

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)**

AT MOROGORO

LAND APPEAL NO. 21 OF 2022

(Arising from the Decision, Judgment and Decree of Land Appeal No. 43 of 2018;
from the District Land and Housing Tribunal for Kilombero/Ulanga, at Ifakara)

BETWEEN

JUMA SAID LUHOMBERO 1ST APPELLANT

HUSSEIN SAID LUHOMBERO..... 2ND APPELLANT

VERSUS

AISHA HAMAD LUHOMBERO RESPONDENT

JUDGMENT

12th December, 2022

CHABA, J.

Before Ifakara Ward Tribunal (the trial Tribunal), Aisha Hamad Luhombero, the respondent herein successfully sued the appellants namely, Juma Said Luhembero and Hussein Said Luhombero claiming ownership of a parcel of land which she inherited from her deceased father. Aggrieved, the appellants unsuccessfully appealed to the District Land and Housing Tribunal for Kilombero/Ulanga, at Ifakara (the DHLT), hence this second appeal.



Briefly, the facts of the case are to the effect that; in Ifakara Ward Tribunal through Land Case No. 16 of 2017, the respondent claimed that the appellants restrained her to proceed with the constructions process on a parcel of land which she inherited from her deceased's father. After full trial, the trial Ward Tribunal ruled in favour of the respondent by declaring her as the lawful owner of the disputed parcel of land. Discontented with the findings, decision and orders of the trial Ward Tribunal, the appellants unsuccessfully appealed to the District Land and Housing Tribunal for Kilombero/Ulanga, at Ifakara in Land Appeal No. 43 of 2018. Still aggrieved, the appellants have come to this Court armed with the following three grounds of appeal: -

- 1. That, both Tribunals erred in law and fact, by reaching into a decision in favour of the respondent without taking into consideration that the respondent abandoned the disputed land since 1997.*
- 2. That, both tribunals erred in law and fact, by delivering decision without considering that the quorum of the Ward Tribunal was not well construed in accordance with the law.*
- 3. That, both Tribunals erred in law and fact having decided on a case without considering that the respondent and her witness' testimony contradicts with the allegations made.*



When the instant appeal was called on for hearing, the appellants appeared in persons and unrepresented, whereas the respondent enjoyed the legal services of Mr. David Mkilya, learned counsel.

Upon going through parties' written submissions, the grounds of appeal fronted by the appellants, reply thereto together with the entire records available, for the purposes of brevity, I will only refer to relevant parts of their respective submissions in respect of the grounds of appeal instead of reproducing the whole submissions by the parties.

To commence, I will determine the appeal by responding to the grounds of appeal as follows:

As regards to the first ground, the appellant's complaint is that, the trial Ward Tribunal erred in law and facts by reaching into a decision in favour of the respondents without taking into consideration that the respondent abandoned the disputed land since the year 1997.

Looking deeply to the appellant's complaint, it gives an impression that the matter is time barred because it was brought beyond the period prescribed by the law. On scrutiny of the parties' submissions in line with the original record, at the outset, I wish to state that I have found that, this ground of appeal is new as it was not raised and canvassed before both lower tribunals. Thus, it is not proper for the appellants to raise it for

the first time, as this is the second appellate forum. I wish to state that for the Court to be clothed with its appellate powers, the matter in disputes should have firstly been deliberated by both lower tribunals.

In view of the above, I therefore find it improper to entertain this new ground of appeal which has been raised for the first time before this Court. The Court of Appeal of Tanzania in the case of **Farida & Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) held that: -

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

Placing reliance on the above principle of law, it is my considered view that, without much dwelling into this ground of appeal, this ground has been brought in Court as an afterthought and accordingly, it is hereby dismissed for lacking merit.

On the second ground, the appellants complained that both lower Tribunals erred in law and fact by delivering decision without considering that the quorum (coram) of the Ward Tribunal was not well constituted in accordance with the law.



On this ground, the appellants argued that the quorum (coram) of the Ward Tribunal was not well constituted as members according to the quorum (coram) were four in numbers with only one woman which is contrary to the law. On her party, the respondent raised a concern asserting that, this is a new ground which was not raised at the first Appellate Tribunal for Kilombero. She submitted that the appellants are not allowed to raise it at this second appellate court. On my part, I fully subscribe to the respondent's argument that, the appellants did raise a new issue which was not raised at the first Appellate Tribunal. I have keenly perused the submissions filed by both parties and the judgment made and composed by Hon. C. P. Kamugisha, esq. Chairperson and satisfied that the issue relating to the quorum/coram and composition of members of the trial Ward Tribunal was framed as illustrated hereunder:

"Kwamba Baraza la Kata lilikosea kisheria kuendesha shauri bila Mwenyekiti wa Baraza."

As garnered from the records of the first Appellate Tribunal, this ground of appeal was tabled before it, deliberated and determined in accordance with the law. At the end, it was found that this ground had no merit and it was dismissed. To my surprise however, the above issue did not feature in the documents filed by the appellants at this stage of second appeal,



nor in the arguments of the parties during the hearing of the second appeal, instead thereof the appellants raised a new issue before this court regarding the quorum/coram and composition of members at the trial Ward Tribunal. This time around, the appellants through their written submission did raise a concern in respect of gender balance of the respective members.]

In view of the above, the practice of this Court and our Apex Court have been to strike out any new grounds raised at the appellate level which were actually not raised at the trial court/tribunal. **See: Samwel Sawe v. The Republic**, Criminal Appeal No. 135 of 2004, (CA) (Arusha) (Unreported); **Kigoma/Ujiji Municipal Council v. Kigoma Cinema**, Land Appeal No. 14 of 2017, High Court of Tabora, and the decision of the Court of Appeal of Tanzania in the case of **Farida F. Mbarak & Another v. Domina Kagaruki & Others** (Civil Reference 14 of 2019) [2021] TZCA 600 (20 October 2021). That said and done, this ground of appeal also fails.

In the case of **Juma v. Manager, PBZ Ltd & Others** (Civil Appeal 7 of 2002) [2003] TZCA 4 (12 November 2003) – (Source: tanzlii.org.go.); the Court held that: -



".....Needless to say, the parties and the court are bound by the pleadings and issues framed and proceed to deliberate on such issues. This issue was not before the trial court and hence it was not dealt with. **The first appellate judge therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place**". (Emphasis is mine).

Relying upon the above principles of law, it is my considered opinion that, there is no legal basis for this court to determine the ground advanced by the appellant.

Having so found, I will not interfere the decisions reached by the trial Ward Tribunal and the District Land and Housing Tribunal for Kilombero/Ulanga, at Ifakara. I thus, proceed to dismiss the appellant's appeal with no order as to costs. **It is so ordered.**

DATED at MOROGORO this 12th day of December, 2022.




M. J. CHABA

JUDGE

12/12/2022