IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)
AT ARUSHA

LAND APPEAL NO. 56 OF 2022

(Originating from the decision of the District Land and Housing Tribunal for Arusha, Application No. 81 of 2015)

OJUKWU JOSEPH HUBERT SIRIKWA (Legal representative of the late Joseph Hubert Sirikwa) ..... APPELLANT

Versus

ENOCK PASCAL HUBERT (Legal representative of the late Pascal Hubert Sirikwa) ..... RESPONDENT

JUDGMENT

6th & 29th September 2023

Masara, J

The subject of this appeal relates to a feud over a parcel of land measuring 78 by 48 paces (henceforth referred to as "the suit land"). The land is located at Sanawari ya Juu, Moivo village within Arusha District. The dispute involved blood brothers, Joseph Hubert Sirikwa and Pascal Hubert Sirikwa, who have since passed. After their deaths, the dispute has since passed over to their children, as administrators of their respective estates.

According to the pleadings and the evidence on record, the Appellant claimed that his father bought the suit land from his young brother, the Respondent's father, in 1984 at a consideration of TZS 70,000/=. The purchase came about as the Respondent's father failed to pay loans he was owed by two colleagues (Lovoi and Moivaro) who used to sell to him

cows for slaughter, as he was running a butchery business. As a result of his failure to repay the said loans, the creditors threatened to curse the Respondent's father through a traditional ritual of breaking a pot ("kuvunja chungu"). Due to the perilousness of the said ritual as embraced by the society, the clan had to intervene.

A clan meeting was convened led by the clan leaders known as "laigwanan". These included Ezra Sirikwa and Longidareki Mbinuis (DW4). The Respondent's father admitted the debts; but he had no money to pay. After deliberations, it was agreed by the clan that the Respondent's father sells his land to one of the family members so as to settle the amount he owed. In the process, the Appellant's father after consulting his family decided to purchase the land at the consideration above stated. The clan advised that, since Joseph and Pascal are siblings, the purchaser of the land should give his brother a place to dwell on. The Appellant's father partitioned the land he bought, giving part thereof to the Respondent's father as a place to stay. That he was left with the suit land.

The evidence further revealed that the Appellant's father was in occupation of the suit land for the whole period of almost 30 years, without interference or disturbance. He leased the suit land to various people including Joseph Tenges Sirikwa (AW3) and Ruth Msaki (AW4)'s

husband, who cultivated the suit land on diverse intervals in exchange of the proceeds with the Appellant's father as the owner of the same. Immediately after the death of the Appellant's father in 2011, the Respondent's father trespassed in the suit land. He evicted Emmanuel Francis Mollel who was leasing the suit land and continued occupying the same.

After he was appointed as the administrator of the deceased's estate, the Appellant sued the Respondent's father in the District Land and Housing Tribunal for Arusha (henceforth "the trial tribunal"), vide Application No. 81 of 2015. He claimed, among others, declaration that his father was the lawful and rightful owner of the suit land. He also claimed for general damages, permanent injunction against interfering with his peaceful enjoyment of the suit land.

On his part, Pascal Hubert Sirikwa (who defended the suit until judgment preparation stage before he died) vehemently disputed the Appellant's allegation, stating that he was the lawful owner of the suit land. He admitted the Appellant's version to the extent that he was indebted and that the Appellant's father paid the debt on a condition that he takes the suit land as a security or lien until he was paid the money paid to those who owed him. According to the Respondent's father, the Appellant's

father was refunded the amount due to him by his wife Prisca Hassani (DW3) in 1995. His account was supported by that of Francis Moita Tenges Sirikwa (AW2), James Hubert Sirikwa (DW2), DW3 and DW4. These stated that the Appellant's father took over the suit land as lien to be returned to the Respondent's father once redeemed.

After hearing the evidence from both sides, the trial tribunal found out that the Appellant's evidence that his father had purchased the suit land from the Respondent's father was wanting. The trial tribunal dismissed the suit with costs. Aggrieved, the Appellant preferred this Appeal on the following grounds, *verbatim* reproduced:

a) *That, the Honourable Chairman of the District land and Housing Tribunal erred in law and facts in holding that the land in dispute was not sold to the Appellant's brother;*
b) *That, the Honourable Chairman of the District land and Housing Tribunal erred in law and facts in holding that there was no sale agreement between the Appellant's father and the Respondent's father;*
c) *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law by failing to consider the Appellant's evidence; and*
d) *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law by failing to evaluate the evidence.*

At the hearing of the appeal, the Appellant was represented by Mr Henry Simon Katunzi, learned advocate, while the Respondent was represented by Mr Elibariki Maeda, learned advocate. Hearing of the appeal proceeded through the filing of written submissions, a schedule of which was adhered to.

In his written submissions, Mr Katunzi prefaced the same by raising a new ground of appeal. The new ground reads as follows:

> *"The Chairman of the District Land and Housing Tribunal having found that the land in dispute was not sold, but rather held by the (sic) Joseph Hubert Sirikwa under a bond (dhamana) he failed to appropriately formulate an issue regarding the property's status as it remained unredeemed from Joseph Hubert Sirikwa since 1984."*

He relied on section 51(1) of the land Disputes Courts Act, Cap. 216 [R.E 2019] (henceforth "the LDCA"), which provides for the applicability of the Civil Procedure Code, Cap. 33 [R.E 2019] (henceforth "the CPC"), where there is lacuna in the laws governing DLHT. He therefore cited Order XXXIX Rule 2 of the CPC, seeking leave of the Court to rely on the new ground. As a consequence of the new ground, Mr Katunzi dropped the original 1st and 2nd grounds of appeal. He submitted on the new ground as the 1st ground and the 3rd and 4th grounds combinely.

Submitting in support of the new ground of appeal, Mr Katunzi was of the view that, having noted that the disputed land was not sold but was held as security by the late Joseph Hubert Sirikwa and as the same was not redeemed, the trial tribunal ought to have resolved the status of the suit land because the Respondent's father never regained possession of the same. In his view, that was to be done by faming an additional issue in consonance with Order XIV Rule 5(1) of the CPC. By doing so, parties would have gotten an opportunity to adduce evidence regarding the status of the disputed land, since it remained unredeemed from 1984 up to 2011 when the Respondent's father trespassed into the same. According to the learned advocate for the Appellant, the trial tribunal was required to make a finding that since the suit land was held by the late Joseph Sirikwa as a lien, any intervention from the Respondent's family before paying the amount owed, would amount to trespass. He prayed that the new ground be upheld.

Elaborating on the 3rd and 4th grounds of appeal jointly, Mr Katunzi submitted that the tribunal chairman erred in discrediting the evidence of AW1 as hearsay. He maintained that, although AW1 did not attend the clan meeting, all other witnesses attended and they testified that the suit land was given to the Appellant's father as security. According Mr Katunzi,

evidence from both sides confirm that the suit land was handed to the Appellant's father as security. That the only remaining issue was whether the suit land was redeemed by repayment of the amount due from the Respondent's father. That, that ought to have been resolved by the tribunal chairman; unfortunately it was not done; thus leading to a miscarriage of justice against the Appellant. He urged this Court to reverse the decision of the trial tribunal on that account.

In rebuttal, Mr Maeda predicated his submission by a preliminary point of objection to the effect that the appeal is time barred. According to him, the Appellant instituted Misc. Land Application No. 67 of 2021, seeking for extension of time to file this appeal. This Court (Kamuzora, J.) on 23/05/202 granted him 30 days to file his appeal from the day of that ruling. The instant appeal was filed on 23/06/2022, which, according to Mr Maeda, is 31 days after the order extending the Appellant time was issued. He therefore prayed for dismissal of the appeal with costs.

Responding on the new ground, Mr Maeda amplified that both the pleadings filed and the evidence adduced were to the effect that the suit land belonged to the Appellant's father as he purchased the same from the Respondent's father. Further, in the reliefs claimed by the Appellant in the pleadings, the Appellant prayed that the suit land be declared the

lawful property of his father. It was counsel's submission that whoever pleads certain facts must lead evidence to prove existence of such facts; hence, it was upon the Appellant to prove ownership of the suit land through purchase by his father as per the pleadings. He maintained that, the submission of the Appellant's counsel on the contrary, is contravening the law on pleadings, which underscores that parties are bound by their own pleadings and no party is allowed to depart from what has been presented in the pleadings. In support of this contention, Mr Maeda relied on the following decisions: **Jonathan Kalaze vs Tanzania Breweries Limited, Civil Appeal No. 360 of 2019**, **Barclays Bank (T) Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019** (both unreported) and **James Funke Ngwagilo vs Attorney General [2004] TLR 161**. He concluded that, since there was no amendment of the pleadings, the trial tribunal could not grant reliefs not pleaded. He pressed for dismissal of this ground of appeal.

In respect of the 3rd and 4th grounds, Mr Maeda amplified that the trial tribunal thoroughly considered parties' evidence and the same was subjected to thorough evaluation. He added that it was through the evidence adduced where the trial tribunal discovered that the Appellant's father did not purchase the suit land rather it was pledged on him as lien.

According to Mr Maeda, there was no evidence from the Appellant whether the bond was released or not. He maintained that the tribunal's conclusion that AW1's evidence was hearsay was justified because he admitted that he did not attend the meeting which allegedly mandated his father to purchase the suit land. He concluded his submission by maintaining that the appeal is time barred, worth dismissal and, in the alternative, even if it is found not to be time barred, it is devoid of merits warranting dismissal with costs.

I have thoroughly considered the trial tribunal records, the grounds of appeal and the submissions by counsel for the parties. Two issues for determination arise from submissions by counsel for the parties: whether the appeal is time barred and, if the issue is resolved in the negative, whether the appeal before me has merits.

I will start with the issue of time limit which was raised by Mr Maeda in his reply submission. Unfortunately, the Appellant, who was in a position to respond to it through a rejoinder submission, did not do so. It is trite law that a point of law can be raised at any stage of the proceedings, as long as all parties to the proceedings are given the opportunity to address the point of law raised. This position is in consonance with the Court of Appeal decision in **Zaidi Baraka and 2 Others vs Exim Bank**

(Tanzania) Limited, Civil Appeal No. 194 of 2016 (unreported), where it was held:

> *"There is consistent judicial pronouncements that a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings provided that the facts admitted or proved on the record enable the court to determine the point of law in question. Since therefore, limitation is a legal issue and since in this case, the claim was based on ascertained facts, the appellants were not precluded from raising it in this appeal. In the case of the* ***DPP v Bernard Mpagala and 2 Others****, Criminal Appeal No 29 of 2001 (unreported) for example, the Court observed as follows:*
>
> > *"Admittedly, limitation is a legal issue which has to be addressed at any stage of proceedings as it pertains to jurisdiction."*

The point of law raised by counsel for the Respondent relates to limitation of time which goes hand in hand with the jurisdiction of the court to adjudicate the matter before it. As restated in the decision cited above, limitation is a point of law which goes to the root of the jurisdiction of the court to adjudicate upon a certain matter, hence it can be raised at any stage of the proceedings. In **Shabir Tayabali Essaji vs Farida Seifudin Essaji, Civil Appeal No. 180 of 2017** (unreported), it was underscored that:

> *"It is trite law that the issue of time limitation* ***is fundamental as it goes to the root of the jurisdiction of the court to adjudicate on a certain matter****. It is, therefore, important for any court to*

ascertain at the commencement of any proceedings on whether or not the matter is within time. This is because, if the court proceeds without the required jurisdiction the whole proceedings and decision thereof might end up to be a nullity. In the circumstances, the issue of time limitation is not and cannot be treated as "a minor or slight" issue which can just be waived as the counsel suggested. Therefore, the prayer cannot be granted."

I do not have reasons to fault the Respondent's counsel for raising the limitation issue in the reply submission because the law permits him to do so. As pointed out earlier on, the Appellant who was confronted by this point, waived his right to file a rejoinder submission. One may be tempted to assume that he conceded to the point that the appeal was filed out of time. An appeal which is found to be time barred cannot be entertained, because it affects the jurisdiction of the Court to entertain the same. The peculiarity of the law of limitation was underscored by the Court of Appeal in **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mchemi, Civil Appeal No. 19 of 2016** (unreported), which cited with approval a decision of the High Court in **John Cornel vs A. Grevo (T) Limited, Civil Case No. 70 of 1998** (unreported), where it was held *inter alia* that:

"However unfortunate it may be for the plaintiff; the law of limitation of actions knows no sympathy or equity. It a merciless sword that cuts across and deep into all those every who get caught in its web."

From the records, the decision of the trial tribunal was handed down on 12/07/2021. The Appellant intended to appeal but found himself time barred. He sought, and was granted extension of time vide Misc. Land Application No. 67 of 2021 whose ruling was delivered on 23/05/2022. In its ruling, this Court directed the Appellant to file his appeal within 30 days from the date of the decision.

Section 4 of the Laws of Limitations Act, Cap. 89 [R.E. 2019) provides as follows:

> *"The period of limitation prescribed by this Act in relation to any proceeding shall, subject to the provisions of this Act hereinafter contained,* ***commence from the date on which the right of action for such proceeding accrues.***" (Emphasis added)

In the calculation of the days for limitation of an appeal period, following an application for extension of time, the Law of Limitation excludes the day when the ruling or order thereof was issued. Section 19(1) and (2) provide as follows:

> *"19.-(1) In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded.*
> *(2) In computing the period of limitation prescribed for an appeal,* ***an application for leave to appeal,*** *or an application for review of judgment,* ***the day on which the judgment complained of was delivered****, and the period of time requisite for obtaining a copy of the*

decree or order appealed from or sought to be reviewed, shall be excluded." (Emphasis added)

The application for extension of time to appeal was issued on 23/05/2022. The instant appeal was filed on 23/06/2022. 23/05/2022 when the decision was delivered is by law excluded. Counting from 24/05/2022 to 23/06/2022 when the appeal was filed, there is a lapse of exactly 30 days, taking into account that May 2022 had 31 days. Bearing in mind that the appeal ought to have been filed within 30 days, I do not agree with counsel for the Respondent that the Appeal is time barred. It was filed within the time prescribed by law. Thus, despite the silence of the Appellant on this issue, I answer the same in the negative.

Having so held, I now turn to consider the merits of the appeal. I will begin with the new ground raised by the Appellant's counsel in his written submission. According to Mr Maeda, going by the Appellant's submission in respect of the new ground is tantamount to departing from the pleadings which laid the foundation of the suit in the trial tribunal. This assertion has not been controverted by the Appellant. Nevertheless, while I agree with Mr Maeda that the pleadings before the trial tribunal did not revolve around the impugned issue, I do harbour a different point of view with regard to the new issue. I do ask myself: was it appropriate for the

learned counsel for the Appellant to raise the new ground in the written submissions.

This Court and the Court of Appeal have consistently insisted in numerous decisions that a new ground of appeal cannot be raised in the written submission, more so when it is factual. A party who seeks to raise a new ground of appeal has to seek and obtain leave of the court. The Court can be moved orally by a party (or his advocate) who intends to introduce an additional ground of appeal. On this, the Court of Appeal decision in **Hashi Energy (T) Limited vs Khamis Maganga, Civil Application No. 200/16 of 2020** (unreported), is instructive. It was stated:

> *"It is clear from the rule that a party wishing to add a ground of appeal or point to be decided upon has an avenue to do so under the provision of rule 113 (1) of the Rules. There is as such no requirement for stating the reason as to why an additional ground is preferred nor is there a condition as to when the application should be made. The provision has equally not illustrated that the applicant is obliged to move the Court by way of notice of motion as it has been done in the present application. Whilst we appreciate the caution taken by Mr. Kamara, by formally moving the Court, we would urge parties in the interest of justice and speedy trials, to opt for the most convenient alternative especially where there is no specific provision directing so,* ***by simply applying for such leave orally.*** *"*(Emphasis added).

Further, on whether or not a new ground can be raised in the written submissions, the Court of Appeal decision in the case of **Hadija Ally vs George Masunga Msingi, Civil Appeal No. 384 of 2019** (unreported), is instructive. It was held:

> *"...whereas parties were ordered to argue the appeal by way of written submissions on 11th May, 2017,* ***the complaint of the appellant was raised by way of her written submissions which were filed on 5th June, 2017****. In other words, the order of 11th May, 2017 to argue the appeal, cannot be extended to include arguing complaints which would come later on 5th June, 2017 by way of written submissions. In our view, the order to argue the appeal by way of written submissions, related only to the grounds of appeal that were on record as at the date of the order, that is 11th May, 2017.* ***In a nutshell, written submissions cannot be used as a forum for raising new complaints.****"* (Emphasis added)

Taking inspiration from the above authoritative decisions, I am of the view that it was wrong for the learned advocate for the Appellant to raise the new ground of appeal in his written submission. He was required to first seek leave of the Court before raising the new ground. Having ruled that the new ground of appeal was raised in contravention of the law, the recourse is to disregard the same, as I hereby desist from determining the new ground of appeal. Similarly, I will not deal with the original 1st and 2nd grounds of appeal because none of the parties submitted on them.

Counsel for the Appellant was rather naïve to omit them without the assurance that his new ground of appeal will be sanctioned.

On the 3rd and 4th grounds of appeal, whose substance relates to evaluation of evidence, I note that the tribunal decision is faulted by the Appellant for discounting the evidence of AW1, which it found to be a hearsay. On my part, I find nothing to fault in the trial tribunal's decision. According to the evidence on record, the Appellant herein, who testified as AW1, plainly testified that he did not participate in the clan meeting that deliberated and purportedly allowed his father to purchase the suit land from the Respondent's father. There is no doubt that such evidence is nothing but a hearsay. I say so as one would have expected the Appellant to bring evidence to corroborate his assertion, knowing that he was not part of the said clan meeting. I find no other witness or evidence corroborating his evidence that the suit land was sold to his father.

Other witnesses, including AW2, DW1, DW2, DW3 and DW4, who attended the clan meeting were unanimous that the suit land was pledged to the Appellant's father as security for the amount he paid on behalf of the Respondent's father and that the suit land would be redeemed upon repayment of that money by the Respondent's father. Placing the land on the Appellant's father as security for the sum he paid for the late Pascal

Hubert Sirikwa's debts, does not amount to transfer of ownership as the Appellant's counsel presupposes. The title over the suit land also cannot pass simply by long use of that land. In order for the title to pass from its original owner to the new owner, there ought to have been an agreement, oral or otherwise, in that regard.

There is also an insinuation that since the land was placed on the Appellant's father as security, the same was not redeemed from 1984 until 2011, when the Respondent's father trespassed in the same. Unfortunately, the Appellant did not adduce evidence suggesting that the amount pledged was paid or not. However, there is evidence from the Respondent and DW3 that the amount owed by the Appellant's father was paid to him way back in 1995 by DW3.

Even assuming that the amount owed was not repaid, the Appellant has another recourse, which is to sue the Respondent for the amount due. The course taken by the Appellant, claiming ownership of the suit land is unmaintainable because title over the suit land never passed to his father as he proposes. I therefore endorse the submission by counsel for the Respondent and the trial tribunal decision that the Appellant failed to prove ownership of the suit land. Ultimately, the 3rd and 4th grounds of appeal are devoid of merits.

Consequently, the appeal is devoid of merits. It stands dismissed in its entirety. The decision of the trial tribunal is hereby confirmed. Considering the relationship of the parties herein and for the sake of enhancing filial bonding, ordering costs may not suit the purpose of this matter. I therefore direct that each party bears their own costs before this Court and at the trial tribunal.

Y.B. Masara

JUDGE

29th September 2023.