

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

MISC. LAND APPEAL NO.87 OF 2021

(Arising from the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Appeal No.45 of 2020, originating from Ward Tribunal for Kidubwa in Land Case No.023 of 2020)

ZUBERI SEIFU KIMBUKE APPELLANT

VERSUS

GRACE CHARLES MAGOA RESPONDENT

JUDGMENT

Date of Last order: 21.10.2021

Date of Judgment: 25.10.2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Kidubwa in Land Case No.023 of 2020 and arising from the District Land and Housing Tribunal for Mkuranga in Land Appeal No. 45 of 2020. The material background facts to the dispute are briefly as follows; Grace Charles Magoa, the respondent instituted a case at the Ward Tribunal for Kidubwa to recover his land which was taken and

developed by Zuberi Seifu Kimbute, the appellant. The respondent also claimed that the respondent invaded his piece of land and possessed it illegally.

On his side, the appellant claimed that he is the lawful owner of the disputed land located at Kidubwa, Picha ya Ndege within Mkuranga District. He claimed that he developed the suit land and the respondent invaded the suit land and build a house therein and stayed in the suit land without paying any rent. The appellant claimed that he is the lawful owner of the suit land which was bought in 2003 from one Kombo Msienzi. To substantiate his claims he tendered a certificate of sale dated 18th June, 2003. The trial tribunal visited locus in quo, analysed the evidence, and decided the matter in favour of Grace Charles Magoa, the respondent.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Mkuranga, at Mkuranga vide Land Appeal No.45 of 2020 complaining that the trial tribunal faulted itself to proceed with hearing without including the seller of the suit land and that the trial tribunal did not consider the evidence adduced by the appellant and documentary evidence. The appellant prayed for the appellate tribunal to declare him as a lawful owner of the suit land. The District Land and Housing Tribunal upheld the decision of the trial Tribunal and maintained that the

respondent is the lawful owner of the suit land. The first appeal irritated the appellant. He thus appealed to this court through Land Appeal No. 87 of 2021 on three grounds of grievance, namely:-

- 1. That, both Ward and Appellate Tribunal erred in law and fact by delivering decision in favour of the Respondent without taking into consideration that the Appellant is the lawful owner of the disputed land.*
- 2. That, both Ward and Appellate Tribunal erred in law and fact by entering the judgment in favour of Respondent without considering the appellant produced granted title.*
- 3. That, both Ward and Appellate Tribunal erred in law and fact by reaching decision in favour of the Respondent without considering the strong evidence produced by the Appellant.*

When the appeal was called for hearing on 29th September, 2021, the respondent appeared in person, unrepresented. By the court order, the appeal was argued by way of written submissions whereas, the appellant filed his submission in chief on 06th October, 2021 and the respondent Advocate filed his reply on 15th October, 2021 and the appellant's Advocate filed a rejoinder on 21st October, 2021.

In his submission, the appellant opted to combine and argue the second and third grounds of appeal together and the first ground separately. The appellant started with a brief background of the facts which led to the instant application which I am not going to reproduce in this appeal.

On the first ground, the appellant contended that at the trial tribunal testified that he is the lawful owner of the suit land which he bought on 2003 from Mr. Kombo Msienzi a plot measuring one acre and tendered a sale agreement dated 18th June, 2003. The appellant went on to submit that the Village Chairman witnessed the sale and he signed the said document. He continued to submit that the records are silent whether the respondent had a reputable document to substantiate her claims rather she tendered a handover certificate which is not a reputable document to prove her case. Fortifying his submission he cited the case of **Barelia Karangirangi v Asteria Nyalambwa**, Civil Appeal No.237 of 2015, the court cited with approval the case of Re B [2008] UKHL 35.

The appellant further claimed that the respondent did not discharge the burden of proof as the spirit of the law has laid down. He added that the trial tribunal acted on unsolid proof provided by the respondent and decided in favour of the respondent contrary to the rules laid down by the

law and precedents. To buttress his submission he referred this court to the case and **John Rwoga v Salimu Ngozi**, Misc. Land Case Appeal No.31 of 2017.

Submitting on the second and third grounds, the appellant contended that both tribunals erred in law and fact to decide in favour of the respondent without considering that the appellant produced a title which was a strong piece of evidence. The appellant claimed that during the trial he produced a certificate of sale bearing a stamp, it was witnessed and signed before the Executive Officer of Vianzi Village. It was his view that he produced solid evidence which shows that he is the lawful owner of the suit land contrary to the respondent's evidence who failed to prove her ownership of the suit land.

In conclusion, the appellant urged this court to allow the appeal and quash the decisions of both tribunals.

Opposing the appeal, the respondent started by complaining that being the second appellate court, it has only jurisdiction to entertain the grounds which were raised by the appellant in the first appellate court, it cannot entertain a new ground which was not raised the appellant at the appellate tribunal unless it involves a serious point of law. He added that the grounds of appeal were neither raised nor determined by the appellate

tribunal. TO fortify his position he referred this court to numerous cases of **Melita Naikiminjal & Another v Sailevo Loibanguti** [1998] TLR 120, Abdul Athmani v R [2004] TLR 151, Butera Isaya Faustine Simeo, Misc. Land Appeal No.39 of 2020 (unreported) the court cited with approval the case of **Bihan Nyankongo & Another v Republic**, Criminal Appeal No. 182 of 2011 (unreported) the Court of Appeal of Tanzania held that:-

" The court on several occasions held that a ground of appeal not raised in the first appeal cannot be raised in a second appeal."

Insisting, the respondent contended that all grounds of appeal raised by the appellant are new grounds, the appellant did not raise them before the appellate tribunal. Stressing, she submitted that it is settled position of law that issues not raised and canvassed by the appellate court or tribunal cannot be considered by the second appellate court. 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."

Cementing his argumentation, the appellant also referred this court to the case of **Simon Godson Macha (Administrator of the late Godson Macha) v Mary Kimaro (Administrator of the late Kesia Zebadayo Tenga)**, Civil Appeal No. 393 of 2019.

The appellant referred this court to the grounds of appeal raised at the appellate tribunal in comparison to the grounds raised before this court. He submitted that the first ground deals with the failure of the respondent to join the necessary party who sold the land to her before the Ward Tribunal. The second ground touches the trial tribunal's failure to consider the time within which the appellant had stayed in the suit land and improvements he had made thereto, and the last ground was on the failure on the trial tribunal to consider documentary and oral evidence adduced by the appellant.

He went on to submit that he has compared the grounds of appeal raised at the appellate tribunal and this court, one noticed that the grounds before this court are new and were not raised and determined at the first appellate court and none of them touches the points of law. Insisting she claimed that all grounds of appeal need evidence to be ascertained. It was his view that this court hands are tied up from

entertaining them and the respondent is also refrained from responding on the grounds for the reasons stated above.

On the strength of the above submission, the respondent beckoned upon this court to dismiss the appeal for being meritless and upheld the decision of the appellate and trial tribunals.

In a short rejoinder, the appellant reiterated his submission in chief. He valiantly argued that the grounds of appeal are not new. Insisting, he submitted that both tribunals failed to consider the oral and documentary evidence. It was his view that the grounds raised at the appellate tribunal are the same raised before this court, the main difference being the wording but the contents or the meaning are the same. To substantiate his claims he referred this court to the third ground of the trial tribunal that the trial tribunal erred in law and fact by failure to consider documentary and oral evidence adduced by the appellant equivalent to the grounds of appeal before this court. To support his submission he referred this court to an example of a new ground such as *locus standi* which was not raised at the appellate tribunal.

On the strength of the above submission, he urged this court to consider the grounds of appeal stated in the memorandum of appeal and allow the appeal.

I have considered the rival arguments by the parties to this appeal. Before I start to determine the grounds of appeal I would like first to address the point of law raised by the respondent that the appellant has raised new grounds of appeal. First of all, I have noted that the respondent has raised the preliminary objection after this court issued the schedule of hearing by way of written submission. The respondent was present when this court issued the said schedule. As long as the respondent has raised her concern in her submission in chief, this court will determine and consider the same as part of the respondent's submission. Addressing the concern raised by the respondent, I have perused the appellate tribunal records and judgment and compared the same with the grounds of appeal raised before this court, and noted the ground raised by the appellant are not raised for the first time before this court. The issue of the lawful owner was determined by the appellate tribunal. For ease of reference, I reproduce the grounds of appeal raised at the appellate tribunal as follow:-

- 1. That the Trial Ward Tribunal erred both in law and in fact in entertaining the matter presented by the Respondent without joining vendor of the suit land hence reached to an unfair decision.*

- 2. The Trial Ward Tribunal erred both in law and fact when they deliver which the appellant has lived and developed the suit land without any interference from the respondent.*
- 3. The Trial Ward Tribunal erred in law and in fact where they made a decision in favour of the respondent without considering the documentary and oral evidence provided by the appellant that he lawful purchased the suit land since 2003 from one Kombo Msienzi Lufunga.*

Guided by the above raised issues, it is clear that the appellant did not raise new grounds of appeal but the wording is different, his dissatisfaction is mainly based on witnesses' evidence and documentary evidence on record. Therefore, this court proceeds to determine the grounds of appeal on merit. I have opted to combine all grounds of appeal because they are intertwined.

The appellant is complaining that the trial tribunal did not consider the evidence on record and his document tendered to prove his ownership of the disputed land as a result the trial tribunal decided that the respondent was the lawful owner of the suit land. Without wasting much time, I have revisited the trial tribunal records and found that the trial tribunal decision was correct since the document tendered to prove his claim was not

related to the disputed plot. The disputed plot is one acre located at *Kidubwa Kitongaji Vianzi Mjini* dated 18th June, 2003. The appellant bought it from one Kombo Msienzi Lufunga in 2014. While reading the respondent and the appellant's claims at the trial tribunal, the landed property in dispute was a Plot located at *Kidubwa, Picha ya Ndege*. *In his testimony, he claimed that he is the lawful owner of a Plot located at Kidubwa, Picha ya Ndege, contrary to the document which he tendered at the trial tribunal as a result he failed to defend his case.*

One of the canon principles of civil justice is for the person who alleges to prove his allegation. Section 110 of the Evidence Act, Cap.6 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:-

" Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The same was held in the case of **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, it was stated that:-

" He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "

Likewise in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that *"he who alleged must prove the allegations"*.

Above all, guided by the evidence of all parties and observations and analysis of all three grounds of appeal, it is without a speck of doubt that the respondent's evidence outweighs the evidence of the appellant. The appellant was required to prove his allegations.

Following the above findings and analysis, the appeal has no merit the same is dismissed,

Order accordingly.

Dated at Dar es Salaam this date 25th October, 2021.




A.Z.MGEYEKWA

JUDGE

25.10.2021

Judgment delivered on 25th October, 2021 in the presence of both parties.




A.Z.MGEYEKWA

JUDGE

25.10.2021

Right of Appeal fully explained.