IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLENEOUS LAND CASE APPEAL NO. 26 OF 2019

(From Appeal Judgment of District Land and Housing Tribunal for Kilombero District at Ulanga, in Land Case Appeal No.154 of 20117, originating from the Ward Tribunal of Mchombe Ward in Application No.49 of 2016)

ABDALLAH MAKELEKETA.....APPELLANT

VERSUS

ZUHURA IDDI FERUZI.....RESPONDENT

JUDGMENT

OPIYO J.

Mr. Abdallah Makeleketa had claimed at the Mchombe Ward Tribunal when this case emanated, that he was allocated the suit land, measured 3 acres, located at Mkusi Area, in Mchome Ward, Kilombero District and Morogoro Region. The allocation was done by Mchombe Village Government. The respondent, Zuhura Idd Feruzi on her part stated that, she owned 8 acres including the 3 acres which the appellant claims to be his. The respondent insisted that, she acquired the said land together with his late husband by clearing a bush which belonged to no one by that time. The respondent has argued from the Ward tribunal that, the appellant was just a tenant on the suit land, being given to rent the same on 2015 for his agricultural activities.

At Mchome Ward tribunal (trial tribunal) the appellant won the case and was declared the lawful owner of the suit land. Zuhura Idd Feruzi took the matter

further to the District Land and Housing tribunal for Kilombero, the 1st appellate tribunal. She was successful this time after managing to tender her exhibit {tenancy agreement, (exhibit A1)} which she claimed the trial tribunal refused to admit the same when she tendered it during trial. Dissatisfied with how the 1st appeal was entertained, the appellant brought the instant appeal based of five grounds, in all of them he faulted the 1st appellate tribunal for misdirecting itself on facts and law when it agreed in its findings that, the appellant was just a tenant on the suit land. His grounds of appeal are as follows:-

1. The District land and Housing tribunal erred in law and in facts in declaring the respondent to be the lawful owner of the land in question for allegations that the appellant was renting the suit land without consideration that the appellant was duly allocated the said land in 2011 by Mchombe Village Government.

2. The District land and Housing tribunal erred in law and facts in being convinced that the same land which was allocated to the Appellant is the same which the appellant rented from the respondent.

3. The District land and Housing tribunal erred in law and facts in concluding that, the land in dispute is the one which was under renting agreement without scrutinising that, in the said renting agreement the respondent is a witness.

4. The District land and Housing tribunal erred in law and facts in declaring the respondent the lawful owner of the suit land and setting aside the Trial Ward's decision for allegations that the tribunal created doubt as the land was rented without considering the village

government receipts submitted by the appellant proving that he is the owner of the land.

When hearing commenced, Advocate Daniel Lisanga appeared for the appellant while Advocate Michael M. Chami, represented the respondent. Hearing was by written submissions.

Advocate Daniel Lisanga has insisted in his submissions in chief that, the appellant was duly allocated the suit land by the Mchome Village Council in the year 2011 for farming purposes; the allocation has never been revoked by the said authority or any other superior organ to date. This fact was never disputed before the trial tribunal and the respondent as per the record had failed completely to prove that she owned the suit land. She only relied on mere statements which were weak. He argued that, the 1st appellate tribunal unreasonably departed from the findings of the trial tribunal and overturned its decision. He cited the case of **Abdul Karim Haji versus Raymond Nchimbi Alois & Another (2006) TLR 419 CAT and Monyo Africa Exploration Ltd versus Faiz Idd Faiz & Others, Commercial Case No. 108 of 2012, High Court Commercial Div., at DSM** for the authority that, it is an elementary principle that he who alleges is the one responsible to prove his allegations/claim to the satisfaction of the court.

The appellant's counsel argued further on the 2nd, 3rd and 4th grounds of appeal that, it was wrong on part of the 1st appellate tribunal to treat the land which the appellant rented from the respondent to be the same as that in dispute while they are two different pieces of land. He contended that, it is on this premise; the respondent managed to conquer the 1st appellate

tribunal and successfully overturned the decision of the trial tribunal regardless of the fact that the appellant did tender receipts from the Village Council proving that he was allocated the said land. The appellant's counsel contended that, the 1st appellate tribunal wrongly interfered with the findings of the trial tribunal contrary to the decision given in **Materu Leison & Another versus R. Sospeter (1988) TLR, 102** where it was held that:-

> *"An appellate Court may in rare circumstances interfere with the Trial tribunal findings of facts. It may do so in instances where the trial court had omitted to consider or had misconstrued some material evidence or had acted on a wrong or in its approach to evaluating evidence."*

In reply, Mr. Michael Chami for the respondent has argued that, the 1st appellate tribunal acted according to section 34(1)(b) of the Land Disputes Court Act, Cap 216, R.E 2019 which allows for additional evidence to be taken on appeal, hence the lease agreement from the respondent was admitted by the 1st appellate tribunal. He argued that, according to the records, the respondent's witnesses were not allowed to testify at the trial tribunal therefore they were allowed on the appeal stage. It was further contended by the respondent's counsel that, where there is a misdirection and non-direction on the evidence or the lower court has misapprehended the substance, the nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings on facts as decided in **Deemay Daat and 2 Others versus Republic, Court of Appeal of Tanzania at Arusha, TLR 2005, at page 133.**

On the 2nd, 3rd, and 4th grounds, the submissions of Mr. Michael was that, it is true that the parties to the lease agreement are different to those in the case at hand, but looking at the wording it is shown that Zuhura Juma Kisogole leased 3 acres on behalf of respondent's family to the appellant. The leased land is at Mkusi so as the suit land. Therefore, it is the same land. The appellant admitted at the 1st appellate tribunal that he had a lease agreement between him and the respondent family and above all he failed to differentiate the two lands, hence the 1st appellate tribunal decided against him.

After these rivalry arguments, I think the first crucial issue is whether or not in the circumstances of this case, the District Land and Housing Tribunal for Kilombero District being the appellate court ought to have allowed new or additional evidence to be presented while hearing the appeal before it.

It was the submissions of Mr. Michael, that the 1st appellate court was right to take additional evidence as it is allowed under section 34(1)(B) of the Land Courts Disputes Act, Cap 216, R.E 2019. For easy reference I will reproduce the above section as follows:-

> 34.-*(I) "The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors, and shall-*
>
> *(b) receive such additional evidence if any"*

Based on this provision, we can agree with what, Mr. Michael has argued on behalf of his client (the respondent). However, I would like to read the above provision together with Order XXXIX Rule 27, of the Civil Procedure Code,

Cap 33 R.E 2019, which provide for the power of the Court to receive additional evidence in a broad and detailed way that:-

> *(1) "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the court, but if ;-*
>
> *(a) The court from where decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(b) the court requires any document to be produced or any witness to be examined to enabled it to pronounce judgment, or for any other substantial cause the court may allow such evidence or document to be produced or the witness to be examined"*
>
> *(2) wherever the court allows evidence or document to be produced in terms of sub-rule (1) the court shall record the reason for the admission"*

From the spirit of Order XXXIX Rule 27, above, it is obvious that, it is not in the discretion of the court to take new or additional evidence from the parties at appeal stage, like what, section 34 (1) (b) of the Land Disputes Courts Act, Cap 216 R.E 2016 insinuates. There are circumstances which will warrant the court to do so. In my opinion, until such conditions are met, before the tribunal, during appeal trial, it is unsafe to invoke the powers given under section 34 (1) (b) of the Land Disputes Courts Act (supra). Hon. Mmilla JA (as he then was), in

the case of **Bhoke Kitang'ita versus Makuru Mahemba, Civil Appeal No. 222 of 2017, Court of Appeal of Tanzania at Mwanza (unreported)** had this to say in interpreting the application of section 34(1) of the Land Disputes Courts Act:-

> *"Surely, the above quoted provision permits the taking of additional evidence as argued by the appellant's advocate. No doubt, the law has made this allowance for very good reasons. Basically, additional evidence may be admitted where, on examining the evidence on record as it stands, some inherent lacuna or defect may become apparent, thus necessitating the filling of that lacuna."*

Also another best justification of taking additional evidence at appeal stages is seen in the case of **S.T. Paryan v Chitram And Others (1963) EA 462** where the conditions for receiving additional evidence in appeal were clearly stated as follows:-

> *"To justify the reception of fresh evidence or a new trial, three conditions must be full filled, first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given would probably have an important influence on the result of a case although it need not be decisive; third; the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible...."*

In the instant appeal, as it was before the 1st appellate tribunal, the above set of conditions justifying the admission of new evidence were not met. It is on record that, the respondent was asked by the Ward Tribunal of Mchombe, during the trial if she had any lease agreement and she replied "*NO*", (see page 2 of the trial tribunals' proceedings). It is strange when the same person at the appeal stage appeared to claim that she produced the lease agreement between her and the appellant over the suit land but, the trial tribunal refused to admit it. Therefore, it was wrong for the District Land and Housing Tribunal for Kilombero District being the appellate Court to admit new or additional evidence while hearing the appeal before it without requisite condition being met. I therefore expunge the admitted exhibit from records, for its admission being irregular.

After expunging the new evidence admitted at the appeal level, what follows is determination of other grounds of the appeal. the grounds are centred in challenging appellate tribunal's belief on the fact that the land was rented irrespective of the appellant having the various receipts issued by the village Government indicating that he was allocated the land in question. He argued that his allocation was not challenged by the respondent at trial tribunal as the respondent failed to prove her ownership apart from her mere statements. He disputed the rented land being the same with the one under dispute.

Upon meticulously going through the records of the lower courts, I am of the settled view that, even in absence of the lease agreement that has been expunged for being irregularly admitted, still from the records from the trial Ward Tribunal of Mchome Ward, the respondent is the one whose evidence

was heavier. The appellant was recorded to have contended that, he was allocated the land that was abandoned and even denied knowing the respondent at trial. But, surprisingly in appeal he admitted to have leased the farm from respondent at some point, although he argued that, it is a different farm from the one in dispute. He did not in any way prove leasing a different farm from the one under dispute, justifying insinuation that, it is the same farm under dispute. What he managed to leave the court with is putting his credibility to great contempt by being a man of two words for the same thing. How could one he denied knowing during trial turned out to be the one who had leased him another piece of land during appeal. Intimating existence of another piece of land leased to him is a mere afterthought worth disrespecting by this court, in my view.

More or so, he did not produce any document proving his ownership. The receipts he tendered during trial are mere land rent receipt in which he chose to take in his name rather than land allocation documents as he claimed in his submission. Land rent receipts alone does not prove ownership of a piece of land. For these reasons, his evidence lagged behind respondent's evidence in weight embedded.

Consequently, the entire appeal is bound to fail for lack of merits. It is therefore, dismissed with no order as to costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

M. P. OPIYO,
JUDGE
15/12/2020