IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO 58 OF 2021

(Arising from Land Appeal No. 110 of the Tarime District Land and Housing Tribunal. Originating from Land Case No 1 of 2020 of Bukura Ward Tribunal)

ADECK SIMBO .....APPELLANT

VERSUS

GHATI OTULO IBECHA..... RESPONDENT

JUDGMENT

4th November, 2021 and 17th December, 2021

F. H. MAHIMBALI, J.:

The dispute between these parties is on ownership of the disputed land. Whereas the respondent claims it to be his, and he successfully sued the appellant at the trial tribunal which declared the respondent as the lawful owner of the disputed land the appellant is in serious contest. Dissatisfied, the appellant unsuccessfully challenged it before the DLHT of Tarime. This is now the second appeal (to this Court) challenging the decisions of the two lower tribunals.

Facts of the case stipulate that one Mzee Simbo (father of the appellant) as per case records appears to have welcomed the

respondent on the use of disputed land. Upon his demise, the respondent is alleged to have forged the purchase documents of the said land purporting to be legally purchased by the respondent.

The dissatisfaction of the appellant against the decision of the two lower tribunals has led to the current second appeal to this court on the following grounds:

1. *That, the 1st appellate Tribunal erred in law facts by ignoring the Appellant's 5th ground of appeal which is a fundamental legal requirement of the law.*
2. *That the 1st appellate Tribunal erred in law and fact by failing to address the appellant's 2nd, 3rd and 4th grounds of appeal without any justifiable reason.*
3. *That, the 1st Appellate Tribunal erred in law and fact basing its judgment on the doctrine of adverse possession yet there is disputed evidence of sale agreement between appellant farther and the respondent.*
4. *That, the 1st appellate Tribunal erred in law and fact by not granting the appellant chance for rejoinder.*

During the hearing of the appeal, Mr. Paul Obwana learned advocate appeared for the appellant whereas the respondent fended for himself.

While adopting the appellant's grounds of appeal, Mr. Paul Obwana submitted in the fourth ground of appeal, that the first

appellate tribunal failed to grant the appellant the chance for rejoinder. That according to law (best practice), it is the requirement that the party who is heard first, has a right of rejoinder upon there being reply by the opposite party. Failure of which is a breach of one's constitutional right to be heard as per article 13 (6) of the Constitution of URT provides for a right of fair hearing. As the respondent had a right to reply from the appellant's submission, (from page 8-9 of the typed proceedings), the respondent raised an issue that the appellant had sued him at Shirati Primary Court and that he won it. The appellant was not given a right to reply, thus, prejudiced the appellant. Whether there was that case and what was the outcome. He also stated that at the visit to the locus in quo, the appellant did not say anything.

With the first ground of appeal, his grief is that the fifth ground of appeal at the DLHT was not responded by the said DLHT on the issue that there was no mediation done at the Ward Tribunal. The DLHT didn't respond to it. By not responding to it, they are at dialema, whether it was not important. He considers that under section 17 (2) of the LDCA, Cap 216 R. E. 2019, as per Ward Tribunal's proceedings, the mediatory duty of the Ward Tribunal was mandatory and not an option by the trial ward tribunal.

On the second ground of appeal, the DLHT didn't consider the 2nd, 3rd and 4th grounds lodged before it without any justifiable reasons. The 2nd ground of appeal was the pecuniary jurisdiction of the Ward Tribunal, that it was not clothed with jurisdiction. The issue of jurisdiction is of paramount importance before any court/tribunal attempts to determine it. It was the duty of the Respondent to state the size and value of the land for the tribunal to decide whether it was clothed with jurisdiction. As per section 17 (2) of the LDCA, that was supposed to be stated at the Ward Tribunal, and the secretary to the Ward Tribunal was duty bound to record it so if the complaint was not worded. As per the first appellate Tribunal proceedings (page 6), the size of the land in dispute is 12 acres or 8 acres. The law is as per section 15 of the LDCA, failure to state the value of the said land, then the issue of jurisdiction of the Ward Tribunal is in question. In the third ground of appeal at the first appellate Tribunal was undisputed that the said land belongs to the appellant's father from whom the Respondent's claim to buy from him without the consent of the wife of the appellant's father thus a forgery. The respondent himself admits that he was just welcomed there by the appellant's father. In buttressing his argument, he referred this court to the case of **Mukyemalila and Thadeo vs**

Luilanga (1972) HCD4, where it was held that an invitee cannot establish adverse possession against host even if an invitee had established unexhausted improvement. Therefore, the DLHT of Tarime, had erred in law in making such a wrong decision (see page 3 paragraph 3 of the typed judgment).

With the issue of forgery of documents of the contract of sale, the records establish that the contract of sale of the said land is between Ghati Otulo and Pasila while the seller is Ghati Otulo and Agustino Simbo. The issue of this document is just a photocopy and not original. There ought to have been original document for it to have a legal validity. Otherwise, the same is not stamped (section 5 of the stamp duty Act). In the case of **Malmo Mantage Konsult AB Tanzania Branch VS Magreth Goma, Civil Appeal No. 86 of 2001** at page 4 sets the requirement as per section 46(1) of the Stamp Duty Act,

> *"that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive the evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless the instrument is duty stamped"*

With the document purported to be a village land committee is not allocating authority but village land council. Therefore, the document purporting to allocate land to the respondent is not a genuine and proper document as per law (see section 3 of the LDCA) submitted Mr. Obwana.

With the third ground of appeal, the trial chairperson erred in law in invoking the principle of adverse possession while there is contradictory evidence in record. With this ground of appeal, he prayed to reiterate what he had submitted in the second ground of appeal. With this submission, he humbly prayed that his appeal be allowed with costs.

Responding to the appellant's ground of appeal, the respondent (Ghati Otulo Ibechu) who fended for himself submitted that he had nothing more to add save what he had replied to the grounds of appeal (in written form) and prayed that the same be adopted by the court as respondent's submission.

In his reply, in essence he resisted the appeal. As to the first ground of appeal, he replied that failure to conduct mediation as per law in the circumstances of this case, didn't prejudice the parties. Thus, the lower tribunals' proceedings should not be declared void.

Regarding ground two of the appeal, he replied that it was the appellant himself who failed to address grounds 2,3,4 when prosecuting his appeal no.110 of 2020 at the DLHT.

In responding to grounds 3 and 4 of the appellant's petition of appeal, he refuted arguing that at the trial tribunal, there was no any sale agreement tendered by the appellant.

In his rejoinder submission following the respondent's reply, Mr. Obwana submitted that two issues are undisputed i.e grounds no 3 and 4. In ground no 3, the issue of sale agreement being forged and ground no 4 that there was no rejoinder submission by the appellant at the first appellate tribunal. He further submitted that, the manner these grounds are refuted generally is not sufficient. The court should consider that these arguments have not been replied by the respondent.

With the first ground of appeal, he submitted that the respondent admits that there was no mediation. Nevertheless, he submits that there was no prejudice. In his understanding, as the law is coached in mandatory terms, then its adherence is not optional.

Regarding to the second ground of appeal, he replied that at the first appellate tribunal, the appellant himself didn't argue these grounds

of appeal. It is not reflected by the tribunal's recordings. He thus reiterated that there was no abandonment as argued but the DLHT didn't record. That is all.

As per tribunal's proceedings and 3rd ground of appeal, it appears the appellant is the son to the late Simbo who welcomed the respondent into the said land in dispute. The legal issue is whether the appellant is the legal heir or administrator of the deceased's estate as per law. On this, Mr. Paul Obwana, submitted that the appellant being the son to the late Simbo, therefore, he is legally mandated to inherit. However, in the context of this case, he was just given the said land by his father. Furthermore, he submitted that it was the respondent who filed a suit at the Ward Tribunal against the appellant. The respondent ought to sue the right party and not the appellant. On this, he prayed that the proceedings of the two lower tribunals be quashed for want of proper party (respondent).

The reason why he sued the appellant, is simply because he had personally encroached/invaded the land his father sold it to him, submitted the respondent justifying his right position as to why he sued the appellant.

In consideration of this appeal, I will only deal with two grounds of appeal which I think are sufficient to dispose of this appeal. These are 1st, and 4th grounds of appeal which raise serious legal issues about failure to hold mediation, and lastly on the issue of not according a party a right to be heard.

With the first issue of the trial Ward Tribunal's failure to hold mediation, it is undisputed that the trial ward tribunal didn't hold mediation in this matter. It just jumped to adjudicatory duty instead of commencing its primary obligation. According to section 13 (1) of the LDCA, it provides that

> 13.-(1) *Subject to the provisions of subsection (1) of section 8 of the Ward Tribunals Act, the primary function of each Tribunal shall be to secure peace and harmony in the area for which it is established, by* ***mediating*** *between and assisting parties to arrive at a mutually acceptable solution on any matter concerning land within its jurisdiction.*

Upon receiving of a land complaint, before resorting to dispute hearing, the law compels the respective Ward Tribunal first to hold mediation proceedings (section 17(2)):

"When a complaint is made to the Secretary under subsection (1),

that Secretary shall cause it to be submitted to the Chairman of the Tribunal who shall immediately select three members of the Tribunal to mediate".

Considering the compulsoriness of the law in adherence to mediation processes, and that it is the primary function of the Ward Tribunal in settling land disputes, the trial ward tribunal skipped its important legal duty in resorting to adjudicating prior to mediatory duty which is its primary function. Taking that into account, the trial proceedings vitiated the law, and thus are a nullity following that abrogation. Similarly, are the appellate proceedings which resulted from the nullity proceedings.

In consideration to the second ground of appeal (by way of enlightment to the learned advocate) that the trial ward tribunal lacked jurisdiction, I hasten to acknowledge the principle that the question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level. Any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision. It is also the legal position that parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction. Indeed, the erstwhile East African Court of Appeal sitting at

Dar es Salaam held in **Shyam Thanki and Others v. New Palace Hotel [1971] 1 EA 199 at 202** that:

> "*All the courts in Tanzania are created by statute and their* ***jurisdiction is purely statutory.*** *I t is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess.* "[Emphasis added]

Much as I agree that the issue of jurisdiction can be raised at any time, however, the appellant's concern on jurisdiction ought to have been raised at the earliest opportunity, most fittingly at start of the proceedings. I am guided with this stand, considering the decision of the Court of Appeal in **SOSPETER KAHINDI vs MBESHI MASHINI** (in **Civil Appeal no. 56 of 2017**). I am thus of the view that the jurisdictional issue raised could not be determined without evidence on the value of the subject matter. As none argued and presented it at the trial tribunal, it cannot validly be considered it now and at this stage. This ground of appeal fails.

Lastly, is on the issue of a right of being heard. The appellant raised a legal concern that he was denied his right of being heard. The records establish that on the 29th March, 2021 when the matter was

then the respondent replied. The records don't establish that if the appellant was accorded his right of rejoinder to the submission by the respondent.

The Court of Appeal has emphasized time and again that a denial of the right to be heard in any proceedings would vitiate the proceedings. Further, it is also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. In **Mbeya - Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 (unreported), the Court emphasized that: -

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:*
>
> *(a) Wakati haki na wajibu wa mtu ye yote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika,basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamiiifu"*

In **Abbas Sherally & Another vs Abdul S. H. M.Fazalboy, Civil Application No. 33 of 2002** (unreported) it was held that:

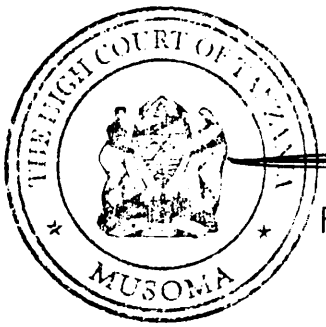
> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

In this case, though the appellant was partly heard, in law that was not sufficient. He ought to have been given his right of rejoinder. The records as they stand, are silent if he was given that right. Otherwise, could have clearly stipulated that so if he waived his right of rejoinder or he had nothing to rejoinder. My holding is this, right to be heard, extends to right to rejoinder. The denial of it is equal to denying one his right of being heard conclusively. That said, this ground of appeal has merit and is allowed.

All this said and done, the appeal is allowed on grounds number one and four. On the revisional powers vested to this court by virtue of section 43(1) of the LDCA, the proceedings and decision of the both lower tribunals are herby quashed and set aside as they are nullity.

As what is the way forward of the matter, considering the current position of the law, I order retrial of the matter pursuant to strict compliance as per the current law. No order as to costs.

DATED at MUSOMA this 17th day of December, 2021.



F. H. Mahimbali

JUDGE

17/12/2021

Court: Ruling delivered this 17th day of December, 2021 in the presence of the Respondent, Mr. Paul Obwana, advocate for the appellant and Mr. Gidion Mugoa – RMA.

F. H. Mahimbali

JUDGE

17/12/2021