

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA DISTRICT REGISTRY)**

AT MBEYA

Miscellaneous LAND APPEAL NO. 23 OF 2021

(Arising from the District Land and Housing Tribunal for Mbeya ta Mbeya in Consolidated Land Appeals No. 131, 132, 133 and 134 of 2020. Originating from Ward Tribunal of Mwakibete in Land Case No. 10/2020)

1. EDINA MWASAMPETA
2. DORICE MWALUGAJA
3. BATHOROWEO SANGA
4. PHILIMON MWANGOLELA

.....**APPELLANTS**

VERSUS

JUSTIN NSHISHI.....RESPONDENT

JUDGEMENT

Date of Last order: 14.09.2021

Date of Judgement: 02.11.2021

Ebrahim, J.:

This appeal arises from the consolidated appeals number 131/2020, 132/2020, 133/2020 and 134/2020 after the first appellate Tribunal found out that the respondent is the same and the disputed pieces of land are co-joined. The case at the Ward Tribunal were: Land Case No.9/2020 - Bathoromeo Sanga (3rd Appellant) Vs the Respondent; Land Case No. 10 – Dorice Mwalugaja (2nd Appellant) Vs the Respondent; Land Case No. 11/2020-Philimon Mwangolela (4th

Appellant) Vs the Respondent; and Land Case No. 12/2020 – Edina Mwasampeta (1st Appellant) Vs the Respondent.

The trial Ward Tribunal after hearing the evidence from both parties in every mentioned case entered judgement for the all the appellants on the reason that the respondent has been instigating land conflicts and unrest in the community while he knew that the disputed pieces of land were not his.

The respondent appealed to the District Land and Housing Tribunal for Mbeya at Mbeya. Seeing that all the appellants had the same cause of action against the respondent, the appellate chairman consolidated the appeals filed by the respondent. The appellate chairman in his judgement ruled out that the Ward Tribunal lacked jurisdiction to entertain the matter as the value of each disputed land was more than 3 million and there was none-joinder of parties. Consequently, he quashed the judgement and proceedings of the trial Tribunal and advised an aggrieved party to file a fresh suit at the proper forum.

Aggrieved, the appellants have preferred the instant appeal raising three grounds of appeal as follows:

1. That the appellate Tribunal erred both in law and fact by holding that Ward Tribunal had no pecuniary jurisdiction after

considering the value of the suit land jointly while the cases were determined separately.

2. That the appellate Tribunal erred in law and fact when decided that there was none joinder of necessary party.
3. That the appellate Tribunal erred in law and fact when failed to properly to analyse the evidence in the records resulting to quash the sound decision of the Ward Tribunal.

When this case was called for hearing, the appellants were represented by advocate Abinel Zephania; while the respondent was represented by advocate Felix Kapinga who was holding brief of advocate Hilda Mbele with instructions to proceed.

Advocate Zephania opted to argue all three grounds of appeal together. Starting with the ground on none-joinder of necessary parties who were sellers, he contended that the dispute was on the boundaries between neighbours and not ownership, hence there was no need to join them as there was no relief claimed from those necessary parties. He recanted the reasoning of the appellate Tribunal and stated that it is not true that those previous owners were not called to testify. To cement his argument, he cited the case of **Abdi M. Kipoto Vs Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017 pgs 9 and 12.

Speaking on the issue of pecuniary jurisdiction, he contended that the matter was consolidated at the appellate stage. He argued that the appellate Tribunal ought to have considered the jurisdiction of each case as filed at the Ward Tribunal considering that the issue was on boundaries.

Submitting on the analysis of evidence, counsel for the appellant stated that the appellate court ought to have considered the evidence adduced at the trial Tribunal which showed that the respondent encroached at the land of the appellants. He said, the witnesses brought by the respondent denied the boundaries shown by the respondent. He prayed for the appeal to be allowed.

Responding to the second ground of appeal, Mr. Kapinga contended that in most cases it is desirable to join a seller.

As for the issue of boundaries, he contended that it also concerns ownership. He referred to the High Court case of **Christina Jalison Mwamlima and Another Vs Henry Jalison Mwamlima and Others**, Land Case No. 19 of 2017 which referred the case of **Juma Kadala Vs Laurent Mnkande**[1983] TLR 103. He further referred to the case of **Abdullatif Mohamed Hamis Vs Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017.

On the issue of pecuniary jurisdiction, he referred to the case of **Sospeter Kahindi Vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017, pg 9 on how the pecuniary jurisdiction of the Ward Tribunal can be determined by evidence of parties.

He argued further that the DLHT decided on the point of law, thus there was no need to analyse evidence. He prayed for the appeal to be dismissed.

In rejoinder, counsel for the appellants pointed out that counsel for the respondent, has not opposed that for the necessary party to have effect, it must be shown how they will be affected by the decision, hence the cited case of **Christina Jalison (supra)** is distinguishable. He re-joined also that the appellate Tribunal is guided by the proceedings of the original Tribunal. As for the surveyed area, he said it does not necessarily oust the jurisdiction of the Ward Tribunal and that the issue was on boundaries and there was no evidence on the development. He reiterated their prayers.

I have carefully followed the submissions by both parties and dispassionately gone through the evidence on record from the trial Tribunal. In determining this appeal, I shall begin with the issue concerning jurisdiction as raised by the 1st appellate court as it would

be a determining factor as to whether I can proceed with other grounds of appeal or not.

The appellate Tribunal in determining the appeal before it on the issue of jurisdiction directed himself as follows:

"We went through the proceedings of the lower tribunal and found that the suit land is not only vast and surveyed but contains various developments like houses and other structures that belong to parties. Both parties admitted before us that value of houses in suit land exceeds three million shillings each. The development in suit land exceed pecuniary jurisdiction of ward tribunal which is limited to 3 million shillings."

I must state at the outset here that the finding of the appellate Tribunal above based on the imported facts. Also, the respondent did not raise it as one of his grounds of appeal when appealing at the DHLT. I am saying so because I have thoroughly gone through the evidence on record and found nowhere has the evidence on the development structures said by the appellate chairman has featured. More – so nowhere has it been stated by any of the appellants or even the respondent on the pecuniary value of the said pieces of land in dispute. What was evidence at the trial Tribunal as for the 1st appellant is that she bought the land in year 2015 and finished

building the same in 2016. However, the respondent has encroached at the part of another unfinished house saying that it is his. On the 2nd appellant, she said she bought the land in 2015 for Tshs.3,000,000/- and according to the evidence on record, the respondent encroached on part of the said land. The same issue has been on all other appellants. Again, the respondent has not been recorded anywhere raising the issue of pecuniary jurisdiction or even saying how much he brought the disputed pieces of land. He did not also evidence on the value of the said disputed pieces of land.

As for the issue raised by the trial Tribunal that the lands were surveyed, there is no such evidence to confirm that indeed the land was surveyed apart from the empty words of the respondent. In this case none of the parties tendered a documentary evidence to that effect. Furthermore, as correctly observed by the counsel for the appellants, the cases were consolidated at the appellate stages hence it was wrong to assume the value of the whole land. The assumption of facts by the court has been discouraged by the court of Appeal in the case of **FILBERT ALPHONCE MACHALO VERSUS THE REPUBLIC**, CRIMINAL APPEAL NO. 528 OF 2016, when the learned appellate judge imported an opinion contrary to the evidence on record. The Court of Appeal held as follows:

*“With due respect to the learned first appellate Judge, **we think it was a misdirection to dismiss the ground of appeal by the appellant, by invoking her own imported opinion instead of basing on the evidence which was before her.** There was nothing in the record to show that Professor Sendul Nguyaine, was one and the same person as Ole Nguyaine. It is our understanding as clearly reflected in the record that the two names, portray two different people and ought to have been treated so”. **[Emphasis is mine].***

Basing on my observations above, I associate myself with the holding of the Court of Appeal.

Counsel for the respondent in substantiating his point on how the pecuniary jurisdiction can be determined at the Ward Tribunal, cited the case of **Sospeter Kahindi (supra)**. Surely, his reliance on the case is self-defeating because in the cited case much as the appellant sought to invoke the issue of pecuniary jurisdiction, the Court of Appeal was of the opinion that the issue was raised as an afterthought at the late stage and parties had already subjected themselves to the jurisdiction of the Ward Tribunal. In this case, the issue of jurisdiction was un-procedurally raised suo motto by the appellate Tribunal. The trial Chairman did not even invite parties to address him on the same. That being said, I agree with the counsel for

the appellant that the appellate tribunal wrongly directed itself on the issue of pecuniary jurisdiction as even the cases were determined separately and it was not an issue raised by the respondent in his grounds of appeal. Thus, the first ground of appeal is allowed.

Coming to the second ground of appeal on joinder and misjoinder of parties, I hasten to subscribe to the holding of the Court of Appeal in the cited case of **Abdi Kipoto (supra)** that;

“A party becomes necessary to the suit if its determination cannot be made without affecting the interests of that necessary party”

The same position was taken by the Court of Appeal in the cited case of **Abdullatif Mohamed Hamis (supra)** where it was held as follows:

“We, in turn fully adopt the two tests and, thus, on parity of reasoning, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from a case to case depending upon facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.”

In that case, the Court of Appeal ruled that the 2nd respondent was a necessary party if sued as administratrix of the estate because the issue was on the sale of the house of the deceased which she was the administratrix.

Tailoring the holdings of the two Court of Appeal above to our instant case, the joining of the sellers of the said pieces of land to the appellants was far-fetched as there was no dispute on whether the sale was legal or illegal? The only issue was that the respondent had encroached at the appellants' pieces of land. Furthermore, the sellers and even the street chairman and the wives for those sellers who are already dead e.g., Eliza Mwakilolela for the late Gidioni Mwandende who sold the land to the 2nd appellant testified at the trial Tribunal. There was also the evidence of the elders (chiefs of the area) Chief Nelbat Mngoni and the retired street chairman named Mwanyonga who testified that the respondent has encroached at the plaintiffs' pieces of land by adding more steps from the boundaries set. That being said, there was no need to join the sellers as their not being parties had not made impossible for the trial Tribunal to adjudicate on the matter. All in all, the trial Tribunal was in a position to pass a decree in the absence of those sellers. Accordingly, I also allow the second ground of appeal.

The last ground of appeal is on the analysis of evidence. In this case, all the witnesses called by the appellant proved the origin of the disputed pieces of land in so far as the appellants' ownership is concerned. As stated earlier, the 1st appellant called one retired street chairman Mwanyonga M. Mwanyonga, who testified that the dispute was long resolved and the village authority had put the boundaries but the respondent kept encroaching others pieces of land and instigating unnecessary disputes.

The respondent in the case of 3rd appellant called one Elias Vijana who was asked to show the land he sold to the respondent. He showed a different piece of land from the one that the respondent claimed that it was his. In all other cases on part of the appellants their boundaries were supported by the sellers/their wives. The respondent had no concrete evidence to show how he got that piece of land or even calling a witness to prove his boundaries.

All in all, I find that had the appellate Tribunal considered and evaluated the evidence on record, he would not have to implore his own evidence and opinion in reaching the decision he had reached.

It is the principle of the law that a person whose evidence is heavier than that of the other is the one who must win - **Hemed Saidi V Mohamed Mbilu** [1984] T.L.R 113 at page 116. I fully subscribe to the

said position. Further, I am also of the stance that in measuring the weight of evidence, it is not the number of witnesses that matters but rather the quality of evidence. In that case, I find that the appellants evidence has much weight than that of the respondent.

At the end result, I allow the appeal with costs and upheld the sound decision and findings of the Ward Tribunal.

Accordingly ordered.




R.A.Ebrahim
Judge