THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 50 OF 2022

(Originating from the District Land and Housing Tribunal for Morogoro, Land Appeal No. 61 of 2021, arising from Mkundi Ward Tribunal)

ABDUL RAFAEL SIARA ..... APPELLANT

VERSUS

AMRANI SELEMANI .....RESPONDENT

JUDGMENT

Hearing date on: 15/07/2022

Judgment date on: 31/08/2022

NGWEMBE, J.

This is a second appeal originating from Mkundi Ward Tribunal, where the respondent sued the appellant for trespass of 4 acres out of 10 acres of farm land. The respondent claimed to have acquired the said land from Mr. Armando Kazana and his wife Celina Joseph by sale, since 2006. In his defence, the appellant averred to have inherited the said land in dispute from his grandfather and grandmother in year 2016.

The Ward Tribunal reasoned and came up with a conclusion that, the respondent was the rightful owner of the land in dispute, who proved to have purchased it from Mr. Armando Kazana and his wife Celina Joseph. The Appellant appealed to the District Land and Housing

Tribunal for Morogoro on grounds challenging the jurisdiction and constitution of the Ward tribunal; non-joinder of a necessary party; time limitation and weight of evidence. The District Land and Housing Tribunal concurred with the Ward tribunal in all aspects, thus dismissed the appeal forthwith. Still aggrieved, further appealed to this court on the grounds as quoted: -

1) That the District Land and Housing Tribunal erred in law in upholding the decision of Mkundi Ward Tribunal which glaringly erred in law and in fact in failing to hold that the seller to the respondent had no title in disputed land and mandate to sell the same.
2) That the District Land and Housing Tribunal erred in law in upholding the decision of Mkundi Ward Tribunal which manifestly erred in law and in fact in making judgment in favour of the respondent, the fact that the evidence was soiled with apparent discrepancies.
3) That the District Land and Housing Tribunal erred in law in upholding the decision of the Mkundi Ward Tribunal despite the fact that the respondent failed to join the seller of land whom his title purports to accrue.
4) That the District Land Housing Tribunal erred in law in finding that there was adverse possession over the land in dispute despite the fact that the assertion is not supported by the evidence on records.
5) That the District Land and Housing Tribunal erred in law in upholding the decision of the Mkundi Ward Tribunal despite the error on the face of record to wit failure to reflect in the judgment

what transpired in the *locus in quo* on thereby causing serious miscarriage of justice.

6) That the District Land and Housing Tribunal erred in law in upholding the decision of Mkundi Ward Tribunal despite having no requisite jurisdiction to entertain the matter.
7) That the presiding honourable Chairman of the District Land and Housing Tribunal erred in law in failing to give reasons for differing with the serious and material opinion of the wise assessors instead she made a mere general statement, which did not reflect reasons in the real sense.

The respondent filed a reply to the amended petition of appeal disputing each ground and prayed the appeal be dismissed with costs. The appellant was represented by diversely advocates, that is, Messrs. Edson Kilatu and Jerome Jeremiah, learned advocates, while advocate B. Tarimo appeared for the respondent.

On 15/07/2022 when the matter came for hearing, Mr. Jeremiah appeared for the appellant. He submitted generally, that the District Land and Housing Tribunal failed to re-evaluate the evidence before the Ward tribunal. He was of the stance that, from the said evidence, there was no proof of ownership by the respondent. Taking ground one and two together, briefly argued that, the Ward tribunal admitted exhibits and evidences with discrepancies and to that effect, the respondent did not prove the case to the required standard.

Arguing on ground three, he cited Order I Rule 9 of the **Civil Procedure Code, [Cap 33, RE 2019]** on joinder of parties. Submitted that, while the respondent claimed to have purchased the disputed land

from Almando and Selina, he did not join them (sellers). To him, the sellers were necessary parties in the case for the tribunal to decide the matter effectively. Failure to join the sellers prejudiced the appellant. He cited the case of **Bakari Bonza Vs. Swalehe Kitulike, Land Appeal No. 118 of 2018.**

On the 4th ground, he referred at page 3 and 4 of the judgment and submitted that, the issue of adverse possession did not arise as the dispute arose between 2006 and 2017 which is only 11 years as opposed to 12 years' time limit.

On ground five, he referred this court to the case of **Prof. Maliyamkono Vs. Wilhelm Sylvester Erio, Civil Appeal No. 93 of 2021** and argued that, the Ward tribunal did not state in its judgment on what transpired and what was observed at the *locus in quo*. For that omission the appellate tribunal erred to uphold such a decision, which had committed miscarriage of justice.

Arguing in respect of the 6th ground on jurisdiction, submitted the disputed land is 10 acres and no evaluation was made. He observed that the Ward tribunal's pecuniary jurisdiction was Three Million. The Ward tribunal entertained the matter without having jurisdiction, therefore the District Land and Housing Tribunal erred when it upheld the decision of the Ward tribunal, which was a nullity.

On the 7th ground, the appellant's advocate referred to page 6 of the appellate tribunal's judgment and pointed that, the assessors gave their opinions, but the chairman did not follow them. He cited section 23 (1) of **The Land Disputes Courts Act, [Cap 216 RE 2019]** and

proceeded to add, the chairman did not give any reason for differing with the assessors' opinion in his judgment.

Countering the appeal, advocate B. Tarimo submitted that, the appeal has no merit at all. The respondent was the one who was in actual occupation of the suit land and was the rightful owner. Under section 119 of **The Evidence Act, Cap 6 RE 2019,** the appellant was bound to prove that, the respondent was not the owner.

On the question of jurisdiction, the learned advocate argued that, the land in dispute is only 4 acres and not 10 acres, which was an undeveloped bushland. The tribunal would not speculate the value of the land in dispute. Went further, the respondent bought the suit land in year 2006, with witnesses present, and they testified during trial. On discrepancies, the learned advocate argued that same have neither spotted nor argued by the appellant.

Submitting on third ground, the learned counsel argued that, the respondent had occupied the land in dispute for 16 years and thus there was no point of joining the vendors, also given the witnesses to the sale testified before the tribunal. He then partly admitted that, the adverse possession doctrine would not apply because the respondent purchased it and occupied it for 16 years without any disturbance. On the issue of visiting *locus in quo*, the respondent's counsel argued that **The Evidence Act** and **The Civil Procedure code** do not apply to the Ward tribunal, therefore, the ground lacks merit.

And on ground seven, the counsel stands on the argument that the tribunal gave reasons for departing from the assessors' opinion. Rested with a prayer to dismiss the appeal forthwith.

In a brief rejoinder, Mr. Jeremiah insisted on the wise assessors' opinions that were not considered, while correcting the respondent's counsel that the one who was found in possession of the land is the appellant. The witnesses of sale were not called to testify, and the discrepancies he pointed out are on whether really there was any sale. He then pointed the issue of adverse possession that was raised by the respondent before the appellate tribunal. Rested by reiterating to the prayer to allow the appeal.

This being a second appeal, on which two tribunals below had concurrent findings, it attracts a great relevance of the good old principle governing the second appellate court. This principle has its history from **Watt or Thomas Vs. Thomas [1947] AC 484** followed in the case of **Peters Vs. Sunday Post Limited [1958] EA 424.**

The heart of the principle is that the second appellate court should not lightly interfere with concurrent finding of facts by the courts below except when there are strong reasons so to do. The principle is now domesticated and applies squarely in our jurisdiction. There is a number of decisions on this point. Some of them are the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H. Jariwala t/a Zanzibar Hotel [1980] T.L.R. 31** and **Neli Manase Foya Vs. Damian Mlinga [2005] T.L.R. 167** where the court of Appeal of Tanzania followed and reinstated the principle. In **Neli Manase Foya,** the Court held: -

> *"It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such*

a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the Lower Courts could make concurrent findings of fact."

This court as well has been following the principle in every moment it faces the relevant case. In the case of **Bushangila Ng'oga Vs. Manyanda Maige [2002] T.L.R. 335,** where this court in following this principle, observed and ruled: -

"It is a well-established rule of practice that in the absence of misdirection or misapprehension of evidence an appellate Court should not interfere with concurrent findings of fact of two Lower Courts. In the instant matter there are concurrent findings of fact by the Primary and District Court. As there does not appear to be any misdirection or misapprehension of evidence there is no justification for interfering with the findings of fact of the two Lower Courts."

The principle under discussion herein possesses significance in the sense that the trial court being in a better position to judge the facts from the parties and their witnesses and had an advantage of observing their demeanours, is taken to have made a more relevant assessment than the appellate courts based on records. In this case as well, this court will honour the findings of fact by two tribunal below, except when there is any misdirection or miscarriage of justice is spotted.

Owing to the nature of the grounds raised, I will not follow the sequence addressed by parties, but I will determine grounds of appeal in the following order; ground 6, 3, 5, and 7 separately and then ground 1, 2 and 4 together. The reason for adopting this customized trend is because, the 6th ground raises a question of jurisdiction, ground 3, 5 and 7 are on procedural rules, while the rest ground 1, 2 and 4 are on the evidence and standard of proof. The good practice is to deal with the point of law first before issues of facts.

Ground six is on the contention that the trial Ward tribunal did not have requisite jurisdiction to entertain the matter. The land in dispute was four (4) acres. No valuation was conducted to know the value neither did any of the parties establish the value before the trial tribunal. Advocate Jeremia stood firm that the said land must have been beyond the pecuniary jurisdiction of the Ward tribunal. On the other side Mr. Tarimo contented that, four acres of bushland was within the jurisdiction. This was never an issue at the trial tribunal. The District Land and Housing tribunal in its judgment found this ground to be unmerited as the value of the land was unknown. The trial Chairperson followed the reasoning made by this court in the case of **Lweshabura Mzinja Vs. Julieta Jacob, Misc. Land Appeal No. 07/2005.** Similar decision was made in the case of **Gunguli R. Maungo Vs. Wilson Ruhumbika, Misc. Land Appeal No. 28 of 2021.**

I acknowledge the principle that the question of jurisdiction is so fundamental and can be raised at any time including at an appellate level. The law is clear that generally, any trial or proceeding by a court lacking requisite jurisdiction to try the matter, will be adjudged a nullity on appeal or revision. This is what in substance was decided by the

Court of Appeal in the case of **Sospeter Kahindi Vs. Mbeshi Mashini, Civil Appeal No. 56 of 2017.**

However, considering the nature of procedure used in the Ward tribunal, also taking aboard undisputed fact that neither of the parties raised the issue of jurisdiction before the trial tribunal, the rule cannot be applied strictly in the circumstance of this appeal. I adopt the Court of Appeal's wisdom in **Sospeter Kahindi**'s case, which I find to be very relevant and expounds the proper device in dealing with the question of Ward tribunal's jurisdiction at appellate stage. The Court held: -

> *"Much as we agree that the issue of jurisdiction can be raised at any time, we think, in view of the orality, simplicity and informality of the procedure obtaining at the Ward Tribunal level, the appellant's concern on jurisdiction ought to have been raised at the earliest opportunity, most fittingly at start of the proceedings. It is noteworthy that in line with the applicable procedure, the parties did not exchange any pleadings and therefore, all questions for trial were based upon the claimant's oral statement of claim and the respondent's oral reply as recorded by the tribunal."*

This court need not to amplify the above quoted any further since it is more comprehensive and informative. The appellant wished this court to make a finding that the Ward Tribunal had no jurisdiction. I think on the facts and circumstance of this case, there was no error by the Ward Tribunal to determine the matter over a 4 acres dispute located at Mkundi Ward. The District Land and Housing Tribunal was

correct to have dismissed this ground. This court as well, basing on the above comprehensive reasoning, I proceed to dismiss it forthwith.

The parties' adversarial arguments in ground three have been well considered. The appellant held fast to the view that the sellers (Mr. Armando and his wife) constituted necessary parties in this case while the respondent stood firm to the stance that the seller in this case was not a necessary party. In a good number of cases, this court has laboured a great deal giving out the legal qualifications of a necessary party. Herein I wish to rule that a seller of the disputed land can be a necessary party depending on the circumstances of each particular case. This is what was held in the case of **Mexons Investment Limited Vs. CRDB Bank Plc, Civil Appeal No. 222 of 2018**.

The parameters to establish necessity of a party to the suit should be more practical than theoretical, that is why they are subjective. A person being a seller of the land in dispute does not automatically make that person a necessary party to the dispute. The Court of Appeal in the case of **Abdulatif Mohamed Hamis Vs. Mehboob Yusuf Osman and Another, Civil Revision No.6 of 2017;** discussed at length on this point: ***one:*** there has to be a right of relief against such a party in respect of the matters involved in the suit; and ***two***, the court must not be in a position to pass an effective decree in the absence of such party, the list is not closed.

Other factors are those stipulated by the provisions of the law, not much relevant in this appeal. On the parameters above, when the party in question is the seller, the second parameter should be considered with utmost importance. In this case, since 2006 when the sale was

said to have taken place, was almost 16 years at the time when the dispute arose, and there was no assertion that the said sellers refuted to have sold the said land. Under the circumstance of the case before the trial tribunal, presence of the Sellers was not necessary. I am sure that the Ward Tribunal and of course, any court under the circumstance can pass an effective decree in absence of the sellers, so I find this ground lacking merits.

On 5th ground, which stood on the complaint that the Ward Tribunal did not reflect in its judgment on what it observed in visiting *locus in quo*. The tribunal's records show that, after visiting *locus in quo*, the tribunal recorded the testimony of other witnesses. There is no statement of the boundaries or otherwise of the disputed land. At the onset I find that there was no necessity to visit *locus in quo*. Parties were not in dispute on the size, location and boundaries of the land. Though the trial tribunal did not state anything about it, what was gathered from *locus in quo* in its judgment, there was no misapprehension of evidence before it. Also, I am aware that this ground was not raised at the first appeal and deserved no consideration at this second appeal. All said, this ground follow the same trend, it lacks merits.

Ground seven had the complaint that the Chairperson departed from the wise assessors' opinion without assigning reasons. In dealing with this ground, in addition to scrutiny of the proceedings and parties' argument, I make a keen reference to the provision of the law, claimed by the appellant to have been contravened. Section 23 of **The Land Disputes Courts Act, [Cap 216 RE. 2019]** provides for composition of the District Land and Housing Tribunal to include not less than two

assessors who shall preside with the chairman. Section 24 of the Act provide for the opinion of the assessors in the following: -

> *"24. In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."*

Correctly as the appellant's counsel argued, the law requires any departure from assessors' opinion be supported by reasons, the same was insisted by the Court of Appeal in the case of **Mbarak and Another Vs. Kahwili (Civil Appeal 154 of 2015)** among others. The District Tribunal at page 6 of the judgment stated clearly that it sat with two wise assessors who gave out their opinions, I quote the relevant part for easy of reference: -

> *"Baraza hili liliketi na wajumbe wawili ambao walitoa maoni yao kama ifuatavyo: -*
>
> *'Nashauri shauri hili lirudishwe upya ili utaratibu wa kisheria ufuatwe na hatimaye haki ipatikane kihalali' (Mrs L. M Nsaha).*
>
> *Kutokana na vielelezo vya muomba rufaa, eneo litamkwe ni la muomba rufaa kwani ni msimamizi wa mirathi. Pia ameonyesha baba yake alivyopata eneo hilo.' (Mrs Jane C. Mngazija.")*

Interpreting from the above, the first assessor proposed nullification of the Ward Tribunal proceedings and trial de novo, while the second assessor opined her verdict in favour of the appellant. This court is settled in its prudence that, owing to the nature of the assessors'

opinion which were dissenting to each other, it would not be possible to concur with both. The District Tribunal chairperson proceeded thus: -

> *"Baraza hili limepitia maoni haya ya wajumbe na halikubaliani nayo kwa sababu mdaiwa/mrufaniwa amethibitisha shauri kwa viwango vinavyokubalika"*

I devotedly exercised my mind to interpret the above, testing it against the appellant's contention whether constituted reasons for departure. The respondent treats the above as reason for departure while the appellant maintained that it did not reflect reasons in the real sense. I admit that the reason assigned by the District Tribunal in its judgment was general and very brief. This displeased the appellant, it seems. However, that was a fair reason for departure. I do not think this brevity in giving the reason deflected any justice. I find this ground lacks merits.

In dealing with grounds 1, 2 and 4, the right principle well-established in land law was discussed extenso in the case of **Alanus Mapunda Vs. Amina Lihengela, Land Appeal No. 4 of 2019** whereby the court held that, the court will grant protection to a person who has subsisting right over the land, which right is established and proved by producing unshakable evidences.

In scrutiny of the evidences adduced before the Ward Tribunal, the testimony of PW1 (respondent), PW2 (Leila Victor), and PW3 (Mohamedi Ali was a witness to the sale) established positively that the disputed land, formerly belonged to one Mzee Kazana Magwimbo, who was allocated by the Village Authority along with other citizens. Then Mzee Kazana died and was survived by his wife, one daughter who also

passed away after the year 2000, then the land descended to their son Mr. Armando Kazana who then sold the same to the respondent in year 2006. This evidence was supported also by Fatuma Thabiti (who was a Village Chairperson in 1999/2000 and subsequent years).

On the other side, the appellant's evidence was that, he inherited the suit land from his grandparents, without mentioning their names. The witnesses who testified on his side, including Paulo Lawrence and Juma Saidi Mohamedi whose evidences were full of contradictions. The appellant in clarification questions, he testified that he did not know that the disputed area was sold. Admitted that knows the Fatuma Thabiti who is her relative, that she had more precise understanding of the history of the suit land.

In the proceeding of the trial tribunal, the respondent had documentary exhibits to tender, but the tribunal did not show if it received the same. Questions were not asked on them and the documentary exhibits did not feature. However, taking the case as whole, that omission was not material neither did it affect the Ward tribunal's decision. Despite the omission, the fact that the respondent purchased the suit land from Armando and Selina was not disputed, while the root of title by the said Armando was positively narrated by Ms. Fatuma Thabit who was a Village Chairperson by then. I entertain no doubt that the said Armando and his wife, though did not attend before the tribunal, had undisputed title over the land, hence had powers to pass the same to the respondent. Except for the procedural weaknesses pointed out, I find no discrepancy in the respondent's evidence before both tribunals.

Considering the fourth ground, I have gone through the trial tribunal's record and the District Land and Housing Tribunals, specifically page 3 of the judgment. The tribunal did not raise the issue of adverse possession. Instead, by *obiter dictum,* it reasoned in alternative on the issue of non-joinder of the seller in distinguishing the case of **Juma B. Kadala Vs. Laurent Mnkande [1983] TLR 103**. The chairman observed: -

> *"Hata kama ingekuwa ni uvamizi basi mrufani asingekuwa tena na mamlaka ya kudai eneo bishaniwa ...nakubaliana na hoja ya wakili wa mrufaniwa kwamba kesi ya **Juma B. Kadala** haiwezi kutumika hapa na hakuna hoja ya kumuunga muuzaji kwani mrufaniwa ameshamiliki eneo hilo kwa zaidi ya ukomo wa muda wa kulidai toka linunuliwe."*

Based on the contents of the trial tribunal's decision and of the District Land Tribunal, I find no merits in grounds 1, 2 and 4, hence I dismiss them all together.

In totality, I find no reason neither in law nor in facts which convinces my conscience to depart from the decision of the District Land and Housing Tribunal. The two tribunals below were correct in law and in fact in so deciding. Thus, this appeal lacks merits same is dismissed entirely with costs payable to the respondent.

Dated at Morogoro this **31st day of August, 2022.**

P. J. NGWEMBE

JUDGE

31/08/2022

Court: Judgment delivered at Morogoro in Chambers, this 31st day of 2022, **Before Hon. S.J. Kainda, DR** in the presence of Mr. Jeremo Jeremiah, Advocate for the appellant and Ms. Josphine Jackson, Advocate for the Respondent.

Right to appeal to the Court of Appeal explained

SGD: HON. S.J. KAINDA

DEPUTY REGISTRAR

31/08/2022

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 9/9/2022 at Morogoro