

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB REGISTRY**

AT MOROGORO

LAND APPEAL NO. 5409 OF 2024

(Originating from Land Appeal No. 8 of 2020 in the District Land and Housing Tribunal for Morogoro, at Morogoro)

KASIM SELEMANI LUKWELE..... APPELLANT

VERSUS

ZAIDAN HALIFA MWINYISHEHE..... RESPONDENT

JUDGMENT

07/05/2024 & 29/05/2024

KINYAKA, J.:

On 30th December 2021, the appellant preferred an appeal before this Court that was registered as Land Appeal No. 41 of 2021 against the decision of the District Land and Housing Tribunal for Morogoro, hereinafter "the first appellate tribunal" which, vide Land Appeal No. 08 of 2020 overturned the decision of Tawa Ward Tribunal in Land case No. BRZ 8 of 2019 that had declared the appellant the lawful owner of the land in dispute.

In Land Appeal No. 08 of 2020, this Court upon being convinced that the honourable chairman of the first appellate tribunal had during the

b

composition of the tribunal's judgment, raised new issue regarding the adverse possession in relation to the land in dispute *suo moto* and without affording the parties the right to address on the same, nullified the judgment and decree of the first appellate tribunal and expunged the same from records. This Court further directed the respective case file to be remitted to the District Land and Housing Tribunal for Morogoro at Morogoro before the same Chairperson for composition of a fresh judgment, and after hearing the parties on the issue raised *suo moto*. [See the case of **Kasim Selemani Lukwele v. Zaidan Halifa Mwinyishehe (Land Appeal No. 41 of 2021) [2022] TZHC 15698 (30 November 2022) at TANZLII**].

It was in compliance with the above orders of this Court that the first appellate tribunal heard the parties on the issue, and on 15th February 2024 delivered its decision declaring the respondent the lawful owner of the land in dispute. The appellant being dissatisfied with the said decision, has presented before this Court four grounds of appeal as follows:

1. That, the tribunal erred in law and in facts for deciding that the respondent is the lawful owner of the disputed land basing on her weak evidence compared to that of the appellant;



2. That, the trial tribunal erred in law and fact by failure to evaluate and analyze properly evidence on records;
3. That, the trial tribunal erred in law and in facts for failure to take records to some of the evidence adduced by the respondent which support the appellant's evidence regarding her evidence; and
4. That, the trial tribunal erred in law and facts for totally ignore the appellants' evidence and only based on respondent's evidence on decided the matter.

On 7th May 2024 when the appeal was placed before me for hearing, the appellant appeared in person while, Ms. Kay Zumo, learned advocate, entered appearance for the respondent. The appeal was disposed through oral submissions.

Submitting on the first ground, the appellant attacked the respondent's evidence for being weak as neither her nor her witnesses testified before the Ward Tribunal that she owned the land in dispute for 40 years. He said, the land in dispute was cultivated by her father when he was young and when he became old, the same was handed over to him where he cultivated on the same until when his father died. He contended that the respondent has her farm around the area but she decided to invade his farm.



In respect of the second ground, the appellant told the Court that he was the one who won at the Ward Tribunal but the District Land and Housing Tribunal gave the respondent the right to use the farms. He contended that the testimony of Athumani Zengwa or Kiserengo who was the uncle of the respondent testified that both the appellant and the respondent had farms in Dimila.

As for the third ground, the appellant averred that all evidence regarding the boundaries of the disputed land that he bordered Keyanda at the northern, eastern and western sides and a road at the southern part, supported his case.

In relation to the fourth ground, he insisted that his evidence was weightier than that of the respondent. He refuted the respondent's claim that she owned the land the past 40 years as according to him, the respondent was a toddler at that time. Relying on the submission above, the appellant prayed for the Court to reverse the decision of the first appellant tribunal and allow his appeal.

Responding to the appellant's complaint on the first ground, Ms. Zumo submitted that the issue as to ownership of 40 years raised by the District Land and Housing Tribunal was determined by the High Court before Hon.

to

Chaba, J. in Land Appeal No. 41 of 2021 where the High Court ordered the parties to return to the first appellate Tribunal in order for the Tribunal to hear the parties on the issue and make a decision on the same. She said that before the Tribunal, parties were heard on the issue as to the respondent's ownership of the disputed land for 40 years.

Fortified by the holding in the case of **Hemedi Saidi v. Mohamed Mbilu (1984) TLR 113** in relation to the standard of proof in civil cases, the learned counsel for the respondent submitted further that the evidence of respondent was not weak but strong which led to the Tribunal's finding that the disputed land was owned by her.

Opposing the second ground, Ms. Zumo informed the Court that the evidence adduced before the first appellate Tribunal considered the evidence adduced at the Ward Tribunal. She said, the appellant's witnesses before the Ward Tribunal failed to inform the Ward Tribunal as to why the appellant did not sue on invasion of his house until 2019 while the late Khalfani Mwinshehe died in 2013. Referring the Court to the case of **Jeremia Shemweta v. R. (1985) TLR 228** where it was held that where doubts are created in evidence the same should be resolved in favour of the opposite party, she averred that it was the contradictions in



the evidence of the appellant that led the first appellate tribunal to adjudicate the matter in favour of the respondent.

On the third ground, Ms. Zumo commenced her submission by reiterating a settled principle as to the sanctity of court records. He referred the Court to the case of **Alex Ndendya v. R., Criminal Appeal No. 207 of 2018** which was cited in the case of **Emmanuel Denis Mosha & Others v. R., Criminal Appeal No. 188 of 2018**, where on page 8, the Court of Appeal held that, it is a settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the record. Based on the authority, Advocate Zumo contended that the third ground has no merit and prayed for the same to be dismissed.

On the fourth ground, she resisted the appellant's submission that the appellant's evidence was ignored by the first appellate tribunal. According to her, the Tribunal decided the matter by considering the evidence adduced before the Ward Tribunal.

However, she informed the Court that after nullification of the first judgement and decree of the District Land and Housing Tribunal by the

High Court, the High Court ordered for composition of a new judgement and hearing of the issue raised by the Tribunal *suo moto*. She said, in its new judgment, the first appellate Tribunal made a decision based only on the issue raised by it *suo moto* and did not decide on matters that they had already submitted earlier. In her views, the decision of the High Court was not complied under the circumstance. In that regard, she prayed for the matter to be returned to the District Land and Housing Tribunal for Morogoro for composition of the proper judgement that will encompass all grounds of appeal including the one raised by the Court *suo moto*.

In his brief rejoinder, the appellant insisted that the respondent did not testify that she owned the disputed land for 40 years before the Ward Tribunal. He pressed that he was the one who occupied the disputed land for over 40 years.

As to the argument of the respondent's counsel that the case should be returned to the District Tribunal, the appellant considered the same to be unfair. He told the Court that it will not be fair for him to be returned to the District Tribunal as he is old and he has been incurring costs on the various cases. He therefore prayed the Court to consider his age and make a decision on merit.

↓

I have given a due consideration of the submissions from the rivalry parties in the present appeal. I find the crucial question for determination before the Court to be whether the present appeal is meritorious.

In disposing the appeal, I have opted to begin with the legal concern raised by Ms. Zumo, that the orders of this Court dated 30th November 2022 were not fully complied with by the first appellate tribunal.

As such, I had to read the judgment of this Court in Land Appeal No. 41 of 2021 referred to by Ms. Zumo. Admittedly on page 14 of the decision, this Court sitting as the second appellate court made the following observations and findings:-

"In the present appeal, as stated earlier on, there is no dispute that the appeal was decided relying on the new issue of adverse possession by the DLHT and the record reveals clearly that, the parties were not accorded with the rights to be heard, which renders the decision of the DHLT a nullity. Consequently, much as it requires, I nullify the judgment and decree in Land Appeal No. 8 of 2020, and the same are expunged from the records. I shall however, not labour on the remaining two grounds of appeal for obvious reason that, by so doing, that will be an academic exercise.

As to the way forward, I order and direct that, the record or case file be remitted to the DLHT for Morogoro, at Morogoro before the same Chairperson

for composition of a fresh judgment based on the framed and agreed issues, and after hearing the parties on the Issue raised suo motu. "[Emphasis Added]

On taking a close glance of the above holding, it is undisputed that the Court's directives were for the Tribunal to hear and determine the issue of adverse possession. Thus, in addition to the issue raised by it *suo moto*, the tribunal was bound to determine the other grounds of appeal raised by the respondent before the Tribunal against the decision of the Ward Tribunal as reproduced below:-

1. *Baraza la kata lilikosea (erred in law and fact) kwa kumpa ushindi mjibu rufaa bila kufanya tathmini ya Ushahidi;*
2. *Baraza la kata lilikosea (erred in law and fact) kwa kushindwa kujumuisha Ushahidi uliowasilishwa ambao ulikuwa muhimu katika kutoa haki;*
3. *Baraza la kata lilikosea (erred in law and fact) kujumuisha Ushahidi ambao haukutolewa katika baraza.*

As rightly submitted by Ms. Zumo, the first appellate tribunal didn't test the above grounds as after summarizing the submission from both parties on the issue it raised *suo moto*, the Tribunal allowed the appeal on the ground that the respondent was favoured by the doctrine of adverse



possession as she had been in the peaceful possession of the land in dispute without interference for a long period of time.

It was expected of the Tribunal to determine all grounds of appeal before it together with the one raised *suo moto*. In its decision dismissing the appeal based on the issue of adverse possession, the tribunal held in the last two paragraphs of the judgement that:-

"kwa kuwa mrufani alishtakiwa Baraza la Kata, ana haki ya kanuni ya umiliki kinzani (adverse possession) kuitumia kama kinga dhidi ya madai ya ardhi hiyo yaliyotolewa na mjibu rufaa katika baraza la kata. Hii ni kwa mujibu wa shauri kati ya The Hon. Attorney General Vs Mwahezi Mohammed (msimamizi wa mirathi ya marehemu Dolly Maria Eustace) na wenzake watatu, shauri la Rufaa ya Madai (Civil Appeal) namba 391 la mwaka 2019. Katika shauri hilo, mahakama ya Rufani ilisema, nanukuu;

"it has to be understood that the principle of adverse possession cannot be used as a weapon but as a shield when one is sued for illegal possession of land..."

Kwa msingi huo, baraza linatoa uamuzi kwamba mrufani ni mmiliki halali wa ardhi bishaniwa. Rufaa inakubaliwa kwa gharama.



Sgd

E.Mogasa

Mwenyekiti

15.02.2024"

In view of the above observation, I entertain no doubt that the honourable chairperson misapprehended the orders of this Court by his omission to determine the grounds of appeal fronted by the respondent herein. Even if I was to assume that the honourable chairperson deliberately chose to dispose of the appeal basing on the point of adverse possession only, still the same is misconceived as in my understanding of the law, an appeal can be disposed on a sole ground without testing the other only when the same is the point of law and not on a matter of fact, coupled with a clear indication in the decision of the inclination. The judgement of the Tribunal does not indicate the reasons for disposition of the only ground of appeal raised *suo moto*. In the absence of the foregoing justification, it is the duty of the appellate court to determine all grounds of appeal presented before it for determination.

In **Malmo Montage Konsult AB Tanzania Branch v. Magret Gama, Civil Appeal No. 86 of 2001**, the Court of Appeal on page 7 held:-



"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal."

Due to his old age the costs incurred by him so far, the appellant prayed for the indulgence of this Court to determine the appeal on merit by determining all the grounds of appeal despite the Tribunal's failure to do so. Much as the concerns are valid, but this Court, being the second appellate Court cannot step into the shoes of the first appellate Tribunal to evaluate and analyze the evidence adduced at the Ward Tribunal which were not determined by the first appellate tribunal.

The Court of Appeal discussed the much similar position in the case of **Revocatus Mugisha v. The Republic, Criminal Appeal No. 200 of 2020**, (unreported) where it underlined;

"Having considered the contending submissions by the learned counsel, it is not disputed that the High Court Judge determined the appellant's appeal on the basis of the third ground of appeal only as she was convinced that it was sufficient to dispose of the appeal. It is our considered view that although the appellate court is not obliged to consider all grounds of appeal, it is supposed to resolve



ail complaints raised in the appeal, separately or jointly as it will deem just."

On the way forward, the Court went on at page 8 and stated:-

"In the event, we allow the appeal. As to the way forward, in the circumstances of this case, we decline the invitation by Mr. Vitalis to step into the shoes of the High Court to decide the appellant's grounds of appeal. We thus remit the record to the High Court for the appellant's appeal to be decided as a whole basing on the grounds raised and the submissions filed by both parties for and against the appeal. The appeal shall be heard by a different judge according to the law."

Influenced by the holding above, I have landed into a firm conclusion that the Tribunal erred by not only its omission to determine all grounds of appeal in its judgment in Land Appeal No. 08 of 2021 dated 15th February 2024 but also its noncompliance with the orders of this Court dated 30th November 2023 as regards to the undetermined grounds of appeal. Since the foregoing legal concern raised by the learned counsel for the respondent suffice to dispose of the entire appeal, I find no need of tackling the grounds of appeal as presented by the appellant in his memorandum of appeal dated 14th March 2024.

That said, I allow the present appeal to the extent demonstrated above.

Given the circumstance, I have found myself constrained to invoke my

revisionary powers provided under section 43(1) (b) (b) of the Land Disputes Courts Act. Cap. 216 R.E. 2019, I order the file to be remitted back to the District Land and Housing Tribunal for Morogoro before the same chairperson for composition of a fresh judgment encompassing the grounds of appeal as preferred by the respondent in Land Appeal No. 08 of 2020 together with the ground raised by the Tribunal suo moto.

Basing on the fact that the disposition of this appeal was due to the mistake occasioned by the first appellate tribunal, I make no orders as to costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 29th of May 2024.



H. A. Kinyaka

H. A. KINYAKA

JUDGE

29/05/2024