IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

MISC. LAND APPEAL NO. 03 OF 2021

(C/F Land Appeal No. 15/2020 from Dongobesh, District Land and Housing Tribunal, which originated from Imboru Ward Tribunal Land Dispute No. 01/2020)

ERNEST MAGANGA.....APPELLANT

VERSUS

ANNA AMO.....RESPONDENT

JUDGMENT

07th June & 11th July, 2022

TIGANGA, J.

In this judgment the appellant, Ernest Maganga sued for the first time before the Imboru Ward Tribunal, of Mbulu District (hereinafter referred to as the trial tribunal) for easement from the respondent in Land Dispute No. 01/2020 of that tribunal. He so claimed that, when he purchased his 20 X 40 meters of land, the person who sold him the land also showed him a pathway through which he would be crossing to access his plot. However, in a blink of an eye, the respondent built a house on the area (pathway) which the appellant was to use in accessing his plot.

Before that Ward Tribunal the appellant lost. Though the ward tribunal appreciated the importance of having the pathway for every

family to access its home, they nevertheless directed him to claim the pathway from the street government. Simultaneous with the dismissal of the claim, the tribunal pronounced the respondent as the lawful owner of the land on which she built a house including the piece of land claimed as an easement.

Following that decision, the appellant was aggrieved, he appealed to the District Land and Housing Tribunal for Mbulu at Dongobesh, (hereinafter referred to as the first appellate tribunal) via Land Appeal No. 15 of 2020.

In that appeal, the appellant fronted five grounds of appeal, which are hereby paraphrased as follows:

1. That, the Ward Tribunal erred for deliberately holding that the disputed land belongs to the respondent while in fact it has been a long time public road which was there even when the appellant purchased his land.
2. That, the Ward Tribunal erred for ignoring the evidence of elders of Mtaa wa Ayanaada who testified that before the respondent had built her house, there was a pedestrian way.

3. That, the tribunal did not consider the fact that the appellant has already built the residential house, and the public road was closed by hindering the appellant from accessing his land.
4. That, the Ward Tribunal erred in law for failure to appreciate the heavier evidence of the elders.

After full hearing, the first appellate tribunal upheld the decision of the trial tribunal and consequently dismissed the appeal for lack of merits on the ground that, basing on the evidence available, the trial tribunal was justified to hold as it did.

Following that decision, the appellant was aggrieved, he appealed to this court by preferring two grounds of appeal as follows:

(1) That the first appellate tribunal erred for failure to re-evaluate the evidence on record as adduced by the parties during hearing, thereby issued a decision not maintainable in law.

(2) That the first appellate tribunal erred both in law and fact for making unfair judgment in the respondent's favour without considering that the trial tribunal quorum was not properly composed according to the law.

He therefore prayed for the appeal to be allowed with costs, the judgment and decree of the trial and first appellate tribunals be quashed

set aside and declare the appellant to have the right to use the suit land as an easement towards his landed property legally bought.

According to the affidavit of the process server filed on 22/02/2022, the respondent was not present when he went to serve her but the summons and other document were received by one Geofrey Askwari on behalf of the respondent. Therefore, the respondent did not appear to defend her appeal, following that state of affairs, the appeal was heard exparte.

The hearing was done by way of written submission. The appellant through the service of Mr. Omary. B. Gyunda, Advocate submitted in support of the first ground of appeal that, the trial tribunal did not analyse the evidence on record, an omission which leads to an injustice.

To substantiate his argument, he cited some instances in the proceedings where in his view, the trial tribunal messed up with the evidence. He said that it can be found in the proceedings showing that, the evidence of John Bombo, Mwenyekiti wa Mtaa and that of Boay Ami, proved that, before the respondent's trespass, there was a pathway which is currently no longer. To him such evidence was unfortunately not considered and analyse by the trial tribunal.

The second aspect, in the first ground of appeal is that, it was legally wrong for the trial tribunal to nullify the sale/purchase agreement between the appellant and one Askwari, as the dispute was not about the agreement but only the pathway. Therefore, the trial tribunal erroneously dealt with the contract or sale agreement which was not the subject matter in the dispute submitted before the trial tribunal. Therefore, it was not proper for the trial tribunal to declare the respondent as the lawful owner of the disputed land, Mr. Gyunda submitted.

He also submitted that the visit to the *locus in quo* was unprocedural because there was no measurement made to ascertain the size of the road alleged to be trespassed onto. To support his argument, he referred this court to the case of **Tluway Tlehhema vs Tlehhema Gadiye,** Misc. Land Appeal No. 7 of 2020 - HC – Arusha (unreported) in which the decision of **Nizar M. H. Ladak vs. Gulamali, Fazal Jan Mohamed** (1980) TLR 29, which requires the size of the land, road or room in dispute to be measured when visiting the *locus in quo* in the presence of the parties and to re-read all the notice taken after re-assembling in the court room.

He submitted that, in this case the width and length of the pathway was not measured and ascertained. Therefore, in his view, that rendered the proceedings of the *locus in quo* a nullity as they were supposed to be part of the record of the trial tribunal something which was not done.

That being the case, it is his view that had the trial tribunal evaluated the evidence and the first appellate tribunal re-evaluated the evidence, the decision could not have been the same as the one delivered. He therefore asked the first ground to be allowed for being meritorious.

Regarding the 2nd ground of appeal, the counsel submitted that the provision of section 11 of the Land Disputed Courts Act [Cap 216 RE 2019] provides for the composition of the Ward Tribunal to be valid if it consists not less than four and not more that eight members, of whom three shall be women. In this case according to the counsel for the appellant, the members of the tribunal were changing. That some times they were four including the secretary, or six or seven. This means that, those who started are not similar to those who determined the dispute. Therefore, the composition lacked consistence, he said. In his view, the change of the members has prejudiced the appellant.

On that base, he prayed the appeal to be allowed with costs by quashing and setting aside the decision of the lower tribunals.

That presents a summary of the records, the grounds of appeal and the submission filed in support of the appeal. Now, in deciding the appeal, I will deal with one ground after the other as presented by the counsel for the appellant.

The first complaint as contained in the first ground of appeal is that, the trial tribunal did not analyse evidence on record, an omission which lead to injustice to the appellant. The counsel referred me to the evidence of three witnesses who were for the applicant namely; John Bombo, Mwenyekiti wa Mtaa and Boay Ami who in their evidence suggested that, there was a pathway before the respondent had trespassed and built it. As it can be deciphered from the argument, the complaint is that the trial tribunal did not evaluate evidence.

In law, the second appellate court is not generally entitled to interfere with the concurrent findings of facts by the courts bellow, except in the circumstances where the court is of the opinion that there was either misapprehension or misdirection of evidence occasioned injustice. See. **Philbert Godson @ Pasco vs The Republic**, Criminal Appeal No. 267 of 2019, CAT –DSM (unreported). In so doing it may

re evaluate evidence on record to ascertain as to whether there is such a misapprehension or misdirection of fact or evidence. Also see **Deemay Daati and 2 others vs The Republic**, [2004] TZCA 29.

When it finds that the trial and first appellate court did not analyze evidence and that failure occasioned injustice, then it may re-evaluate the evidence and come with its own findings.

I have passed through the proceedings, there is no evidence suggesting that there was a pathway on the land which was owned by one Askwari Siai who sold land to the appellant. All witnesses' evidence suggests that, on the peace of land where the house of the respondent was built and where the appellant alleged to have his pathway trespassed onto had trees which belonged to Anna Amo. Some said, the land was the property of Askwari, while others said, both the land and the trees were the properties of the respondent. From the evidence, I find it to be clear, and I find nothing which this court can deem to be unanalyzed.

Regarding the fact that, the trial tribunal was wrong because it nullified the sale agreement between Askwari and the appellant, this court is estopped from discussing it because it was not made the ground of appeal before the first appellate tribunal.

However, this court may, in exceptional circumstances where the issue raised relates to point of law, entertain the ground of appeal which has not been raised and dealt with in the first appellate court. For the reasons which I am going to give, I am of the view that, this is a point of law, therefore it falls in the exceptions.

Looking at the claim before the trial tribunal, it is clear that the claim was a pathway, there was no claim intending to nullify the sale agreement entered into by one Askwari and the appellant. Therefore, in my view, the trial tribunal fell into error of deciding on the issue which the parties did not call it upon to decide. That said, I find the decision and pronouncement made by the trial tribunal declaring the sale between Askwari and the appellant to be a nullity because it was un procedurally made. That decision in respect of the sale agreement is overturned for the reasons given.

Regarding the composition of the Ward Tribunal, the appellant contended that the members were changing and that those who started to hear the dispute are not the ones who determined it. To ascertain the truth or otherwise of these allegations, a visit of the record is necessary, on my visit to the record, I found that, members of the trial tribunal who presided over the first date on 05/05/2020

frequencies she missed did not affect the required numbers of women according to law. That said, I find the second ground of appeal to be without merits. It is for that reasons dismissed.

That being the position, the entire appeal is dismissed as explained save for the order nullifying the declaration of the sale agreement to be invalid. Given the nature of the disputes and the parties involved, no order as to costs is made.

It is accordingly ordered.

DATE at **ARUSHA**, this 11th day of July 2022.

J. C. TIGANGA

JUDGE