IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 121 OF 2021

(Arising from Mkuranga District Land and Housing Tribunal at Mkuranga before Hon. Mwakibuja, Chairperson Land Application No. 6 of 2019 dated 25.05.2021)

MOHAMED MOHAMED MUHINDA (Legal Representative

Of the late Mohamed Said Muhinda) ..... **APPELLANT**

VERSUS

UBAYA KATUNDU ..... **1ST RESPONDENT**

ADAM JUMA KIBAVU ..... **2ND RESPONDENT**

JUDGMENT

Date of Last order: 02.11.2022

Date of Judgment: 18.11.2022

A.Z. MGEYEKWA, J

This is an appeal; it stems from the decision of the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Application No.6 of 2019. The material background facts to the dispute are briefly as follows;

Ubaya Katundu, the 1st respondent lodged a suit against the appellant and the 2nd respondent. The 1st respondent alleged that the appellant has included his piece of land as part of the late Mohamed Saidi Muhinda's properties. The 1st respondent claimed that he bought the suit land in 2005 from the 2nd respondent and he used it peacefully until 2018 when the dispute arose.

The appellant denied the allegations and claimed that his father is the one who bought the suit land was using and never sold. The District Land and Housing Tribunal decided the matter in favour of the 1st respondent and he was declared the lawful owner.

Aggrieved, the appellant appealed to this court and raised four grounds of grievance as follows:-

1. *That, upon holding that evidence adduced proved that the original owner of the disputed land was the late Mohamed Said Muhinda, the trial Chairperson erred both in law and in fact when she concluded that the said Mohamed Said Muhinda sold the disputed land to Mzee Jongo who later sold it to the 2nd respondent who also purported previous owners.*
2. *That, the trial Chairperson erred both in law and fact by arriving at the conclusion that the disputed land was sold by the late Mohamed Said Muhinda solely based on hearsay evidence of PW3.*

3. *That, the trial Chairperson erred both in law and in fact by declaring the 1st Respondent the lawful owner of the disputed land despite overwhelming proof that the 2 Respondent had no better title to pass to the 1st Respondent.*
4. *That, the trial Chairman erred both in law and in fact by shifting the burden of proof to the Appellant as regards ownership of the disputed land in 2005 while there was no evidence led that the disputed land was ever sold to the 2nd Respondent.*

When the matter came up for hearing on 29th September, 2022, the appellant and the 1st respondent appeared in person, unrepresented. The 2nd respondent was absent. The matter proceeded *exparte* against the 2nd respondent who was duly been served to appear in court. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant and the 1st respondent complied with the Court order.

In his submission in support of the appeal, the applicant began to narrate the genesis of the appeal which I am not going to reproduce. The appellant opted to combine the first and second grounds and argue the third and fourth grounds separately.

Submitting on the first and second ground, the appellant contended that the Chairman in paragraphs 5 and 3 of the typed judgment of the trial

tribunal made a finding that accordingly to the evidence adduced the original owner of the suit land was the late Mohamed Said Muhinda. He quoted the holding of the trial tribunal as hereunder:-

> *"Tulianza na kiini cha kwanza cha mgogoro kuu, ushahidi uliotolewa unathibitisha kuwa marehemu Mohamed Said Mulinda (sic) ndiye alikuwa mmiliki halali wa eneno lenye mgogoro."*

He went on to submit that the Chairman further made a finding that following PW1 evidence the suit land was sold by the late Mohamed Saidi Muhinda to Mzee Jongo and he sold the same to the first respondent in 2005 and he sold it to the appellant. He also referred this Court to page 6 paragraph 2 of the trial tribunal Judgment and submitted that despite PW3 stating that he was the first respondent's neighbor, PW3 admitted that he knew the suit land belonged to the late Mohamed Saidi Muhinda and heard Mzee Jongo was selling it to the second respondent. Thus, it was his view that PW3 adduced hearsay evidence and evidence. He valiantly argued that apart from the first respondent's (PW1) mere oral and PW3 hearsay evidence there was no any other evidence that proved that indeed the late Mohamde Said Muhinda sold the suit land to Mzee Jongo who sold it to the respondent.

The appellant did not end there, he contended that a contract for the disposition of a right of occupancy must be in writing. To support his

submission he referred this Court to section 64 (1) (a) of the Land Act, Cap. 113 [R.E 2019], he asserted that there was no any contract or memorandum produced in the tribunal showing that the late Mohamed Saidi Muhinda had sold the suit land to Mzee Jongo, thus, it was submission the tribunal erred to conclude that the late Mohamed Saidi Muhinda had sold the suit land to Mzee Jongo.

Submitting on the third ground, the appellant contended that the original owner of the suit land was the late Mohamed Saidi Muhinda and PW3 testified to the effect that he did not know how Mzee Jongo purportedly acquired the suit land. He went on to argue that PW3 did not know how Mzee Jongo acquired the suit land since there is no genuine transfer from Mzee Jongo to the second respondent. He asserted that Mzee Jongo was a material witness on the part of the first respondent and since he did not call him to testify then the tribunal ought to have drawn an inference that Mzee Jongo been called to testify he would have testified against the first respondent's interest. To buttress his contention he cited the case of **Hemed Said v Mohamed Mbilu** TLR [1984].

Arguing for the fourth ground, the appellant asserted that according to sections 110 and 111, and 112 of the Evidence Act, Cap.6 [R.E 2019], the burden of proving that the suit land belonged to him is on the first respondent. He argued that surprisingly on page 6 of the tribunal's

Judgment the Chairman shifted the burden of proof to the appellant contrary to the law. He stated that first, there was no evidence that the appellant's late father ever sold the disputed land. He spiritedly argued that it was not correct to condemn the appellant for failure to prove a fact that he was not bound to prove by the law was unjust.

In conclusion, the appellant beckoned upon this court to quash and set aside the judgment of the District Land and Housing Tribunal and declare him the lawful owner of the suit land with costs.

Opposing the appeal, the respondent's confutation was strenuous. He opted to submit generally. In his submission, the respondent submitted that the appellant acknowledged that the first respondent occupied and used the land for over 20 years. He went on to submit that the law of limitation bars the appellant to file a suit for recovery of the land since the limitation period to recover land is 12 years. To buttress his contention he referred this Court to section 3 of the Law of Limitation Act, Cap. 89 [R.E 2019].

The respondent further contended that there is no any good cause adduced by the appellant since he lacks the power to institute any claim in recovering land against the first respondent due to time limitation. He stressed that the appellant's submission in chief has nothing to warrant this Court to set aside the District Land and Housing Tribunal Judgment.

To bolster his submission he cited the case **Tanzania Electric Supply Company Ltd v Hellen Byera Nestory**, Land Case Appeal No. 113 of 2020. The respondent distinguished the cited case of **Hemed** (supra) by the appellant for the reason that the adverse possession was involved because they claims that they bought the suit land more than 27 years and his late father was alive. To support his submission on adverse possession he cited the case of **Moses v Lovegrave** [1952] QB 533 and **Hughes v Griffin** [1969] ALL ER. He insisted that based on the cited authorities, the appellant could not have the first respondent occupation and possession of the land for over 12 years without interruption.

On the strength of the above submission, the respondent argued this Court to sustain the decision of the District Land and Housing Tribunal and dismiss the appeal with costs.

In his rejoinder, the appellant maintained his submission in chief. He argued that the respondent's reply was not based on his submission in chief. He stated that he know that the suit land belongs to his father. He contended that the appellant has raised new facts of adverse possession, pleadings, proceedings and the tribunal's decision does not contain any fact concerning adverse possession. He went on to submit that assuming that the first respondent who was the applicant pleaded the doctrine of adverse possession, the said plea cannot be used by Plaintiff as a sword

when arrayed by the respondent in proceedings initiated against him. Fortifying his submission he cited the case of **Alex Senkoro & 3 Others v Eliambuya Lyimo (As administrator of the Estate of Fredrick Lyimo**, Civil Appeal No. 16 of 2017 (unreported).

The appellant urged this court to disregard the cited cases by the 1st respondent because the same was not supplied to him. Ending, he maintained his prayer to quash and set aside allow the appeal.

I have subjected the rival arguments by the parties to the serious scrutiny they deserve. Having so done, I think, the bone of contention between the learned counsels is whether the appellant had proved her ownership over the suit property. The appellant has locked horns with the respondent on this matter. Each part opposes the version of the other. In my determination, I will address the first, second, and third grounds together because they are intertwined. Equal related are the third and fourth grounds.

The first and second grounds are related to evidence on record. The appellant claims that PW3 evidence was hearsay evidence and that there was no any proof of sale from the two purported previous owners. The Chairman in his findings found that the respondent has proved that he is the lawful owner based on the fact that he bought the suit land from the first respondent.

I have gone through the proceedings and noted that the first respondent testified to the effect that he bought the suit land from the respondent.

I fully subscribe to the submission that PW3 evidence was hearsay evidence and the Chairman in his findings before rending his decision he relied on PW3 evidence who testified that he heard that Mzee Jongo sold his plot to the first respondent considering the fact that PW3 admitted that he did not know how Mzee Jongo obtained the suit land because he knew that Mohamed Saidi Muhinda was the lawful owner.

In the record, the appellant testified that the suit land belonged to his late father Mohamed Said Muhinda his evidence was supported by PW3 who knew that the suit land belonged to the late Mohamed Said Muhinda. Ubaya Katundu in his testimony claimed that he is the lawful owner. He merely testified that the appellant in 2005 told him that he wanted to dispose of his land located at Bigwa Mkuranga, and he involved his brother one Omari Katundu. To prove his ownership Ubaya Katundu tendered a sale agreement dated 2nd September, 2005. He testified that Nasoro Mponda and Omari Katundu bought the suit land on his behalf. Exhibit P1 shows that Adam Juma sold the suit land to Ubaya Katundu with a value of Tshs. 1,300,000/=and the same bears the Magistrate of the Primary Court. PW2 testified to the effect that he witnessed the sale agreement at the Primary Court. PW3 evidence was hearsay evidence

the same cannot be considered although PW1 evidence was supported by PW2.

On his side, the appellant testified to the effect that the suit land was owned by his late father but he did not tender any sale agreement to prove his ownership. In his submission, the appellant claimed that there was no proof of the transfer of ownership of Mohamed Said Muhinda to Mzee Jongo. Even though DW1 testimony was not supported by any evidence, accordingly to PW1 evidence, he admitted that Adam Juma Kibavu obtained the suit land from Mzee Jongo who bought the suit land from Muhinda. Therefore, there is no dispute that Mohamed Muhinda was the original owner and Mzee Jongo transferred the suit land to Adam Juma, however, the 1st respondent did not prove the transfer of suit property from Mzee Jongo to him and whether Mohamed Muhinda transferred the suit land to Mzee Jongo.

In absence of documentary evidence of transfer then exhibit P1 cannot suffice to declare the 1st respondent the lawful owner. Had it been that Mzee Jongo was called to testify and prove that he transferred the suit land to Adam Juma Kibavu then it could support PW1's case contrary to that the evidence on record is not sufficient enough to declare the 1st respondent a lawful owner of the suit land.

I subscribe to the submission made by learned counsel for the respondent that the 1st respondent in his reply raised a new issue which he did not raise at the trial tribunal. The issue of adverse possession was raised at the appellant court for the first time. Therefore, I respectively agree with the learned counsel for the 1st respondent that it is not proper to raise a ground of appeal in a higher court based on facts that were not canvassed in the lower courts. As a rule, for the Court to be clothed with its appellate powers, the matter in dispute should first go through lower courts or tribunals. The Court of Appeal of Tanzania in the case of **Haji Seif v Republic**, Criminal Appeal No.66 of 2007 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 issue of adverse possession has been raised for the first time before this Court.

Under the circumstances, I find the appellant's contention in the first and second grounds are meritorious. I will therefore detain myself in evaluating and analyzing the remaining grounds of appeal.

For the aforesaid findings, I find that the appeal has merit. Therefore, I quash and set aside the Judgment, Decree, and proceedings of the

District Land and Housing Tribunal for Mkuranga in Land Application No. 6 of 2019 and orders that arise thereto. The appeal is allowed to the extent explained above. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 18th November, 2022.

A.Z.MGEYEKWA

JUDGE

18.11.2022

Judgment delivered on 18th November, 2022 via video conferencing whereas the appellant and the 1st respondent were remotely.

A.Z.MGEYEKWA

JUDGE

18.11.2022

Right of Appeal fully explained.