

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

AT ARUSHA

LAND APPEAL NO. 48 OF 2020

(From the decision of the District Land and Housing tribunal of Mbulu at Dongobesh
in land Appeal No. 9 of 2019, originated from Murray Ward Tribunal in Land Case
No. 15 of 2019)

SAMWEL NAMAN AMI.....APPELLANT

VERSUS

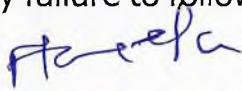
PAULO BAHAMAMARA.....RESPONDENT

JUDGMENT

16.08.2022 & 08.09.2022

MWASEBA, J.

The appellant herein upon being dissatisfied by the decision delivered by the District Land and Housing Tribunal of Mbulu at Dongobesh, lodged this appeal based on the following grounds:

- i) The Honourable Chairman of the District Land and Housing tribunal of Mbulu at Dongobesh erred in law and in fact by considering the contract for sale of land which ought to be admitted as evidence.
- ii) The Honourable Chairman of the District Land and Housing tribunal of Mbulu at Dongobesh erred in law and in fact by failure to follow proper procedure in admitting additional evidence. 

- iii) The Honourable Chairman of the District Land and Housing tribunal of Mbulu at Dongobesh erred in law and in fact by failure to consider properly evidence on record.

Briefly stated, facts relevant to this matter reveals that, the appellant herein claimed at the ward Tribunal for a piece of land measured $\frac{1}{2}$ acre worth Tshs. 500,000/= from the respondent herein claiming that the same was given to him by his father. When the trial tribunal received the evidence from both parties declared that the land which was $\frac{1}{4}$ and not a $\frac{1}{2}$ acre as alleged by the complainant/appellant belonged to the respondent as per the evidence and exhibits tendered during trial. Further the Tribunal ordered the appellant to vacate from the suit land. Being aggrieved, the appellant unsuccessfully appealed to the DLHT of Mbulu at Dongobesh where the decision of the ward tribunal was upheld and the appeal was dismissed with costs. Dissatisfied, the Appellant lodged this appeal armed with three grounds as submitted herein.

At the hearing of this appeal Mr George Njooka, learned counsel represented the Appellant while Mr Basil Boay, learned counsel appeared for the respondent. At the request of parties, the appeal was disposed of by way of written submissions.

Supporting his appeal on the first ground, the counsel for the Appellant submitted that the sale agreement which was admitted in additional evidence ought not to have been admitted as it lacks stamp duty which is contrary to Section 47 of **the Stamp Duty Act**, Cap 189 R.E 2019. The case of **Malmo Montagekonsul AB Tanzania Branch Vs Margaret Gama**, Civil Appeal No. 86 of 200 (CAT- Unreported) was cited to support his argument.

Responding to this ground, Mr Basil submitted that as long as the appellant did not object its admissibility then the same cannot be challenged at this stage. The appellant missed the boat and is barred from challenging the said exhibit as it was held in the case of **Joseph Deus @ Sahani and Masumbuko Bugali @ Mwanambiti vs Republic**, Criminal Appeal No. 564 of 2019 (CAT- Unreported). Further to that, the fact that the sale contract lacks stamp duty did not prejudice the appellant, so, there is no merit on this ground.

On the second ground of appeal, Mr Njooka submitted that the additional document was admitted without following proper procedures for admission. He added that it was the witness who were supposed to tender the documents and not an advocate and the other side were supposed to be allowed to cross examine the witness regarding the said documents.

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To cement his point, he cited the case of **Bhoke Kitang'ita vs Makuru Mahemba**, Civil Appeal No. 222 of 2017 (CAT – unreported).

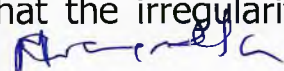
On this ground, Mr basil replied to the second ground that the sale agreement was admitted at the ward tribunal and not at the 1st appellate tribunal as submitted by the counsel for the appellant. He added that the respondent tendered additional document after adhering to **Section 34 (1) (b) of the Lands Disputes Court Act**, Cap 216 R.E 2019 and if the appellant had anything with it, he could have objected it from the beginning and not challenging it at the 2nd appellate court. The cited case of **Bhoke Kitang'ita** (supra) is distinguishable since the respondent obtained leave before tendered the documents as additional documents to be relied upon. More to that even the decision of DLHT did not base on the additional evidence but on the whole evidence adduced by the parties. The respondent managed to prove ownership of the disputed land by tendering sale agreement as per **Section 64 (1) (a) of the Land Act**, Cap 113 R.E 2019.

On the last point, the appellant's counsel argued that the 1st appellate tribunal failed to consider properly the evidence on record. He went further to point out irregularities on record as follows: first, all the witness at the ward tribunal gave their evidence without being sworn, they gave

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statement rather than testimonies and this irregularity is enough to vitiate the proceedings of the ward tribunal as per **Section 3 and 4 of the Oaths and Statutory Declaration Act**, Cap 34 R.E 2019. Second, the evidence was taken randomly example on the first day both the appellant and the respondent gave their evidence. Third, there was no cross examination between the witnesses neither by the parties nor by the members of the ward tribunal which renders a judgment as nullity. Fourth, the respondent failed to prove when and how the appellant came into possession of the piece of land. The person who claimed to sale the land to the respondent did not mention the time he inherited the said land from his father, thus the DLHT ought to have compared the testimony of the appellant and Gadiye Giliyo on how they acquired the said land and not the respondent herein. Further to that, the seller (Gadiye Giliyo) failed to bring witnesses on how he acquired the said piece of land as all the witnesses were strangers to him. Thus, he prayed for the appeal to be allowed with costs.

In replying to this ground of appeal, the respondent's counsel argued that the respondent and his witnesses managed to prove their case by submitting heavier evidence than of the appellant and his witnesses. He added that the ward tribunal was a proper place to analyse the evidence and they discharged their noble duty. He added that the irregularities

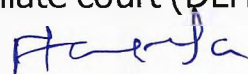


raised at this stage were not raised at the 1st appellate court hence raising them at this stage will be just an afterthought. He prayed for the appeal to be dismissed and the judgment of the trial tribunal and the 1st appellate court be uphold basing on **Section 45 of the Land Disputes Court Act**, Cap 216 R.E 2019.

Having considered the rival arguments advanced by the counsel for the parties and examined the record of appeal, the issue to be determined by this court is whether the appeal had merit.

Starting with the first ground of appeal, the appellant complains that the sale agreement was admitted without having the stamp duty contrary to **Section 47 of the Stamp Duty Act**. This court upon revisiting the records of the case has noted that the sale agreement was tendered at the Ward Tribunal and not at the DLHT. The same was never challenged at the 1st appellate court (DLHT). Therefore, it is not proper to challenge the same at this stage as it is an afterthought.

The same goes to the 3rd ground of appeal, where the appellant alleged that the evidence was not properly evaluated based on a number of irregularities at the ward tribunal including the way the evidence was tendered and the failure of witnesses to be cross examined. The said irregularities were never raised at the 1st appellate court (DLHT) therefore,

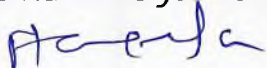


the same can neither be challenged nor raised at this stage. The Court of Appeal in the case **Galus Kitaya Vs. Republic**, Criminal Appeal No 196 of 2015 (CAT-Unreported) was confronted with the issue whether it can decide on a matter not raised in and decided by the High Court on first appeal. It stated as follows:

"On comparing grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, ground one to five are new grounds. As the court said in the case of Nurdin Mussa Wailu v. Republic (supra), the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal."

The same was held in the case of **Raphael Enea Mngazija (Administrator of the estate of the late Enea Mngazija) Vs Abdallah Kalonjo Juma**, Civil Appeal No. 240 Of 2018 (CAT-Unreported) that:

"After having looked at the record critically we find that, the first ground is new. As was stated in Galus Kitaya v. Republic and Athumani Rashid v. Republic (supra), we think that this ground being a new ground for having not been raised and decided by the first appellate court, we cannot look at it and determine the same. In other words, we have no jurisdiction to entertain it."

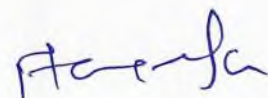


On the basis of the cited authorities, it is therefore settled that this being the 2nd appellate court will only look into matters which came up in the 1st appellate court and were decided; not on matters which were neither raised nor decided on appeal at the DLHT. Therefore, since the 1st and the 3rd ground of appeal contains matters which were never raised and determined by the DLHT being the 1st appellate court, this court lacks jurisdiction and finds no merit on the 1st and 3rd ground of appeal.

So long as I have no jurisdiction to determine the 1st and the 3rd ground of appeal as they are new facts, I will now turn to the remaining ground which is the 2nd ground of appeal where the appellant complained that the procedures of admitting additional evidence were not followed since it was an advocate who tendered the same to be admitted instead of the appellant. I have revisited the record and found that at the 1st appellate tribunal the respondent filed an additional document to be relied upon by the respondent which was a minutes of elders meeting presided by sub-village officer. The same was filed under **Section 34 (1) (b) of the Land Disputes Court Act**, Cap 216 R.E 2019 which provides that:

"1. The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall-

b) receive such additional evidence if any,



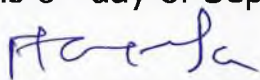
The record shows that the appeal was disposed of by way of written submission whereby both parties had an opportunity to file their submission. In his submission the appellant did not bother to dispute in any how the additional document filed by the respondent. Further to that, the DLHT in its impugned judgment never relied on the additional document to decide the lawfully owner of the disputed land. Its decision was based on the strong evidence submitted by the respondent and his witnesses at the trial ward tribunal which supersedes that of the appellant and his witnesses. Therefore, the second ground has merit.

That being said, and on the basis of the reasons stated, this appeal lacks merit and it is hereby dismissed with costs. The decision of the two lower tribunals is upheld.

It is so ordered.

DATED at ARUSHA this 8th day of September 2022




N.R. MWASEBA

JUDGE

08.09.2022