

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

MISC. LAND APPEAL NO. 15 OF 2021

(Originating from the Judgment of Hon. Chinuku F, (Chairperson) District Land and Housing Tribunal for Kigoma Land Appeal No. 31/2021)

YAHAYA YUSUFU KHALFANIAPPELLANT

VERSUS

IDRISA FADHILI KASOMARESPONDENT

RULING

18/7/2022 & 19/8/2022

L.M. Mlacha,J

The appellant Yahaya Yusufu Khalfan was dissatisfied by the decision of the District Land and Housing Tribunal for Kigoma (the DLHT) made in Land Appeal No. 31/2021. He came to this court with 4 grounds of appeal which read thus:

1. That, the Appellate tribunal erred in law and fact without considering the evidence adduced by the Appellant on the fact that the Appellant owns his own plot no. 748 Block "A" Gezaulole, within Kigoma Municipality and the Respondent owns his own plot No. 747 Block "A" Gezaulole within Kigoma Municipality.

2. That the Appellate Tribunal erred in law and fact by deciding in favour of the Respondent without considering that during the survey of the said Block "A" to both plots 747 and 748 the Respondent was the one who showed to the Land officers the boundaries of the said two plots.
3. That the Appellate Tribunal erred in law and fact by denying the Appellant's witnesses who adduced before the trial tribunal that the appellant have been using the said disputed plot for more that 40 years their families have been using without being disturbed.
4. That, the Appellant Court erred in law and fact by failure to consider the documentary evidence tendered by the trial Tribunal during the hearing of the said suit to wit the title deed which gives the Appellant 99 years right of occupancy.

The respondent, Idrisa Fadhili Kasoma, on being served came with a preliminary objection with two points which read as under.

1. That, this Appeal is legally un maintainable on account that the Appellant has raised a new ground of appeal which were not pleaded to the District Land and Housing Tribunal

2. That, the Appeal before this Honourable court is legally incompetent for being filed without accompanied with the copy of decree appealed against in Land Appeal No. 15 of 2021.

The appellant was represented by Mr. Michael Mwangati while the respondent had the services of Mr. Silvester Damas Sogomba. With leave of court hearing was done by written submissions.

I had time to read the pleadings and submissions carefully. In ground one the complaint is that the appellant has raised new grounds before the court, grounds which were not tested in the DLHT. Mr. Sogomba reproduced the grounds which were submitted to the DLHT and those which are now pending before the court. He submitted that the appeal is improperly before the court and must be struck out because the grounds are not similar. He referred the court to **Joseph Manyanya v. Chacha Masawe**, Miscellaneous Land Appeal No. 150 of 2020 (High Court of Musoma), **Raphael EneaMngazija (Administrator of the Estate of the late Enea Mngazija) v. Abdalah Kalonjo Juma**, Civil Appeal No. 240 of 2018 (CA) and argued the court to strick out the appeal.

Mr. Michael Mwangati resisted the submission saying that the grounds of appeal raised in this court are the same with those raised in the DLHT. He argued the court to dismiss the objection.

Mr. Sogomba submitted on ground two saying the appellant has filed the appeal without attaching a copy of the decree. Counsel submitted that much as the Land Disputes courts Act Cap 216 R.E 2019 has no provision requiring the attachment of a decree in the Memorandum of Appeal but section 51 (1) (b) call for the application of the Civil Procedure Code Act, Cap 33 R.E 2019 (the CPC) where there is a gap in the Law. Counsel referred the court to rule 1(1) of the CPC which has a mandatory requirement to attach a copy of the decree in the Memorandum of Appeal. He argued the court to struck out the appeal.

Mr. Michael Mwangati conceded the objection but argued the leave of court to refile the appeal.

I will start with ground one. Like Mr. Sogomba, I will reproduce the grounds of appeal to see if they are similar. The grounds of appeal raised in the DLHT read: -

1. Kwamba, baraza la kata lilikosea kisheria na kimantiki kwa kusikiliza shauri wakati halina mamlaka kisheria kusikiliza eneo ambalo lina hati

kubwa ya miaka 99 iliyotolewa na Kamishna wa Ardhi katika kiwanja Na. 748 kitalu "A".

2. Kwamba, baraza la kata lilikosea kisheria na kimantiki kwa kusikiliza shauri na kulitolea uamuzi wakati halina mamlaka kisheria kusikiliza eneo lenye thamani ya milioni saba.
3. Kwamba, baraza la kata lilikosea kisheria na kimantiki kwa kutozingatia Ushahidi mzito wa mleta rufaa kuwa ndiye mmiliki halali wa eneo linalogombaniwa.
4. Kwamba, baraza la kata la Gungu lilikosea kisheria na kimantiki kwa kusikiliza na kulitolewa uamuzi eneo lenye mgogoro bila kuunganishwa kwenye shauri Kamishna wa Ardhi aliyetoa hati ya kiwanja namba 748 kitalu "A" kwa YAHAYA FADHILI KHALFAN.

I have read the judgment of the DLHT repeatedly. I have also examined the grounds of appeal. In principle I agree that in a second appeal the court cannot adjudicate on an issue which was not raised in the first appellate court. In other words, matters which were not raised in the first appellate court cannot be raised in the second appeal. That is a settled position and I have no problem with it. My problem is whether the grounds of appeal must be the same. With respect to Mr. Sogomba, I think the

answer is no. The grounds of appeal need not be the same as suggested by Mr. Sogomba. What is needed in my view is that, the grounds of appeal in the second appellate court must arise from issues which were raised and decided by the first appellate court. So, the measure is not the grounds of appeal which were tabled in the first appellate court but the findings and decision of the first appellate court. We look at the judgment of court not the grounds of appeal. We look at the reasoning and decision of the court.

Looking at the reasoning and decision of the DLHT I could get the followings decision. i) that, the ward tribunal visited the suit premises and evaluated the evidence properly. The evidence of the appellant (Yahaya Yusufu Halfani) was weak. ii) that, it was not necessary to join the land commissioner because the survey was initiated by the appellant (Yahaya). This is also an afterthought. iii) that, the respondent (Idrisa Fadhili Kasoma) is the lawful owner of the land. iv) that, the ward tribunal had jurisdiction to hear the case so long as the value of the land did not exceed 3,000,000/= despite the fact that the land was held under a long term right of occupancy. v) that, the issue that the ward tribunal did not take into account the evidence of the appellant is not true, not backed by the

record and dismissed. vi) that, the ward tribunal evaluated the evidence properly and rightly found for the respondent.

In ground one, the appellant is complaining that the DLHT erred in law and fact for failing to consider the evidence of the appellant. This is not a new ground. It is in the finding and decision of the DLHT. Ground two challenges the examination of the evidence about the survey. It is not a new ground because that matter was raised and decided by the DLHT. Ground three talk of failure to evaluate the evidence of the appellant. Like ground one, it is not a new ground. It arises from the finding and decision of the DLHT. Ground 4 talk of failure to consider documentary evidence. It is also an area which was touched by the DLHT which said that if had examined the evidence adduced at the ward tribunal and be satisfied that the ward tribunal had done its job properly. It is not a new area. In total I will say that all the grounds of appeal arise from the findings and decision of the DLHT. The first ground of objection is dismissed.

As observed above counsel were in agreement in ground two save for the consequences. But with respect to learned counsel, I find the submissions made on ground two as being strange because my perusal of the pleadings did not support what was submitted. I saw a copy of the decree headed

“Tuzo” in Kiswahili attached to the grounds of appeal. I called counsel for clarification and agreed that the decree is attached. Counsel had apologized. In view of what has been seen on records and the apology of counsel, much as I agree that Mr. Sogomba had a valid point in law, I will mark ground two as misconceived and proceed to dismiss it.

With those few remarks the objection is dismissed, costs in course.




L.M. Mlacha

Judge

19/8/2022

Court: Ruling delivered.




L.M. Mlacha

Judge

19/8/2022