

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO.92 OF 2021**

(Arising from the District Land and Housing Tribunal for Temeke at
Temeke in Land Appeal No.42 of 2020 Originating from the Ward
Tribunal for Kiburugwa in Land Case TMK/KBR/BRZ of 2020)

SHAWEJI ATHUMANI MACHELA APPELLANT

VERSUS

SADA OMARI SULE RESPONDENT

JUDGMENT

Date of Last order: 29.10.2021

Date of Judgment: 04.11.2021

A.Z.MGEYEKWA, J

This is the second appeal. At the centre of controversy between the parties to this appeal is a suit landed property whereas each party claims ownership of suited landed property. The decision from which this appeal stems is the Judgment of the Ward Tribunal for Kiburugwa. The material background facts to the dispute are not difficult to comprehend. They go

thus: the appellant lodged a suit against the respondent claiming that he is the lawful owner of the disputed landed property. The appellant stated that he used his pension funds to buy the suit landed property and the respondent witnessed the sale agreement. The respondent on her side claimed that she is the one who bought the suit landed property. To substantiate her testimony she tendered a sale agreement.

The trial tribunal decided the matter in favour of the respondent. Aggrieved, the appellant lodged an appeal at the District Land and Housing Tribunal for Temeke in Land Appeal No. 42 of 2020. He claimed that the trial tribunal faulted itself to decide the matter in favour of the respondent while her claims are unfounded. The appellate tribunal upheld the decision of the trial tribunal.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged an appeal before this court on two grounds of complaint seeking to assail the decision of the District Land and Housing Tribunal. The grounds are as follows:-

- 1. That the Honourable appellate tribunal erred in law and fact to determine the case by relying on the document which the appellant*

was a witness without regarding that the appellant and the respondent was husband and wife at the time they bought the said house.

- 2. That generally the Honourable trial tribunal failed to analyse, evaluate and examine the evidence adduced by the parties as a result he delivered an unfair decision against the appellant.*

When the matter was called for hearing on 29th October, 2021, the appellant and the respondent appeared in person unrepresented.

The appellant started his onslaught by submitting general the two grounds of appeal. He complained that he was dissatisfied by the decision of both tribunal's decisions since he is the one who bought the suit landed property. The appellant claimed that the respondent's testimony that she bought the suit landed property is untrue since she did not say where she obtained the money which enabled her to buy the said house. The appellant also complained that the respondent has a child with him but he never saw the said child. He added that the evidence on record was not well evaluated, he claimed that the respondent claimed that she received her pension but she did not prove she has an account.

In reply, the respondent was brief and straight to the point, she claimed that the appellant has raised new grounds which was not raised at the

appellate tribunal or the trial tribunal. She denied that she has a child with the appellant. The issue of accounts and pension were not raised at the tribunals. She stated that the tribunal reached a fair decision after analysing the evidence on record.

In his short rejoinder, the appellant has nothing new to re-join. He insisted that he bought the suit landed and has all documents to prove his ownership.

After a careful perusal of the record of the case and the final submissions submitted by both parties. In determining the appeal, the central issue is *whether the appellant had sufficient advanced reasons to warrant this court to allow the appeal.*

I will combine the first and second ground because they are interviewed, both grounds are relate to evidence on record. The appellant is complaining that *the Honourable appellate tribunal erred in law and fact to determine the case by relying on the document which the appellant was a witness without regarding that the appellant and the respondent was husband and wife at the time they bought the said house.*

The record reveals that the matter before the trial tribunal was in regard to the landed property the issue of marriage was not part of the

appellant's complaints. Therefore there is no evidence that the appellant and the respondent were husband and wife. As rightly pointed out by the respondent this is a new grounds such as the issue of child and the issue of pension which was not raised at the appellate tribunal therefore the same cannot be raised at the second appellate court.

I respectively agree with the respondent that the appellant has raised new grounds in his submission. Generally it is not proper to raise a ground of appeal in a higher court based on facts that were not canvassed in the lower courts. Ordinarily, in order for the Court to be clothed with its appellate powers, the matter in dispute should first go through lower courts or tribunals. The Court of Appeal of Tanzania in the case of **Haji Seif v Republic**, Criminal Appeal No.66 of 2007 held that:-

*“ Since in our case that was not done, this Court lacks jurisdiction to entertain that ground of appeal. We, therefore, do not find it proper to entertain that **new ground of appeal** which was raised for the first time before this court.” [Emphasis added].*

Applying the above authority in the instant appeal it is vivid that the issues of having a child with the appellant and pension are new grounds that was not raised at the appellate tribunal. Therefore, I am not in a

position to entertain the said new grounds which was raised for the first time before this court.

With regard to the document, it was the respondent who tendered a sale agreement at the trial tribunal. The sale agreement was between the respondent and the Mtupe Salehe and Sada Omary Sule. The respondent had two witnesses who witnessed the signing of the Sale Agreement on 29th July, 2008, the appellant was among the respondent's witnesses. The documentary evidence tendered by the appellant was his pension document, he was paid Tshs. 2,258,003.44 whereas the same does not prove that he bought a house. All documents tendered by the appellant did not prove that he bought a house rather the said documents proves that the appellant was paid his pension. Would had it been that he had a Sale Agreement to prove his allegations then the same would have supported his claims. The law is settled that who alleges must prove in the case of **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, it was stated that:-

“ He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. ”

In the case at hand, the appellant did not prove his claims that he bought the house in exclusion of the respondent. Therefore, there is no any reason for this court to overrule the decision of the tribunals since the respondent's evidence was heavier compared to the appellant's evidence.

In consequence, I find that there is no merit in the two grounds of grievance. That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with both tribunals findings. Therefore, I proceed to dismiss the appeal without costs. Order accordingly.

Dated at Dar es Salaam this date 04th November, 2021.



A.Z.MGEYEKWA

JUDGE

04.11.2021

Judgment delivered on 04th November, 2021 in the presence of both parties.



A.Z.MGEYEKWA

JUDGE

04.11.2021

Right of Appeal fully explained.