

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

MISC. LAND APPEAL NO.100 OF 2021

(Arising from the District Land and Housing Tribunal for Kibaha at Kibaha
in Land Appeal No.113 of 2019, originating from Ward Tribunal for Bwilingu
in Land Case No.25 of 2019

ZERAPHI JUMA LIHAWA APPELLANT

VERSUS

RAJABU NGOE KAMOTE RESPONDENT

JUDGMENT

Date of Last order: 25.11.2022

Date of Judgment: 02.12.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Bwilingu in Land Dispute No.25 of 2019 and arising from the District Land and Housing Tribunal for Kibaha at Kibaha in Land Appeal No. 113 of 2019 which was delivered on 9th April, 2021. The material background facts to the dispute are briefly as follows; Zeraphi Juma Lihawa, the

appellant instituted a case at the trial Tribunal against Rajabu Ngoe Kamote, the respondent. The appellant complained that the respondent invaded his land and sold it. On his side, the respondent denied the allegations. He stated to the effect that the appellant is the owner of the suit land, however, he instructed him to sell the suit land. The trial tribunal determined the matter and ended up dismissing the case.

Dissatisfied, the appellant lodged an appeal at the District Land and Housing Tribunal for Kibaha claiming among other things that the trial tribunal faulted itself to order the respondent to pay him Tshs. 500,000/= while at the same time the trial tribunal ruled out that the appellant and respondent agreed to sell the suit land. The first appellate tribunal sustained the decision of the trial tribunal.

The District Land and Housing Tribunal for Kibaha decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on nine grounds of appeal as follows:-

1. That, the trial tribunal erred in law in differing with assessors' opinion.
2. That, the trial tribunal Chairman delivered a Judgment which was not signed by assessors.

3. That, the Chairman erred in law for failure to issue an injunctive order to the intruders restraining them from developing the suit land.
4. That the Chairman erred in law for failure to take any measure against the respondent after filing his reply to written submission in chief out of time.
5. That the Chairman erred in law to allow the appellant to be refunded Tshs. 500,000/= as payment for the sale of the land to which the appellant consented.

When the matter was called for hearing before this court on 25th November, 2022, the appellant appeared in person, unrepresented. The applicant served the respondent through substitution of service and the respondent was informed to appear in Court on 25th November, 2020 for hearing. However, the respondent did not show appearance. Therefore this court proceeded with hearing *ex parte* against the respondent.

In his submission, the appellant had not much to say. On the first and second grounds, he contended that the Chairman's decision was not supported by the assessors' opinions.

Submitting on the third ground, the appellant argued that the Chairman did not issue an order to restrain the invaders to proceed with construction but luckily the invaders fled and they are nowhere to be seen.

As to the fourth ground, the appellant argued that the appellate tribunal erred in law by admitting the reply of the respondent which was filed out of time contrary to the Court scheduling order.

Concerning the fifth ground, the appellant simply contended that Chairman faulted himself in ordering the buyer to pay the appellant Tshs. 500,000/= being the amount of the alleged sale while he did not authorize the sale of the suit land.

In conclusion, the appellant urged this Court to quash the decisions of both tribunals and declare him the lawful owner.

Having gone through the appellant's submission, the main issue for determination is whether the instant appeal has merit in view of the grounds raised argued by the appellant. In my determination, I will consolidate the first, second, third, and fifth grounds together because they are intertwined. Except for the fourth ground which will be determined separately.

With respect to the fourth ground, the appellant contended that the Chairman erred in law by admitting the reply filed by the respondent while the same was filed out of time. I have perused the District and Housing Tribunal and noted that the Tribunal ordered the matter to be disposed of by way of written submission and as per the Tribunal's scheduling order the respondent was required to file his reply on 15th July, 2020, however, the respondent filed the same on 17th July, 2020. The appellant had a chance to raise his concern during his rejoinder which was required to be filed at the tribunal on 22nd July, 2020 but he has waived his right to file a rejoinder. Therefore, the appellant cannot raise the same before appellate Court because nothing can be done by this Court.

As to the first, second, third, and fifth grounds of appeal, I have scrutinized the Land Appeal No.113 of 2019 records and noted that the said grounds of appeal raised by the appellant are new grounds; the ground that the trial tribunal erred in law to differ with assessors opinion, that the trial tribunal Chairman delivered a Judgment which was not signed by assessors, the chairman erred in law for failure to issue a restraining order and the Chairman erred in law to allow the appellant to be refunded Tshs. 500,000/= as payment for the sale of the land to which the appellant consented.

All are new grounds that were raised for the first time before this Court. 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. 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. 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].*

Equally, the Court of Appeal of Tanzania in of **Paschal Aplonal v Republic**, Criminal Appeal No. 403 of 2016 [TANZLII 28th October, 2019], the Court of Appeal cited with approval the case of **Ramadhan Mohamed v Republic** , Criminal Appeal No. 112 of 2006 (unreported) held as follows:-

“ We take it to be settled law, which we are not inclined to depart from, this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised

nor decided by neither the trial court nor the High Court on appeal.”

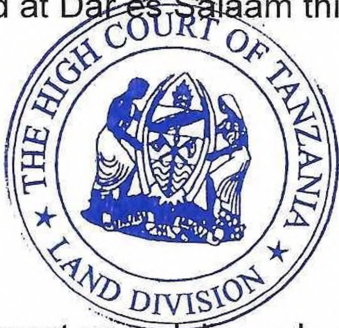
[Emphasis added].

In light of the stated position of the law, the appellant's grounds are not tenable. In this regard, this Court cannot at any rate consider such factual matter at this stage.

In the upshot, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 2nd December, 2022.





A.Z.MGEYEKWA

JUDGE

02.12.2022

Judgment was delivered on 2nd December, 2022 in the absence of the parties.




A.Z.MGEYEKWA

JUDGE

02.12.2022

Right of Appeal fully explained.