

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISCELLANEOUS LAND CASE APPEAL NO 138 OF 2018**

(Arising from the District Land and Housing Tribunal of Kinondoni at Mwananyamala in  
Land Case Appeal No. 28 of 2018; Original Application No. 14 of 2018 of Kwembe Ward Tribunal)

**MONICA SARAH JOHN .....APPLICANT**

**VERSUS**

**KASSIMU RAJABU AMOUR.....RESPONDENT**

Date of Last Order: 18.07.2019  
Date of Judgment 27.09.2019

**JUDGMENT**

**V.L. MAKANI, J**

The appellant in this appeal is MONICA SARAH JOHN. She is appealing against the decision of District Land and Housing Tribunal in Land Appeal No. 28 of 2018 (Hon. M. Lung'wecha, Chairman). The matter originated from Kwembe Ward Tribunal as Application No.14 of 2018.

Aggrieved with the decision of the District Tribunal, the appellant filed this appeal with the following grounds:

- 1. That, the trial tribunal erred in law and fact by entering judgment in favour of the respondent by relying on mere words without considering the sale Agreement tendered by the Applicant.*
- 2. That, the Ward tribunal erred in law and facts by not joining the vendor as part of the suit as requested by Applicant.*

- 3. That, the Appellate tribunal erred in Law and fact by failing to weigh evidence by the parties and test the same with the finding of the trial tribunal.*
- 4. That, the trial tribunal erred in Law and fact by entering Judgment in favour of the Respondent without assessing the strong evidence adduced by the Applicant and her witnesses concerning the disputed land.*

The appellant in this appeal appeared in person, while the respondent was represented by Mr. Kitua, learned Advocate. The Appeal proceeded by way of written submissions.

The appellant argued the first, third and fourth grounds together. She was of the view these grounds were centered on one issue of evidence. She insisted that, the Trial Tribunal erred for not considering the Sale Agreement tendered by her as an exhibit. She submitted that, the Trial Tribunal failed to weigh the strong evidence by the appellant and her witnesses in respect of the disputed land as the respondent encroached into her land and exceeded the boundaries demarcated.

In support of the above submission, the appellant sought support from section 119 of the Evidence Act, CAP 16 RE 2002 which stipulates that where there is a question of ownership of anything, the burden of proving that the other part is not the owner, lies on the party who asserts this fact. The appellant cited the case of **Ally Abdallah Rajabu vs. Saada Abdallah**

**Rajabu (1994) TLR 132** and **R vs. Syssex Justice Exparte McCarty (1924) 1 Kb 256**. The appellant also stated that a person whose evidence is heavier than that of the other is the one who stands to win. She then referred to the case of **Hemed Said vs. Mohamed Mbilu (1984) TLR 113**.

On the second ground of appeal, the appellant submitted that the Ward Tribunal, erred in law and facts by not joining the vendor as requested by the appellant (then Applicant). She submitted that the Vendor was the one who was familiar with the disputed land. She contended that, such non joinder was detrimental. The appellant thus prayed to be declared the lawful owner of the disputed land.

Resisting the appeal, Mr. Kitua Advocate for the Respondent, drew the attention of this Court that ground one, three and four were new grounds of appeal which were not grounds of appeal at the District Tribunal. He went on to explain that, the District Tribunal on appeal was invited to decide on two grounds only, that is, the pecuniary jurisdiction of the Ward Tribunal and the issue that the Vendor was not joined during the trial. Mr. Kitua invited the court to look at the case of **Elisa Moses Msaki Vs Yesaya Ngateu Matee 1990 TLR 90 (CA)** where it was stated that, the Court of Appeal will only look on the matters raised in the lower Court, not on the new matters. He further put emphasis on the above position by citing the case of **Galus Kitaya Vs Republic, Criminal Appeal No. 196 of 2015** (unreported), where, the same position was taken in that new grounds on the appeal stage

was held to be improper. He further argued that, even if the grounds were to be considered they deserved nothing because they were baseless. He submitted that, the respondent had the title first because he bought the piece of land before appellant on 02/11/2011, whereas Appellant bought on 04/02/2012 and therefore the dimensions of the appellant's property could not be extended to include that of the respondent.

As to the second ground, Mr. Kitua submitted that, appellant never requested to join seller in the proceedings. He said opting to sue without joining the seller was to the Appellant's detriment as was stated in the case of **Bi. Hawa Mohammed vs. Ally Seif (1983) TLR 32**. He concluded by referring to Order I Rule 9 of the Civil Procedure Code, CAP 33 RE 2002 (the **CPC**) which provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties. He emphasized by referring to the case of **Mayasa Bushiri Kalewanga Vs Joseph Mahawi, Land Appeal No. 32 of 2018 (HC-Land Division, DSM)**. Thus prayed for dismissal of this appeal with costs. Arguing in her rejoinder, Appellant insisted that, non-joinder of the vendor was fatal. She added that despite her request to the ward tribunal for the vendor to be joined, still the ward tribunal was reluctant to join the vendor. Same he added, the principle of natural justice of equal hearing was not accorded to her.

Having carefully going through the written submission of parties and the records of the lower tribunals, it is indeed apparent that the first, third and fourth grounds of appeal are new grounds of appeal which were never raised

nor decided at the District Tribunal which was the first appellate Tribunal. In the case of: **Kipara Hamis Misagaa @ Bigi vs. Republic, Criminal Appeal No. 441 of 2007 [2018] TZCA 88** it was stated:

*"It is now settled that, as a matter of general principle, this court will only look in to the matters which came up in the lower Court and were decide; not on matters which were not raised or decided by neither the trial court nor the higher Court on Appeal".*

In view of the above position of the law I am in agreement with Mr. Kitua that the first, third and fourth grounds being issues not raised and considered in the District Tribunal this court cannot consider them either. The issues that were raised and considered at the District Tribunal were the pecuniary jurisdiction of the Ward Tribunal and the appellant's right to join the vendor at the Ward Tribunal.

Both Appellant and Respondent presented their sale agreements in respect of the disputed land at the Trial Tribunal. Going through the records, the appellant bought her piece of land for Tshs. 3,500,000/= and respondent bought his piece of land at Tshs. 4,600,000/= (20x32) for both the Appellant and Respondent. However, the dispute is only on boundaries between the appellant and respondent. It is not on ownership of the land. The issue of boundaries cannot be measured by money hence by common sense and logical reasoning one cannot claim pecuniary jurisdiction. In any case, as correctly stated by the Chairman of the District Tribunal the appellant was the one who instituted the application at the Ward Tribunal and so she was

supposed to know the proper forum to file her claims rather than coming to court to challenge her own filing. Nevertheless, as aforesaid, the Ward Tribunal had jurisdiction to entertain the matter.

Regarding the second issue, there is nowhere on the record of the Trial Tribunal, that the appellant prayed had prayed to join the vendor. It was the duty of the appellant seek for leave to join the vendor if she so wished. The Trial Tribunal was under no duty to join the vendor *suo mottu*. The appellant who was the applicant at the Trial Tribunal was the one who knew the person to sue and no other person and the Tribunals therefore cannot take the blame.

In the upshot, I find the appeal without merits, and it is consequently dismissed with costs.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**27/09/2019**