

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPEAL NO 30 OF 2020

(Arising from the proceeding, judgment and decree of the District Land and Housing Tribunal for Mbulu at Dongobesh in Land Appeal No. 25 of 2017 Originating from land case No. 2 of 2017 before Dongobesh Ward Tribunal)

PASKALI MATHIAS

(As Personal Legal Representative

of the late MATHIAS KASMIRI) APPELLANT

VERSUS

JOHN GWALTU RESPONDENT

JUDGMENT

28/02/2022 & 11/04/2022

KAMUZORA, J.

The Appellant being dissatisfied with the judgement and decree issues by the District Land and Housing Tribunal for Mbulu at Dongobesh preferred this current appeal on the following grounds: -

- 1. That, the first appellate Tribunal erred in law and fact in over relying on contradictory evidence of DW2 one THIMOTHEO L. PANGA.*
- 2. That, the first appellate Tribunal was unable to consider and analyse the evidence on record and thereby arriving into erroneous decision.*

3. *That, the first appellate Tribunal erred in law and fact in overruling the decision of the members of the Tribunal who actually observed the land in dispute during locus in quo.*

4. *That, the first appellate Tribunal erred in law and fact in disregarding opinion of the two members of the first appellate tribunal.*

Before hearing of the appeal commenced and with the leave of this court the Appellant added ground No 5 of appeal that, *the Judgment of the Ward Tribunal and consequently of the District Land and Housing Tribunal are bad in law for some of the members of the Ward Tribunal did not participate in the hearing but did write the judgment.*

Hearing of the appeal was by way of video conference and the Appellant was represented by Mr. Bungaya Panga and Felischism Baraka while the Respondent enjoyed the service of Mr. Bashiri Mallya both learned advocates.

Submitting in support of appeal Mr. Panga argued jointly the 1st, 2nd and 3rd ground of appeal on the evaluation of evidence. He submitted that two witnesses; Timotheo Panga and Isack Awe whose evidence was used by the District Land and Housing tribunal (First appellate Tribunal) to set aside the decision of the Ward Tribunal are unreliable. He explained that while Timotheo claimed that there was no remained land, Isack Awe claimed that there was remained land which

was owned by the Respondent John Gwaltu. The Appellant was of the view that such evidence is unreliable.

The counsel for the Appellant submitted further that, the ward tribunal stated that the Respondent's land was demarcated by sisal and the land left was used by the Appellant for a long time. The Appellant claimed that it was wrong for the first appellate court to set aside the trial tribunals judgment which actually visited the land in dispute.

Submitting for the 4th ground of appeal Mr. Panga argued that the first appellate tribunal disregarded the opinion of the two tribunal assessors who were of the opinion that the land belonged to the Appellant and the chairman departed with that opinion without assigning any reason.

As for the 5th ground of appeal, Mr. Panga argued that there were two members of the ward tribunal who were alternating and some of them absconded the tribunal session. He explained that on 20th January 2017 two members of the Tribunal one Angela Margwe and Luktini Dafi, absconded hearing but on 24th January 2017 Angela participated in giving opinion and Luktini never participated.

The counsel for the Appellant claimed that members who were present at the commencement of the hearing of the matter had to be present until the final determination of the matter. That, any change of

the member has to be made in explanation and to the knowledge of the parties. He therefore prayed for the proceedings, judgment and decree of both lower tribunals to be nullified.

In reply Mr. Bashir submitted that the proceedings of the Ward Tribunal and page 3 of the judgment of the first Appeal Tribunal clearly shows that the evidence by one Timotheo collaborated the evidence of the Respondent such that after allocation of land there remained no excess land which remained unallocated to the parties. He added that DW2 was the village chairman during operation vijiji and witnessed the allocation of land to villagers. That evidence of DW2 reveals that after the allocation the Appellant and the Respondent were separated by road and no land remained unallocated. That, such testimony was supported by DW3 Isack and therefore the evidence of the two witnesses did not contradict itself as the advocate for the applicant is trying to persuade the court and instead the evidence of Daudi Lagwen contradicts the evidence of the Appellant.

Mr. Bashir went on and submitted that the DLHT was satisfied with the evidence in record that the Respondent herein managed to prove his case on the balance of probability and awarded the Respondent the land in dispute. To cement his submission, he cited the case of Andrea **Duda**

and 8 others Vs Martin Doto Nyenge, Land Appeal No 55 of 2019 (Unreported).

Responding to the 4th ground, the Respondent submitted that, the appellate tribunal was correct in its decision as it gave reasons for disregarding the opinion of the assessors as can be read from page 6 paragraph 4 of the judgment. He thus prayed for grounds 1 to 4 of the appeal to be dismissed.

With regard to the 5th ground, the counsel for the Respondent submitted that the question is whether the dates when the two members missed the hearing can occasion injustice to the parties to the case. He stated that the law under section 11 of the Land Disputes Courts Act Cap 216 is clear that the coram of the Ward Tribunal is not less than 4 members and not more than 8 members whom 3 must be women. He thus submitted that, no date that the coram of the ward Tribunal was not complete. To support his submission, he cited the case of **Yakobo Magoiga Gichere Vs Peninah Yusuph**, Civil Appeal No 55 of 2017 CAT and he prayed that the decision of the District Land and Housing Tribunal be upheld.

In alternative to ground five the counsel for the Respondent urged this court to determine whether this ground can be entertained at this stage. He referred the case of **Merita Naikiminjal and Loishilaari**

Naikiminjal Vs Sailaveo Loibanguti, Civil Appeal No 8 of 1994 TLR [1998] p 120 where the court was of the view that an issue not raised in the 1st appeal can not be raised and determined by the 2nd appellate court. That, since no party raised an issue of the coram of members before the District Land and Housing Tribunal then it cannot be raised and entertained at this stage. The counsel for the respondent prayed for the appeal to be dismissed with costs.

In a brief rejoinder to the 1st, 2nd and 3rd ground of appeal Mr. Panga submitted that the Respondent counsel did not reply whether the testimony by Timotheo Panga and Isack Awe were reliable evidence. He insisted that the case of **Andrea Duda** cited by the Respondent is distinguishable as the rules and practice applicable in that case is different from the rules and practice applicable to the Ward tribunal.

On the 5th ground he re-joined the issue of the attendance of the ward members is a pure legal issue which can be raised at any stage even by the court itself. That, what is barred to be raised is factual issue not dealt with by the first appellate tribunal and the irregularity cannot be saved by the holding of the Court of Appeal in Magoiga's case cited by the counsel for the Respondent.

I will deliberate on the grounds of appeal in the manner adopted by the counsel for the parties.

Starting with the 1st, 2nd and 3rd ground of appeal the issue for the determination is whether there was a proper analysis of evidence by the first appellate tribunal. The Appellant claimed that the DLHT relied on the contradictory evidence of Temotheo L. Panga and was unable to consider and analyse other evidence on record and thereby arriving to erroneous decision. For the Appellant the DLHT was wrong to overturn the decision of the Ward tribunal which was given after the members have visited the locus in quo.

I have carefully gone through the judgment of the DLHT, the proceedings of the two lower tribunals as well as the arguments made for and against the appeal. I find it useful to state in the very beginning that there was proper analysis of evidence by the first appellate court.

It is in record that the evidence of Timotheo Panga supported the evidence of the Respondent and did not in any way contradict itself. The District Land and Housing Tribunal at page 3 of its judgment opted to give weight to the evidence of the Timotheo Panga for the reason that Timotheo Panga was the Chairman during Operation Vijiji and his

evidence was clear that the boundary to the parties' land was the road and not the sisal. I agree with the reasoning of the DLHT for the following reasons.

One, it is in evidence and undisputed by the parties that they were all allocated land during operation vijiji. It is also in record that at the time of allocating land to villagers, the road was also planned in that area. While the Respondent claim that the road stand as demarcation to his land against that of the Appellant, the Appellant claim that after the land he has ½ acre of land attached to the Respondent's land across the road. That fact was not supported by Timotheo Panga and it is undisputed fact that he was the chairman during operation vijiji and he well participated to the allocation of land to villagers. I therefore find that the DLHT was right to give weight to the evidence of Timotheo Panga.

Two, the Respondent apart from his evidence, he presented three more witnesses before the Ward Tribunal. Michael George, Timotheo L. Panga and Isaki A. Awe. The evidence of Michael George and Timotheo L. Panga shows that there were both present during operation vijiji and they witnessed the allocation of land to villagers. They all confirmed the Respondent's evidence that the disputed land was allocated to the Respondent, and it was separated from that of the Appellant by the road

planned during operation vijiji. The evidence of Isack Awe was based on the conflict that arose in 2010 between the parties as regard to the same disputed land. The conclusion to that dispute was that the land was left to be owned by the Respondent John Gwaltu.

The evidence of the Appellant before the Ward Tribunal reveal that he inherited the land from his late father Mathias Kasmiri before operation vijiji in 1975 and during operation vijiji when the allocation was done, the Respondent land extended to the Appellant's land and he planted sisal but he later removed the sisal and planted it to another area exceeding the land he was allocated during operation vijiji. However, the Appellant agreed that there was no sisal planted during operation vijiji but claimed that he was grazing cattle to that area. The Appellant presented three witnesses Herman Mathias, his brother, Daud Lagwen and Isack Daffi. There is evidence similar to the fact that the Appellant was owning the land prior to operation vijiji. However, during cross examination Daudi Lagwen changed the story and claimed that he is not aware of the person occupying the disputed land before operation vijiji. Another plaintiff's witness Isack Daffi claimed that the disputed land was declared by the village counsel to be the road reserve. Thus, it becomes clear that the Appellant's witnesses contradicted the Appellant's evidence.

The Ward Tribunal visited the locus in quo and their sketch plan/map shows that the disputed land is attached to the Respondent's land across the road from the Appellant's land thus justifying the Respondent's evidence that the land is demarcated by road. The Ward tribunal decide in favour of the Appellant on the ground that there was sisal planted on back days showing that the Respondent's land ended where the sisal was planted. However, there is evidence showing that no sisal was found in that area.

From the above analysis I am convinced that the DLHT was right to find the evidence of the Respondent's side more convincing as opposed to that of the Appellant. With the evidence in record, it is more convincing that the Respondent proved that he was allocated the dispute land during operation vijiji and his land was demarcated by road from that of Appellant. The claim by the Appellant that he owned a piece of land (1/2 acre) attached to the Respondent's land across the road is unjustified and weak as compared to that of the Respondent. I therefore find no reasons to hold otherwise in this issue. The 1st, 2nd and 3rd ground of appeal are without merit and are hereby dismissed.

On the 4th ground of appeal, the issue for consideration is whether the first appellate court did disregard the opinion of the members. The Appellant contended that the DLHT disregarded the opinion of two

members without assigning the reasons. Reading through the judgment of the District Land and Housing Tribunal specifically page 6, it is clear that the Chairman stated his departure to the opinion of the two assessors and assigned reason for so doing. I therefore find this ground baseless.

The 5th ground of appeal was an additional ground raised during hearing of the appeal to the effect that the judgment of the ward tribunal and consequently of the DLHT are bad in law for some of the members of the Ward Tribunal did not participate in the hearing but did participate in writing the judgment. I will not labour much to this ground because this ground was not raised before the first appellate tribunal thus it will be not proper for the same to be dealt with on the second appeal. It is the requirement of the law that on the second appeal, the court will only deal with issues that were raised and determined by the first appellate court. The Court of Appeal in Criminal Appeal No. 206 of 2017, **Erneo Kidilo and Matatizo Mkenza Vs the Republic** adopted its decision in **Joseph Leko Vs. R., Criminal Appeal No. 124 of 2013** (unreported) where the Court observed:

*"...Apparently this ground was not raised in the High Court. It is a new ground. The **Court has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a second appeal.** See the case o f SELEMAN RASHID*

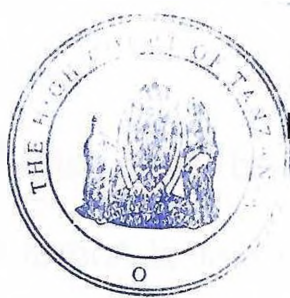
@ DAHA V R Criminal Appeal No. 190 of 2010 and BIHANI NYANNKONGO & ANOTHER V R Criminal Appeal No. 182 of 2011 (both unreported) among others."

The similar position was adopted by this court in PC Civil Appeal No. 10 of 2020, **Hussein Juma Vs Farouk Mohamed** by Siyani J.

Subscribing to the above authorities, it is my conclusion that the fifth ground of appeal which the Appellant preferred as additional ground is a new ground which was neither raised nor discussed in the first appellate court thus not maintainable before this court.

In the upshot the appeal is devoid of merit and its hereby dismissed in its entirety with costs.

DATED at **ARUSHA** this 11th day of April 2022




D.C. KAMUZORA

JUDGE