

**IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
MISC. LAND APPEAL NO. 32 OF 2020**

(Originating from decision of the District Land and Housing Tribunal for Katavi District at Mpanda in Land Appeal Case No. 11 from Tongwe Ward Tribunal case No. 15 of 2019)

JOHN LEGEZAMWENDO MNYOGI.....APPELLANT

VERSUS

ELIAS SINDABAGIJE.....RESPONDENT

JUDGEMENT

Date of Last Order: 24/05/2022

Date of Judgement: 11/08/2022

NDUNGURU, J

A brief background of this matter is that one Elias Sindabagije (henceforth the respondent) sued one John Legezamwendo Mnyogi (henceforth the appellant) before the Ward Tribunal of Tongwe (henceforth the trial tribunal in land dispute No. 15 of 2019 over a piece of land (hence forth disputed land) which he claimed to have bought from the person who also bought from the appellant. In its judgement delivered on 21.01.2020, the trial tribunal found claims by the appellant with merit and declared him as the lawful owner of the disputed land, thus the appellant ordered to give vacant possession.

The appellant was aggrieved by the trial tribunal decision. On 19.02.2020, he appealed to the District Land and Housing Tribunal of Rukwa (henceforth the appellate tribunal) by filing a memorandum of appeal. The said appeal was registered as Appeal No. 11 of 2020. Upon determined the matter, the appellate tribunal upheld the decision of the trial tribunal.

The appellant aggrieved with the decision of the appellate tribunal has lodged the present appeal to this court with six grounds of appeal. The said grounds are as hereunder quoted.

- 1. That the first appellate tribunal erred in law and fact for failure to hold the respondent miserably failed to prove the ownership nor trespass over the disputed land.*
- 2. That the first appellate tribunal erred in law and fact for failure to hold that the respondent failed to prove citizenship which had detriment over the issue of ownership.*
- 3. That the first appellate tribunal erred in law and fact as it blindly glossed over admission of lies by the respondent's testimony.*
- 4. That the trial tribunal's proceedings are vitiated for lack of necessary party in the proceedings.*
- 5. The first appellate tribunal erred in law and fact in relying on the evidence of the respondent herein which was very contradictory, un worth of truth, afterthought and without evidential value at all.*

6. That the first appellate tribunal erred in law and fact in declaring the respondent as the lawful owner of the plot in dispute without cogent proof neither orally nor documentary evidence of proving the ownership of the land in dispute.

Unlike when the matter was before the appellate tribunal, before this court, Mr. Deogratius Sanga learned advocate appeared for the appellant, whereas, Ms Neema Charles learned advocate appeared for the respondent during the hearing of this appeal.

Arguing in support of the appeal, Mr Sanga dropped the 4th and he went on arguing 1st, 5th and 6th grounds altogether, and 2nd and 3rd grounds separately.

Mr Sanga asserted that as regards the 1st, 5th and 6th grounds of appeal that the respondent failed to prove ownership of the disputed land and that the same was trespassed by the appellant. He went on asserting that the first appellate court failed to take into account that the respondent did not prove his ownership and that the respondent had trespassed.

Further, Mr Sanga submitted that before the trial tribunal the respondent said he acquired the said land by purchasing it. The respondent did not prove sale by producing sale agreement as provided

by section 101 of TEA. But no sale agreement nor witness was called to prove the sale/disposition.

Further, he submitted that there is no evidence to prove that the sale was witnessed by the local authority where the land subject of matter was located. He referenced the case of **Robert Rwiche V. Athman Ally** Land Appeal No 09 of 2014 H C, Sumbawanga, unreported.

That the respondent in his testimony submitted not to know the size of the disputed land.

He further asserted that the testimony of the respondent is contradictory as far as the time the respondent had occupied land. He submitted that his witness said the respondent has occupied the land for 20 year and when cross examined, he said for 3 years. As regards who sold the land to the respondent, the respondent said to had bought to Mwananjelwa but Gelas said the respondent bought from Mtunda. These are two deferent persons.

Though all that were submitted before the first appellate tribunal, Mr Sanga argued the chairman yet misdirected himself by deciding that the respondent proved ownership and trespass on the part of the appellant.

As to the 2nd ground, concerning citizenship, he prayed to drop it as it was not featured during trial. As to the 3rd ground of appeal, he asserted that as per the trial tribunal's proceedings the respondent when responding to the questions of the appellant confessed to have lied as far as the ownership is concerned. He believed the respondent lied that his evidence was worth to be discredited.

Notwithstanding, the appellant proved to be the owner of disputed land. His evidence and that of his witnesses proved his ownership. He prayed the appellant's appeal be allowed. He be declared a lawful owner of the disputed land and costs of this appeal.

In reply thereto, Ms. Neema Charles went on submitting on the 1st and 3rd grounds together. She asserted that there is evidence proving that the respondent is the lawful owner of the suit plot. The appellant testified to have purchased it in 2004 the purchase price was 150,000/= and that he bought a suit land to one Msukuma one Mwananjela. Yet still the respondent had witnesses at the trial Ward tribunal who testified on the purchase to one Msukuma. They said that before the land was owned by the appellant who then sold it to Mwananjela who later sold it to the respondent.

She asserted further that such evidence was corroborated by one Apolinary Mnyoge, who was/is the young brother of the appellant.

She asserted that under section 10 of the Law of Contract Act, two types of contracts are recognised, oral contract and written one, thus even oral contract entered by the respondent and the seller was valid.

On the 5th and 6th grounds altogether, she submitted that there was no lie no contradiction. The respondent bought the land in dispute in 2004, he went on using it for three (3) years. He stopped using it for 3 years for rejuvenating it. That in between there arose a dispute which was tried at Mpanda Ndogo Ward between him and the appellant, where the appellant won it. Thus, there is no contradiction on the time the respondent owned land in dispute. The fact that he bought to one Mtunda is a hearsay which has no value at all.

To her, the evidence of the appellant is the one which contradicted itself. One Laimond Regeza, appellant's witness was full of contradiction as he said he has stayed at the plot for 64 years while when testified he said he was 65 years old. The appellant told the tribunal that he was there since 1971 which does not amount to 64 years as testified by his witness. If true that he owned from 1971 till when the dispute arises, he had 48 years why then saying 15 years if he is not lying. Thus, it is the evidence of the appellant which contradicts. Thus, the appellant failed to prove the case to the standard required. As there is evidence from Apolinari his relative that the appellant sold it to Mwananjela who later

sold it to the respondent. Therefore, she prayed for the appeal be dismissed with costs.

In his brief rejoinder, Mr. Sanga submitted that the counsel for the respondent has not disputed that there are contradictions, that Mwananjela was not called, that there was no contract. Further, she has not disputed that the village authority was not involved in the sale. That she has not disputed the allegation that the land was sold by two different persons. Gelas Mbilila gave evidence in chief not a hearsay.

That the presence of the case at Mpanda Ndogo Ward, where the respondent said to had worn the case, there is no any evidence on record to that effect. That it is the respondent who filed the case before the tribunal, why did he not execute the decision of Mpanda Ndogo Ward if there was such a case. The appellant said he cultivated it for 15 years then rented to the people. It is clear that Mnyoge was at which farm for 64 years. Thus, his age immaterial it has no any contradictions. He prayed the appeal be allowed with costs.

I have thoroughly gone through the files of the two tribunals below; and the respective submissions from the learned counsel for both appellant and respondent. A question to be resolved is whether this appeal has merit or not.

The appeal is based on credibility of witnesses. There is a lot of authorities on this. One being is **Goodluck Kyando vs Republic** [2006] TLR 363, Where CAT had said: -

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness. Their testimony was not challenged."

Am also alive to the position that the trial court/tribunal is at best place to determine and assess credibility of witnesses than appellate court and that credibility of a witness is the domain and territory of the trial court. See the case of **Ali Abdallah Said vs Saada Abdallah Rajab** [1994] TLR 132, **Shaban Daudi vs Republic**, Criminal Appeal No. 28 of 2001, unreported, in the case of **Shaban Daudi vs Republic**, The Court held that: -

"Credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of the witness can also be determined in two other ways. One, when assessing the coherence of the testimony of that witness and two, when the testimony of that witness is considered in relation to the evidence of other witnesses including that of the accused person. In those two occasions, the credibility of

witness can be determined even by a second appellate court when examining the findings of the first appellate court."

It is on record that the respondent was in uninterrupted possession of the disputed land since 2004 when he claimed to have purchased the same from one Mwananjemu Jilasa. The respondent testified at the trial tribunal that he purchased the disputed land in 2004 for the consideration of Tshs. 150,000/=. That sometimes in year 2019 he saw his land being trespassed by the appellant who cleared trees and cultivated therein.

The respondent version of testimony is supported by his witness No. 3 one Apronary Mnyogi who testified in detail on how the respondent got into possession of the disputed land. The witness testified at the trial tribunal that he once told by the Mwananjemu that he bought the disputed land from the appellant in a year 2002. He informed the trial tribunal that he was also told by the respondent that he bought the same disputed land from Mwananjemu Jilasa.

It is also undisputed to both sides that one Mwananjemu once lived at the farms of the appellant. The appellant even admitted to have married the granddaughter of Mwananjemu in his testimony. That implies he was not an unfamiliar person to the appellant.

Obviously, the respondent's case was dented by his failure to produce any documentary evidence to support his claim that he purchased the disputed land from Mwananjemu, which is the main complaint of this appeal by the appellant. However, it is was findings of the trial tribunal and appellate tribunal that the appellant sold the disputed land to one Mwananjemu who then sold the same to the respondent. Unfortunately, as it was said at the trial tribunal one Mwananjemu shifted to unknown place that he could not be called to testify. Although it is accepted that in some circumstances, it happens sale conducted undocumented. However, as hinted above the respondent produced witness one Apronary Mnyogi who to my firm consideration was credible witness who testified at length that the appellant sold the disputed land to Mwananjemu who then sold to the respondent. Both tribunals below believed his testimony as per the case of **Goodluck Kyando** [supra] above.

In view of the above, am of the considered position that the tribunals below made a proper assessment of the testimonies of the witnesses until they came to their concurrent findings on balance of probability.

As regards contradictions in occupation of disputed land was already resolved by the appellate tribunal when it said the matter was not an issue at the trial tribunal.

As regards issue of size of the disputed land, issue of trespass, sale not witnessed by the local authority and admission of lies are the new issues which were not raised or discussed at the first appellate court. These new grounds of appeals fall short of merit as it is raised for the first time in this second appeal. It has been the position of the law that matter which had not been raised or discussed in the first appeal cannot be raised in the second appeal like this one. These new grounds which neither raised by the trial tribunal nor on appeal by this court, therefore, the issue can be said to be of no worth to be considered and determined by the Appellate Court. There is a chain of authorities which have taken that stance, which is, matters not considered by the lower courts cannot be raised in the Higher Court. See cases of **George Mwanyigili vs Republic**, Criminal Appeal No. 335 of 2016, unreported, **Juma Manjano vs Republic**, Criminal Appeal No. 211 of 2009, unreported, **Sadick Marwa Kisase vs Republic**, Criminal Appeal No. 83 of 2012, unreported, also the case of this court of **Alfred Nyaoza vs Salvatory Mwanabula**, Misc Application No. 3 of HC at Sumbawanga.

Since I am satisfied that in the instant case there is no extraordinary circumstances that require me to interfere with the trial tribunal findings of fact, I would agree with findings of the tribunals below as stated in the case of **Materu Laison & Another vs R. Sospeter** [1988] TLR 102 as per Moshi, J as he then was;

"Appellate Court may in rare circumstance interfere with the trial Court findings or facts. It may do so in instances where trial Court has omitted to consider or had misconstrued some evidence, or had acted on wrong principle or had erred in its approach in evaluating the evidence."

In fine, I find that the appeal before me is not meritorious. I have not seen any reasons to fault the decision of the tribunals below.

The same is hereby dismissed with costs.

It is so ordered




D.B NDUNGURU

JUDGE

11/08/2022