

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)**

**AT MWANZA
LAND APPEAL NO. 24 OF 2021**

*(Arising from the Decision of the District Land and Housing Tribunal for Mwanza at
Mwanza in Land Appeal No. 23 of 2020 originated from Pasiansi Ward Tribunal)*

TABU KULWA ----- APPELLANT

VERSUS

VERONICA LUGOLA----- RESPONDENT

JUDGMENT

Last Order: 16.3.2022

Judgment Date: 13.5.2022

M. MNYUKWA, J.

This is a second appeal by the appellant challenging the concurrent findings of the two lower tribunals namely the ward tribunal of Pasiansi (trial tribunal) and the District Land and Housing Tribunal of Mwanza (the appellate tribunal) as to the ownership of a disputed land.

The concurrent findings of the trial tribunal and the appellate tribunal declared the respondent as the lawful owner of the disputed land. This decision aggrieved the appellant, hence the present appeal.

The brief facts that have given rise to this appeal as per the records in the trial tribunal goes that; the parties in this appeal were the co-wives of



the deceased, one John Maganga. The respondent herein instituted a suit against the appellant on 13th May 2013 claimed before the trial tribunal, her right on a piece of land apportioned to her by their husband during his lifetime. The disputed land is claimed to have been taken by the appellant at the time when the respondent was at Ukerewe attending medical treatment after a long sickness. When she came back, she found her piece of land was in possession of the appellant who claimed that, the disputed land was given to the appellant's children.

During the hearing of the matter at the trial tribunal, the respondent gave her evidence to the effect that she contracted marriage with John Maganga since 1980 until when he met his death. That, on 2001 she felt sick for a year without getting any recovery which compelled her to go to their home at Ukerewe for further treatment and that she stayed there for almost seven years. That, when she came back, she found her house had fallen down and she was informed by the appellant that she did not possess any land for the reason that the land was given to the appellant's children.

On her part, the appellant gave her evidence at the trial tribunal and brought two witnesses to give evidence on her favour. The appellant testified that, the respondent was her co-wife and that she was possessing



a piece of land but she has sold the same during the lifetime of their husband and decided to shift to Ukerewe. She further testified that, the respondent stayed at Ukerewe until when their husband died and she came after the burial ceremony of their husband and instituted a case at the trial tribunal.

The witness of the appellant one Tito Maganga testified that he knows the parties as the wives of his deceased brother one John Maganga. That each of them possessed the house and that the respondent sold her piece of land for Tsh 200,000/- and that he witnessed the transaction. He added that at some time he was living at Tabora and when he came back, he did not find the respondent and when he asked about her whereabouts, he was informed that she was shifted to Ukerewe.

The other witness of the appellant testified that she bought part of the disputed land from John Maganga in 2003 for Tsh 200,000/= who sold it on behalf of the respondent. The witness testified that, he asked John Mganga as to why he sold the house which was not belonged to him and his reply was that he was authorized by the respondent to sell her piece of land so as to get money for medical treatment because he was not capable financially to cover medical expenses of his wife.



After hearing the evidence of both parties, the trial tribunal decided in favour of the respondent for the reason that the disputed land belonged to the respondent since only half of the land was sold out. Aggrieved by that decision, the appellant appealed to the appellate tribunal which also upheld the decision of the trial tribunal. It is on record that, the main concern of the appellant in the appellate tribunal was that the trial tribunal failed to properly evaluate the evidence adduced and that the respondent failed to prove the case on the required standard.

As she was again dissatisfied with the appellate tribunal, the appellant brought this appeal and advanced eight grounds of appeal as they are reproduced hereunder;

1. *That the appellate district land and housing tribunal erred both in law and fact when it dismissed appellant appeal.*
2. *That the appellate district land and district housing tribunal erred in law and in fact when he failed to take into consideration the evidence which was adduced before the trial tribunal that the appellant and respondent were co-wives married by one Hohn Magangawho had equally divided to both of them plot of land but the respondent sold her plot of land and went to her home in Ukerewe to treat her abdominal sickness*
3. *That John Maganga the husband of the appellant and respondent, subsequently dies away, but before he had died away took part in*



selling the respondent's plot of land to enable the respondent get money to treat her abdominal disease

- 4. That the appellate district land and housing tribunal chairman erred in law and fact by failing to take into consideration the evidence of the appellant, DWI Tabu Kulwa, DW2 Tito Maganga and DW3 Levina Kamuhanzile, who clearly testified to the effect that, the respondent had sold to DW3 Levina Kamuhanzile all her plot of land which was divided to her by her husband, the late John Maganga prior to his death*
- 5. That the appellate district land and housing tribunal chairman erred in law and fact when he failed to take into consideration that there was no plot of land left by the respondent when she sold her divided plot of land to DW3 Levina Kamuhanzile*
- 6. That the appellate district land and housing tribunal chairman erred in law and fact when he believed the false evidence of the respondent, that she had bought the suit plot of land with her own money which she had got from sale of green vegetables (mchicha) sold half of the said suit plot of land and remained with half plot of land the subject matter of this case, the very evidence which is utterly false and contrary to evidence on record of DWI, DW2, DW3 and yet without proof of land sale agreement vide which respondent bought the said suit plot and from which person who sold it to her.*
- 7. That the appellate district land and housing tribunal chairman heard this appeal with maximum prejudice after he had first denied appellant copies of judgement and forced appellant to apply for extension of time to appeal the matter finally reached the High Court*



vide Misc. Land Application No 161/2019 in which the High Court ordered the appeal to be heard out of time by DLHT hence the impugned biased judgement by Hon. S. M. Rumanyika

8. That the appellate district land and housing tribunal chairman erred in law when he ordered the appellant to demolish away her house stone foundation which she had constructed on her own plot of land in question

The appellant prayed for the following relief;

- i. Appeal be allowed with costs.*
- ii. Biased judgement of appellate district land and housing tribunal and that of the trial ward tribunal be quashed and set aside*
- iii. An order that the respondent had sold away all her divided plot of land and that the suit plot of land is appellant's plot of land which she had acquired from her deceased husband the late John Maganga prior to his death*
- iv. An order that respondent did not buy the suit plot of land from anyone else with money she alleges she got from sale of green vegetables (mchicha) and water as there was no proof of the said false allegation*



- v. *An order that the stone house foundation built by appellant onto her own plot of land which was divided to her by her late husband John Maganga hence no need for her to demolish it away.*
- vi. *Any other relief this court may deem fit to grant.*

When the matter was scheduled for hearing the appellant prayed the appeal to be argued by way of written submission as she was sick. By the consent of the respondent and with the leave of the court, the appeal was argued by way of written submissions. I thank both parties for compliance with court order when filing their respective submissions.

Arguing in support of the first ground of appeal, the appellant submitted that the appellate tribunal erred to dismiss the appeal since the evidence adduced before the trial tribunal shows that the disputed land was her property that she was acquired from her late husband. On the second ground of appeal, she submitted that the chairman of the appellate tribunal failed to consider the fact that the respondent had sold her piece of land as evidenced by the letter that had been admitted at the trial tribunal and that the allegation as to only part of her land was sold is unfounded.

On the third, fourth and fifth grounds of appeal, the appellant submitted that the chairman of the appellate tribunal failed to appreciate



the fact that the late John Maganga during his life time sold the remaining property of the respondent and the proceeds of sale was given to the respondent to cover her medical expenses. That, the chairman of the appellate tribunal failed to take into consideration the evidence of DW1, DW2 and DW3 who testified that the plot of land of the respondent was sold away by her late husband after authorizing him to do so. And that the respondent failed to adduce evidence if at all the portion of land remained unsold as she failed to state the measurement in terms of the square meter of the entire land and what remained after the said sale.

On ground six of the appeal the appellant stated that the appellate tribunal erred in its decision to consider the false statement of the respondent on the averment that she acquired the disputed land by her own source of income after selling vegetables. On the seventh ground she avers that the chairman of the appellate tribunal was biased as he denied her the copy of the judgment which resulted the appellant to apply for extension of time to file appeal out of time. As to the eighth ground of appeal, the appellant submitted that the appellate tribunal erred to have ordered the appellant to demolish her stone foundation.

In response, the respondent opposes the entire appeal and prayed the same to be dismissed with costs. As to the first ground of appeal, she



submitted that the evidence of DW2 and DW3 revealed that the respondent owned the piece of land after she had purchased the same through her personal income after selling vegetables and that the evidence of DW3 corroborates the evidence of the respondent that is only part of land was sold as well as DW2 who witnessed the sale transaction.

On the second ground the respondent submitted that the land that was partitioned to the parties had no dwelling house that's why the trial tribunal in its judgement ordered the demolition of the foundation on the disputed plot of land. In regards to the third and fourth grounds of the appeal, the respondent responded that the evidence of DW3 before the trial tribunal was very clear showing that she bought only half of the land.

As to the fifth ground of appeal the respondent stated that the size of the land which was sold can be seen on page 4 of the judgement of the trial tribunal as the purchaser testified that she bought half of the land. She went on stating that, this court cannot alter the position of the lower tribunal findings as the evidence was properly evaluated as it was stated in the case of **Materu Leison & J. Foya v R. Sospeter** [1988] TLR 102.

On the sixth ground, she stated that the disputed plot was her personal property bought by her own source of income and the same

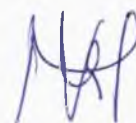


joined hand with DW3 when she asked the seller as to why she was selling the property that was not belonged to him. She added that her evidence collaborates with the evidence of DW3 and therefore she remarked that this ground lacks merit. She referred to the case of **Mbusuu Domin Mnyaroje v R** [1995] TLR 1995 to support her argument that her evidence corroborated the appellant's witness.

On the seventh ground she briefly stated that there was no proof of prejudice as alleged by the appellant while on the eighth ground it was her submission that it was right for the appellate tribunal to order the demolition of the foundation based on the findings made by it.

In rejoining, the appellant did not submit anything new from her submission in chief. She distinguished the case of **Materu Leoson Foya** (*supra*) cited by the respondent since the evidence of the respondent relied on a false statement as it is not true that she acquired the piece of land through her personal income. That's mark the end of both parties' submissions.

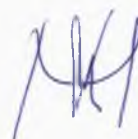
From these submissions, I will now determine this appeal in which I will have one issue to tackle which is, whether this appeal has merit. In answering this issue, I will jointly determine the chosen grounds of appeal for the reason that will be revealed later in this judgement.



Before I embark to determine the merit of the appeal it is important to point out that it is a settled position of law that submissions are not evidence. This position is well stated in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman of Bunju Village Government and 11 others**, Civil Appeal No 147 of 2006. I bring this principle into the attention of this appeal because the appellant on her sixth ground of appeal alleged that the appellate tribunal consider the false statement of the respondent. Indeed, those statement were just the mere words submitted by the respondent in the appellate tribunal and were not part of the evidence on the trial tribunal. Moreover, the appellate tribunal did not consider it in its decision as it is clearly reflected in its judgment which entirely based on the evidence adduced at the trial tribunal.

Moreover, I find it convenient to state the settled position of the law that the second appellate court is barred from entertaining the new grounds of appeal that was not raised and determined in the first appellate court. The said position is well stated in the case of **Sebastian Rukiza Kinyondo Vs Medard Mutalemwa Mutungi** [1999] TLR 479.

That being the case, after going through the available record, I find that the sixth ground of appeal is a new ground of appeal that was not



raised and determined in the first appellate tribunal. The same goes to the seventh ground of appeal which is also a new ground of appeal that was not raised at the first appellate court. This also applies to the eighth ground as it is a new ground that was not raised and determined by the appellate tribunal. Indeed, the eighth ground is the decision of the trial tribunal that has been upheld by the appellate tribunal. Therefore, guided by the above position of law, the sixth, seventh and eighth grounds of appeal cannot be entertained and determined in this appeal.

Turning now to the gist of this appeal, the important question for determination in this appeal is whether there is any justification for the interference of the concurrent findings of facts by the two lower tribunal which declared the respondent as the lawful owner of the disputed land. It is a trite law that the second appellate court should be reluctant to interfere with concurrent findings of the two courts below unless it is obvious that the findings are tainted with misapprehension of evidence or violation of principle of law or procedure or have occasioned a miscarriage of justice. See the case of **Helimina Nyoni v Yerenia Magoti**, Civil Appeal No 61 of 2020, CAT at Tabora which quoted with approval the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Sotes v A.h Jariwala t/a Zanzibar Hotel** [1980] TLR 31 and the case



of **Neli Manase Foya v Damian Mlinga** [2005] TLR 167 and **Bushangila Ng'onga v Manyandamage** [2002] TLR 335 (HC).

It is noteworthy at this stage to state that the first, second, third, fourth and, fifth grounds of appeal hinged on the grounds that the appellate tribunal failed to properly evaluate the evidence adduced which resulted to upheld the decision of the trial tribunal. Since the above grounds of appeal touches on the evidence, for the purpose of convenient, I will jointly determine them altogether.

It is my understanding that evidence is fundamental to any decision in the case being it civil or criminal. As far as the civil litigation is concerned, the facts in issue in any case must be proved by evidence and any person entrusted to give decision is mandatory required to decide the case on the evidence adduced by the parties. Thus, the decision-making process should base on the evidence of witnesses adduced before the machinery which administer justice being it the tribunal or the court.

My perusal of the available court record is apparent that there is a letter in the trial tribunal record written by the respondent authorizing John Maganga to sell the plot of land on her behalf and there is a sale agreement entered by John Maganga and DW3 who purchased the respondent's plot on behalf of her child.



The available record further revealed that the respondent was owning a piece of land as it was supported by the evidence of DW1, DW2 and DW3 adduced before the trial tribunal. While the evidence of the respondent is silent as to how she acquired that piece of land, the evidence of DW1 and DW2 suggests that the respondent acquired that piece of land as her share given by the late John Maganga during his lifetime as well as the evidence of DW3 shows that the respondent owned the piece of land that was sold to her as she asked the late John Maganga as to why he was selling the land that was not belong to him.

Upon going through the evidence of the parties and the grounds of appeal advanced in the appellate tribunal, the main controversy is not about the sale of land as the respondent did not deny if her plot of land was sold, the main controversy is whether after the sale the respondent remained with a plot which is a disputed plot in this appeal. The evidence of the appellant, DW1 shows that the respondent authorized John Maganga to sell the whole of her plot and the evidence of DW2 who was a witness in the sale transaction revealed that the respondent personally sold the whole land. On the other hand, the evidence of DW3 who is the purchaser of the land shows that only half of the land was sold to her. This evidence is available in the trial tribunal proceedings when DW3 was



cross examined by the respondent as she replied that she does know the respondent and that she purchased half of the land.

From the evidence of DW3, it is my firm view that the respondent owned land whereby half of it was sold out to DW3 and the other half remained that's why the respondent claimed ownership. I say so because the evidence of DW3 as shown in court record suggests that John Maganga sold the plot of land of the respondent for Tsh 200,000/-. The record further shows that the respondent's land was sold out so as get money for her medical treatment. I believe the above is the truth because that evidence was adduced by the witness who was called by the appellant to testify on her favour. This fact is also the findings of the trial tribunal after visited the locus in quo.

On the other hand, the evidence of DW2, Tito Maganga falls short and contradicted the evidence of DW1 and DW3 as to the explanation that the respondent personally sold her piece of land for Tsh 2,000,000/= . This evidence is disbelieved because the sale transaction shows that the seller was John Maganga and DW2 was the witness who witnessed the sale transaction. The same goes to the evidence of DW1 who stated that the purchaser bought the whole plot of land while the purchaser herself testified that she bought only half of the land. In other words, the



evidence of DW3 is worth to be believed to the effect that half of the plot remained unsold of which to my opinion is the disputed land which belongs to the respondent.

Furthermore, the appellant's submission insists that since the measurement of the size of the land sold to the purchaser was not stated, she took the position that the whole plot of land was sold out. The said argument was strongly opposed by the respondent who linked the evidence of DW3 to show that only half of the land was sold. In determining the merit of this assertion, I went through the sale agreement available in the court file and it is my firm view that the sale was done by mutual trust and confidence between the parties as they have entered in a very simple contract which bears the names of the parties, that is the buyer and the seller, the price of the contract and the names of the witnesses only. For that reason, since DW3 was called out by the appellant to testify in her favour, I believe her evidence as a true account of what was sold out in the respondent's plot.

For the foregoing discussion, I find the first, second, third, fourth and fifth grounds of appeal to have lack merit and they are hereby dismissed. The order and Judgment of the tower tribunals are well maintained.



In view of the above, I find the appeal is devoid of merit and it is hereby dismissed. Based on the relation of the parties, I make no order as to costs.

It is so ordered.

Right of appeal explained to the parties.




M. MNYUKWA
JUDGE
13/05/2022

Court: Judgment delivered on 13st May, 2022 in the presence of the parties.


M. MNYUKWA
JUDGE
13/05/2022