IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION, DAR ES SALAAM)

AT MOROGORO

LAND APPEAL NO. 45 OF 2021

(Arising from the District Land and Housing Tribunal for Kilombero, at Ifaraka in Land Appeal No. 69 of 2020; Originating from the Decision of Mbasa Ward Tribunal, in Land Case No. 2 of 2020)

ZAINABU MPINGAWANDU (As the Administratrix of the Estate of the Late Mohamed Mpingawandu) .....APPELLANT

VERSUS

HAMIS HASSAN LIPANDE (As the Administrator of the Late Hamis Hassan Lipande)..... RESPONDENT

JUDGEMENT

13th June, & 31st Aug, 2022

CHABA, J:

This second appeal traces its origin from the decision of Mbasa Ward Tribunal in Land Case No. 2 of 2020 whereby the appellant, Zainabu Mpingawandu unsuccessfully sued the respondent, Hamis Hassan Lipande on allegation of trespass over her two acres of land located at Kikwawila area within Mbasa (Kibaoni) Ward in Ifakara Township within Kilombero District.

Aggrieved by the decision of that Ward Tribunal, the appellant appealed before the District Land and Housing Tribunal for Kilombero/Malinyi

District, at Ifakara (the DLHT) where she challenged the decision of the trial Ward Tribunal by filling six grounds of appeal but again, she was unsuccessful. Still aggrieved, she has preferred the instant appeal armed with five (5) grounds of appeal.

Briefly, the background of this case follows that; the appellant (applicant at the trial Ward Tribunal) sued the respondent in the Ward Tribunal of Mbasa (Kibaoni) as alluded to above, claiming that the latter invaded her land measured two acres located at Kikwawila area within Mbasa (Kibaoni) Ward, in Ifakara Township within Kilombero District. On his part, the respondent, Hamisi Hassani Lipande alleged that he was granted the disputed land by his father in the year 1990. He contended that he has been in possession of the disputed land since the year 2015. In the year 2015, he got eye problem and attended medical examination and thereafter went for surgical treatment. From there, the appellant took that advantage to invade the appellant's parcel of land and later claimed ownership in respect of the disputed land. When the matter was heard at Mbasa Ward Tribunal, it ruled in favour of the respondent. The appellant was aggrieved and unsuccessfully appealed before the DLHT.

As noted above, upon further dissatisfied by the decision of the DLHT, the appellant has come to this court armed with five (5) grounds of appeal which are:

1. That, the Honourable Learned Chairman erred in law and upon fact in dismissing with costs the Appeal and uphold the decision of the trial Ward Tribunal in being convinced that, the Respondent was able to adduce evidence of being allocated by his father without

showing a written "WILL" from his father if he really allocated to him the land and the relatives to attend and sign the will. Consider the Respondent is not the only child to the natural father.

2. That, the Honourable District Land and Housing Tribunal's Chairman erred in law in departing from the opinion of the two Assessors sat with who opined in favour of the Appellant above for being convinced that the Appellant is in possession of the disputed land from 1990 till 2013 without any disturbance by the Respondent while the Appellant proved to be developing the disputed land as per the opinions of the Assessors.

3. That, the Learned Chairman erred in law in admitting that, based on the standard requirement by the law, the Respondent was able to adduce evidence which proved on how he came into possession without clarifying whether he was a true owner via written documentation or oral support of the witnesses who appeared before the court. Further to that the Respondent could not reply to the petition of appeal to give the Honourable Chairman to prove as the allegation (Sic).

4. That, the District Land and Housing Tribunal in departing with the opinion of the two Assessors erred in law and upon facts in upholding the decision of the trial Ward Tribunal, hence dismissing the appeal with costs in being convinced the possession of the disputed land from 1990 to 2013 without regarding one area to be owned by more than one person is practically impossible as chaos must resume (Sic).

5. That, the appeal is in time as the Judgment of the District Tribunal was ordered for amendment of the appeal (Sic).

During hearing of this appeal, both parties agreed to argue the grounds of appeal by way of written submissions. Parties filed their respective written submissions in compliance with the court's scheduling orders. The appellant was unrepresented while the respondent enjoyed the legal service of Mr. Josebeth Kitale, learned counsel.

Arguing in support of the grounds of appeal, the appellant highlighted in general to the effect that, she failed to prove the ownership as the deceased's WILL from which she contended to secure her ownership was not tendered. She continued to submit that, the transfer of ownership from the respondent's father to the respondent was supposed to be signed by the commissioner for land so as to prove the transfer of the land. The appellant further argued that the case was not proved in the required standard by the law. It was her further contention that the trial tribunal failed to analyze the evidence tendered. She argued that the year in which the respondent's father had the possession of the disputed land was not proved during the trial before the Ward Tribunal. Therefore, she prayed this court to quash the decision of the two tribunals.

In reply to the appellant's submission, Mr. Josebeth Kitale strongly opposed the appellant's submission, and he was of the view that the appellant raised new issues which were neither pleaded nor discussed before the trial tribunal. To cement his argument, the learned advocate cited the case of **Farida and Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (Unreported) where the Court held *inter-alia* that:

"It is the general principle that the appellate court cannot consider or deal with an issue that were not canvassed, pleaded and or raised at the lower court".

The learned advocate further submitted that, the second appellate court can only interfere with the concurrent findings of the two courts or tribunals below where there are misdirection of evidence or miscarriage of justice as it was underlined by the Court of Appeal of Tanzania in the case of **Amratral Damodar Maitaser and Another t/a Zanzibar Silk Stores v. A. H. Jariwaila t/a Zanzibar Hotel [1980] TLR 31.** He stood firm to the view that the evidence was properly analysed as per **section 110 (1) & (2) of the Evidence Act [Cap R. E, 2019]** now **[R. E. 2022].** Mr. Kitale emphasized that the respondent did manage to establish how the land came into his possession by adducing the evidence to the effect that he was granted the land by his late father. Regarding the WILL, Mr. Kitale maintained that neither the same was mentioned at trial, nor at the first appellate Tribunal. The respondent was in peaceful occupation of the disputed land from 1990 to 2015 and it was the appellant who trespassed over the land. He prayed the appeal to be dismissed with costs.

In rejoinder, the appellant reiterated her submission in chief. On the respondent's contention that she raised a new issue, the appellant denied the allegation and said she did not raise any new issue. As to the cases cited by the respondent, the appellant had the view that all cases are irrelevant and cannot in anyway apply in this case. Finally, she reiterated

her prayer that, the appeal be allowed and whole decisions and orders of the Lower Tribunals be quashed.

Having carefully considered the rival submissions advanced by the parties, the grounds of appeal and upon examined the record of appeal before this court, the main issue for consideration, determination and decision thereon, is whether the appeal by the appellant has merits.

Before considering the merits of this appeal, I find it apposite to firstly consider the position of the law and the established principle of law, when the matter nock on the door of the second appellate court. It is a trite law that the second appellate court will not routinely interfere with the concurrent findings of facts by the two tribunals or courts below unless where the two completely misapprehended the substance, nature and quality of the evidence or where there are misdirections or non-directions on the evidence, or when it is clearly shown that there is a miscarriage of justice or a violation of some principles of law or practice (See: **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (1981) T.L.R. 149 at 153; **Salum Mhando Stores v. Republic** (1993) T.L.R. 170, **Amratlal D. M. t/a Zanzibar Silk Stores vs. A. H. Jariwala t/a Zanzibar Hotel** (1980) T.L.R. 31)).

As correctly noticed by the lower tribunals, the appellant ought to prove her allegations on the balance of probability. According to the record, the lower tribunals analyzed and evaluated the evidence before it and came with the conclusion that the appellant failed to prove ownership over the disputed land. Even the evidence adduced by her witness, shows that the

disputed land does not belong and/or owned by the appellant. On reviewing the evidence adduced by the respondent, it shows clearly that he had been in occupation over the disputed land since 1990 to 2015 and he used to till the disputed land and cultivated therefrom throughout all years without any disturbance. As gleaned from the records of the lower tribunals, at page 4 of the typed trial DLHT's judgment, both tribunals concurrently were on the same facts that: -

> *"... but on the standard required by the law the respondent was able to adduce evidence which proved on how he came into possession of the suit land. At the Trial Tribunal the respondent was able to adduce evidence which clearly shows that he was in possession of the disputed land from the year 1990 till the year 2013 without any disturbance from any other person. The evidence adduced by the respondent and his witnesses were well corroborated unlike that of his counter part who is the appellant herein."*

Coming to the appellant's contention that the respondent did not tender any WILL to prove ownership of the disputed land, the trial tribunal did not admit the alleged WILL as an exhibit. Secondly, the respondent's father granted the disputed land while he was alive in the year 1990 therefore there was no any need to produce in evidence the said WILL since it was not probate matter. In this respect, I subscribe to the learned advocate's submission that the appellant has invited unwanted argument for one reason that there was no need of family meetings and the transfer of the

disputed land by the commissioner to change ownership was not so important because the said disputed land was (is) un-surveyed land. This ground is answered in negative.

With regards to the second argument, my determination is that looking at the evidence on records and the appellant's allegation that the year on which respondent's father obtained the disputed land was not specified or mentioned, I think in my view that, this is an aforethought because the appellant was in trial. Unfortunately, even when the appellant was availed with the opportunity to cross-examine the witness, she did not utilize such an opportunity as a result she did not cross examine on the facet of year in which the respondent's farther commenced to possess the house. In my view, failure to cross-examine the respondent, this can be taken as an acceptance of the evidence advanced by the respondent in relation to the question of ownership of the disputed land on the side of the respondent's father. In **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (Unreported) the Court observed that:

> *"It is trite law that failure to cross examine a witness on an important matter ordinarily implies the accepts of the truth of the witness".*

From the foregoing, and to the extent of my findings, in absence of the exact year, I find that in the circumstance of this case nothing have remains to shake the respondent's evidence because the vital issue which was indeed supposed to be proved is, who is the lawful owner of the

disputed land between appellant and respondent, and how does the same came into his possession but not how the respondent's father did obtain the said disputed land. Again, this ground is un-merited.

In the upshot, I am satisfied that this appeal lacks substantial cause to justify this court interfere with the decision of the lower Tribunals. I would, therefore, uphold the judgement and decree of the DLHT and proceed to dismiss the entire appeal with costs. **Order accordingly.**

DATED at **MOROGORO** this 31st day of August, 2022.

M. J. CHABA

JUDGE

31/08/2022