

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 22 OF 2022

*(Arising from Land Case No. 93 of 2017, Kinondoni District
Land and Housing Tribunal)*

SHABANI SHOMARI MKUMBO *(As Administrator of
estate of SHOMARI SHABANI MKUMBO)* **1ST APPELLANT**

BI SITI MOHAMED..... **2ND APPELLANT**

VERSUS

NASRI OMARI *(As guardian of CAUTHAL
NASSIRI OMARI (Minor))*..... **RESPONDENT**

JUDGMENT

Date of order: 21.09.2022

Date of Ruling: 28.09.2022

KADILU, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Kinondoni (Hon. Rugarabamu), delivered on 20.12.2021. The appeal consists of 5 grounds as follows:

1. The trial Tribunal erred in law for determining a dispute for which it had no jurisdiction.

2. The Chairperson of the Tribunal erred in law and fact for determining a dispute which was already determined in Land Case No. 347 of 2014 by the High Court (Land Division).
3. The Hon. Tribunal Chairperson erred in law for failure to analyse and evaluate the evidence tendered before it, therefore reaching to a wrong decision.
4. The Hon. Tribunal Chairperson erred in law and fact on holding that Juma Yasini who sold the land to the Respondent, was properly allocated the disputed piece of land.
5. The trial Tribunal erred in law and fact for holding that the disputed piece of land is not the area which was previously owned by Lazarus Lokaji Mollel.

The Appellants prayed for the court to set aside the whole judgment and decree of Kinondoni District Land and Housing Tribunal with costs.

The Respondent filed a reply to the Appellants' memorandum of appeal and disputed all grounds of appeal as follows:

1. Kinondoni District Land and Housing Tribunal had jurisdiction to determine the suit.

2. Contents of paragraph 2 of the memorandum of appeal is strongly disputed. The parties before the District Land and Housing Tribunal had never been involved in the said Land Case No. 347 of 2014, and that the alleged case involved different parties and different geographical location of the disputed land.
3. The Hon. Chairperson of the Tribunal was correct in law and fact by reaching to the decision as evidence purported to be adduced by the Appellants was not the best evidence.
4. The Respondent prays for the appeal to be dismissed with costs.

On the day of hearing, the Appellants were represented by Ms. Agness Uisso, learned Counsel while the Respondent enjoyed the legal service of Mr. Dismass Mbandu, learned Advocate. Submitting on the 1st ground of appeal, Counsel for the Appellants stated that jurisdiction is a fundamental aspect in every dispute and it goes to the root of the authority of the court to adjudicate any case. She cited the case of *Fanuel Mantiri Ng'unda v Herman Mantiri Ng'unda* [1995] TLR 159 where the Court of Appeal held that it is absurd for the court to proceed on assumption that it had jurisdiction since jurisdiction is a bedrock on which the court's authority and competence to entertain and decide the matter rests.

She reminded the court that District Land and Housing Tribunals are established under s. 22 of the Land Disputes Courts Act [Cap. 216 R.E. 2019] and they are required to exercise jurisdiction within the district, region or zone in which they are established. The learned Advocate explained that without the requisite jurisdiction, Kinondoni District Land and Housing Tribunal determined the dispute while all documents of allocation show that the disputed land is located in Kifuru, Kinyerezi in Ilala District. She asserted that the same point was raised in the District Land and Housing Tribunal, but the Tribunal rejected the proposal to visit the disputed land to satisfy itself about the location.

The learned Counsel cemented her argument by citing the case of *Sospeter Kahindi v Mbeshi Mashini*, Civil Appeal No. 56 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) in which it was stated that:

"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess. "

She submitted that lack of jurisdiction is usually adjudged on appeal or revision. She then prayed for the court to allow the appeal, quash proceedings of the District Land and Housing Tribunal and set aside its judgment with costs.

Regarding jurisdiction, Counsel for the Respondent insisted that Kinondoni District Land and Housing Tribunal had jurisdiction to determine the dispute because the disputed land was situated in Kinondoni District. He expounded that the pleadings of the parties and evidence adduced indicated so. After demarcation of new administrative boundaries, the disputed land which was in Kinondoni District is now in King'azi area, Kwembe Ward – Ubungo District.

He elaborated that in the documents referring the dispute to the Tribunal, the property was described as situated in King'azi area, Kwembe Ward.

The Appellants never raised any concern about geographical location of the disputed land, that is why the Tribunal did not visit the disputed land. He cited the case of *Barclays Bank (T) Ltd v Jacob Muro*, Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania at Mbeya, where it was held that parties are bound by their pleadings. He prayed for the court to dismiss this ground for lack of merit.

Given the importance of jurisdiction, I have to dispose this ground of appeal first. The Appellants allege that Kinondoni District Land and Housing Tribunal had no jurisdiction to try the matter because the suit property was not situated in Kinondoni District. The records indicate that the disputed land was described as located at King'azi area, Kwembe Ward within Ubungo District. Paragraphs 3 and 6 (ii) & (iii) of the document (application) referring the dispute to Kinondoni District Land and Housing Tribunal illustrates this and that is why initially the dispute was resolved by Kwembe Ward Tribunal. In March 2017 when the dispute was referred to Kinondoni District Land and Housing Tribunal, Ubungo District Land and Housing Tribunal was not operational. Land disputes from Ubungo were adjudicated by Kinondoni District Land and Housing Tribunal until 25.10.2019 when Ubungo District Land and Housing Tribunal was established via G.N. No. 44 of 2019. In addition, when the dispute was firstly referred to Kwembe Ward Tribunal, members of the Tribunal visited the disputed land and a sketch map describing the location and size of the land in dispute was drawn as shown in the records of the Tribunal. All along, the disputed land was described as located in Kifuru street, Kwembe Ward within Ubungo Municipality.

In the joint written statement of defence for the 1st and 2nd Respondents, they noted paragraph 3 of the application which described location and address of the suit property, and in respect of paragraph 6, they admitted that the land in dispute was under the custody of local Village Authority. I thus concur with the learned Counsel for the Respondent that parties are bound by their pleadings. In the case of *Barclays Bank (T) Ltd v Jacob Muro* (supra), the Court of Appeal observed as follows:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

Contending that the disputed land was not within territorial jurisdiction of Kinondoni District Land and Housing Tribunal is a new point which cannot be entertained at this stage. It is only in exceptional circumstances that the

appellate court may allow a new point to be raised before it, regard being that the Respondent shall not be prejudiced by the appellant raising the new ground at the hearing of the appeal. Consequently, I find this ground devoid of merit and I dismiss it accordingly.

Turning to the second ground of appeal, it raises the question of *res judicata* as the Appellants allege that the Chairperson of the Tribunal determined a dispute which was already determined in Land Case No. 347 of 2014 by the High Court (Land Division). The records display that Land Case No. 347 of 2014 was between *Lazarus Lokaji Mollel & 9 Others* while the case at hand is between *Shomari Shabani Mkumbo & Others v Nasri Omari*. Further, the suit property in the case of Lazarus was located in Kisarawe while in the present appeal, the disputed land is located in Ubungo.

It is a well settled principle that in order for the plea of *res judicata* to successfully operate, the following conditions must be proved, namely: (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim; (ii) the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit; (iii) the party in the subsequent suit must have litigated under the same title

in the former suit; (iv) the matter must have been heard and finally decided; (v) the former suit must have been decided by a court of competent jurisdiction. The leading authorities on the doctrine of *res judicata* include *Umoja Garage v NBC Holding Corporation* [2003] TLR 339, *Stephen Wassira v J. Warioba & AG* [1996] TLR 334 and *Peniel Lotta v Gabriel Tanaki & Others* [2003] TLR 312.

Based on the authorities above, it cannot be ruled that Land Application No. 93 of 2017 in Kinondoni District Land and Housing Tribunal was affected by the principle of *res judicata*. As such, I also find this ground of appeal lacking merit and I proceed to dismiss it.

I will deal with grounds 3, 4 and 5 of the appeal together. The Appellants allege that the Hon. Chairman of the District Land and Housing Tribunal failed to analyze properly the evidence tendered before him. I have examined the record of the Tribunal carefully and found that evidence was analysed from pages 3 -9 of the Tribunal's judgment. The analysis was done in terms of testimonies given by witnesses, documents tendered and relevant authorities on the subject matter. Therefore, this ground of appeal was not proved so, it is dismissed too.

It is also asserted by the Appellants that the Chairman of the Tribunal erred in law and fact on holding that Juma Yasini was properly allocated the disputed land. According to the records, Juma Yasini was allocated the disputed land by Kifuru Street Authority on 20.12.2006. He brought witnesses and tendered documents to prove his ownership during the hearing in the Tribunal. The record reveals that documents presented by the 1st Appellant do not show the application number, they do not specify the land sought to be allocated or names of those who allocated the said land to him. In Kwembe Ward Tribunal, the 2nd Appellant is said to have failed to describe the procedures that she had used to get her piece of land. She testified that she did not measure her piece of land and she does not remember when she paid for it. As such, this ground of appeal is devoid of merit and it is hereby dismissed.

The Tribunal is claimed to have erred in law and fact for holding that the disputed land is not the area which was previously owned by Lazarus Lokaji Mollel. Perusal of files on record indicates that in the list of persons who trespassed to Mr. Lazaru's land and who were ordered to compensate him after having lost the case in Land Case No. 347 of 2014, the name 'Juma Yasini' is not included. However, the names of the 1st and 2nd Appellants are

there. In the District Land and Housing Tribunal, one of the assessors had this to say while expressing his opinion:

"...Jina la Mjibu maombi Na. 3 (Juma Yasini) halimo kwenye orodha hiyo. Nashawishika kukubaliana na shahidi wa kwanza kwamba eneo hili halikuwa sehemu ya eka 34 za Mollel, kwani huyu Mollel hakuwa anamiliki maeneo yote yaliyogawiwa. Ndiyo maana Mjibu maombi Na. 3 anadai kwamba kwa kipindi chote alichopewa akaliendeleza na kuishi hapo, hakuwahi kulalamikiwa na mtu yeyote, si Mollel wala Mjibu maombi Na. 1 au 2. Kwa hali hii, eneo hili ni la Mleta maombi, baada ya kuuziwa na mmiliki halali."

In determination of the dispute by the Ward Tribunal, members of the Ward Tribunal visited the disputed land and prepared a sketch map of the land in dispute. It was their finding that Juma Yasini who sold the disputed land to

the Respondent was able to establish his ownership by using documentary evidence and testimony of witnesses who were called. This was also the finding of assessors and the Chairman of the District Land and Housing Tribunal who had an opportunity to assess the credibility of the witnesses who testified before them. Thus, this ground of appeal has failed.

Thus, grounds 3, 4 and 5 of the appeal have not been proved.

In view of this, I have no reason to fault the two lower courts' findings with regard to the ownership of the disputed land. Consequently, this court

declares the Respondent a lawful owner of the land in dispute. The appeal is dismissed with costs. It is so ordered.



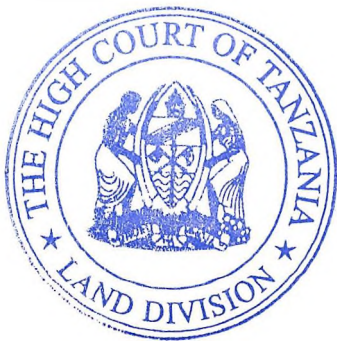
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KADILU, M.J.,

JUDGE

28/9/2022

Judgment delivered on the 28th Day of September, 2022 in the presence of Ms. Agness Uisso, Advocate for the Appellant and Mr. Dismass Mbando, Advocate for the Respondent.



A handwritten signature in blue ink, appearing to read "M.J. Kadilu", is written above a horizontal dotted line.

KADILU, M. J.

JUDGE

28/9/2022.