IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO.53 OF 2021

(Originating from Land Application No. 40 of 2021 in Chato District Land and House Tribunal at Chato)

RAMADHAN ZUMBE.....APPELLANT

VERSUS

EMMANUEL DANIEL.....1ST RESPONDENT

BOSCO MUGARULA.....2ND RESPPONDENT

JUDGMENT

Date of Last Order: 27/10/2022

Date of Judgment: 04/11/2022

KAMANA, J:

This appeal originates from Land Application No. 40 of 2009 in the Chato District Land and Housing Tribunal at Chato in which the 1st Respondent, Mr. Emmanuel Daniel the then an Applicant, triumphed the Appellant Mr. Ramadhan Zumbe the then the 1st Respondent and Mr. Bosco Mugarula the 2nd Respondent who was also the 2nd Respondent in the said Land Application. The subject matter at the trial Tribunal was a piece of land which the 1st Respondent claimed to have permitted the Appellant to build a kiosk.

It was alleged by the 1st Respondent that he had an agreement with the Appellant under which the latter was allowed by the former to build a kiosk on his own costs and use the same for a period of three

years before starting to pay the 1st Respondent a rent rated at Tshs. 20,000 a month. The alleged agreement was said to have been entered in 2002 and the construction of the kiosk was completed in 2003. In that case, it was the 1st Respondent's case that the Appellant was supposed to start paying rent in July, 2005.

From the completion of the kiosk to July, 2005 things went well between the 1st Respondent and the Appellant. However, in July, 2005 when the 1st Respondent, in expectation of receiving rent from the Appellant, was informed by the 2nd Respondent that the Appellant, who in the year 2004 was transferred by his employer from Nyakahura to Mutukula, had rented him the kiosk and already taken a rent for a period of six months. Having heard that, the 1st Respondent contacted the Appellant who told him that he (the latter) is an owner of the kiosk in question.

In his quest for justice, the 1st Respondent filed an application before the Chato District Land and Housing Tribunal suing the Appellant and the 2nd Respondent. In that application, the 1st Respondent prayed for the following reliefs:

1. Eviction order against the Respondent from the suit property.
2. Payment of Tshs. 500,000 as rent.
3. Costs.

In determining the controversy, the trial Tribunal framed the following issues:

1. Who is a rightful owner of the disputed land.
2. Whether the disputed land had been occupied by the Appellant.
3. Whether there is house on the disputed land.
4. Whether the Appellant owes rent to the 1st Respondent.
5. Whether the 1st Respondent has extended his land boundary to the land owned by the Appellant.
6. To which reliefs the parties are entitled.

After hearing the evidence adduced by both parties, the trial Tribunal, with regard to the first issue, was of the view that the 1st Respondent is an owner of the disputed land as he acquired the same after clearing the bush as opposite to the Appellant who claimed to have been allocated the disputed land by the Village Government. Concerning the second issue, it was the position of the Tribunal that the disputed land had been occupied by the Appellant on the understanding that after recouping his construction costs he would start to pay the 1st Respondent the agreed rent.

As regards the third issue, it was the decision of the Tribunal that there was no house in the disputed land opposite to what was claimed by the Appellant except a kiosk with three rooms as claimed by the 1st Respondent. In respect of the fourth ground, the Tribunal held that the Appellant owes rent to the 1st Respondent. In determining the fifth issue, the Tribunal found that the 1st Respondent did not expand boundary of his piece of land contrary to what was alleged by the Appellant.

Finally, it was declared by the Tribunal that the 1st Respondent is an owner of the disputed piece of land. Further, the Appellant and the 2nd Respondent were ordered to handover the kiosk to the 1st Respondent. Besides those orders, the Tribunal ordered that the Appellant should pay the 1st Respondent a total of Tshs. 20,000/- per month from July, 2007 up to the time of executing its judgment and costs.

Being aggrieved by the decision of the trial Tribunal, the Appellant preferred this appeal armed with five grounds of appeal as follows:

1. That the trial Tribunal erred in law and in fact by granting the orders in favour of the 1st Respondent contrary to the required standard of proof on the balance of probability.
2. That the trial Tribunal erred in law and in fact by granting the orders not pleaded and proved by the 1st Respondent.

3. That the trial Tribunal, in reaching to its decision, erred in law and in fact by failure to evaluate exhibits and facts available on records.
4. That the trial Tribunal erred in law and in fact by failure to decide the matter on the pleaded cause of action and by failure to invoke adverse inference against the 1st Respondent who did not produce the alleged agreement for a construction of a one room building.
5. That the trial Tribunal erred in law and in fact by deciding in favour of the 1st Respondent basing on assumptions and contrary to the well established principles of law.

Basing on the above grounds of appeal, the Appellant prays this Court to allow the appeal with costs.

When the appeal was called on for hearing, the Appellant had the services of Mr. Sijaona Revocatus, Advocate. On the opposite side, the 1st Respondent was represented by Mr. Christian Byamungu, Advocate and the 2nd Respondent did not enter appearance as it was in the trial.

Submitting in support of ground one of the appeal, Mr. Revocatus, learned Counsel for the Appellant prefaced by submitting that the 1st Respondent failed to prove his case on the balance of probability as he did not prove his ownership of the disputed land and how he came into possession of the said land. He contended that the burden of proving

that he is the owner of the disputed land can never be shifted from him to the Appellant. To buttress his position, the learned Counsel referred this Court to the decision of the Court of Appeal in the case of **Agatha Mshote v. Edson Emmanuel and Others**, Civil Appeal No.121 of 2019 where the Court stated:

> *'In view of what we have endeavoured to discuss, the Appellant failed to prove her case on the balance of probabilities and it can not be safely vouched that she has discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the Respondent's case, if any, cannot salvage the plight of the unproven Appellant's case.'*

Responding in opposition to what was submitted by the learned Counsel for the Appellant on ground one, Mr. Byamungu was in agreement with his counterpart that the 1st Respondent was under the duty to prove his case on the balance of the probabilities. However, he averred that the 1st Respondent proved his case on the balance of probability in accordance with the provisions of section 3(2)(b) of the Tanzania Evidence Act, Cap. 6 [RE.2019] which stipulate that a fact in a civil case is proved by a preponderance of probability. It was his

submission that the 1st Respondent managed to prove how he came into possession of the disputed land as reflected in pages 3 and 4 of the typed judgment of the trial Tribunal. To bolster his arguments, the learned Counsel referred this Court to the persuasive decisions in the cases of **Manager NBC Tarime v. Enock M. Chacha**, [1993 TLR] 228 and **Epafra Teete v. Twiga Builders Ltd**, Civil Case No.12 of 2019. Both cases stressed that in civil cases there must be a proof on the balance of probabilities.

In his rejoinder, Mr. Revocatus, learned Counsel noted with appreciation his counterpart's agreement with his assertion that the 1st Respondent was under the duty to prove his case on the balance of probabilities. He further contended that the 1st Respondent failed to discharge the said duty for his failure to produce before the Tribunal his agreement with the Appellant.

Before determining the merits of ground one, I think it is imperative to state at this point that this Court as the first appellate Court has powers to reconsider and reassess the evidence adduced in the trial Tribunal. In this regard, I am inspired by the decision of the Court of Appeal in the case of the **Registered Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017 in which the Court stated:

'On our part, we are in agreement with both learned advocates that it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.'

That being the position, in determining the first ground of appeal and, if the need arises, in the course of determining other grounds of appeal, I will not hesitate to reevaluate the evidence adduced in the trial Court.

Reverting to ground one of the appeal, it is worthy to note at this juncture, that the legal minds before me, in addressing the Court in submission in chief and replies, focused on whether the 1st Respondent proved his ownership of the disputed land and established how he came into possession of the same. However, during the rejoinder, the learned Counsel for the Appellant hinted that the 1st Respondent failed to produce the alleged agreement between him and the Appellant.

During the trial, in convincing the trial Tribunal with regard to his ownership of the disputed land, the 1st Respondent testified that he acquired the disputed land in the year 1990 by way of clearing the bush. According to his evidence, the size of the acquired land which situates at Nyakahura was 100x35 meters. The 1st Respondent testified that the

disputed land has a size of 6x6 meters. To bolster his evidence, the 1st Respondent tendered minutes of the meeting (SME1) that was convened on 16th December, 2000 for the purpose of resolving land dispute between him and TANROADS which were admitted. It was the evidence of the 1st Respondent that the meeting involved him as an owner of land that shares boundary with the land owned by TANROADS. In adducing his evidence, the 1st Respondent stated that the Appellant was not allocated the disputed land by the Village Government as he alleged.

In support of his case, the 1st Respondent brought before the Tribunal a witness in the name of Ayub Biyalingana Chiza. In his evidence, the witness testified that he participated in land dispute resolution between the 1st Respondent and TANROADS whereby the latter complained that the former has encroached on its land. After resolving the dispute, the witness stated that they kept the records in writing and proceeded to erect beacons demarcating the lands owned by the parties to the said dispute.

The witness testified further that the Appellant came to Nyakahura as a police officer commanding station and resided in one of the houses owned by the 1st Respondent. Thereafter, the Appellant was allocated a small piece of land to construct a kiosk whereby the 1st Respondent and the Appellant were in agreement that after the latter's recoupment of

construction costs, he would vacate from the kiosk or start to pay rent. He further averred that the Appellant was not the only person to enter into that scheme with the 1st Respondent as there were other persons who have constructed kiosks on the land owned by the 1st Respondent and pay rent.

Another witness in support of the 1st Respondent's case was one Ananias Idelfonce. In examination in chief, this witness despite testifying that the disputed land is owned by the 1st Respondent, he did not account on how the 1st Respondent came into possession of the said land. During cross examination, the witness testified that he does not know how the 1st Respondent came into possession of the disputed land. He averred that the Village Government did not allocate the disputed land to the Appellant. The witness testified that on the disputed land there is one building with more than one room.

Testifying in support of the Appellant, one Juma Magara Katunzi stated that on 23rd July, 1998 the Appellant applied for land in the Village Office. Pursuant to that application, on 5th September, the Village Government allocated land for residence at Ngalalambe Village and a farm in the same village. The land for residence was 25x30 steps in size. To buttress his evidence, the witness tendered a letter from the

Chairman of Mabale Village which was admitted by the Tribunal as Exhibit SUE1.

It was the evidence of the witness that the 1st Respondent encroached on the lands owned by TANROADS and the Appellant. Due to that encroachment, the witness testified that the meeting was held for the purpose of resolving the dispute whereby boundaries demarcating the lands owned by TANROADS, the 1st Respondent and the Appellant were established. In support of his evidence, the witness tendered the minutes of the said meeting which was dated 9th November, 2007. The said document was admitted by the Tribunal as an Exhibit SUE2. The witness continued to testify that the house owned by the Appellant had three rooms.

During cross examination, the witness testified that the Committee responsible for social services was the one which allocated the disputed land to the Appellant. He stated further that the lands owned by the Appellant and the 1st Respondent are separated by the narrow path. He stated that he did not know how the 1st Respondent owned the land in question. When replying the question from an Assessor, this witness testified that he participated in resolving the dispute between TANROADS and the 1st Respondent though he insisted that the disputed land is owned by the Appellant who is also receiving rent.

Hamidu Yassin Kau was also called by the Appellant to testify in support of his case. In his testification, the witness said that he was the one who drew a sketchy map of the house in the disputed land. According to this witness, he had an agreement with the Appellant for building a three-room house with blocks. He was also in agreement with the Appellant to construct a restaurant using timber. He fulfilled his obligation by constructing the said structures. He prayed the Tribunal to admit a sketchy map bearing his handwriting as an Exhibit. The said Exhibit was admitted and marked SUE3.

During cross examination, the witness testified that the whole building is on the land sixed 6x6 meters or 6x5 meters. He testified that it is the Appellant who told him that he shares a boundary with the 1st Respondent.

The Appellant Ramadhani Zumbe testified that in 1998 he applied for land in the Mabale Village Government whereby on 5th September, 1998 the said application was granted. In granting the application, the Village Government allocated him a plot with 25x30 steps and a farm. Thereafter, he had the services of Hamidu Yassin Kau who constructed for him a house with three rooms whereby the two rooms were used for

business purposes and the remaining room was for his residence. Apart from those structures, the witness testified that he built a restaurant.

The Appellant testified that he entered into tenancy agreement with many tenants including one Apolinari Mugarura on behalf of his young brother Bosco Mugarura (2nd Appellant). He tendered the Agreement entered on 6th January, 2000 to establish his ownership of the land in question. The said Agreement was admitted by the Tribunal and marked SUE5. He further averred that he happened to live in one of the rooms in the year 2000.

Hassan Juma was called to testify in support of the Appellant's case. He stated that he knows the Appellant as his land lord since the year 2000 when he rented a kiosk. He testified that the structure containing the kiosk has three rooms and a front verandah built with timber. It was his evidence that in January, 2000 the Appellant was living at the guest house owned by one Rostam Othman before transferred to Mutukula in March, 2000. Upon being transferred, it was the testification of the witness that the Appellant requested him to be a caretaker of the said house and at the time of the trial he was still performing that function.

The last witness in support of the Appellant's case was one Wiliam Faida. This witness in examination in chief testified nothing with regard

to the issue in question. During cross examination, he testified that the Appellant's house has four rooms but he was quick to point out that he does not know if the said house belongs to the Appellant.

Having heard evidence of both parties, the trial Tribunal visited the *locus in quo* and found that the 1st Respondent shares the boundary with TANROADS. Further, when the Tribunal measured the land with 25x30 steps which is claimed by the Appellant, it found that the land encroached the land owned by TANROADS for almost 5 steps and on the other side the land encroached in the kiosks owned by the 1st Respondent.

After producing evidence of both parties, I am now directing myself into determining whether the 1st Respondent proved his case on the balance of probabilities. It is trite law that a burden of proof is upon a litigant who wants the Court to give the judgment in his favour. This position has been reiterated in a number of cases including the case of **Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No.114 of 2012 where the Court of Appeal stressed the following:

> *'It is similarly common knowledge that in civil proceedings, the party with the legal burden also*

bears the evidential burden and the standard in each case is on the balance of probabilities.'

Further, equipped with powers to reconsider and reevaluate the evidence adduced in the trial Tribunal, I am mindful of the fact that in the course of exercising such powers, I am not supposed to touch issues relating to the credibility of the witness so far as their demeanours are concerned as the Tribunal was better placed to gauge the credibility of the witnesses testified before it. However, I am alive to the fact that in exercising its powers, the first appellate Court like this one can re-evaluate the evidence in the line of testing coherence of the evidence adduced by the witness and considering the evidence of the witness in relation to the evidence of other witnesses. This position was lucidly enunciated by the Court of Appeal in the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 (unreported) where the Court of Appeal pronounced the following:

'The credibility of witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person.'

The 1st Respondent claimed to own the disputed land after clearing the bush sometimes in the year 1990. In support of his contention were minutes of the land dispute resolution meeting held on 16th December, 2000 between him and TANROADS. This evidence is supported by the evidence adduced by one Ayubu Biyalingana Chiza who testified to have participated in the said land dispute resolution meeting between the 1st Respondent and TANROADS.

On the other hand, the Appellant claimed to own the disputed land after the same being allocated to him by the Village Government on 5th September, 1998. This evidence is supported by the evidence of other witnesses including Juma Magara Katunzi who testified that the Appellant applied and granted the disputed land by the Village Committee responsible for social services. This witness tendered a letter which granted the said land to the Appellant (SUE1).

I have taxed my mind to ascertain this issue as to who owns the disputed land and I have come to the conclusion that the 1st Respondent is the owner of such land since he has managed to prove ownership on the balance of probabilities. This is due to the number of reasons.

Firstly, since the land dispute between the 1st Respondent and TANROADS over boundary was resolved on 16th December, 2000 as per the evidence adduced before the Tribunal, how come the Appellant was not involved in the said dispute resolution taking into consideration that he was allocated the disputed land in 1998? Under normal circumstances, it is incomprehensible for a dispute over a boundary to involve parties who had no interest over the same as the Appellant tried to convince the Tribunal and this Court.

Secondly, the assertions that the Village Government allocated land to the Appellant are untenable in my mind since the trial Tribunal when visited the *locus in quo* found what is claimed to be the land allocated to the Appellant (25x30 steps) extends to the land owned by TANROADS and the 1st Respondent. In view of that, this Court asked itself how can the Village Government allocate land over another person's land? Assuming that the Village Government did make a mistake in allocating land to the Appellant within the land owned by TANROADS and the 1st Respondent as the visit to *locus in quo* depicts, is such allocation legally in the eyes of the law?

Thirdly, according to the evidence adduced by Juma Katunzi Magara, the Appellant was allocated land by the Committee responsible for social services. Again, this Court asked itself whether such a

committee had powers to allocate land in a village. The same witness testified in examination in chief that he participated in resolving the boundary dispute involving TANROADS, the Appellant and the 1st Respondent. On examination by one of the Assessors, the witness retracted his statement by stating that the dispute was between TANROADS and the 1st Respondent. This anomaly was not corrected during the re-examination and I am persuaded to hold that this witness is untrustworthy as he contradicted himself in adducing his evidence.

Fourthly, the alleged minutes that resolved the boundary dispute between TANROADS, the Appellant and the 1st Respondent (Exhibit SUE2), in my view, are tainted with doubts. One, there is no signature of the 1st Respondent though the witness who tendered it Juma Katunzi Magara testified that the 1st Respondent refused to append his signature whilst the latter testified that there was no a meeting that led to such minutes. Two, assuming that the said meeting took place, this Court asked itself how come the Appellant did not attend such an important meeting which decided issues of which he had interest? Three, neither the Appellant nor his witnesses, in exclusion of Juma Magara Katunzi, who testified to the effect that there was a meeting to resolve boundary dispute between TANROADS, the Appellant and the 2nd Respondent.

Since I have already formed an opinion that Juma Magara Katunzi is untrustworthy, I cast doubt on the genuineness of Exhibit SUE2.

As I hinted hereinabove, this Court is of the satisfaction that the 1st Respondent proved his case on the balance of probabilities. Hence, ground one of the appeal crumbles so far as the ownership of the disputed land is concerned for the reasons I have already provided when determining the ground.

Coming to ground two, the learned Counsel for the Appellant argued that the trial Tribunal misdirected itself by ordering that the 1st Respondent is an owner of the disputed land despite the fact that the 1st Respondent did not pray for the declaration as an owner of that land. He submitted that parties to a suit are bound by their own pleadings and no party is allowed to depart from his pleading.

Replying, the learned Counsel for the 1st Respondent submitted that Paragraph 6(a)(i) of the Application contains prayers of the 1st Respondent in which he pleaded that the Appellant without justification rented his place to the 2nd Respondent. Further, the learned Counsel referred this Court to Paragraph 6(a)(ii) of the Application in which the 1st Respondent complained that the 2nd Respondent occupied his place unlawfully. It was his submission that in paragraph 7 of the Application, the 1st Respondent prayed to be declared as an owner of the disputed

land. He summed up by contending that the reliefs granted by the trial Tribunal reflect what is pleaded by the 1st Respondent. The learned Counsel for the Appellant did not rejoin on that ground.

I fully agree with the learned Counsel for the Appellant that parties in a civil suit are bound by their pleadings and deviation from them is not condoned. In this regard, I am persuaded by the decision of this Court in the case of **Yara Tanzania Limited V Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & two others,** Commercial Case No. 5 of 2013, Mwambegele J, (as he then was) in which it was stated:

> *'... it is a cardinal principal of law of civil procedure founded upon prudence that parties are bound by their pleadings... .If I may be required to add another persuasive authority from Nigeria I would add Adetoun Oladeji (Nig) Ltd vs Nigeria Breweries PLC (2007) LPELR-SC91/2002(sourced through http.l/nigerialaw.org/adetoun%200Iadeii%28Nig%29 %20Ltd%20Ltd%20Nigerian%20Breweries%20PIc.ht m); also cited as Adetoun Oladeji (Nig) Ltd. VsN.B. Plc(2007) 5 NWLR (Pt1027) 415J in which it was also categorically stated that it is settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings. That is the position of the law in Nigeria as well as in*

this Jurisdiction - see Peter Karanti and 48 others Vs Attorney General and 3 others. Civil Appeal No. 3 of 1988(Arusha unreported).'

I had the apt time of perusing the Application particularly Paragraph 7 which is specifically for reliefs. The 1st Respondent prayed for the following reliefs:

1. Eviction order be made and the Respondent (the Appellant) be out of his house.
2. The Respondent (the Appellant) be ordered to pay Tshs. 500,000/- as rent.
3. Costs.

Reading between the lines, the prayer that eviction order be issued so the Appellant be out of the house connotates that the Applicant (1st Respondent) wanted to be recognised as the owner of the disputed land. It is my considered view that eviction order cannot be issued without the Court satisfies itself as to the ownership of the disputed property. In view of that, the trial Tribunal when framing issues, it framed the issue as to who is a rightful owner of the disputed land. This was done for the sole purpose of ensuring that the application for eviction order is properly granted to the rightful owner of disputed land. It is evident that both parties agreed to the framed issues and

addressed them before the Court. At this point I am inclined to the observation of this Court in the case of **Nelson Mayombo and Another v. Halima Yasini Masanja**, Land Appeal No. 35 of 2021 in which my learned Brother Ngwembe, J stated:

> *'If an issue is not pleaded, parties are not allowed to raise it. However, the court, during composition of a judgement, may find a pertinent legal issue, parties must be invited to address it prior to delivery of such judgment.'*

By way of extension, it is my opinion that the trial Tribunal was necessitated to frame the said issue so as to properly determine the orders prayed by the 1st Respondent. For the foregoing reasons, the second ground of appeal fails.

On the third ground, I must point out at this stage that the said ground was argued in two fronts. The first front was relating to evaluation of the evidence by the trial Tribunal so far as ownership of the disputed land is concerned. The second one was relating to the issue of tenancy agreement between the 1st Respondent and the Appellant. With regard to the first front, I am not prepared to deal with it as it has already dealt with when determining ground one. Further, when dealing with the second front of ground three, I will also consider the

submission made in respect of ground four as they are somehow related.

On ground three the learned Counsel for the Appellant contended that the 1st Respondent did not submit the alleged tenancy agreement with the Appellant though in the list of documents he stated that he would rely on the said agreement to prove his case. The learned Counsel contended in ground four that in the absence of the tenancy agreement, the tribunal was supposed to draw an inference that there was no such agreement and that the Appellant is a lawful owner of the disputed land which was allocated by the Village Government.

Upon perusal of the proceedings of this appeal, I have discovered that the learned Counsel for the 1st Respondent when responding to ground 3 focused his attention on the issue of ownership of the disputed land and he did not address the issue of the alleged tenancy agreement. However, on ground four, he submitted that the absence of the tenancy agreement between the 1st Respondent and the Appellant is not a reason to conclude that the former has failed to prove ownership of the disputed land. He contended that the 1st Respondent managed to prove his ownership of the disputed land. It was his submission that the 1st Respondent's witness one Anania Idelfonce testified to have a tenancy agreement with the 1st Respondent and that the 1st Respondent has

tenancy agreements with other persons. The learned Counsel contended that the 1st Respondent failed to submit the tenancy agreement due to the fact that he had no original copy.

In rejoining, Mr. Revocatus, learned Counsel for the Appellant contended that loss of the original copy of the tenancy agreement is not a sufficient reason for not tendering the agreement. He was of the opinion that the copy of the said agreement could be tendered before the Tribunal.

Without much ado, I concur with the reasoning of the learned Counsel for the Appellant. The tenancy agreement was of utmost importance in establishing a tenancy relationship between the 1st Respondent and the Appellant. Oral account as to the existence of such agreement does not convince me that the Appellant was a tenant in the land owned by the 1st Respondent. This Court asked itself why the 1st Respondent failed to submit a copy of the alleged agreement through the avenues of the Tanzania Evidence Act, Cap. 6? Further, the Respondent's witness Anania Idelfonce despite claiming to have the tenancy agreement with the 1st Respondent failed to tender the same before the Tribunal. In that case, I hold that there was no tenancy agreement between the 1st Respondent and the Appellant and probably the Appellant is on the land owned by the 1st Respondent for other

arrangements best known to them. That being the case, the third ground, to the extent of the absence of the tenancy agreement and the fourth ground are allowed.

Coming to the fifth ground of appeal, it was submitted by the learned Counsel for the Appellant that the Tribunal decided the Application basing on the assumptions without taking into consideration the evidence of the Appellant and his witnesses. He contended further that the Tribunal did not take into consideration that the Appellant was in possession of the disputed land for more than twelve years without any interference from the 1st Respondent. It was his position that the Appellant had an adverse possession since he had been in possession of the disputed land since 1998 up to 2009 when the 1st Respondent started to challenge his ownership. It was his contention that the Tribunal was supposed to draw an inference that the Appellant has an adverse possession. He referred this Court to the decisions of this Court of Appeal in **Bhoke Kitang'ita v. Makuru Mahemba**, Civil Appeal No. 222 of 2017 and **Attorney General v. Mwahezi Mohamed** and Others, Civil Appeal No. 391 of 2019.

When taking the floor, Mr. Byamungu, learned Counsel for the 1st Respondent faulted the arguments of his counterpart. He contended that in deciding the Application, the Tribunal considered pleadings and

evidence on record. He hinted that before concluding the case, the Tribunal visited *loqus in quo* and formed its opinion. With regard to adverse possession, Mr. Byamungu submitted that issue is a new one which was not pleaded in the trial and hence it could not form part of the appeal. He stressed that the 1st Respondent started to fight for his rights in the year 2009 after the Appellant failed to honour his duty of paying rent. The learned Counsel summed up by submitting that the period in question is not twelve years and that being the case the cited cases of **Bokhe Kitang'ita (Supra)** and **Mwahezi Mohamed (Supra)** are irrelevant in the instant circumstances.

Mr. Recovatus, learned Counsel for the Appellant in his rejoinder submitted that the issue of adverse possession was pleaded in ground five of the Appeal by using the words that the Tribunal decided the Application contrary to the principles established by the law.

In disposing of this appeal, I am of the view that the issue of adverse possession as rightly contended by Mr. Byamungu is the new one as it was not discussed in the trial. It is trite law in this jurisdiction that the Court when exercising appellate powers is incapable of entertaining new issues which were not raised and adjudicated in the courts below it. The Court of Appeal in the case of **Bakari Hamisi**

Ling'ambe v. Republic, Criminal Appeal No. 161 of 2014 stressed that:

> *'Some of the grounds of appeal raised new issues that had not been considered by the courts below. They could be an afterthought. However, being a second appellate court, we cannot deal with an issue which was either not disputed or raised in the courts below and a finding to the contrary made.'*

Borrowing the leaf from this decision, I am inclined to hold that the issue of adverse possession is a new one and this being the appellate Court is restrained from entertaining it. In my opinion, this is an afterthought advanced with the purpose of the saving the boat from capsizing. By coming up with this ground of appeal, the learned Counsel for the Appellant is trying to ride two horses at the same time. The first horse he rides is to the effect that the Appellant is a rightful owner of the disputed property after being allocated with the Village Government. The second horse is the adverse possession the Appellant claims to have of the disputed land. This ground crumbles.

In view of the foregoing, the appeal is partly allowed to the extent stated therein. No order as to costs. It is so ordered.

Right to Appeal Explained.

KS Kamana
JUDGE
04/11/2022

The Judgment delivered this 4th day of November, 2022 in the presence of learned Counsel for both parties.

KS Kamana
JUDGE
04/11/2022