IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

MISC. LAND APPEAL NO 37 OF 2022

{Originating from the judgment of the Ward Tribunal of Mwandet in Application No 8 of 2017 C/F Misc. Application No 30 of 2018 of the District Land & Housing Tribunal of Arusha at Arusha, and Misc. Land Appeal No 13 of 2-19 of the High Court of Tanzania Arusha District Registry and Land Appeal No 45 of 2020 of the District Land & Housing Tribunal of Arusha at Arusha}

NJUMALI SINGOI _____ **APPELLANT**

VERSUS

MELIYO LOVOKIEKI _____ **RESPONDENT**

04/04/2023 & 26/06/2023

JUDGMENT

BADE, J.

The Appellant above named being aggrieved by the Judgment of Appellate Tribunal of District Land and Housing Tribunal for Arusha at Arusha delivered on 12th July, 2022 before Honourable G. Kagaruki, in Land Appeal No. 45 of 2020, she is now appealing against the whole decision on the following grounds:

1. That, the Appellate Tribunal erred in law and facts in deciding the Appeal in favor of the Appellant based on the ground of Appeal which was not disputed at all by the Respondent; 2) by failing to nullify the decision of the trial Ward Tribunal of Mwandet while the Respondent thereto had no locus neither to sue nor to be sued in her personal capacity on the disputed property; 3) in failing to quash and set aside the decision of the trial Ward Tribunal of Mwandet which adjudicate

and determined the matter that it had no jurisdiction at all; 4) in failing to quash the proceedings and to nullify the decision of the trial Ward Tribunal of Mwandet which was wrongly instituted by non-joinder of the parties; 5) by failing to quash the proceedings and set aside the decision of the trial Ward Tribunal of Mwandet which determined the matter while it was not properly constituted; 6) by failing to quash the proceedings and nullify the decision of the trial Ward Tribunal of Mwandet that heard and decided the matter in the favour of the Applicant thereto without considering the law of limitation regarding institution of land matter; 7) by failing to set aside the decision of the trial Ward Tribunal of Mwandet which determined and decided the matter in the favor of the Respondent thereto without justifiable evidence of ownership of the disputed land; 8) in failing to nullify and set aside the decision of the trial Ward Tribunal of Mwandet which denied the Appellant the Constitutional right to be heard; and lastly, in failing to nullify and set aside the decision of the trial Ward Tribunal of Mwandet which lacked cause of action against the Appellant.

The appellant's counsel had the ball rolling on ground 1 of the petition of appeal. He argues that since there were matters which were not controverted by the respondent's side as they only chose to submit on certain grounds and particularly abandon ground no 8, this meant he conceded or admitted to the facts of the appellant's submission. So the chairman should have entered a consent judgment (sic). He relied on the authority of the case of **Herman PC Civil Appeal No 42 of 2019** [2020 Tanzlii] where the court said if a party failed to reply on a point raised, it means they have admitted on that fact. He also referred to the case of

Lekule Ole Shumu Civil Appeal No 28 of 2018 [Tanzlii media neutral citation 2018] HC Arusha, where the Court restated a principle that the Court should not deal with extraneous matters that are not before it. He also cites the case of **Saidi Salum vs Republic,** Criminal Appeal no 499 of 2016.

Arguing ground 2 of the grounds of appeal, the counsel reckoned that the appellant who was the respondent at the tribunal had no locus standi as she was not the administrator of the estate of her deceased husband and so she had no business being in court, neither had she any say over the property of the deceased. He cited the case of **Said Shishango vs Fatuma Mussa,** Misc Land Appeal no 16 of 2016 (unreported), and thus this ground should be found with merit.

On ground 3, the counsel contends that the matter had been determined without the ward tribunal having jurisdiction over the case. He refers to Section 15 of Land Disputes Courts Act Cap 212; that jurisdiction of the ward tribunal is 3 million, while the tendered document indicated that the matter was valued at 6 million (see the rent agreement). He thus maintains that the Ward tribunal had no jurisdiction to hear the matter. Jurisdiction matters have been decided upon severally referencing the case of **Wazo Hill vs Hermelinda Joseph Bikongoro,** Land Case No 10 of 2020; and **Fanuel Ng'onda and Herman Ng'onda**, Civil Appeal No of 20

Arguing ground 4 of the grounds of appeal, he contends that there were necessary parties that were not joined at the tribunal and non-joinder is bad in law, particularly he thinks the seller who sold the suit property to the Respondent, should have been joined. He argues that the non-joinder

of parties should have been seen by the District Land and Housing Tribunal and acted upon.

In respect to ground 5, the counsel contends that the tribunal was not properly constituted as per section 11 of the Land Disputes Act, which gives the composition of the ward tribunal. In the instance case, the coram was not duly constituted as there were only two women instead of three. See **Nada Qwaray,** Miscellaneous Land Appeal no 2 of 2013. So this also vitiates the proceedings of the ward tribunal

Arguing ground 6 which is constituted around the law of limitation on the institution of land dispute. The Appellant counsel argues that the respondent was sold the land by one William Rarian, while the latter took 28 years to institute a land dispute, as against the law which requires it to be 12 years, otherwise, adverse possession will take effect. He maintains that judgment of ward tribunal at p 1 alludes to this issue. So it is unfair to have been sued on the land that they have enjoyed for 29 years without any disturbance.

In respect of the 7th ground of appeal, that there is no justifiable evidence of ownership of the disputed land as none of the parties were able to show through evidence that there is a rightful owner of the disputed land, so it was erroneous to disown the property from the person who had possession of the land for over 28 years, and give it to the person who was not able to prove any ownership.

In any case, he argues that there is a contract of sale by William to Meliyo Mayema, and not Meliyo Lovokieki. He referred the case of **Stanslaus Ragba Kasusura vs AG & Phares Kabuye** [1982] TLR 338 which

alludes to the fact that assessing witness credibility and deciding material facts is the duty of the trial tribunal.

Arguing ground 8 of appeal on the violation of the appellant's right to be heard against a constitutional guarantee. The counsel maintains that the Appellant was condemned unheard, that she only appeared once and was not called during the hearing of the matter. While they said the Appellant was served, there was no evidence that the Appellant was in fact served. The records are silent and made reference to the case of **Onesmo Nangole vs Lemomo Kiruswa,** Civil Appeal No 129 of 2016, and **Kalunga and Co Advocates vs NBC,** Civil Application No 124 of 2005 both insisting on the right to be heard.

Lastly, the counsel alludes to a lack of cause of action against the Appellant since it is not stated anywhere how/ where it arose in Land Application No 8 of 2017, and the District Land & Housing Tribunal in Land Appeal no 45 of 2020 where he believes it was supposed to be shown, whether it is the whole or only part of the suit land that is being appealed against. He urges that the appeal be found with merits and be allowed with costs.

Responding, the counsel for the respondent undertook the same flow as the Appellant did.

Starting with ground 1, he showed his surprise on the cause of complaint embedded on this ground, that just because the respondent did not respond on the ward tribunal's ground 7 does not mean they have acquiesced to it. He reasoned that a ground of appeal is not evidence that if submitted and not controverted, then it should have been taken as admitted.

He reasoned that submissions on grounds of appeal are mere words from the bar. In any case, the ground was rightfully ignored because it was talking about the cause of action against the appellant. That was a mere repletion of ground 1, which was responded to sufficiently, having prayed that the respondents had no locus to institute a case against her because she was not the administratrix of the husband's estate. In that case, the counsel for the Respondent firmly insists on the advanced reasoning sufficiently covering ground 8. This he also reminds, is the same holding by the housing tribunal.

Responding to the second ground of appeal, on the issue of the Appellant's locus standi, he reasoned that the deceased as per the records at the Ward Tribunal is that he sold the farm while he was still alive to William Rarian, who was also alive when the matter was before the Ward Tribunal, and testified before the Ward Tribunal as SM2 as recorded in p2 of the typed proceedings, where he explained that he bought the farm from the deceased, and used the said land for 24 years; after which he sold it to the Respondent. The Respondent was on the said farm until after the Appellant trespassed onto it, and that is when he sued the Appellant herein. See p9 of the judgment of the District Land & Housing Tribunal, where the Chairman made an observation about the *locus standi* of the Appellant and reached a decision that it was proper for the appellant to be sued by the respondent. The sale contract that was spoken about by the counsel of the appellant, does not feature on any record (proceedings/judgment) of both the lower Tribunals.

Regarding ground 3 that there is a jurisdiction issue on the pecuniary value; the counsel puts it forth that there is no any evidence on record that the land that the appellant trespassed upon had a value of over 3

million. The contract spoken about does not feature anywhere on the record. More still, the claim on the Ward Tribunal was on trespass on land. He made a reference to the case of **Andrew Kimonga Mwakapola vs Hamoud Said and 2 others,** Civil Appeal No. 8 of 2019 where the learned judge in this case observed:

> "The jurisdiction of the court was not at issue at the District Court, and the deliberation was not determined based on the court's jurisdiction."

The counsel joined issue with the Appellant's counsel that the question of jurisdiction can be raised at any time as long as it is relevant to the particular situation. The matter before the Ward Tribunal was whether Njumali Singoi the appellant herein trespassed on the land of the Respondent. So he firmly urged that the claim was on trespass, not ownership, nor jurisdiction which was never an issue in the dispute.

Responding to ground 4, which was on the issue of nonjoinder of a necessary party, contending that William Rarian who was a witness (SM2) at the Ward Tribunal should have been made a party to the suit. He reminds once again that ownership of the land was not in dispute. The Respondent who was the person in actual possession was the one suing, and his ownership was not at issue. The record would show that the trespasser was the appellant herein, and thus there was no point in joining William Rarian as a party or any other person for that matter. Even if that was so, the Civil Procedure Code Order 1 Rule 9 has it that a suit shall not be defeated by misjoinder or nonjoinder of parties. The counsel made reference to section 51 of Land Disputes Act Cap 216, which provides that while exercising respective jurisdictions, the High Court and District Land

& Housing Tribunal shall apply the Civil Procedure Code and the Tanzania Evidence Act.

Regarding the fifth ground that the Ward Tribunal was not duly constituted, the counsel referred to section 11 of the Land Disputes Act Cap 216. He argues that the provision does not speak of the coram's (sic) of the tribunal, but rather the composition of the Ward Tribunal – that is at least 4 and no more than 8, 3 of which should be women. Section 12 speak of qualification, tenure, and membership as provided under sub section 5 & 6. The issue of coram (akidi) is provided by Ward Tribunal Act Cap 206 section 4(3), which says coram at a sitting of the Tribunal shall be one-half of the total number of members. In the matter that was before the Ward Tribunal, 4 members were sitting, which is half of the number (8) as provided for under subsection (a).

He made reference to the case of **Abdalla Mohamed vs Hariri Mohamed,** Land Appeal No 1 of 2019 (Tanga) Mruma, J. explained the issue of coram in the Ward Tribunal and the District Land & Housing Tribunal chairman had reproduced the ratio in the above-cited case on his typed judgment which emphasized the point that the provision is on formation, and not coram.

Arguing ground 6 which is on the law of limitation, the counsel refers to page 1 of the Ward Tribunal decision, stating that on 01/08/2017, Njumali Singoi is said to have trespassed on the land of the respondent. So it is clear that the matter was preferred at the right time, that is immediately after the said trespass since 13/10/2017 is when the proceedings started to record the pendency of the matter. The claim that there should have been joined an administrator of the estate of the deceased is baseless as

the husband sold the land during his lifetime. Equally, it is not on record that the appellant enjoyed the land for 29 years and this fact is not featured anywhere on the Tribunal's record. That is a new matter and an afterthought.

In response to ground 7 on the issue of evidence on proof of land ownership, the SM2 who was alive when the matter was being tried, stated clearly that he was the one who sold the land to the respondent. The contract that the counsel was trying to bring to the attention of the court does not feature anywhere on the record and the counsel wonders how or where the counsel came across it. All 6 witnesses testified that the respondent was the rightful owner of the land in dispute. So he urges that this ground be found baseless and with no merit.

With respect to ground 8 of the grounds of appeal on the right of the appellant to be heard, the counsel charges that the appellant denied herself the right to be heard by refusing to attend the Ward Tribunal proceedings as she claimed to have had no faith in it. See pp 1 & 2 of the Ward Tribunal proceedings, where it is on record that she was summoned but ignored or refused to attend. There was no need to prove service through a court process server as the Ward Tribunal's proceedings are clear on its record that she attended and disclaimed its authority over her. The District Land & Housing Tribunal also while considering the appeal, p10 of the judgment, there was an observation by the Chairman of the District Land & Housing Tribunal on the way the Appellant conducted herself during the trial at the Ward Tribunal. The Chairman explained that the Appellant was in attendance once, and afterward simply ignored to attend even after being summoned as per p1 of the proceedings /decision of the Ward Tribunal.

And lastly, in responding to ground 9 on disclosure of the cause of action, counsel for the respondent argues that it is a repetition of the 2nd ground of appeal as set forth in the petition of appeal. The cause of action is trespass, where the appellant was claimed to have trespassed onto the respondent's land without any justifiable cause, after which the respondent immediately put his complaint before the Ward Tribunal.

As a matter of observation, the reasons adduced at the District Land & Housing Tribunal on Appeal No 45 of 2020 which produces the appeal before this court are the same, without any further alteration whether on the grounds or the judgment. It has not been shown in any way at which point or in which way the chairman of the District Land & Housing Tribunal erred in resolving the grounds of appeal put before the tribunal. He thus concludes that it is his firm view that the appeal before this court is frivolous, and prays that the same be dismissed and the appellant be condemned to pay costs.

Rejoining, the counsel for the appellant made general responses and explains that it is proper to bring about the same grounds of appeal that were submitted at the first appellate court and that he would supply the court with the authority to support this stance.

The respondent did not respond to the 8th ground. Not 7th. He insists that the counsel did not respond to it and that he did not indicate that they will not respond to it for any reason.

Replying specifically on ground 2, on the proposition that the deceased was the one who sold the land is not supported by the record that he sold the land. While he maintains that on the issue of locus, the appellant's locus standi was not resolved.

Rejoining on ground 3 that the value of the landed property was not put on record as the Ward Tribunal did not ascertain the value of the property. He also disputes that the matter before the Ward Tribunal was not criminal trespass.

He also rejoin on ground 4 that ownership of the said land was actually at issue, and not criminal trespass. He also concedes that the Civil Procedure Code does not apply at the Ward Tribunal or Primary Court, but still insists that non-joinder of a party is fatal. Meanwhile, he urges against the response on ground 5 that in the constitution of the members of the Ward Tribunal, the case that was cited by the counsel is distinguishable.

In response to ground 6, the counsel retorts that there is no date amongst the ones stated by the counsel that the appellant is said to have trespassed on the land, while on ground 7, SM 2 did not state the boundaries of the land sold to the respondent. Against ground 8 he argues there is no summons or that she was called but refused to attend, and thinks that the summons was supposed to be returned to attest to the refusal, and finally, he disputes that ground 9 is a repetition insisting that there was no cause of action adduced, and thus concludes to have the appeal allowed with costs.

Having heard the submissions by both counsels for the parties, and dispassionately reading the records of the two lower tribunals, I am guided to consider if the first appellate tribunal's decision was faulty in its evaluation of the trial tribunal to make this appeal meritorious, especially because the same grounds of appeal were reproduced on this court.

I wish to make it clear that this court being the second appellate court will not fault the concurrent findings of the two lower courts unless there is a misapprehension of evidence, miscarriage of justice or violation of principles of law. See the case of **Helmina Nyoni vs Yeremia Magoti**, Civil Appeal No. 61 of 2020, (CAT).

Also, the learned counsel for the respondent was worried that it is bad in law to reproduce the grounds of appeal from the previous 1st appeal. To clear the doubt, the decision in **Omary Kassim Mbonde vs. Republic,** Criminal Appeal No. 175 of 2016, the Court of Appeal of Tanzania is telling as it held:

> "Indeed, there are a range of cases in which the court had occasion to observe that as a second appellate court, it cannot adjudicate on grounds of appeal which were not raised and determined in the first appellate court."

This is to say the grounds of appeal previously considered are the ones to be re-considered, except the appellant is duty bound to demonstrate how the first appellate court erred in determining the raised issue as it did. Imperatively, the court is not to consider any ground that was not raised previously. This was the holding in the case of S**amwel Sawe vs Republic,** Criminal Appeal No. 135 of 2004 in which the Court stated:

> "As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second (sic) appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court.

In the case of **Abdul Athuman vs R** (2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is, therefore, struck out."

In this regard and in the strength of the foregoing authority, if there was a ground of appeal that was not raised previously, it will be expected that the court disassociates itself from being detained by that ground.

Meanwhile, I will generally deal with the grounds of appeal tackling the ones touching pure points of law that goes to the jurisdiction of the ward tribunal to determine the land matter before it, and thus I shall start with ground 3 and 5. I agree with the respondent's counsel that pecuniary jurisdiction should be established either through pleadings or evidence. But then again, the procedures in the Ward Tribunal would only bring about the issue of pecuniary value at the evidence stage. I say so because the procedures at the Ward Tribunal when they were exercising trial functions were different in the sense that they are based on orality, simplicity, and informality. As a matter of fact, in the Ward Tribunal, there are no pleadings or pre-trial conferences. So the truth be told, the time that any pecuniary value of the matter would come to the fore is during the taking of evidence.

Thus, in the absence of clear evidence on the value of the land in dispute, it would be improper to speculate that the subject matter has a value exceeding three million shillings. As hinted in the submissions for this appeal, the appellant's counsel could not tell this court the value of the

land in dispute and my own scrutiny of the record could not find any. Thus, mere contentions from the bar would not oust the Tribunal's jurisdiction unless the appellant had put in evidence during trial to the effect that the value of the land in dispute was well beyond three million shillings. See **Sospeter Kahindi vs Mbeshi Mashini,** Civil Appeal No. 56 of 2017 CAT at Mwanza.

In view thereof, non-disclosure of the land value in the Ward Tribunal is not fatal unless there is clear evidence from either party that the value is above the pecuniary jurisdiction of the Ward Tribunal. Also see **Kubili Sululu vs Mhindi Shija** (Misc. Land Case Appeal No. 15 of 2020) [2022] TZHC 15192 (12 December 2022)

In the event, I find this ground of appeal in respect of the jurisdiction of the Ward Tribunal to entertain the matter without any merit.

Turning to ground 5 that the first appellate court had failed to quash the proceedings and set aside the decision of the trial Ward Tribunal of Mwandet which determined the matter while it was not properly constituted; I think this matter is also settled in law in that while its not disputed that the composition of the Ward Tribunal which we have been referring all along as the trial tribunal is a matter of law. But more importantly, there is a difference between the constitution or composition of the Ward Tribunal; and quorum as the same sits to determine a matter before it. The former concept refers to the makeup of the tribunal including defining who can be members of the tribunal and how they can be selected into it, as well as their roles and responsibilities. The latter is about the minimum number of members required to be present at the

sitting of the tribunal's proceedings for it to be able to conduct its business validly and make decisions that are legally valid and binding.

The two concepts are envisaged and alluded to under section 11 of the Land Disputes Court Act Cap 216, for the composition of the Ward Tribunal, and section 4 (3) of the Ward Tribunal Act, Cap 206 for the quorum. The former provides as follows: -

> "Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act."

Meanwhile, section 4(3) of the Ward Tribunals Act Cap 206 provides

> "The quorum at a sitting of a Tribunal shall be one-half of the total number of members."

This was also cemented by this Court (Mruma, J.) in **Abdalamani Mohamedi vs Halidi Mohamed** (Misc. Land Case Appeal No. 1 of 2019) [2020] TZHC 564 where he held:

> "In my view Section 11 of the Land Disputes Courts Act [Cap 216] does not have anything to do with Coram at the sitting of the Ward Tribunal for the purpose of adjudication. The provision is geared towards the formation of the Ward tribunals. The relevant provision on the quorum during adjudication is Section 4(3) of the Act.

A view to which I fully subscribe. In that case, I find this ground of appeal meritless.

Turning to grounds 2, 4, 7, and 9 they put the points in the contention that the deceased was the one who sold the land, and therefore ownership of the said land was actually never at issue, but rather a criminal trespass whose genesis is recorded from 01/08/2017, where the appellant is said to have trespassed on the land of the respondent, at which point the claimant preferred the application with the ward tribunal on the said trespass since 13/10/2017.

I am inclined to agree with the counsel for the appellant that the other contention as he proposes is not supported by the record. This would be for the obvious reason that the trial proceeded exparte and the tribunal had no benefit of getting the appellant's side of the story meaning the facts as presented by the respondent were uncontroverted and thus whatever the appellant is bringing forth now is not part of the record of the trial tribunal. Similarly, there is no support from the record that the husband of the appellant did not sell the land to the respondent, a fact which makes the want of the appellant's locus standi for not being the personal legal representative a non-issue.

In consequence, grounds 2, 4, 7, and 9 all crumble for being unsupported by the record. They are baseless and thus without any merit.

In respect to ground 6 of the grounds of appeal regarding how time limit should have been construed for adverse possession upon the appellant Njumali Singoi who is said to have occupied the land for 29 years unperturbed according to the appellant's counsel, who is claimed on the other hand that she has trespassed on the land of the respondent.

As a matter of principle, the law of limitation would have barred the respondent from filing a suit for the recovery of the land if the appellant

has used the land for 29 years. The period of limitation to recover land is 12 years in terms of section 3 (1) of the Law of Limitation Act, Cap. 89, RE 2019, read together with Part I item 22 of the schedule of the same Act.

The principle of adverse possession on the lapse of time limit to reclaim land is well stated in the celebrated case of **Moses vs Lovegrove [1952] 2 QB 533**, where it was pronounced by the Court in England that:

> "..... a person seeking to acquire title to the land by adverse
>
> possession had to cumulatively prove the following:
>
> a) That there had been the absence of possession by the true owner through abandonment;
>
> b) That the adverse possessor had been in actual possession of the piece of land;
>
> c) That the adverse possessor had no color of right to be there other than his entry and occupation;
>
> d) That the adverse possessor openly and without the consent of the true owner has done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
>
> e) That there was a sufficient animus to dispossess and an animo possidendi;
>
> f) That the statutory period, in which case is twelve (12) years, had elapsed;

appeal, the appellate court usually evaluates whether the lower court/tribunal has appreciated the evidence and gives it a proper analysis to come to the right conclusion or not; and whether the law has been followed and interpreted correctly. In the absence of any law that has been violated, I do not see how this ground would have any basis. It too fails.

In the upshot, this appeal is without any merit and it is hereby dismissed with costs.

It is so ordered.

Dated at **Arusha** this **26th** day of **June 2023**

A. Z. Bade
Judge
26/06/2023

Judgment delivered in the presence of parties / their representatives in chambers /virtually on the **26th** day of **June 2023.**

HIGH COURT OF TANZANIA

A. Z. Bade
Judge
26/06/2023