

**IN THE HIGH COURT OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**LAND APPEAL NO. 07 OF 2021**

(Originating from Application No. 97 of 2019 by the District Land and Housing Tribunal for Iringa by Hon. A.J Majengo chairman originates from Kising'a Ward Tribunal)

**DAUDI MPAGAMA ..... APPELLANT**

**VERSUS**

**ENESIA KASUGA ..... RESPONDENT**

*26/10 & 07/12/2021*

**JUDGMENT**

**MATOGOLO, J.**

The appellant one Daudi Mpagama was successful sued by the respondent one Enesia Kasuga at Kising'a Ward Tribunal. After being dissatisfied with the decision of the Ward Tribunal he appealed to the District Land and Housing Tribunal for Iringa whereby his appeal was dismissed. Still dissatisfied with that decision he preferred this appeal in

which he lodged petition of appeal with a total of four (4) grounds of appeal as follows;

1. That, the decision of the District Land and Housing Tribunal is tainted with fatal irregularities as the Chairman failed to record the opinion of the assessors and assign reasons for differing with them in his judgment.
2. That, the learned District Land and Housing Tribunal Chairman erred in law and fact in upholding the decision of the Ward tribunal and disregarding in toto the weightier evidence adduced by the Appellant at the trial.
3. That, the learned District Land and Housing Tribunal Chairman erred in law and in fact in holding that the Appellant boycotted the Ward Tribunal while there is cogent evidence that the appellant had no confidence on the members of Ward tribunal presided to hear the dispute.
4. That, the learned District Land and Housing tribunal Chairman erred in law and fact in upholding the decision of the Ward Tribunal and disregarding in toto that the Ward tribunal entertained the matter contrary to rules of natural justice.

The Appellant prayed for the following orders:-

- (a) That the decision of Appellate District Land and Housing Tribunal and Ward Tribunal be quashed in their entirety.

- (b) That this honourable court be pleased to declare the appellant the lawful owner of the suit land.
- (c) Vacant possession.
- (d) Any other relief (s) that this honourable court may deem, fit, just and equitable to grant.

At the hearing parties were represented, the appellant was represented by Mr. Jonas Burton Kajiba Learned Advocate while the respondent was represented by Mr. Amandi Isuja learned Advocate.

The matter was disposed of by way of written submissions.

Mr. Kajiba abandoned ground of appeal No.01 thus he argued on the rest of the grounds of appeal. With regard to the 2<sup>nd</sup> ground of appeal, that the learned District Land and Housing Tribunal Chairman erred in law and fact in upholding the decision of the Ward tribunal and disregarding in toto the weightier evidence adduced by the Appellant at the trial. Mr. Kajiba submitted that, the ground of appeal focused on evidential matters and the issue for determination before the trial Ward Tribunal were two-fold; namely who is the lawful owner of the suit land, and to what relief(s) are the parties entitled to? He went on submitting that at the trial Ward tribunal both parties called witnesses. The appellant at the trial tribunal to prove his case testified that he acquired the suit land in 2004 after lawful purchasing from Khalid Lipangile and he obtain customary right of occupancy on the same piece of land

which the respondent claims hers. He submitted that, the appellant submitted a documentary evidence (sale agreement) entered between the appellant herein and one Khalid Lipangile at the Village Government dated 20.09.2004 and the Customary right of Occupancy number 73IRA 10517 issued on 13<sup>th</sup> December 2012 as an exhibit. He went on submitting that, the appellant's testimony was corroborated at the trial by DW2 Isaya Nyiisi who testified that;

*"Ninachokumbuka mnamo mwaka 2004... alikuja Daudi Mpagama, Alani Mtikiti na Khalid Lipangile wakanieleza ya kuwa wanataka kuuziana Mashamba ekari mbili. Muuzaji akiwa Khalid Lipangile na Mnunuzi akiwa Daudi Mpagama zoezi liliendelea la kluandikishana"*

He contended that, even when cross- examined before the trial Tribunal DW2 did assert the fact the land in dispute belongs to the appellant and the transfer between the appellant and one Khalid Lipangile was lawful and there was an exhibit to prove the same.

Mr. Kajiba submitted that, the respondent as PW1 summoned two witnesses, Rehema Alani Mgaya PW2 and Muhemedi Yusuf Kamanga PW3. The respondent testified that, she acquired the land in dispute for a nearly fourteen years because she underwent medical operation and a shortage

of rainfall, she testified that, she has no exhibit to prove the same when cross- examined by the respondent.

Mr. Kajiba went on submitting that, the evidence adduced by the respondent at the trial Ward Tribunal was weak and that submitted by the appellant was weightier as he tendered written document signifying that he lawfully purchased the suit land from Khalid Lipangile. He contended further that, the respondent side failed to tender any exhibit to prove that the disputed land was given to the respondent on the instruction of late Khalima Mahamudu despite the fact that in their testimonies the respondent side admit that there was documentary evidence to prove the same. Thus, he prayed or this ground of appeal to be regarded for it has merit.

With regard to the third ground of appeal that the learned District Land and Housing Tribunal Chairman erred in law and in fact in holding that the appellant boycotted the Ward Tribunal while there is cogent evidence that the appellant had no confidence on the members of ward tribunal presided to determine the dispute. Mr. Kajiba submitted that, it is apparent on the record of the proceedings at the trial Ward Tribunal on 4<sup>th</sup> November 2021, the appellant through a letter raised a concern that he was not ready to proceed with the matter, but the District and Housing Tribunal proceeded to entertain the matter. It was his argument that, the trial Tribunal ought to hear the appellant's concern prior to the determination of the matter. Mr. Kajiba invited this court to investigate the matter and proceed to allow the ground of appeal.

With regard to ground of appeal No.4 That the learned District Land and Housing tribunal Chairman erred in law and fact in upholding the decision of the Ward Tribunal and disregarding in toto that the Ward Tribunal entertained the matter contrary to rules of natural justice.

Mr. Kajiba submitted that, the Ward Tribunal while entertaining disputes in all proceedings are also bound to pursue principles of natural justice in accordance with the Article 13(6)(a) of the Constitution of the United Republic of Tanzania, precisely section 16(2) of Ward Tribunal Act Cap 206 R.E 2002 obliged Ward Tribunal in determination of a complaint to accord an opportunity to each party to a case to explain his part of the matter and to present his witnesses and to ascertain as to whether there is any member having person or financial interest, ie bias.

He submitted further that, in the instant case on 04<sup>th</sup> November 2019 at page 2 of the Ward Tribunal's proceedings raised a concern of having no confidence with the members of the Tribunal in the conduct of the proceedings but on 22<sup>nd</sup> November 2019 the records of the proceedings show that, the matter proceeded ex-parte in the absence of the appellant and the respondent stated in her case but on 29<sup>th</sup> November 2019 the trial Ward Tribunal's record of proceedings show the Ward Tribunal agreed the appellant to return to the hearing of the matter and unjustly to a stage where the respondent had already stated her case.

Mr. Kajiba submitted that, it is mandatory for the tribunals to adhere to the cardinal principles of natural justice by tribunals specifically offering the right to be heard to the parties to the case. To support his argument,

he cited the case of ***Kanda v Government of Federation of Malaya [1962] 322;337***, Lord Denning as he then was held that:-

*"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict them.... It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other".*

Mr. Kajiba submitted that, as the trial Tribunal's proceedings violated a principle of natural Justice the available remedy is to nullify the decision, to support his argument he referred this court to the case of ***National Housing Cooperation v Tanzania Shoe Company Limited and Others [1995] TLR 251***.

Mr. Kajiba concluded by praying to this court to nullify the proceedings and decision of the District Land and Housing Tribunal that uphold the decision of the trial Ward Tribunal that was in violation of the principles of natural justice, and allow the appeal with costs.

In reply Mr. Isuja with regard to the 2<sup>nd</sup> ground of appeal submitted that, the trial tribunal acted based on the weight of the evidence of the respondent and her witnesses. He argued that, it is a dictate of the law and legal principles that, the person whose evidence is heavier than that of the other is the one who must win. He referred the case of ***Hemedi Saidi v Mohamed Mbilu [1986] TLR 113.***

He submitted further that, from record of the trial Tribunal proceedings, the respondent said that she owns and used the suit land for a long period of time and from the testimonies of witnesses confirmed the same.

With regard to allegations that, the respondent tendered no documentary evidence, he contended that, at the trial Tribunal the respondent tendered no documentary evidence, but according to him even oral evidence can suffice to be used in reaching a decision by the Court. To support her argument, he referred the case of ***Abas Kondo Gede v Republic***, Criminal Appeal No. 472 of 2017, (unreported) in which it was held that:-

*"We must emphasize that oral evidence being one of the methods of receiving evidence in a court of law is crucial in providing a particular fact and the court is entitled to rely on it in reaching its conclusion.*



*By oral evidence it means that a witness tells the court a fact which he has first had personal knowledge or that he perceived the fact from his senses”.*

Mr. Isuja submitted that, the first appellate Court the District Land and Housing Tribunal analyzed the evidence adduced before the trial Ward Tribunal and found the evidence of the respondent and her witness to be heavier than that of the appellant. He supported his argument by referring the case of ***Japan International Cooperation Agency (JICA) vs. Khaki Complex Limited***, Civil Appeal No.107 of 2008 CAT at Dar Es Salaam (unreported) when the Court referred the case of ***Watt v Thomson (1947) AC***, and said that:-

*“It is strong thing for an appellate court to differ with the findings on a question of facts, of the judge who tried the case, and who has had the advantages of seeing and hearing the witnesses....”.*

Mr. Isuja went on submitting that, the law is very clear and settled that where a case is one of fact, in absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court to an erroneous occasion. To support his argument, he referred this court by the case of ***Ali Abdallah Rajab vs Saada Abdallah Rajab and Others (1994) TLR 132***. He went on submitting that, the rationale behind this legal position is

that the trial Ward Tribunal was better placed to assess the demeanor and credibility of witnesses who come before it and testified during trial of the dispute hence arrived at the conclusion it reached. He contended further that, since the Kising'a Ward Tribunal heard from the witnesses first hand it is their firm view that the same was better placed to evaluate the evidence before it and arrived to a proper decision as it did.

With regard to the third and fourth ground of appeal, Mr. Isuja submitted that, the same are baseless as both parties were accorded right to be heard as it was correctly observed by the first appellate Tribunal. He contended further that, from the record of the trial proceedings dated 22/11/2019 and subsequent meetings thereto the appellant was present and for undisclosed reasons stayed mute where he was asked by the trial Tribunal to cross-examine the respondent's evidence as it is well evidenced from the proceedings dated 22/11/2019 that;

*"Maswali kutoka kwa wajumbe  
wamemaliza shauri litaendelea kwa  
kusikilizwa Ushahidi was Enesia Kasuga  
kwani Daudi Mpagaama amesusia  
kusikiliza shauri".*

He went on submitting that, the appellant was given another chance on 03/12/2019 to cross-examine Respondent's evidence considering that, on 22/11/2019 the day when the respondent testified, he was present as the same was noted by the counsel for the appellant. Mr. Isuja argued that

the appellant cross-examined the respondent as it is reflected in the record of the Tribunal proceedings.

With regard to the complaint by the appellant on the issue of bias, Mr. Isuja submitted that, the same has no proof but just mere say. The appellant should note that on 22/11/2019 he was forgiven by the Ward Tribunal by constantly abusing the due process of the trial Tribunal, Mr. Isuja quoted the paragraph of the alleged abusing the due processes:-

*"Mimi Daudi Mpagama ninakili kulikataa  
Baraza la kata ya Kising'a nakuwa  
nitakuwa tayari kuendelea kusikiliza pale  
nipoituia (sic) shauri likiendelea  
kusikilizwa upande wa Mdai"*

Mr. Isuja submitted that, parties and Tribunal were in good terms and were well co-operated each other for reaching the solution of the problem. The appellant has not shown any material from the record of the trial Tribunal proceedings or judgment to support a conclusion of actual bias on the part of the Tribunal. He went on submitting that, appellant ought to address to this court to what errors of law and fact from the decision of the trial Tribunal not honest and integrity of the trial Tribunal. He cemented his argument, by referring the case of ***Republic v. Sharif Hamad*** [1992] TLR 277, in which Mmila RM (Ext.J) inclined to the legal principle enshrined in the case of ***Janes v National Coal Board*** (1957) 2Q.B at page 67, in which it was held that:-

*"The honesty and integrity of a judge cannot be questioned, but his decision may be impugned for error either of law or fact".*

He submitted further that, the counsel for the appellant failed to demonstrate before this Court whether or not there is bias, to that he referred this court to the case of ***Republic vs Albert Awour and 3 Others [1985] TLR 20*** where it was held that:-

*In determining whether or not there is bias, the court should not be guided by the subjective view of the accused, rather the test should be whether, in the circumstances of the case, right minded persons would think that there is likelihood of bias".*

He went on contending that, the same position was echoed in the case of ***Mucoba Bank Plc vs. Herry Bwede, Labour Revision No. 32 of 2017 HC Iringa Kente, J. when referred the case of Minister of Immigration and Multicultural Affairs vs Jia Legend (2001) 205 CLR 507 and South West Sydney Area Health Service vs Edmonds (2007) NSWCA 17, that:-***

*"An allegation of actual bias should not be made lightly and that a party*

*asserting actual bias against a judicial officer carries a heavy onus. The allegation must be distinctly made and clearly proven”.*

With regard to the case of ***Kanda v Government of Federation of Malaya*** (supra) and the case of ***National Housing Cooperation vs. Tanzania Shoe Company Limited and Others*** as cited by the counsel for the appellant he said that, the same is distinguishable to our case at hand because in the two cases parties were not accorded with the right to be heard as evidenced from the proceedings of the trial Tribunal.

Mr. Isuja concluded by submitting that, the appeal is devoid of merit and there are no extraordinary circumstances that requires the interference by this Court with both tribunals findings, as it was stated in the case of ***Scholastica John v. Andrew Rubambula*** Misc. Land Appeal No. 22 of 202 HC at Mwanza (Unreported) thus, he prayed that the appeal be dismissed with costs.

Having read the respective submissions by the parties and having read the grounds of appeal and examine the court record, the question that call for determination is whether this appeal has merit.

The counsel for the appellant abandoned ground of appeal No. 01, I will only deal with the remaining grounds of appeal.

Starting with ground No. 02 that, the DLHT erred to uphold the decision of Ward Tribunal and disregarding in toto the weightier evidence adduced by the appellant at the trial.

Having carefully read the submissions by the learned counsel from both sides and examined the court record, it is my considered opinion that, this ground has no merit because the evidence by the respondent was heavier than that of the appellant. The respondent managed to summon witnesses who testified on her side, these include Muhamed Yusuph Kamanga who testified that his grandmother used to reside with the respondent when she was sick and the respondent was the one who took care of her. And that the respondent was given the disputed land measuring 2 acres by their Grandmother and the family was informed about the allocation of the land. Also Rehema Alan Mtikiti corroborated the evidence of Muhamed Yusuph Kamanga.

The appellant testified that, he bought the suit land from one Khalidi Lipangile in presence of Isaya Lutengamaso Mnyilisi. But the record is silence regarding the whereabouts of the said Khalidi Lipangile who sold the land to him, as the seller of the disputed land as contended by the appellant. He was an important witness on his side in order to prove if truly he bought the disputed land from him. It is my view, failure to bring one Khalid Lipangile and testify on his side regarding the disputed land this court may draw adverse inference against him. In the case of ***Hemed Said versus Mohamed Mbilu*** (supra), where it was held that:-

*"(iii) Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests".*

The position above applies to our instant case that, the act by the appellant failing to call the seller of the disputed land as he alleged he bought from him, as a material witness on his side, this court is entitled to draw an inference adverse against him as he failed to bring the witness that may be he knew that he would have given evidence contrary to his interest.

Reading through the evidence on record, I am of the considered opinion that the evidence by the respondent is heavier than that of the appellant that is why the Ward Tribunal ruled on her favor, thus this ground of appeal has no merit the same is dismissed.

With regard to ground of appeal No 3, Mr. Kajiba submitted that, at the trial tribunal on 4<sup>th</sup> November 2020 the appellant through a letter he raised a concern that he was not ready to proceed with the matter, the Ward Tribunal ought to hear the concern prior determination of the matter. This ground of appeal has no merit, the records of the Ward Tribunal is quite clear that, the appellant raised the said concern and the same was overruled by the Ward Tribunal, the decision which was correct in my view as the Tribunal could not grant the prayer even on flimsy allegations. It

was correctly held by this court, Kente, J. as he then was, in the case of ***Mucoba Bank PLC***, (supra) that an allegation of actual bias should be made lightly, the same must be distinctly made and clearly proven. To add onto that, a party cannot utilize allegation of bias as a way of forum shopping, any allegation of bias must be strictly proved. The trial Tribunal correctly heard the complaint but overruled it and the case was ordered to proceed with hearing. Thus, this ground of appeal is devoid of merit the same is dismissed.

With regard to the 4<sup>th</sup> ground of appeal, the main complaint is that, the DLHT erred in law and in fact in upholding the decision of the Ward Tribunal and disregarding in toto that the Ward Tribunal entertained the matter contrary to rules of natural justice. This ground in my opinion has no merit, after going through the Ward Tribunal records, I have found that, there is nowhere the Ward Tribunal did not adhered to the principles of natural justice as alleged, the appellant was afforded with the right to be heard, but for the reasons known to himself opted not to attend when the respondent testified. But on 29/11/2019 he prayed to the Tribunal to forgive him for his act of abusing the Ward Tribunal and he said he was ready to proceed with the case from where it was ended, and the same proceeded and he was present until the end of the case. Thus, his allegations of bias and that he was not afforded with the right. The appellant's act of asking the Tribunal to forgive him is an indication that he realized that what he did was not correct. The allegation of not being heard is baseless. Hence this ground also fails.



It is my firm view that, this appeal a second appeal, the court can rarely interferes with concurrent findings of facts by two courts below, unless an appeal lies to the court on point of law or where there is misdirection or non-direction on the evidence.

Having carefully read the court record, there is no where I have found that there is misdirection or no-direction of evidence to move this court to interfere with concurrent findings of fact of the two lower tribunals, the position was demonstrated in the case of **Bushangila Ng'oga versus Manyanda Maige** [2002] TLR 335 where was stated inter alia that:-

*"It is settled that in the absence of misdirection or misapprehension of evidence, an appellate court should not interfere with concurrent findings of fact of the two lower courts, in this case there was no misdirection or misapprehension of evidence and therefore no justification for interfering with the findings of the fact of the two lower courts".*

Basing to above discussion it is my considered opinion that, this appeal has no merit the same is dismissed with costs.

It is so ordered.

**DATED at IRINGA** this 7<sup>th</sup> day of December, 2021.



  
**F.N. MATOGOLO**

**JUDGE.**

**07/12/2021**

Date: 07/12/2021

Coram: Hon. F. N. Matogolo – Judge

Appellant: }  
Respondent: } Present  
C/C: Grace

**Mr. Jonas Kajiba - Advocate:**

My Lord I am appearing for the appellant. The matter is for judgment. We are ready.

**COURT:**

Judgment delivered



  
**F. N. MATOGOLO**

**JUDGE**

**07/12/2021**