IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 66 OF 2018

(Arising from the Judgment of the District Land and Housing Tribunal for Kinondoni in Land Appeal No. 95 of 2016)

HAWA HAMIS MAMBA.....APPELLANT

VERSUS

HAJI RAMADHANI.....RESPONDENT

JUDGMENT

22/03/2021 & 20/05/2021

I. MAIGE, J

This is the second time the appellant is attempting to fault the decision of the ward tribunal for Kunduchi (the trial tribunal). His first attempt at the District Land and Housing tribunal for Kinondoni ("the first appellate tribunal"), proved futile. The appeal was dismissed and the decision of the trial tribunal upheld.

It is useful to mention that while in the first appeal the decision of the trial tribunal was questioned for want of jurisdiction, in this second appeal, the appellant has added the following two grounds:-

(i) That the appeal tribunal erred in law and in fact for dismissing the appeal while the trial tribunal had not properly constituted.

(ii) That the tribunal erred in law and in fact for hold the respondent is a lawful owner of the land in dispute for non-joining a seller of the property.

In the conduct of this appeal, the appellant enjoyed the service of Nestory Adam Mkoba, learned advocate and the respondent Mr. Shalom Samweli Msakyi also learned advocate. By the direction of the Court, the appeal was argued by way of written submissions.

Submitting on the first ground, it was Mr. Mkoba's contention that, as the value of the suit property was above TZS 3,000,000/=, the trial tribunal was, in accordance with the provision of section 15 of the Land Disputes Courts Act, R.E., 2019 ("the LDCA") without jurisdiction. He thus urged the Court to nullify the judgments and proceedings of both the tribunals.

On the second ground, it was the counsel's submissions that for the reason of the number of women being less than two in the composition of the trial tribunal, the same was not properly constituted in terms of section 11 of The LDCA which provides as follows:-

> *"Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a ward Committee as provided for under section 4 of the Ward Tribunals Act, 1985."*

Relying on the authority in **Mernad Nelson Mwalyambi, Miscellaneous Land Appeal 6 of 2019 HC OF Mbeya, (**Unreported**),** the counsel advised the Court to nullify the judgments and proceedings of both the tribunals.

Yet on the issue of composition, it is the submissions for the appellant that, the judgment and proceedings of the **first appellate tribunal** were fatally defective for not observing the rule as to participation of assessors set out in the provision of regulation 19(2) of the **Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003.**

The complaint in the last ground of appeal was such that in not joining the vendor as a party to the proceedings, the judgment and proceeding of the trial tribunal were null and void. The attention of the Court was drawn to the decision in **Juma B. Kadala vs Laurent Mkandae (1983) TLR** where it was held that :- *"Non-joinder of a seller in land dispute is fatal to the proceedings"*

Remarking on the appeal generally, Mr. Msaki submitted in the first place that, the appellant being not the administratrix of her deceased husband in whom she is shielding his property, she does not have the necessary standing to litigate on the matter.

On the first ground, Mr. Msaky does not agree with the appellant and her counsel that, the claim was not within the pecuniary jurisdiction of the trial tribunal. The reason being that, the value of the subject matter of the dispute was expressly estimated at TZS 3,000,000/- That, in his view, was well within the pecuniary jurisdiction of the trial tribunal. He submits further that, since what constitutes the suit property was at variance between the parties, whether the matter was within the pecuniary jurisdiction of the **trial tribunal** was a factual issue which could not be determined without evidence. The counsel placed reliance on the authority of the Court of Appeal in **SOSPETER KAHINDI VS MBESHI MASHINI CIVIL APPEAL NO OF 2017** where it was held that:-

"We are of the view that the jurisdictional issue could not be determined without evidence on the value of the subject matter".

On the second and third grounds of appeal, it was submitted in the first place that, the grounds having not been raised in the first appeal, they cannot for the first time be raised in the second appeal as in the instant case. The counsel placed heavy reliance on the authority of the Court of Appeal in **FARIDA AND ANOTHER VS DOMINA KAGARUKI CIVIL APPEAL NO. 136 OF 2006** cited with approval in **KIZUWA KIBWANA**

VS GIBSON BAINGAYE, Misc Land Appeal No. 35 of 2017 where it was held as follows:-

> *It is general principle that the Appellate Court cannot consider or deal with issues that were not conversed or pleaded or raised at the lower court.*

In the alternative, Mr. Msaky submitted, in respect to the second appeal that, assuming it is valid, the same cannot affect the substantial validity of the judgments and proceedings of both the tribunals. The submissions is based on the counsels' understanding of section 45 of the **LDCA** read together with the overriding objective principle set out in **Written Laws (Miscellaneous Amendments) No 03 0f 2018.** The former provision provides that:-

> *"No decision or order of a ward tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during or in such decision or order or order or on account of the improper admission or rejection of any evidence"*

To substantiate his contention, the counsel cited the authority of the Court of Appeal in **YAKOBO MAGOIGA GICHERE VS PENINAH YUSUPH, CIVIL APPEAL NO.55 OF 2017** where the Court of Appeal as per **Honorable Chief Justice Juma CJ,** observed that "*failure to identify*

members who presided over the proceedings is not fatal to reverse an appeal as such defect does not render injustice."

On the last ground, it was the counsel's submission that, non-joinder of a party has never been a fatal irregularity. This is in accordance with the counsel's understanding of **Order 1 rule 9 of The Civil Procedure Code [Cap 33 RE 2019].** In any event, it is submitted, an objection of such nature ought, under Order 1 rule 13 of the **CPC,** to have been raised at the earliest stage. Reliance was placed on the authority in **ELIA KASALILE AND 20 OTHERS VR THE INSTITUTE OF SOCIAL WORK, CIVIL APPEAL NO. 145/2016 CAT DSS at page 17 held that :-**

> *"....it is our view that, if the respondent perceived that the dispute involved only one party, her responses would not have covered all the appellants. They would have made reference to only one person. But all the same , even if found that there such an anomaly , we thing in or consideration view, it ought to have been raised at the possible time as provided under Order 1 rule 13 of the Civil procedure Code Cap 33 which provides that...."*

With the above exposition of the nature of the contention, it may be desirable to consider the merit or otherwise of the appeal. Before doing so, I find myself unable to do without first addressing whether the last two grounds in so far as they were not raised in the first appeal are maintainable.

In this matter, it is not in dispute that the last two grounds were raised for the first time in the second appeal. The general position of law is that, the second appellate court cannot entertain a ground which was not raised in the first appeal. There are many authorities in support of that proposition. For instance, in **MELITA NAIKIMINJAL & LOISHILAARI NAKIMINJAL VERSUS SAILEVO LOIBANGUTI (1998) T.L.R. 120,** the Court of Appeal as per Lubuva, JA (as he then was) was of the view that *an issue not raised before the first appellate court cannot for the first time be raised and entertained by the second appellate court.*

The rule in **MELITA CASE** as I understand the law is a general rule which admits some exemptions. Therefore, in **TANZANIA-CHINA FRIENDSHIP TEXTILE CO. LTD VS OUR LADY OF THE USAMBARA SISTERS, TLR, 2006, 70,** it was held that, an issue of jurisdiction can be raised at any stage, including an appellate stage.

If I can apply the principles enunciated in the two authorities just referred, I do not think that the last issue in so far as it was raised for the first time in the second appeal can stand. The reason being that non- joinder of a party does not affect the jurisdiction of the trial tribunal. On the second ground, I would agree with the appellant and his counsel that for the

reason that it affect the jurisdiction of both the trial tribunal and the first appellate tribunal, it can be entertained at this stage. I will consider it here below along with the first ground.

The first ground cannot consume much time of this Court. The first appellate tribunal cannot be faulted in the circumstance of this case. The reason being that the appellant who raises this ground being the claimant at the trial tribunal, what is the value of the subject matter of the dispute was within her own personal knowledge. For the reason better known to herself, she did not disclose. As that is not enough, when she was asked about the value of the suit property on appeal, she told the pressing chairperson that she did not know. In such a situation why should the trial and the first appellate tribunals be blamed. In my view therefore, the first ground of appeal is without merit and it is accordingly overruled.

This now takes me to the second ground which has two aspects. The first aspect is the composition of the trial tribunal. It is questioned for offending the provision of section sections 11 and 23 of the **Land Disputes Courts Act [Cap 216 R.E. 2019]** which provides that the ward tribunal shall be composed of not less than 4 nor more than 8 members of whom three of them should be women.

From the proceedings of the trial tribunal, it is apparent that the membership composition of the same has never been below 4 as the law requires. On 24/05/2016, the record shows that, the coram of the trial tribunal was of seven members and 31/05/201 five members. They were six members on the date of judgment. Admittedly, the number of the lady members were two. Assuming, without deciding that, the above provision was not fully complied with, the omission, in view of the authority of the Court of Appeal in **YAKOBO MAGOIGA** is minor irregularity which can be ignored under the provision of section 45 of the LDCA read together with overriding objective principle brought by the **Written Laws (Miscelleneous Amendment) (No.3) Act, 2018 [ACT NO 8 of 2018].**

On the second aspect, the decision of the DLHT is challenged for non-complying with the provision of **Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) regulations, 2003** which provides:-

> *"Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require* ***every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahiii"***

In this case, the records show, the appeal was for the last time, heard on 25/10/2017 and the matter was placed for judgment on 11th January 2018. The proceedings are silent on when the assessors were directed to give their opinions. The judgment of the first appellate tribunal was delivered in the absence of the assessors too.

In my reading of the record of the trial tribunal, I came across with a detailed opinions of one of the assessors whose name is not disclosed. Soon after the opinion and in the same paper, the second assessor one Kimwaga opined as follows:-

"Kwa maelezo yaliyotolewa na Ushahidi wote uliopo nakubaliana na maoni ya mjumbe aliyetanguiia"

Regulation 19(2) of the LCDA expressly requires every assessor to give opinion in writing. This means in my view that, the opinion must be independent. The opinion of the second assessor as above mentioned, suggests that, it was based on what he read from the opinion of his fellow assessor. In my view, such an opinion can not be said to be independent. In the case of **BARTAZARY S. MATONYA & 2OTHERS VS MARIAM JUMA MTEMVU & 3OTHERS, LAND APPEAL NO.137 OF 2019 at page 5 it was held that;**

> *"The proper procedure was for every assessor to give his own opinion and sign in a separate document since the word "shall" is used, the provision makes it mandatory for every assessor to give out his individual opinion in writing"*

It is also a rule of law in accordance with the authority in **TOBONE MWAMBETA VS. MBEYA CITY COUNCIL, CIVIL APPEAL NO. 287**

OF 2017 that, the opinions of the assessors must be offered in the presence of the parties so as to enable them to know the nature of the opinion. A similar position was stated in **Edna Adam Kibona vs. Absolom Swebe (SHELI)** *(supra)* where it was observed as follows:-

> *We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulations 19(2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in record and must be read to the parties before the judgment is composed.*

In the circumstance therefore, I agree with the counsel for the appellant that, such a requirement was not complied with. On that account therefore, the judgment and proceedings of the first appellate tribunal were null and void. The appeal therefore succeeds to the extent as aforestated. The judgment of the **first appellate tribunal** is hereby set aside and the proceedings thereof quashed. The file is hereby remitted to the **first appellate tribunal** for rehearing of the appeal before another chairperson and a new set of assessors. The respondents shall pay the costs of prosecuting the appeal. It is so ordered.

I. Maige

JUDGE

20/05/ 2021

Judgment delivered this 20th day of May in the presence of the appellant in person and Mr. Shalon Msaky, learned advocate for the respondent.

I. Maige

JUDGE

20/05/ 2021