

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

MISC. LAND APPEAL No. 38 OF 2022

(Originating from the decision of Nzera Ward Tribunal in Land Application No. 05 of 2021 and the decision of District Land and Housing Tribunal for Geita at Geita in Misc. Land Application No. 24 of 2021)

ANJERINA HAKIBA
SOSPETER HAKIBA ----- **APPELLANTS**
HUNGWA HAKIBA

VERSUS

METHUSELA HALUHANYA----- **RESPONDENT**

JUDGMENT

Last Order date: 18.04.2023

Ruling Date: 24.04.2023

M. MNYUKWA, J.

The appellants appealed against the decision of the District Land and Housing Tribunal (DLHT) of Geita at Geita in Land Appeal No. 24 of 2021 which was decided in favour of the respondent. In the record, it goes that, the parties had their dispute before Nzera Ward Tribunal in Land Application No. 05 of 2021 which was decided in favour of the respondent on 19.03.2021. It was the respondent who initially instituted a dispute before Nzera Ward Tribunal against the appellants for trespassing into his

piece of land he bought for Tsh 3,600,000 on 19/12/2020 from Kadusa Mayunga.

The record further revealed that, the appellants are the children of the late Hakiba Hungwi who claimed that, the disputed land passed to the widows of the late Hakiba Hungwi after his death. Upon hearing the evidence from both parties, the Ward Tribunal of Nzera decided the dispute in favour of the respondent after satisfied that he bought the disputed land from the lawful owner, Kadusa Mayunga who inherited it from Hakiba Hungwi.

Dissatisfied, the appellants in this appeal, approached the DLHT for Geita at Geita and filed Appeal No.24 of 2021 against the decision of the Nzera Ward Tribunal in Land Application No. 05 of 2021. In their petition of appeal before the DLHT, the appellants' advanced four grounds of appeal as hereunder

- 1. That the ward tribunal erred in law and fact by believing on the will as a document which legalized the respondent as a legal owner of the land while the said will was improperly prepared and incomplete in the eyes of law.*
- 2. That the ward land tribunal erred in law and facts by entertaining the land dispute inwhich the respondent sued the wrong party since the deceased properties are all under the appointed administrator of the deceased*



3. *That the ward tribunal erred in law and facts by delivering the decision in favour of the respondent while there is no any legal evidence that justified the legal ownership of the land by the respondent*
4. *That the ward land tribunal erred in law and facts by not following the requirement of adverse possession of land under ten years that which requires prompt compensation to the one who claims possession of land under that situation.*

After hearing the above grounds of appeal, the DLHT determined the matter in favour of the respondent in this appeal. Aggrieved further by the decision of the DLHT, the appellants filed the present appeal with 5 grounds as hereunder:-

1. *That the Chairman of the DLHT erred in law and fact for failure to order retrial since Kadusa Mayunga was supposed to be joined as a defendant before the ward tribunal.*
2. *That the Chairman of the DLHT erred in law and fact for failure to properly analyse the documentary evidence presented before him.*
3. *That the Chairman of the DLHT erred in law and fact since the procedures for purchasing village land were not followed and thereby the sale agreement was null and void.*
4. *That the Chairman of the DLHT erred in law and fact for failure to take into consideration that the key witnesses*



who would have helped justice to be done were not called before the ward tribunal

5. That the Chairman of the DLHT erred in law and fact for failure to take into consideration that the appellants were denied the right to object the tendering of the exhibits before the ward tribunal.

During the hearing of appeal, the appellants were represented by the learned advocate, Renatus Malecha while the respondent appeared in person, unrepresented. The appellants' counsel was the first to submit and he prays to argue the 1st ground of appeal and abandoned the remaining grounds of appeal.

In his submission, the counsel for appellants argued that, the DLHT erred in law and fact because it has failed to order retrial to the ward tribunal for its failure to join the necessary party, who is Kadusa Mayunga in this suit. He went on that, before the ward tribunal, Kadusa Mayunga was alleged to be the lawful owner of the disputed property on the allegation that he inherited it by will through Exhibit K1 which was tendered by the respondent, Methusela Aluhanya who also tendered exhibit K2 which is the sale agreement between him and Kadusa Mayunga.

He further submitted that, since Exhibit K2 shows that Kadusa Mayunga sold the disputed land to the respondent, he was supposed to



be joined as a necessary party before the ward tribunal because the relief claimed by the respondent derived from Kadusa Mayunga and therefore the Court could not pass effective decree without joining him. He was of the view that, it was not proper for Kadusa Mayunga to have been called and testified as a witness.

The counsel for the appellants added that, the argued ground of appeal was not one of the ground of appeal and that the DLHT was supposed to see it as a ground of appeal so as to order trial denovo. He remarked that, the 1st appellate court had the duty to re-evaluate the evidence presented in the ward tribunal. He concluded that the DLHT goes contrary to the decision of the Court of Appeal in the case of **Abdulatif Mohamed Hamis v Mehboob Yusuf Osman** 2008 TLR 25 which held that the Court has to look on whether there is a right or relief against such a party in respect of the matter involved in the suit, and that the court can not be in a position to pass an effective decree in the absence of such a party.

Responding, the respondent prays to adopt his reply on the 1st ground of appeal to form part of his submissions. He went on that, the DLHT could not have joined Kadusa Mayunga as a party to the suit because he was not a party to the suit in the ward tribunal. He added



that, Kadusa Mayunga cannot be joined as a necessary party to the suit because he was the legal owner of the disputed land after he had inherited it by way of will from his grandfather and that he was in possession of the disputed land for more than 30 years that's why the DLHT ruled out that, he was the lawful owner of the disputed land. He therefore prayed the appeal to be dismissed.

Re-joining, the respondent did not add anything as he reiterated what he had submitted in chief.

After going to the appellants' grounds of appeal and considering the submissions from both parties, the main issue for consideration and determination is whether the appeal is merited or not.

As I have earlier on indicated, the appellants counsel abandoned all the grounds of appeal and argued only one ground of appeal which is the first ground of appeal that challenged the decision of Chairman of DLHT for its failure to order retrial so as to join Kadusa Mayunga as a necessary party in this suit.

I had time to go through the court record especially the grounds of appeal presented before the DLHT to find out whether the argued ground of appeal forms part of the grounds of appeal before it.



In order to give parties the right to be heard, I probe the parties, to address the Court on whether this court had the jurisdiction to determine the argued ground of appeal.

In his address, the counsel for the appellants quickly responded that, the argued ground of appeal is the new ground of appeal and therefore this court had no jurisdiction to entertain it.

On his part, the respondent who appears in person being a layman, leave the court to decide on the issue raised by it *suo moto*.

To begin with, it is a trite law that, the 2nd appellate court will not have jurisdiction to deal with a new ground of appeal that was not raised and argued by the parties in the 1st appellate court. This stand has been taken by the Court of Appeal and in this Court in a plethora of authorities.

In our case at hand, joining Kadusa Mayunga as a necessary party to the suit was not among the grounds of appeal in the DLHT and the same was not discussed in the trial court. The issue of non-joinder of the necessary party is not a point of law for this Court to proceed to determine while it was not argued and raised in both, at the trial court and the 1st appellate court.



In the case of **Westone s/o Haule v The Republic**, Criminal Appeal No 504 of 2017, the Court of Appeal said that:

"Our law is settled that matters which were not canvassed by the first appellate court cannot find way in the second appellate Court unless it relates to a legal issue."

The foregoing position was reiterated in the case of **Simon Godson Macha (Administrator of the estate of the late Godson Macha) v Mary Kimambo (Administrator of the estate of the late Kesia Zebedayo Tenga)**, Civil Appeal No 393 of 2019 when quoting its decision in the case of **Juma Manhano v Republic**, Criminal Appeal No 211 of 2009 where it was pointed out that:

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court."

See also the case of **Godfrey Wilson v Republic**, Criminal Appeal No 168 of 2018, **Hassan Bundala @ Swaga v Republic**, Criminal Appeal No386 of 2015

Guided by the above decision of the Court of Appeal, I find that this Court being the 2nd appellate court is not vested with jurisdiction to entertain the 1st ground of appeal. I shall thus struck out the said ground of appeal.



As the appellants' counsel conceded to the issue raised by the court *suo moto* and abandoned the other grounds of appeal, nothing remained for this Court to determine. I thus, find the appeal devoid of merit and consequently, I proceed to struck out the same with no order as to costs.

It is so ordered.




M.MNYUKWA
JUDGE
24/04/2023

Right of Appeal explained to the parties.


M.MNYUKWA
JUDGE
24/04/2023

Court: Judgment delivered on 24th April 2023 in the presence of both parties.


M.MNYUKWA
JUDGE
24/04/2023