IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

MISC. LAND APPEAL NO. 12 OF 2020

(Originating from Decision of the District Land and Housing Tribunal for Mpanda at Katavi in Land Appeal No. 43 of 2020 Land Dispute Case No. 102 of 2020 Karema Ward Tribunal)

SENSO MWANDU.....APPELLANT

VERSUS

ANASTAZIA NGALA.....1ST RESPONDENT

LUSOMISHA.....2ND RESPONDENT

NGENDA.....3RD RESPONDENT

ANDREA NUHU.....4TH REESPONDENT

JUDGEMENT

Date of last Order: *23/12/2021*
Date of Judgment: *13/04/2022*

NDUNGURU, J.

This is a second appeal. The matter has its genesis from Karema Ward Tribunal (henceforth the trial tribunal). At the trial tribunal the appellant herein unsuccessfully sued the respondents claiming piece of land alleged to be invaded by the 1st, 2nd and 4th respondents herein. Dissatisfied the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Katavi (henceforth the Appellate Tribunal)

where the 1st,2nd, and 4th respondents was declared the rightful owner of the disputed plot.

Aggrieved by the appellate tribunal decision, the appellant has preferred this appeal by lodging the following grounds of appeal;

1. *That the appellate tribunal erred in law and fact by upholding the decision of the Karema Ward Tribunal against both respondents while Ngenda was not the party at the trial tribunal.*
2. *That the appellate tribunal erred in law and fact in evaluating the evidence on ownership of the disputed which was adduced by the parties hence reached to wrong decision.*
3. *That the appellate tribunal erred in law to entertain the matter which was nullity ab initio for failure to show the members who heard the matter day to day.*

As this appeal was called on for hearing, the appellant had a legal service of Mr Peter Kamyalile learned advocate whilst the respondent had a legal service of Mr Ayubu Mwakalonge, Learned Advocate. The learned advocate for the appellant prayed to this court for hearing of the appeal by way of written submission. This court ordered the case to proceed hearing by way of written submission and the court set a date for each counsel to file submission.

In support of the appeal Mr. Kamyalile with leave of the court under Order XXXIX Rule 2 of the Civil Procedure Code, Cap 33 RE 2019

drew the attention of this Court on irregularity of the Appellate Tribunal for failure to dispose of the preliminary objection first before determining of the appeal. To support his prayer, he referenced to me the case of **Adelina Koku Anifa and Another vs Byarugabaalex,** Civil Appeal No. 46 of 2019.

He further submitted that on 5th day of August 2020 the 3rd respondent filed the Notice of Preliminary Objection to the effect that the appeal is hopelessly drawn. The record shows that on 29/09/2020 the preliminary objection was raised in the hearing but the matter was adjourned on the reason that the assessor was sick. The case was fixed for hearing on 3/11/2020 in which the appeal was heard on merit without disposing the preliminary objection which was procedural irregular and fatal.

Mr Kamyalile submitted that it is trite law that the court/tribunal ought to have heard the preliminary objection first before going into merit or substance of the suit or appeal. Failure to dispose the preliminary objection before going to the merit of the case or appeal is to render the proceedings a nullity. To support his position, he cited the case of **Kha Abubakar Athuman vs Daud Lyakugile Ta D.C Aluminium and Another**, Civil Appeal No. 86 of 2018, unreported. As per the case above of **Kha Abubakar Athuman vs Daud Lyakugile**

Ta D.C Aluminium and Another the entire proceedings ought to be nullified, and the Judgement and decree arising thereof ought to be set aside and direct the preliminary objection to be heard before another Chairman.

Addressing the first ground of appeal, Mr Kamyalile submitted that it is trite law that it was wrong on an appeal to join a person who was not a party to the trial. The appeal No. 43 of 2020 of the appellate tribunal originated from Land Dispute No. 102 of 2019 at Karema Ward Tribunal. At the trial tribunal respondents were three namely Anastazia Ngala, Lusomisha and Adrea Nuhu. Ngenda was not a party to Land Dispute No. 102 of 2019 at Karema Ward Tribunal. He further argued that it was not proper for the appellate tribunal to entertain the appeal which joined Ngenda among the respondents while he was not a party at the trial. Its legal impact was to render the whole decision a nullity as per the case of **Peter Nderia Mushi vs The Minister for Land Housing and Urban Development** [1984] TLR 64 CA.

Addressing the second ground of appeal Mr Kamyalile submitted that the second appellate court cannot disturb the concurrent findings of court/tribunal below unless there is a misapprehension of evidence, a miscarriage of justice or violation of some principles of law or procedure.

Case of **Amratlal Damodar Maltaser and Another T/A Zanzibar Silk Stores vs A. H Jariwalla T/A Zanzibar Hotel** [1980] TLR 31.

He argued that in evaluating the evidence adduced by the appellant the first appellate tribunal violated some principle of law or procedure and there was misapprehension of evidence which led to miscarriage of justice. The evidence adduced by the appellant was heavier than evidence of respondent. The appellant testified that he purchased the disputed land which was trespassed by the respondents. In proving so the appellant produced at the trial tribunal two sale agreements of the disputed farm which are in the trial file. The first one of 30 acres which he purchased from Sitani Munyawalila dated 06/09/1999 and second was one of 40 acres which he purchased from Kisinza Malago dated 28/04/2000. Thus, he was entitled to be the lawful owner of the disputed farm as per the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113.

It was his submission that the appellate tribunal found that the appellant had nothing to produce to substantiate that the land was sold to him. He argued that that was not true as there were two sale agreements which were produced at the trial tribunal by the appellant. That the appellate tribunal faulted the ownership of the appellant on the ground that the sale was not reduced into writing under section 64 of

the Land Act, Cap 16 RE 2019 and the sale was not approved by the village council.

It was further submitted that the appellate tribunal violated some principle of law or procedure as at the time when the appellant purchased the disputed land, the Land Act was not yet come into operation, also the Land Act does not apply in the land located at village council. The appellate tribunal violated the law. Also, the appellant ownership was approved by the village council through a receipt No. 23628 dated 11/07/2000 and No. 23627 dated 21/10/2001 which was produced at the trial tribunal.

He finally prayed the appeal be allowed.

Responding to the submission by the appellant, the respondent was of the position that the preliminary objection was well determined by the appellate court by striking it out without costs.

As regards the first ground he submitted that the appellant was the one who lodged an appeal in the appellate tribunal by naming those names mistakenly. He said the defect raised in the appellant's submission was minor, harmless and curable under Order XXXIX Rule 3 (1) of the CPC and he also cited section 97 of the CPC which allow the

court to do general amendment for any defect for the purpose of determining the real issue or question on merit.

He urged the court to consider **Article 107 A (9) (e)** of the Constitution of the United Republic of Tanzania, 1977 which requires the court to determine matters on merit without entertaining technicalities. He cited also **Order XXXIX Rule 3 (1)** of the CPC and section 97 which allow the court to do general amendment for any defect for the purpose of determining the real issue or question on merit. He referenced the case of **Gap oil (Tanzania) Limited vs The Tanzania Revenue Authority and 2 Others**, Civil Appeal No. 9 of 2000.

As regards the second ground he submitted that at the trial tribunal the appellant failed to prove to the tribunal that he was the owner of the disputed land. He further submitted that the respondents proved that they have been using the disputed land way back since 2006 and that they were given the disputed land by the village authority and receipts were issued to them.

They finally prayed for the appeal be dismissed with costs.

I have keenly followed the arguments of the learned counsel for the both parties and I have read between the lines the appellant grounds of appeal and the entire proceedings of the tribunals below.

Let me start with the irregularity as addressed by the learned counsel for the appellant as regards the failure by the appellate tribunal to dispose of first preliminary objection before determining the main suit.

Admittedly, the 3rd respondent on 5th August 2020 filed the notice of preliminary objection to the effect that the appeal was hopelessly drawn as the name Ngenda addressed on the petition of appeal is ambiguous.

As correctly submitted by the learned advocate for the appellant the appellate tribunal did not hear and determine the preliminary objection by the 3rd respondent. Nowhere in the records of the appellate tribunal the preliminary objection was addressed and disposed of. When the matter came for hearing on 3rd November 2020 after adjournment on 29th September 2020 the Hon Chairman proceeded with the hearing of the appeal, and ultimately delivered the judgement on the appeal, which is an irregularity.

It is a general practice and now a law that where preliminary objection is raised in the course of hearing main suit, the court /tribunal is duty bound to dispose of it fully before determination of the main suit. The position has been stated in the Court of Appeal case of **Khaji Abubakar Athumani vs Daud Lyakugile TA. DC Aluminium and Mwanza City Council** (supra) cited by the learned advocate for the appellant.

However, am of the considered opinion that the preliminary objections raised by the 3rd respondent and the learned advocate Sindamenya as regards names of the parties do not qualify to be pure point of law. The preliminary objections must be on a pure point of law as stated in the case of **Mukisa Biscuits Co. vs West End Distributors Ltd**, (1969) EACA 696. In my opinion, the points raised cannot stand as preliminary objections as they are not purely points of law. I said so because even if argued the raised preliminary objections would not dispose of the suit. Thus, the matters raised do not go to the root of the appeal.

Again, there is a complaint that Mr Ngenda was not a party to the trial tribunal, thus he was erroneously joined as 3rd respondent at the appellate tribunal. Looking at the complaint form of the Trial Ward Tribunal, the appellant filed land dispute against three persons, namely

Anastazia, Lusomisha and Anderea. For easy of reference the complaint form reads that I quote;

> *"MiMI NSENSO MWANDU NAWALALAMIKIA WATU 3 ANASTAZIA, LUSOMISHA NA ANDEREA KWA KOSA LA KUVAMIA SHAMBA LANGU NA KULIMA BILA IDHINI YANGU AMBALO NI KOSA NA TARATIBU ZA INCHI"*

The fact that both parties do not dispute the error as appears in the appellate tribunal's proceedings and judgement as well the drawn decree and for the interest of justice as per Order 1 Rule 9 of the Civil Procedure Code, Cap 33 let the name of the 3rd respondent one Ngenda be removed from the records.

It is obvious, I would like to agree with Mr Kamyalile that in Appellate Tribunal's decision there is a misdirection or non-direction on the evaluation of evidence by the appellate tribunal. Upon my perusal of the records of this appeal, the appellant before the trial tribunal tendered documentary evidence as a proof as regards the buying of the disputed land. However, Hon Chairman misdirected himself to hold that the appellant had nothing to produce to substantiate that the land was sold to him. Thus, in view of that nothing was done to evaluate whether the documentary evidence produced does prove or disapprove the ownership of the disputed land. That the findings of the appellate court

are subject to interference by this court. In the case of **Materu Laison & Another vs R. Sospeter** [1988] TLR 102 as per Moshi, J as he then was;

> *"Appellate Court may in rare circumstance interfere with the trial Court findings or facts. It may do so in instances where trial Court has omitted to consider or had misconstrued some evidence, or had acted on wrong principle or had erred in its approach in evaluating the evidence."*

It is therefore, my finding that the Hon Chairman of the Appellate Tribunal failed to re-evaluate the evidence in the determination of the appeal from the decision of trial tribunal. It is 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 finding of fact. See the **case of Peters vs Sunday Post Limited** [1958] EA 424 at page 429.

In this case, the appellate tribunal, which was the first appellate court/tribunal, concurred with the findings of fact by the Karema Ward Tribunal.

It was however held in the above case that, it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to

review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.

Now this court is duty bound to re-evaluate the evidence as adduced in the trial tribunal. In proving his claim at the trial tribunal, the appellant testified along with his witness. He testified that the 1st, 2nd and 3rd respondents invaded his farm which he purchased from one Mnyawalila. He purchased 30 acres of which the respondents named had invaded. The appellant tendered two sale agreements, one dated 28/ 04/ 2000 which shows that he purchased 40 acres for the consideration of 800,000/= from one Kisiza Malago and two dated 06/09/1999 which shows that he purchased 30 acres for the consideration of 600,000/= from one Sitani Mnyawalila. The appellant also tendered receipts dated 21/10/2001 and 11/07/2000 from Karema Village which endorse such land by the appellant for farming.

Tigia Kisinza appellant's witness testified that his father was the one who sold land to the appellant.

In her respective defence, the 1st respondent Anastazia Ngala testified that she was allocated such land by the village committee in a year 2006. That she was one of the beneficiaries of the land allocated by

the village committee. She further testified that she cultivated such land for 14 years until when the appellant invaded her land. Her witness one Elemami Isaki testified that he was hired to clear the land of Anastazia in a year 2006. Her second witness one Benard Kalimasi testified that he witnessed the payment by 1st respondent of her land to the village office.

The 2nd respondent Lusomisha in his defence testified that he purchased the land from one Hamis. He further informed the trial tribunal that it was his third year cultivating such land. He told the trial tribunal that he did not have any document for such land. His witness one Lupigasa Luvinza testified that Lusomisha purchased the land from one Hamis. That Lusomisha purchased such land for the consideration of 2400,000/=. His second witness one Hamis Ngasa testified that he sold two acres to Lisomisha.

The 3rd respondent in his defence testified that he purchased such land from one Masumbuko for the consideration of 2,000,000/=. He further testified that Masumbuko got that land from village government. His witness one Paulo Maganga Lusinde testified that one Masumbuko sold the land to Mwananuhu.

It is apparent, upon my scrutiny of the testimonies of both sides, that the appellant tendered documentary evidence as regards his land

which he alleged to have been invaded by the respondents. On the other hand, the 1st respondent said to have been allocated such land by the village committee, unfortunately persons who were involved and mandated to allocate such land were not called to testify so as to prove such fact. The allocation of land by the village government as alleged by the 1st respondent is highly wanting in proof.

The 2nd and 3rd respondents claimed to have purchased the land from individual persons in the village. However, no any village leader was called to testify to such transactions.

The fact that all respondents acquired their land after the appellant had acquired land, that to my view created reasonable doubt in their ownership.

On the balance of probability, the evidence on the part of the appellant tendered at the trial tribunal is weigh than that of the respondents.

Having seen the misdirection on the evidence by the trial tribunal as well the appellate tribunal as discussed above, I now reverse the findings of the both tribunals below and declared the appellant as the rightful owner of the disputed land against the 1st, 2nd and 4th respondents.

For the foregoing reasons, I allow the appeal.

I make no orders as to costs.

It is so ordered.

D. B. NDUNGURU

JUDGE

13. 04. 2022