

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC.LAND APPEAL NO. 84 OF 2021

(Arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No. 58 of 2020 Originating from Talawanda Ward Tribunal in Case No. 1 of 2019)

SEIFU MOHAMED SEIFU APPELLANT

VERSUS

ZENA MOHAMED JARIBU RESPONDENT

JUDGMENT

Date of last Order: 07.10.2021

Date of Judgment: 15.10.2021

A.Z.MGEYEKWA

This appeal is against the Judgment and Decree of the District Land and Housing Tribunal for Kibaha, in Land Appeal No. 58 of 2020. The material background facts to the dispute are as follows: in 2020, the respondent lodged a suit at Talawanda Ward Tribunal in Land Case No.58 of 2020 against the appellant claiming that he has trespassed her 10-acre piece of land. The suit land lying on the border between the appellant and the respondent. The respondent's father rented a piece of land to the

appellant with conditions that he should not plant mango trees or coconut trees. The dispute arises after the respondent saw the appellant cultivating his portion of land, the appellant denied the allegations. The trial tribunal decided in favour of the respondent. The Chairman declared the appellant the lawful owner of the suit land.

Being aggrieved with the trial tribunal decision, the appellant filed an appeal before the District Land and Housing Tribunal for Kibaha complaining that the trial tribunal had no jurisdiction to determine the suit and the trial tribunal did not consider the evidence adduced by the appellant. The appellate Chairman decided the matter and ended up upholding the decision of the trial and dismissed the appeal.

Aggrieved, the appellant came before and raised nine grounds of grievance, namely:-

- 1. That, the learned Chairperson erred in law by rejecting the appellant's additional evidence.*
- 2. That the learned Chairperson erred in law by deciding that the Ward Tribunal had jurisdiction to entertain the matter on the dispute.*
- 3. That the learned chairperson erred in law by delivering a defective judgment.*

During the hearing of the appeal, the appellant was represented by Mr. George Masumbuko, learned advocate, the respondent enlisted the services of Mr. Mwemsigwa, learned counsel.

Submitting in support of the first ground of appeal, the appellant's counsel simply submitted that the appellant requested the Chairman of the appellate tribunal to record additional evidence but he rejected.

Arguing for the second ground of appeal, the learned counsel or the appellant contended that the District Land and Housing Tribunal erred in law in deciding that the Ward Tribunal had jurisdiction to determine the matter. He added that the respondent conferred jurisdiction to the trial tribunal contrary to the law. He insisted that the disputed land exceeded the pecuniary jurisdiction as per the law since the value of the suit land exceeded Tshs. 3,000,000/=.

With respect to the third ground, Mr. Masumbuko contended that the judgment is defective since it lacks the point of determination arising from the parties' submission. To bolster his submission he referred this court to page 3 of the appellate judgment. He added that the Chairman opted to omit or not to state what the parties have submitted since she was avoiding lengthening the judgment. He claimed that the appellate Chairman's judgment was composed contrary to the provisions of Order XX Rules 4 of the Civil Procedure Code Cap.33 [R.E 2019] which

obligates courts to state findings and reasons upon which the decision is based, by taking into account issues raised by parties and the court. Stressing, Mr. Masumbuko submitted that a judgment shall contain a point of determination and the word shall in Order XX Rule 4 of the Civil Procedure Code Cap.33 [R.E 2019] is couched on the mandatory term.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to revise the appellate tribunal judgment and order the respondent to surrender the suit land to the appellant who is the lawful owner.

The learned counsel for the respondent came out forcefully and defended the appellate tribunal's decision as sound and reasoned. Arguing for the first ground, Mr. Mwemsigwa from the outset contended that the appellant's complaint is unfounded. He argued that the Land Disputes Court Act empowers the lower tribunal to receive additional evidence and there is a procedure to be followed. He added that however seek for additional evidence must seek leave from the court to adduce such kind of evidence. He went on to submit that when leave is granted the witness is sworn in and additional evidence is received and the witness will be cross-examined and the tendered document must meet the admissibility test. The learned counsel for the appellant complained that the rejected document was from the bar which was annexed to the

written submission. It was his view that the appellate tribunal was correct to reject the document since it was new evidence, therefore, the appellate tribunal could not rely on it. Fortifying his submission he cited the case of **William Remedius Mapesa v Chausiku Manyasi Mtani**, Civil Application No. 270 of 2000, that a new matter on appeal should not be allowed.

As to the second ground, the learned counsel for the respondent submitted that the additional evidence which was rejected is the one to prove whether the trial tribunal had jurisdiction. He added that as long as the additional evidence was rejected then this ground has no legs to stand on. He went on to argue that in the trial tribunal this issue was not raised and he rebutted that the respondent conferred jurisdiction on the trial tribunal since the owner of the property is the one who estimates the value of his property thus in the eyes of the respondent the trial tribunal had jurisdiction to determine his case.

Submitting on the third ground, Mr. Mwemsigwa was brief and straight to the point, he argued that the appeal was heard by way of written submission and the chairman in her judgment stated that she will not reproduce the parties' submission since doing so will prolong the judgment. He added that what was stated in the parties' submissions was considered albeit briefly. He added that the Chairman produced the

ground of appeal and considered all the grounds of appeal. It was his view that the judgment had no any problem since all points for determination were considered. He referred this court to the written submission of the parties.

On the strength of the above submission, the learned counsel for the respondent has humbly implored this court to find no any scintilla of merit in the appeal by the appellant. He urged this court to sustain the decision of the District Land and Housing Tribunal and find that this appeal is demerit and dismiss it with costs.

Rejoining on three ground of the appeal, the learned counsel for the appellant reiterated his submission in chief. Insisted, he contended that the Chairman did not consider the parties' submission in her judgment since she did not produce their submission. He distinguished the cited case of **William** (supra).

I have gone through the submissions by both counsels, simultaneous with carrying a thorough review of the original record. Having done so, I wish to state from the outset, and without any hesitation, that this appeal is meritorious and must succeed. I will justify my position by tackling the grounds of appeal.

The first ground argued by the learned counsel for the appellant was related to new evidence. The learned counsel for the appellant simply

argued that the Chairman faulted himself for not considering additional evidence. On this ground, I fully subscribe to Mr. Mwemsigwa that the raised new issue was not raised to the trial tribunal. I have revisited the court records and found that the issue of additional evidence was not raised and canvassed before the trial tribunal. Thus, it was not proper to raise it for the first time at the appellate tribunal. I wish to say that for the Court to be clothed with its appellate powers, the matter in dispute should first be discussed at the trial tribunal.

In case the appellant wanted the appellate tribunal to admit new evidence then he was required to apply for leave and follow the proper procedure in the admission of new evidence. Failure to that this Court lacks jurisdiction to entertain this ground of appeal. I, therefore, do not find it proper to entertain that new ground of appeal which was raised for the first time before me. The Court of Appeal of Tanzania in the case of Farida & Another v Domina Kagaruki, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

" It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."

In respect of the first ground, that the impugned appellate tribunal judgment did not conform to the tenets of a good judgment as laid down by the provisions of Order XX Rules 4 and 5 of the Civil Procedure Code Cap.33 [R.E 2019]. The basis of this argument is that the said judgment was not responsive to the submissions made by the parties and that the Chairman did not consider the points for determination. The respondent's counsel is not convinced. He sees nothing anomalous in the judgment since every ground was adequately covered. I fully subscribe to the appellant's contention on this ground. My scrupulous review of the judgment takes me to page 3 at the judgment whereas the Chairperson stated that she will not reproduce the submissions of the parties. Then she proceeded to determine the grounds of appeal without analyzing, discussing, or considering the submissions made by parties and reached a conclusion. Failure to consider parties' submission in a judgment is not a mere slip. It is an intolerable omission which is a serious travesty of a judgment, which borders on an epic miscarriage of justice. The Court of Appeal of Tanzania in the case of **Anurali Ismail v. Regina** 1 TLR 370 Abernethy J, made some observations on the requirements of the judgment. He said:

*"A good judgment is clear, systematic, and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported, **and if***

should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a court of appeal to know what facts are found and how."

Applying the above authority, I find that the failure to consider parties' submission was nothing short of flagrant abdication in the Chairman's noble duty. Therefore, I allow this ground of appeal.

In the upshot, as I held above, I proceed to quash the District Land and Housing Tribunal judgment and I direct a new chairman to compose a new judgment commence after the tendering of the written submissions.
Order accordingly.

DATED at Dar es Salaam this 15th October, 2021.




A.Z.MGEYEKWA

JUDGE

15.10.2021

Judgment delivered on 15th October, 2021 in the presence of both parties.




A.Z.MGEYEKWA

JUDGE

15.10.2021

Right to appeal full explained.