

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 34 OF 2021

(Originating from Land Case No. 73 of 2019 and Land Appeal No. 106 of 2019 before Msoga Ward Tribunal and Kibaha District Land and Housing Tribunal)

ASANI DAUDI APPELLANT

VERSUS

**AMINA SHERIA (as an administratrix of
the estate of the late SHERIA KONDO) RESPONDENT**

JUDGMENT

Date of the last Order 25.08.2022

Date of Ruling 29.08.2022

A.Z.MGEYEKWA

This is a second appeal, it stems from the decision of the Ward Tribunal of Msoga in Land Case No.73 of 2019 and arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No. 106 of 2019. The material background facts to the dispute are briefly as follows, the respondent instituted a case at the Ward Tribunal of Msoga to recover his

piece of land. The respondent lodged a suit against the respondent and Salumu Daudi claiming that the appellant and Salumu Daudi invaded her boundary. The respondent claimed that the suit land was part of the inheritance and she was appointed as an administrator of the estate of Sheria Kondo. The respondent testified that the suit land is located at Mngeja Street in the Village of Dizole.

On his side, the appellant denied the respondent's claims. The respondent claimed that she is the lawful owner of the suit land. Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kibaha vide Land Appeal No. 106 of 2019 complaining among others that the respondent did not prove her case and a similar matter is pending before the same tribunal. The appellate tribunal determined the appeal and decided in favour of the respondent.

The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on five grounds of grievance, namely:-

- 1. That, the learned Chairman erred in Law for remarking that nowhere on records of the Ward Tribunal the Appellant informed that Trial Tribunal that there was a case pending in the District Tribunal about the same farm while the proceedings of the Tribunal are very clear.*

2. *That, the learned Chairman erred in Law for assuming that the brother of the Appellant was a party to a case at the Trial tribunal while the front page of the Trial Tribunal is self-explanatory as "Mdaiwa" is only the Appellant and nowhere on record the said Brother testified.*
3. *That, the learned Chairman erred in law for not fixing a day which specifically was to inform the parties about the opinions of the members and the reasons behind their stands.*
4. *That, the learned Chairman erred in law for not avoiding to have two cases about the same subject matter hence creating absurdities.*
5. *That, the learned Chairman erred in law for not creating the doubts as to why the records of proceedings show have no genders and the same name of the member are of the same hand writings which as it seems were not written by the members themselves but written before the day of the case.*

When the appeal was called for hearing on 26th August, 2022, the appellant and respondent appeared in person, unrepresented.

On the first, second and fourth grounds, the appellant contended that there is a pending appeal at the District Land and Housing Tribunal in relation to the same farm. He claimed that Amina Sheria lodged a suit against his brother Salum Daud, the administrator of the estate of the late

David Rashid in Application No. 221 of 2016. He added that his brother was a second respondent in the said application.

On the third ground, the applicant simply submitted that assessor opinion were not read over by the Chairman of the District Land and Housing Tribunal.

Arguing for the fifth ground, he had not much to say rather he claimed that establishment of the Ward Tribunal was improperly as the issue of gender was not considered and it seems the names of assessors were written by the same person.

In reply, the first and respondent's confutation was strenuous. The respondent came out forcefully and defended both trial tribunals decision as sound and reasoned. On the first, second and fourth grounds, she claimed that the two cases are quite different. She went on to state that the dispute before the tribunal is related to a different plot and located in another area, she added that the matter was determined and the Chairman has set a Judgment date. She added that in the instant case the appellant trespassed into her land and Village Council decided on her favour and at the Ward Tribunal the tribunal visited the locus in quo and the respondent was able to identify the boundaries and she emerged a winner, hence this appeal.

On the 3rd ground, the respondent simply contended that all assessors were present during the hearing of the case and that they gave their opinions and the gender was observed.

In his rejoinder the appellant had nothing new to rejoin. He prayed for this court to quash the decision of the Ward Tribunal.

Having summarized the submissions and arguments of parties for and against the appeal, I should now be in a position to determine the appeal on which the parties bandied words. The issue for determination is *whether the appeal is meritorious*.

I now turn to the issues of contention as reproduced above and as clustered. After going through the trial and appellate tribunal records I noted a point of law therefore, I had to call the parties to address me whether the respondent had *locus standi* to lodge a case at the Ward Tribunal of Msoga.

The record reveals that on being in accord with the appellant that the first appellate tribunal did not observe that the respondent at the Ward Tribunal lodged a suit as an administrator of the estate of the late Sheria Kondo.

The trial proceedings reveal that the respondent tendered a letter of administration of the estate of the late Sheria Kondo which was issued in 4th September, 2017. Therefore, it is clear that the respondent lodged the suit as an administratrix of the estate of the late Sheria Kondo,

unfortunately both tribunals did not record her as and administratrix. For the interest of justice and to set the court records clear, I allow the respondent to rectify her name appearing in the Petition of the Appeal to read Amina Sheria (as an administrator of the estate of the late Sheria Kondo).

I now turn to the gist of the appeal. The issue which is the bone of contention in this appeal is whether the appeal is meritorious. In my determination, I will consolidate the third and fifth grounds together because they are interrelated. Equally related are the first and fourth grounds which I shall also determine together. Except for the second which will be argued separately.

Starting with the second ground, I have noted that this is a new ground that was not raised at the appellate tribunal. 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.”

In the subsequent decision in **Haji Seif v Republic**, Criminal Appeal No.66 of 2007, the Court held that:-

*“ Since in our case that was not done, this Court lacks jurisdiction to entertain that ground of appeal. We, therefore, do not find it proper to entertain that **new ground of appeal** which was raised for the first time before this court.” [Emphasis added].*

Applying the above authority in the instant appeal it is vivid that the second ground is a new ground of appeal which is raised for the first time before the second appellate court. Therefore the same is disregarded.

On the first and fourth grounds, the appellant is claiming that there is a pending case at the District Land and Housing Tribunal about the same farm. I have revisited the trial tribunal proceedings to find out whether the appellant notified the tribunal about the existing matter at the District Land and Housing Tribunal, the records are silent which means the appellant's claims are an afterthought and the same are not supported by any cogent evidence.

It was upon the appellant to tender documentary evidence at the trial tribunal to prove his allegations but he did not do so. Let us assume that there is a case pending before the District Land and Housing Tribunal involving the same suit land, then the parties in the pending case before the District Land and Housing Tribunal were in a position to raise their

objection which was not done. Therefore, as long as there is no cogent documentary to support his claims then this court cannot allow this ground on his favour.

Arguing for the third and fifth grounds, the appellant is complaining that the Chairman erred in law for not fixing a date to inform the parties about the opinion of the assessors. The record reveals that the appellate tribunal on 22nd May, 2020 set the date of the Judgment on 24th July, 2020. When the parties appeared for hearing the Judgment the Chairman informed them that the Judgment was not read. The Chairman adjourned the delivering of the Judgment four times and on 8th March, 2021 the Chairman delivered the Judgment. On 22nd may, 2020 the Chairman informed the parties that they were awaiting for the assessors submissions. The records does not show that the Chairman read the assessor's opinion in front of the parties. However, the records show that the assessors' opinions were filed in the appellate tribunal and the assessors' observations are reflected in the judgment. In the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, the Court of Appeal of Tanzania held that:-

“... the opinion of assessors must be given in writing and be reflected in the proceedings before a final verdict is issued”.

Equally, the Court of Appeal of Tanzania in the case of **Ameir Mbaraka and Another v Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) held that:-

"Therefore in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In the circumstances, we are of a considered view that assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity." [Emphasis added].

Applying the above authorities in the instant case, it is clear that the assessors' opinions are reflected in the appellate tribunal proceedings before the final verdict. Again, the Chairman acknowledged the assessor's opinion in his Judgment. In my view, the same suffices. The issue of gender is a requirement in establishing a Ward Tribunal and not during the hearing of the appeal or case, therefore, these grounds are demerit.

In the upshot, I proceed to dismiss the appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 29th August, 2022.


A.Z. MGEYEKWA
JUDGE
29.08.2022


Judgment delivered on 29th August, 2022 in via video conferencing
whereas the appellant and respondent were remotely present.




A.Z. MGEYEKWA

JUDGE

29.08.2022