

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

LAND APPEAL CASE NO. 02 OF 2021

**MWANJAA RAMADHANI JUMA.....APPELLANT
VERSUS**

**MKOLONI ISSA WAZIRI..... RESPONDENT
(Arising from the decision of Kondo District Land and Housing Tribunal)
(R.S Mandari-Chairman)**

Dated 10th March, 2020

In

Land Appeal Case No.33/2021

JUDGMENT

25th April & 20th May, 2022

MDEMU, J.:

This is a second appeal. Briefly, in Mondo Ward Tribunal, in Land Case No.01/2021, the Respondent filed a dispute claiming that the Appellant has trespassed into her land. After full trial, the Tribunal decided in favour of the Respondent. The tribunal also proceeded to convict the Appellant and imposed a fine to the tune of Tshs.10,000/= or in default, to clean the Ward Executive Officer's office for 14 days for failure to bring her son one Mussa Hassan Waziri before the Tribunal as ordered. According to the trial Tribunal's record, the Respondent purchased the suit land from the Appellant and the purchase price in

consideration thereof was paid to Mussa Hassan Waziri through mobile phone.

Aggrieved, the Appellant appealed before the District Land and Housing Tribunal at Kondoa in Land Appeal No. 33 of 2021 which upheld the decision of the trial Tribunal. Aggrieved again, the Appellant appealed before this Court on the following grounds:

- 1. That, the District Land and Housing tribunal erred in law and in fact to ignore the Appellant's first ground of appeal that the case at the ward tribunal was decided as a criminal case, even copy of a ward tribunal's judgment shown clearly that the Appellant was commanded to pay TSH. 10,000/= as a fine. Fine receipt No.134723 is attached to this petition as Annexure A1 and ward tribunal judgment.*
- 2. That, the District land and Housing Tribunal erred in law and in fact by failing to recognize that, the Respondent broke an agreement which entered with Appellant as a middleman (Dalali) to sale Appellant's plots for value of Tshs.750,000/= per plot. The Appellant himself took one plot and paid 450,000/= and owed Tshs.300,000/= to him but unfortunately and illegally took away the Appellant's*

plots without completing the payments and the Chairman of The District Land and Housing Tribunal gave all plots of the Respondent who is not the really owner of the land in disputed. The copy of payment is attached to this petition as annexure A2.

3. That, the District Land and Housing Tribunal erred in law and fact to give the victory to the Respondent who is not the owner of the plots.

4. That, the Honourable Ward tribunal erred in law by favouring the Respondent without considering that the Respondent testimony was weak.

On 25th April, 2022 when the appeal was scheduled for hearing, both parties appeared in person. The Appellant prayed this court to adopt his grounds of appeal to be part of her submissions. In addition to that, the Appellant stated that, there was no any agreement between him with the Respondent to sale his land rather he gave him (Respondent) the land so that he can dispose it to customers on her behalf. He said further that, the Respondent acted as an agent to the sale and they agreed that, she could give him a commission on the sale price.

It was her argument further that, all pieces of land which was not sold belongs to her. He added that, the Respondent did not remit part of the sale proceeds so that she could give his commission.

In reply, the Respondent submitted among other things that, the Appellant sold the suit land to him in 2016. The sale was witnessed by Village Council and ten cell leaders. He argued that, in 2021 the Appellant stated that since the value of the land has appreciated, then the Appellant should add some money or else she is ready to return the purchase price to the Respondent. He prayed the appeal be dismissed. That was the end of both parties' submissions.

I have gone through both parties' submissions together with the entire record. Having heard the submissions of both parties and going through the grounds of appeal, this court has come up with the following two issues to dispose this appeal. They are: **one**, whether the trial tribunal determined the matter as a criminal case. **Two**, Whether the trial and first appellate tribunal were right to decide in favour of the Respondent basing on the evidences adduced.

In response to the first issue, this court having gone through the Ward Tribunal's findings and orders, it is revealed that, the tribunal convicted the Appellant and passed a sentence. The Appellant was

ordered to pay a fine of Tshs. 10,000/= or serving the sentence of cleaning the WEO's office for about fourteen days. The said decision is partly extracted as follows: -

"..... Ndipo baraza limemuona ndugu Mwanjaa ametenda kosa kwa makusudi. Baraza limemtia hatiani alipe faini ya Tsh.10,000/= au Adhabu ya kufanya usafi kwenye ofisi ya mtendaji wa kata ndani ya wiki mbili yaani siku 14 ili iwe fundisho kwa watu wengine..."

From that piece of trial tribunal's decision, it is obvious that the tribunal convicted and sentenced the Appellant which, as a matter of law, that power is solely vested in criminal Courts. Section 16 of Cap. 216, provides for the powers of the Ward Tribunal in the proceedings of civil nature, land matter inclusive that:

16.....the Tribunal in proceedings of civil nature relating to land may-

- (a) order the recovery of possession of land;*
- (b) order the specific performance of any contract;*
- (c) make orders in the nature of an injunction both mandatory and prohibitive;*
- (d) award any amount claimed;*
- (e) award compensation;*

(f) order the payment of any costs and expenses incurred by a successful party or his witnesses; or

(g) make any other order, which the justice of the case may require,

The section as just reproduced, neither provides for conviction nor an order of fine and performing public activities (cleaning WEO's office) as it was ordered by the Ward Tribunal.

Regarding the second ground of appeal, I find it to have no basis, since the trial records does not state the same. The Appellant didn't testify to have had an agreement with the Respondent on disposition of the suit property at the at Tshs. 750,000/= on which she was partly paid Tshs. 450,000/= and remained the balance of Tshs. 300,000/=. As submitted by the Respondent, and observed by the first Appellate Tribunal, that was a new fact which may not be permitted on appeal stage. In the case of **Farida and Another vs. Dominina Kagaruki, Civil Appeal No. 136 of 2006**, (unreported), the Court of Appeal held, I quote: -

"It is general principle that the appellate Court cannot consider or deal with issues that were not canvasses pleaded or raised at the lower Court. For that reason, they are dismissed"

Therefore, the second ground of appeal, on that stance, has no merit and is accordingly dismissed.

The third and fourth grounds of complaint is on evaluation of evidence. The Respondent who was declared the owner of the suit land testified that, the Respondent disposed the same in consideration of Tshs. 450,000/= the money which was handed over to the Appellant's son one Mussa Hassan Waziri. It was therefore the duty of the Respondent to prove existence of that transactions.

It is trite law that a burden of proof in civil suit is to the one who alleges the existence of a certain facts. This position is stated in **Sections 110 and 111 of the Evidence Act, Cap. 6**. In the case of **Antony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2004 (unreported), the Court of Appeal held that:

".....in civil cases, the burden of proof lies on the party who alleges anything in his favour."

In the record, the Respondent is recorded to have had a sale agreement being evidence of acquiring the said land from the Appellant through sale. However, to the conclusion of trial, the trial tribunal's record doesn't reveal as to whether the same was tendered in evidence. That sale agreement being missing in the proceedings, the remaining evidence

is that of Respondent and his witness one Mohamed Ally Rashid who was hired by the Respondent to cultivate the suit land but was stopped by the Appellant. This evidence alone is wanting to prove ownership.

I am aware of the legal principle that; the second appellate court should not interfere with concurrent findings of facts of two courts below unless there is misapprehension of facts. In **Neli Manase Foya vs Damian Mlinga [2005] TLR 167** the Court of Appeal 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."

Given the above principle, the two tribunals below declared the Respondent the rightful owner of the suit land upon misapprehension of certain facts as hereunder: **One**, there was no sale agreement tendered in the trial tribunal to establish that the Appellant herein disposed through

sale the suit land to the Respondent. **Two**, it is recorded in the decision of the trial tribunal that, members visited the disputed land, a fact which is silent in the proceedings. One would therefore ask where the tribunal imported such evidence without visiting the land in dispute. There is also evidence that there are several pieces of land. Visiting the suit land would be relevant to ascertain the boundaries of the disputed land. **Three**, it seems the Appellant lost because he failed to bring one Mussa Hassan Waziri who received the money on her behalf. This was a witness material to both the Appellant and the Respondent.

For the foregoing, there is a need to interfere with the concurrent findings of the two tribunals below by invoking revisional and supervisory powers of this court prescribed under the provisions of section 43 (1) (b) of Cap. 216 which reads:

43.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-

(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it

*appears that there has been an error material
to the merits of the case involving injustice,
revise the proceedings and make such decision
or order therein as it may think fit.*

That said and done, the proceedings and decisions of Kondo District Land and Housing Tribunal in Land Appeal No. 33 of 2021 and that of Mondo Ward Tribunal in Land Application No. 1 of 2021 are hereby nullified. It is ordered further that, the Ward Tribunal of Mondo to determine the matter afresh on the guided facts above. Each part to bear own costs.

It is so ordered.



Gerson J. Mdemu
JUDGE
20/05/2022

DATED at DODOMA this 20th day of May, 2022.



Gerson J. Mdemu
JUDGE
20/05/2020