

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

MISC. LAND APPEAL NO.63 OF 2021

PASCKALI RUGEMALILA.....APPELLANT

VERSUS

SIMON MAPUNDA.....RESPONDENT

Date of Last Order: 05.10.2021
Date of Judgment: 06.12.2021

JUDGMENT

V.L. MAKANI, J.

This is a second appeal. The appellant herein lost at Saranga Ward Tribunal (the **Ward Tribunal**) in Land Application No.44 of 2019. He appealed and again lost at the District Land and Housing Tribunal at Kinondoni (the **District Tribunal**) in Land Appeal No. 19 of 2020 (Hon. S. H. Wambili, Chairperson). Being dissatisfied with the decision of the District Tribunal the appellant has preferred this second appeal based on the following grounds:

- 1. That the appellate Tribunal erred in law and fact for deciding in favour of the respondent by refusing to receive the map from the Ministry of Lands and Human Settlements which was adduced by the appellant to prove that respondent herein indeed trespassed the disputed land hence violating section 34 (1) (b) of the Land Disputes Courts Act, Cap 216 RE 2019*

2. That both tribunals erred in law and fact by deciding in favour of the respondent by declaring that the land occupied by the respondent was given out by Appellant, whilst is a different piece of land which was invaded by the respondent herein.

The appellant has prayed for the appeal to be allowed and the decisions of the District Tribunal be quashed and set aside.

With leave of the court the appeal was argued by way of written submissions. The submissions by the appellant were drawn and filed by Ms. Irene Felix Nambuo from Legal and Human Rights Centre. Mr. R. Mrindoko, Advocate drew and filed submissions in reply on behalf of the respondent.

In her submission, Ms. Irene gave a brief background of the matter and added that the respondent wants to establish a wall in a piece of land which he does not own lawfully. That the act of the Tribunals to allow the respondent to proceed with the erection of the said wall will narrow the passage as a result some places cannot be accessed during emergencies. She said that the District Tribunal waived its right to receive the map as evidence from the appellant without taking into consideration that the law of evidence is inapplicable at the Ward Tribunal as per section 15 (1) of The Ward Tribunals Act, 1985. She

said that section 34 (1) b of the Land Disputes Courts Act, Cap 216 RE 2019 provides power for the presiding Chairman to receive additional evidence during the appeal, but when the appellant wanted to provide the said map, the presiding Chairman refused to receive it without any justifiable reasons.

As for the second ground of appeal, Ms. Irene said that the Tribunals failed to evaluate the statement of the respondent's witness. That in 2003 when the respondent purchased the suit land, he had no passage nor the fence. That the same was testified by his witness one Bosco Ignas Haule, the vendor to the respondent who said the beacon was no longer there. The respondent was shown all the boundaries by the vendor but still went further to remove them and reclaim to be the lawful owner. She insisted that the respondent's vendor confirmed that the piece of land which he wants to use is lawfully owned by the appellant. Counsel added that the respondent's witness one Diana Mbwilo testified that the respondent was not cooperative in leaving one metre for the passage, and in response he built to the brim. She said the respondent has a tendency of encroaching pieces of land from neighbours. She said that the two witnesses of the respondent confirmed that the land was surveyed, and the respondent is within

the appellant's premises. That Bosco Ignas Haule stated the number of the beacons to prove that the land was surveyed. That the Tribunals did not diligently act on that testimony. She prayed for the appeal to be allowed.

In reply, Mr. Mrindoko said that the records are very clear that the issue in the present ground of appeal was not the issue raised and discussed in the District Tribunal. That it is settled that the second appellate Court will not act and adjudicate on matters which were not raised and adjudicated by the first appellate Court. That in the District Tribunal the issue raised was whether the Ward Tribunal denied receiving the map adduced by the appellant. He added that the District Tribunal found that there was no survey map tendered by the appellant in the course of hearing at the Ward tribunal. Mr. Mrindoko said that in the present appeal the appellant has come with a new ground of appeal. The issue that the appellant produced a map from the Ministry for Lands and Human Settlement as additional evidence in the District Tribunal and that the Tribunal refused to receive the said map was not raised and discussed in the District Tribunal. He relied on the case of **Simon Godson Macha vs. Mary Kimambo, Civil appeal No.393 of 2019 (CAT-Tanga)**(unreported).

Mr. Mrindoko further said the appellant has never applied to produce the said purported map as additional evidence in the first appellate court. He said the appellant was required under section 34 (1) (b) to move the court by Chamber summons and affidavit so that the court could take additional evidence on appeal if it was not taken in the trial Tribunal. That in the said affidavit supporting the application the appellant should have stated the reasons for failure to produce the said evidence at the trial Tribunal. Counsel supported his arguments by relying on the case of **Paulo Mushi vs. Registered Trustee Of Consolatha Fathers, Misc. Land Application No.717 of 2018** (unreported). He said that the appellant's arguments are an afterthought as the Chairman was not bound to decide on issues not raised by the appellant.

On the second ground of appeal, Mr. Mrindoko said that, the second ground was not among the issues raised and discussed in the District Tribunal. That at the District Tribunal the issue was whether the appellant was denied fair hearing. That in the present appeal the appellant has raised a new ground and that the second ground of appeal was not among the issues raised in the Ward Tribunal and in

the District Tribunal. He thus prayed for the appeal to be dismissed with costs.

In rejoinder Ms. Irene reiterated her main submissions.

In considering this appeal the main issue for determination is whether the grounds and the submissions in support of the appeal have merit. Ms. Irene is alleging that District Tribunal unlawfully refused to receive the map from the Ministry of Lands which was adduced by the appellant to prove that the respondent trespassed the suit land. I have taken time to go through the records of the Ward and District Tribunals, however there is nowhere in the proceedings of the Tribunals, that is the Ward and District Tribunals where the appellant prayed to tender the alleged map. Further, in the records of the Ward Tribunal, the parties at different times testified that the area has not been surveyed. In question No.21 in the Ward Tribunal's proceedings the appellant was asked:

"Wapimaji wakipita utawaruhusu kupima na kuacha hiyo barabara?"

He replied:

"Ndio watapima kama barabara."

Further one of the witness Bosco Ignas Haule in question No.1 was asked:

"Eneo ulilomuuzia Mapunda limepimwa?"

He answered:

"Lilipimwa kama shamba kubwa ila kile kipande alichouziwa Haule hakijapimwa."

The above part of the proceedings of the Ward Tribunal shows that the plots were not surveyed and that suggests that there was no map from the Ministry of Lands as alleged by the appellant. Apart from that and as stated earlier, the proceedings of both Tribunals do not reflect that the appellant prayed to tender such map at any stage of the proceedings. The first ground therefore has no merit and it is dismissed.

As for the second ground of appeal, I agree with Mr. Mrindoko that this is a new ground which was not raised by the appellant at the District Tribunal. The Tribunals never decided in favour of respondent by declaring that the land occupied by the respondent was given out by the appellant whilst it is a different piece of land which was invaded by the respondent. But parties at the Tribunal were discussing erection of the wall by the respondent at the edge boundary of his land. Parties never discussed anything to do with a different piece of

land which was invaded by the respondent. It is obvious therefore that the second ground of appeal is a new ground which was not discussed at the Tribunals below. That being the case therefore, it cannot be discussed at this stage as it was not subject for discussion in the first appellate Court. In the case of **Travertine Hotel and 2 Others vs. NBC [2006] TLR 133** the court stated:

"As a matter of general principle an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal".

In the result, and basing on the above analysis, the entire appeal is devoid of merit and it is hereby dismissed with costs.

It is so ordered.



V.L. MAKANI
JUDGE
06/11/2021