

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 182 OF 2021

(Appeal against the entire decision of the District Land and Housing Tribunal for Mkuranga District at Mkuranga (Hon. R. Mwakibuja-Chairperson), dated 1st July 2021 in Land Appeal No. 7 of 2021)

ALLY MOHAMED MWERA APPELLANT

VERSUS

ASHA ALLY MOHAMED RESPONDENT

JUDGMENT

*Date of last Order: 21/09/2022
Date of Judgment: 03/10/2022*

KHALFAN, J.

The appellant has preferred this appeal having been aggrieved by the decision of the District Land and Housing Tribunal for Mkuranga District at Mkuranga. The appeal consists of two grounds in his Petition of Appeal to which I refer for ease of reference and clarity thus:

1. *That the learned Chairperson misdirected herself in fact and in law in failing to make proper analysis of both oral and documentary evidence*

that were tendered and explained at Kibiti Ward Tribunal and the same being explained in the District Land and Housing Tribunal for Mkuranga District.

2. *That the learned Chairperson misdirected herself in fact and in law in failing to notice that rules procedure (sic) for handling civil matters were not observed during trial at Kibiti Ward Tribunal.'*

At the hearing of the appeal, Mr. Ludovic Nickson appeared for the appellant while Mr. Denis Dendela fended for the respondent. Both learned Advocates made their respective oral submissions for and against the appeal.

Mr. Nickson submitted on the first ground to the effect that the sale agreement which purports to give ownership of the disputed land to the respondent was wrongly admitted at the Ward Tribunal. He gave the reason that, it contravened the requirement of **Section 47 (1), (2) and (3) of the Stamp Duty Act, Cap. 189 R.E. 2019** which prohibits the admission of unstamped sale agreement.

Mr. Nickson submitted further that another procedural error is to the effect that the documents received as exhibits at the Ward Tribunal were never

named to be admitted as exhibits. He argued that failure to name the said documents meant that they do not form part of the record of the court's proceedings. To cement his argument, he cited the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited**, Civil Appeal No. 107 of 2004, CAT,

Another procedural error as pointed by Mr. Nickson is such that the Ward Tribunal of Kibiti Ward was not properly constituted. The quorum of the said Trial Tribunal comprised only one female member instead of three out of eight members. He argued that this is contrary to the requirement of **Section 11 of the Land Disputes Courts Act, Cap. 216 R.E. 2019**. He insisted that no right of a party can pass when procedural laws are not observed. He urged the Court to uphold such reasoning and quash the decision of the appellate tribunal.

Mr. Nickson submitted on the second ground of appeal that the first appellate Chairperson did not make proper analysis of both, the oral and documentary evidence. He referred this Court to page 2 of the appellate tribunal's decision and argued that, the size of the disputed land was not proved. He cited the case of **Africarriers Limited v Millennium Logistics Limited Commercial Case No. 131 of 2017**, that the

respondent failed to discharge the burden of proving the size of the disputed land. He concluded his submission to the effect that the appellate tribunal failed to make proper analysis of the evidence and prayed that the appeal be allowed and that the decision of the appellate tribunal be quashed.

In response to the appellant's submission, Mr. Dendela replied: first to the first ground of appeal that, as per page 2 of the decision of the appellate tribunal as referred to by Mr. that the alleged failure to prove the size was attributed to the appellant. He contended that the record is such that the appellant produced the sale agreement before the Trial Tribunal without proving the size and boundaries of the plot. Mr. Dendela argued that it was the appellant who did not prove the size of the plot.

Mr. Dendela went on submitting that the case of **Africarriers Limited v. Millennium Logistics Limited (supra)**, which was cited by Mr. Nickson, casts the duty to prove the size of the appellant's plot as per **Section 110 of the Evidence Act Cap. 6 R.E. 2022**. He therefore prayed for the dismissal of the first ground of appeal.

Mr. Dendela's reply to the submission on the second ground is such that, the Ward Tribunal is not bound by rules of evidence or procedure. He cited the provisions of **Section 15(1) of the Ward Tribunals Act, Cap 206** to the effect that the said tribunal can formulate its own conduct of hearing matters. He submitted further that, in that regard, the said errors are baseless and urged this Court not to consider them.

In his rejoinder, Mr. Nickson submitted that, that Mr. Dendela had misconstrued the law and facts. On the question of the applicability of rules of evidence and procedure, he argued that; by citing **Section 110 of the Evidence Act Cap. 6 R.E. 2022**, he admitted that the rules of evidence apply to the Ward Tribunal. He also argued that **Section 15 of the Ward Tribunals Act** is part of the Act which contains Amendments from **Act No. 5 of 2021** namely the **Written Laws Miscellaneous Amendments (No. 3) Act of 2021**. He added that, the Ward Tribunals are no longer decision makers.

Mr. Nickson further submitted that, the current appeal does not fall within the ambit of the **Written Laws Miscellaneous Amendments (No. 3) Act of 2021**; that by the year 2020 the Ward Tribunals had power and mandate to make decisions hence they were obliged to comply with rules

of procedure. Mr. Nickson finalized his rejoinder by reiterating his submission in chief in respect of the burden of proof of the size of the disputed land.

Lastly, he maintained that the submission that the respondent had already demolished the wall is an argument from the bar. He added that the same is not reflected from any record of the Court. He urged the Court to ignore the same as the wall is still intact.

I have carefully considered the grounds of appeal, the submissions by both parties, the record and the relevant law. I will deal with them simultaneously. The main issue is whether the appeal has merit. The issue that arises from the rival arguments on the first ground of appeal is whether the trial and the appellate tribunals failed to make proper analysis of both oral and documentary evidence that were on record. I will begin with the appellant's complaint on the application of **Section 47 (1) of Cap. 189 R.E. 2019** which reads as follows: -

'No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or contest of parties authority to receive the evidence or shall be acted

upon, registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped.'

The above position was illustrated in the case of **Boniface Jeremiah v Stephen Lukumay** [1995] TLR 122 at page 123 while interpreting the provisions of **Section 47 (1) of the Stamp Duty Act, Cap. 189 R.E. 2019**. In that case, the respondent successfully sued the appellant based on unstamped mortgage deed. The counsel for the appellant raised the question of admissibility in evidence of the unstamped document on appeal. This Court as per Mwalusanya, J., (as he then was), while quoting the case of **Sunderji Nanji v Ghaloo** [1958] EA 762, held that:

'the question of admissibility of an unstamped document cannot be raised on appeal but only at the trial. This is so that the other party can be given an opportunity of paying the requisite duty and thus making it admissible'

The available record reveals that the appellant did not raise the issue of admissibility of the sale agreement in issue neither before the Trial Tribunal nor the Appellate Tribunal. Under such circumstances, I entertain no doubt whatsoever that the finding of both, trial and appellate tribunals on the

sale agreement cannot be impeached now. There is no misdirection on the part of the Hon. Chairperson of the Appellate Tribunal on this point.

Another issue on determination of the first ground of appeal is whether the Trial Tribunal is bound by rules of evidence and procedure. While Mr. Nickson argued that the trial tribunal is bound by rules of evidence and procedure; on the other hand Mr. Dendela, submitted otherwise relying on the law under **Section 15 of the Ward Tribunal Act Cap. 206 R.E. 2022** which states that:

'15, - (1) The Tribunal shall not be bound by any rules of evidence or procedure applicable to any court.

(2) A Tribunal shall, subject to the provisions of this Act, regulate its own procedure.

(3) In the exercise of its functions under this Act a Tribunal shall have power to hear statements of witnesses produced by the parties to a complaint, and to examine any relevant document produced by any party.'

The above quoted provision is very clear. The Ward Tribunals are not bound by rules of evidence and procedure. Mr. Nickson argues that the

provisions of **Section 15 of the Ward Tribunals Act Cap. 206 R.E. 2019** are not applicable by virtue of the **Written Laws (Miscellaneous Amendments) (No. 3) Act of 2021**. I have gone through the cited law; I am of the considered view that the latter provisions do not repeal **Section 15 of Cap 189 R.E 2019**. I am of the view that the Trial Tribunal in this appeal was not bound by rules of evidence and procedure.

I agree with Mr. Dendela that the burden of proof lies on the appellant. The record establishes that the appellant is the one who alleged to own the size of eight (8) metres before the Trial Tribunal. While answering the question of members of the Trial Tribunal, the appellant stated, and I quote page 2 of the hand written proceedings of the Ward Tribunal as:

'MASWALI TOKA KWA WAJUMBE KWENDA

KWA MDAI:-

SWALI – JE AMEJENGA KATIKA ENEO LA

SHAMBA AU KIWANJA.

JIBU – ENEO LA KIWANJA.

SWALI – JE KIPANDE ALICHOJENGA KINA

UKUBWA GANI.

JIBU – UPANA MITA 8 UREFU MITA 12...'

It is obvious from the above quoted extract that, the appellant was the one who alleged to own eight (8) metres. I agree with Mr. Dendela that legal requirement of **Section 110 of the Evidence Act R.E 2019** applies against the appellant as opposed to the respondent. After all, the appellant's sale agreement does not show the size of the plot that the appellant alleged to have bought from Elisha Mlinganila, to wit, 100 x 50 metres. Again, before the first Appellate Tribunal, the appellant stated while responding to questions on page 3 of handwritten proceedings of the Appellate Tribunal from members of the said tribunal that:

'...Hati yangu ya mauziano haionyeshi ukubwa wa eneo langu...Mjibu rufaa kaingia kwenye eneo langu lenye ukubwa wa mita nane...'

The record is clear that the act of the respondent to demolish the hut (banda) is not an afterthought as submitted by Mr. Nickson. The appellant did, categorically, submit at the hearing before the Appellate Tribunal on page 2 of the handwritten proceedings:

'Mwomba rufaa.

Sijaridhika na uwamuzi wa baraza la Kata. Nataka mjibu rufaa abomoe banda lake ambalo amejenga kwenye eneo lango...'

The question that I ask myself is whether Mr. Dendela's submission that the respondent has already demolished her hut (banda) rendering this appeal baseless, is supported by the available record or not. The record establishes that the appellant did pray for the demolition before both lower tribunals. The same is not an argument from the bar but it forms part and parcel of the available record tracing its origin from the Trial Tribunal and repeated before the appellate tribunal.

There is no doubt that the appellate tribunal re-evaluated the evidence available on record. It is clear from the record that the Appellate Tribunal found the appellant's evidence adduced before the Trial Tribunal not sufficient to prove the alleged ownership of eight (8) metres. The appellant failed to prove that the disputed land is more than what the respondent has demolished.

The argument that the sale agreement was not marked as exhibit and therefore does not form part of the record is unfounded. I am of considered opinion that the requirements to mark exhibits do not bind the

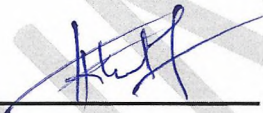
Ward Tribunal by virtue of **Section 15 (1) of the Ward Tribunals Act, Cap. 206 R.E. 2019.**

In view of the foregoing findings, I am settled in my mind that both grounds of appeal are devoid of merits.

In the upshot, I find the appeal before me devoid of merit. I proceed to dismiss the same in its entirety with costs.

Dated at Dar es Salaam this 3rd October 2022.




F. R. KHALFAN
JUDGE
03.10.2022

Court

Judgment delivered this 3rd day of October, 2022 in the presence of Ms. Esther Simon, learned Counsel for the appellant, Mr. Ally Mohamed Mwera, the appellant, Mr. Denis Dendela, learned Counsel for the respondent and Ms. Asha Ally Mohamed, the respondent.




F. R. KHALFAN
JUDGE
03.10.2022