.
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> 2. That, the trial ward tribunal erred in law and in fact by in favour of the respondent who trespassed the appellant land and started to cut trees.

3. That, the trial ward tribunal erred in law and in fact by deciding the case in favour of the respondent for failure to evaluate the evidence correctly before reaching its decision.

4. That, the trial ward tribunal erred in law and in fact by deciding in favour of the respondent who claimed to own the land which doesn't belong to him."

The appeal before the DLHT was heard by way of written of submissions, the appellant filed his submissions in accordance with the schedule ordered by the Court. Despite being served the respondent failed to file their reply submissions on time and neither were they able to seek the indulgence of the appellate tribunal in extending time to do so. The appeal, therefore, proceeded exparte. At the end of the process the appellate tribunal was satisfied that there was no ground to fault the decision of the trial tribunal, the resultant orders were for the dismissal of the appeal with costs.

In arriving at its verdict, the appellate tribunal was satisfied that, evidence before the trial tribunal was flawless that the appellant had failed to prove that he was the lawful owner of the suit property and as such the respondent was a trespasser. On a similar note, the

appellate tribunal, upon examination of evidence, was convinced that the evidence presented by the respondent was more cogent than that of the appellant.

The appellant is again not pleased by the conclusions of the appellate tribunal. He has therefore preferred a second appeal to this Court. The appeal is predicated on the following complaints:

> "1. That, the District Land and Housing Tribunal erred in law judgment without respondent evidence on the reply of the appellant written submission to support his petition of appeal.
>
> 2. That, the District Land and Housing Tribunal erred in law and fact by deciding the case in favour of the respondent for failure to reply the appellant written submission to support his petition of appeal for more than three (3) times.
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> 3. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent for the among of assessors of District Land and Housing Tribunal Mr. Mohamed Poromoko try to say that "mimi kwa maoni yangu Ushahidi uliotolewa na mjibu rufaa una uzito kuliko uliotolewa na muomba

rufaa" is not true because the respondent not evaluate the evidence.

4. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent basing on his weak evidence and ignored the appellant heavy evidence tendered before the trial Ward Tribunal and District Land and Housing Tribunal.

5. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent who trespassed the appellant land and started to cut trees.

6. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent for failure to evaluate the evidence correctly before reaching to its decision.

7. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent for the judgment of Ward Tribunal prove that the area claimed by respondent is not lawful owner and the lawful owner is Dani Majele.

8. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in

favour of the respondent who claimed to own the land which does not belong to him.

9. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent for the reply of the petition of appeal say that the Evidence Act of 1967 followed but in the matter of ward tribunal the Evidence Act are not used.

10. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent for the reply of petition of appeal respondents agree that trespassed and cutting the trees.

11. That, the District Land and Housing Tribunal erred in law and fact by deciding the matter in favour of the respondent for reply of petition of appeal does not match for the petition of appeal."

Hearing of the appeal proceeded by way of written submissions after orders to proceed exparte against the respondent were issued. The appellant submissions were filed in accordance with the schedule issued by the Court.

I have carefully reviewed the records, memorandum of appeal as well as the submissions made by the appellant, the remain issue for my consideration for now is to ascertain the merit or otherwise of the appeal. however, before I proceed to the merit or otherwise of the appeal, I wish to point out two principles of law that are key to this appeal regard being that this is a second appeal. Firstly, it is trite that matters raised for the first time in the second appeal may not be entertained by the second appellate Court for lack of jurisdiction. There is a long list of authorities on this point, they include the case of **Abdul Athuman v. Republic** [2004] T.L.R. 151, **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004 and **Juma Manjano v. The DPP**, Criminal Appeal No. 211 of 2009, CAT (both unreported). In the case of **Samwel Sawe v. Republic** (supra), the Court said: -

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of Abdul Athuman V. R (2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High*

Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground appeal is therefore, struck out."

Guided by the above authority I am placated that the appellant did not include the **first; second; third; seventh; nineth; tenth;** and **eleventh** grounds were not included in the appellants Petition of Appeal filed on 27th day of July, 2018 before the appellate tribunal. As was stated by the Court of Appeal **(Juma, C.J.)** in **Emmanuel Mwaluko Kanyusi & Others vs Republic** (Consolidated Criminal Appeal No.110 of 2019 & 553 of 2020) [2021] TZCA 215; (28 May 2021 TANZLII), the decision not to consider the said grounds is jurisdictional.

I will now turn to the second principle, it is well settled that, as a matter of principle, it has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. This position was stated in **Peters v. Sunday Post Limited** (1958) EA 424 at page 429 -

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the

advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion." (See also: ***Wattor Thomas v. Thomas*** *(1947 AC 484)*

The above principle is founded on the reasoning that a second appellate court should only be enjoined to deal with issues of law and not facts. The rationale behind is that the trial court having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record. See **Juma Kasema @ Nhumbu vs Republic** (Criminal Appeal No.550 of 2016) [2020] TZCA 198; (05 May 2020 TANZLII).

In determining this appeal, I shall be guided by the above principle. It is apparent from the records that, having expunged grounds first; second; third; seventh; nineth; tenth; and eleventh grounds, the remaining grounds, that is **grounds four, five, six** and **eight** are essentially the same grounds raised by the appellant before the first appellate tribunal. As alluded earlier, this Court is

only entitled to interfere with the concurrent findings of facts made by the courts below if there has been misapprehension of the nature and quality of evidence, or where there is mis-directions or non-directions on the evidence and other recognized factors occasioning miscarriage of justice. I will now proceed to examine the records to see the position of this Court in the present appeal.

Going by the evidence on record, it is patent that the ward tribunal had the opportunity and advantage to see and hear the witnesses testifying before the tribunal during the trial. Further to that, it made a visit to the **locus in quo** and received further evidence and testimonies. Having supplied different portrayal of boundaries during trial and during site visit, the trial tribunal was satisfied that appellant did not know the boundaries of his land. In its conclusion, the trial tribunal, was satisfied that the disputed land and the trees therein were the properties of the respondent. The trial tribunal made the following observation:

> *"... G. Letema alisema dani majele huwa tunaelewana hata kama nimezidi upande wake: Kwa hali hiyo Baraza limeona G. Letema hana haki kuanza kupinga Ramani yake aliyoonyesha mwenyewe mbele ya Baraza tena hajui mipaka ya*

eneo lile. Ni wazi Eneo la miti ni mali ya J. Kusalula."

The District Land and housing Tribunal, which was the first appellate court, examined the trial tribunal proceedings and judgment in relation to the complaints raised by the appellant and was convinced that the trial tribunal correctly dismissed the appellants claims. In arriving at its decision, the DLHT was guided by the cardinal principle of law that he who alleges must prove. Relying on the above principle the DLHT resolved that, the appellant, who was the applicant at the trial tribunal, had failed to establish his ownership over the suit land.

On the other hand, the DLHT, like the trial tribunal, was satisfied that, based on the available evidence, the respondent had sufficiently demonstrated that he was the lawful owner of the disputed land and the trees therein. The tribunal had based its decision on an established and cherished principle that in civil suits the standard of proof is on the balance of probabilities and therefore courts will always accept evidence which is more credible and probable. See **Wolfgango Dourado vs Toto Da Costa**, Civil

Appeal No.102 of 2002 and **Antony M. Masanga vs Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No.118 of 2014 (all unreported). The DLHT resolved that there was no apparent reason to fault the decision of the trial tribunal.

From the above analysis of what transpired before the tribunal and first appellate tribunal it is apparent that the two tribunals below made concurrent findings and decided against the appellant on points of fact. As observed above, grounds four, five, six and eight are all purely factual, which going by the above analysis are not open for this Court on a second appeal.

Having examined the records I am satisfied that the appellant has failed to demonstrate any misapprehension of the evidence, or mis-directions or non-directions on the evidence, or a miscarriage of justice or violation of some principle of law or practice by the trial court and first appellate tribunal sufficient to warrant interference of the concurrent findings of the lower tribunals by this Court. See **Noel Gurth aka Bainth and Another vs. R.**, Criminal Appeal No. 339 of 2013 (unreported).

In fine, I am satisfied that the first appeal was rightly determined. In the result, I dismiss the appeal in its entirety. Given that the respondent did not appear before the Court, I make no order as to costs.

It is so ordered.

DATED at **MOROGORO** this **26th** day of **NOVEMBER, 2021**.

S.M. KALUNDE

JUDGE