IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION - DSM)

AT MOROGORO

LAND APPEAL NO. 05 OF 2020

(Arising from the Judgement of the District Land and Housing Tribunal for Kilombero/Malinyi in Land Appeal Case No. 391 of 2019)

ZAINABU MPINGAWADU .....APPELLANT

VERSUS

MJUSI KAWAGO .....RESPONDENT

JUDGMENT

31st August, 2022

CHABA, J.

This is a second appeal. The matter traces its origin from the decision of the Ward Tribunal namely, Kibaoni Ward Tribunal at Ifakara in Land Case No. 20 of 2020 where the appellant sued the respondent for trespassing over her ¾ acre or parcel of land situated at Ifakara Township.

Aggrieved by the decision of the Ward Tribunal, the appellant filed an appeal before the District Land and Housing Tribunal for Kilombero/Malinyi at Ifakara (the DLHT) via Land Appeal No. 391 of 2019 where the DLHT (First Appellate Tribunal) upheld the decision of the Ward Tribunal and declared the respondent herein (Mjusi Kawago) as the lawful owner of the disputed land. Still aggrieved, the appellant knocked the door of this court by way of appeal seeking what she believed to be her rights through substantive justice.

The material background of the dispute are briefly as follows: The appellant alleged to be a lawful owner of ¾ acre that she obtained through inheritance from her late father. In 2019 the appellant instituted a Land Case No. 20 of 2019 at Kibaoni Ward Tribunal against the respondent for trespass over the said parcel of land. To substantiate her claim in respect of ownership of the disputed land, she summoned one Mwanaisha Ndimbi (PW2) as her witness. On the other hand, the respondent contended that he purchased the disputed land together with the house from Ramadhan Makwinja on 30th November, 2008 and has been in continuous occupation over the said parcel of land from 2008 till 2019 when the appellant filed the suit. The sale agreement was tendered in the trial Ward Tribunal and later the Ward Tribunal visited the locus in quo (disputed land) and finally decided in-favour of the respondent.

In a bid to pursue for her rights, the appellant preferred the instant appeal clothed with six (6) grounds as enumerated hereunder:

1. *That, the Honorable Chairman of the District Land and Housing Tribunal erred in law and upon fact in dismissing the appeal with costs and in departing from the opinion of the other Assessors who considered the non-reply of grounds of petition of appeal done by the Respondent as it is not known where old chairman the appeal be devoid and having no merit as Respondent for that manner in not responding the way reply conceded with the grounds of appeal (Sic).*

2. *That, the Honourable Chairman of the trial tribunal erred*

in law and upon fact in not considering the not disputing of the Respondent the improperly assessing the evidence adduced at the ward Tribunal by the way of replying the grounds of petition of appeal and in conceding with the wrong decision as the ward Tribunal did an action which is hereby believes to shock the justice (Sic).

3. *That, the District Tribunal in upholding the decision at the ward Tribunal while knowing the Respondent deliberately could not abide by filing schedule of the appeal was disposed of by way of written submission an action which proved the Tribunal to have personal interests in dismissing with costs the appeal as it is not known where did the Tribunal snatched the fact to uphold the decision of the ward tribunal.*

4. *That, the trial tribunal erred in law and upon fact in being convinced that in 2008 the Respondent bought the disputed land from the land owner and has been in continuous occupation over that piece of land without having a criminal case judgment from a court having land criminal cases which convicted the Appellant for entering criminally the disputed land to prove the continuous occupation and the 2019 claim of the land alleged to has been done by the Appellant (if any) (Sic).*

5. *That, the appeal is in time as the decision of the Kilombero/Malinyi District land and Housing Tribunal was delivered on 30/07/2020 and copy of judgment was received on 08/09/2020.*

This appeal proceeded by way of written submissions after all parties conceded to. It was ordered that the appellant had to file her written submission in chief on 22nd December, 2021 and the respondent had to file a reply to the written submission in chief on 6th January, 2022 and re-joinder (if any) on 13th January, 2022. Both parties filed their respective

submissions in supporting and opposing the grounds of appeal respectively.

Submitting in support of grounds of appeal, the appellant did not submit and argued the grounds of appeal rather than submitting on non-relevant issues which was not called for and further abandoned grounds 1, 4 and 5. In respect of the first ground, the appellant submitted that the respondent did not file reply to the petition of appeal at the DHLT and the trial Chairman continued to deliver the judgement. On the second ground, it was submitted that the appellate Chairperson did not consider the evidence tendered at trial when determining the case. Thus, the appellant is the owner of the disputed land.

As regard to the third ground, the appellant highlighted that the respondent did not abide by the court's scheduled orders during filing her respective submission. Based on the above submission, the appellant prayed the court to allow the appeal and dismiss the first appellate tribunal's decision with costs.

In opposing the appellant's submission, the respondent submitted that replying to submission in chief is not mandatory in law and there is no law guiding to that effect. He submitted further that the appellant did not abide by the court's scheduled orders in filling written submission hence failed to prosecute his own case. He underlined that, the DHLT being the first appellate court had a duty to re-evaluate the evidence of the trial Ward Tribunal under section 34 (1) (a) of the Land Disputes Courts Act [Cap. 216 R. E, 2019] and cited the case of **Deemay Daati and Two Others vs. Republic [2005] TLR. 132** to fortify her argument. To round up, she prayed the court to dismiss the appeal with

costs.

In rejoinder, the appellant insisted that since the respondent failed to submit his respective submission on time, such act resulted to failure to prosecute the case (Sic). She finally reiterated her prayers with costs.

Having considered the rival submissions from both parties and perused the grounds of appeal and further upon gone through the proceedings of the trial Ward Tribunal and the District Land and Housing Tribunal, the issue for determination, consideration and decision thereon is, whether or not this appeal has merits.

Before I proceed to deal with this appeal, I must confess that the parties' written submissions are so confusing and too shoddy. However, the following are my observations:

With regards to the first ground of appeal, the appellant's complaint is that the respondent did not file a reply and the trial tribunal proceeded to pronounce the judgment. On his party, the respondent argued that there is no any law which dictates that replying to written submission in chief is mandatory. As a matter of law, I agree with the respondent that there is no specific law which requires that, once the written submission in chief is lodged in court, the other party must file reply thereon. It is the of matter practice. This ground is baseless.

On the second ground, the appellant argued that the respondent did not abide by the court's scheduling orders for failure to file a written submission, rather the trial tribunal proceeded to enter judgment in favour of the respondent. It is trite law that failure to file written submissions as ordered by the court is tantamount to failure to prosecute and or defend

the matter as the case may be. This position of the law was stated in **Harold Maleko vs. Harry Mwasanjala,** DC Civil Appeal No. 16 of 2000, (HC-Mbeya) (unreported) in which Mackanja, J. (As he then was) held: -

> *"I, hold, therefore that the failure to file written submission in time prescribed by the court order was inexcusable and amounted to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."*

Also, in the case of **Famari Investment (T) Limited v. Abdallah Selemani Komba** (Administrator of the Estate of the Late Sharifa Abdallah Salama); Misc. Civil Application. No. 41 of 2018, (HC-Mbeya) (Unreported), which was cited with approval in **P3525 LT. Idahya Maganga Gregory v. The Judge Advocate General,** Court Martial Criminal Appeal No. 2 of 2002 (Unreported) it was held:

> *"It is now settled in our jurisprudence that the practice of filling written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non- appearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound. Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered. Needless to state here that submissions filed out of time and without leave of the court are not legally placed on records and are to be disregarded."*

From the above cited cases, it is true that the respondent did not file

his written submission as scheduled. The record of the first appellate Tribunal shows that the appellant was supposed to file her written submission in chief on 21st April, 2020 and the respondent's reply by or on 20th May, 2020 and rejoinder (if any) by or on 1st June, 2020. It is however, shown in the record of the first appellate Tribunal that the appellant filed her written submission on 14th day of April, 2020, but the respondent did not file reply thereto instead applied for extension of time to file his reply to written submission and the appellate Tribunal extended time as prayed for 14 days. On 22nd day June, 2020 the record shows: -

> *22/06/2020*
> *Coram - C. P. Kamugisha, Chairman*
> *Appellant-present*
> *Respondent-Absent*
> *Tribunal - No reply has been filed despite extension of time that was availed to the respondent*
> *Order: Judgment on 30/7/2020*

Therefore, the records speak for itself clearly that the respondent was accorded the extension of time but did not file the same as the result the tribunal proceeded to evaluate the evidence of the trial tribunal and pronounced judgement. Page 2 of the first appellate Tribunal's Judgement read: -

> *"It was the appellant that could abide by the filling schedule, as the* ***respondent could not file his reply".***

I am settled in my mind that, since the respondent failed to file his submission in time, then the appellate Chairman had to proceed to

evaluate the evidence on record as correctly adhered to by the DLHT. Having analyzed so, I agree with the respondent that this ground also has no merits.

Regarding the third ground, the appellant alleged that the first appellate Tribunal failed to evaluate the evidence as the result ruled in favour of the respondent. It is the position of the law that the second appellate tribunal cannot interfere with the concurrent findings of lower tribunals unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or violation of some principles of law or practice. This was held in the case of **Ahmed Said v. Republic**, Criminal Appeal No. 291/2015; CAT (Unreported) where the Court observed that: -

> *"We similarly understand that this is a second appeal to which it is well settled that this Court will ordinarily be slow to intervene and overturn the concurrent findings of the two courts below. But this established rule of practice is predicated on the premise that the two courts below did not act upon a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice. Where the concurrent findings are based on such incorrect premises, the Court will certainly interfere on a second appeal to right the injustice".*

The same position was underscored in the case of **Samwel Kimaro v. Hidaya Didas,** Civil Appeal No. 271 of 2018 where the Court of Appeal held:

"Nonetheless; both the trial Tribunal, after hearing the evidence ruled that the appellant had knowledge and the High Court, after reviewing the evidence of the trial Tribunal arrived at the same conclusion that the appellant was aware of rent increase. As such the question whether the appellant was notified orally or through formal written notice, is purely based on facts and not law. This being a second appeal, we refrain in interfering with lower courts concurrent findings of fact".

Again, the Court of Appeal of Tanzania in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A. H. Jariwalla t/a Zanzibar Hotel, (1980) TLR 31,** held as follows: -

"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."

Apart from the above legal principles of the law, on reviewing the lower courts records the appellant deposed that she was given the disputed land by **her** father, she was the administratrix of the deceased estate, as it shown in the trial Ward Tribunal that when the appellant was cross-examined by assessors, she replied as follows:

"Swali toka kwa wajumbe,

Swali; je kama ikionekana mwaka 2008 utakua bado uja kuwa kwenye kesi utaliambia nini baraza?

Jibu: Sheria ichukue mkondo wake.

Swali hilo eneo umelipata wapi?

Jibu: lilikua la baba.

Swali: ***je una vielelezo vyovyote ulivyopewa na baba yako?***

Jibu: ***sijapewa.***

Swali: Je, katika familia mko wangapi?

Jibu: ***wanne lakini mimi ndio msimamizi wa mirathi.***

Swali: Je, unawajua uliopakana nao?

Jibu: Kusini Mrisho, Kasikazini Mhoki, Magharibi Mhawi na Makunyira, Mashariki simjui. [Emphasis is mine].

However, during the trial the appellant did not have any document to prove the ownership of the disputed land or even possessing a letter showing that sometimes in between she appointment as an administratrix as required by the law, and she did not state when her father was passed away and when she was appointed as an administratrix of the deceased estate. Badly enough, the appellant instituted the claims in her personal capacity and not as an administratrix of the deceased's estate. If the property did belong to her father's property, the appellant ought to have been instituted *mirathi* proceedings to prove that she applied and successfully appointment as an administratrix of the deceased's estate. In absence of all these legal requirements, the appellant lacks locus stand to institute a case against the respondent under the umbrella of being an administratrix of the deceased's estate as it was underscored in the case of **Hadija Said Matika v. Awesa Said Matika,** Civil Appeal no. 2/2016, HC - Mtwara, (Unreported), wherein the Court held: -

"There may be cases where the property of a deceased person may be in dispute such cases all those interested in determination of the dispute or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish claim of deceased's property".

From the foregoing, and to the extent of my findings, it is obvious that the appellant has failed to establish and prove to the satisfaction of this court that truly she was (is) an administratrix of the estate of her late father. That means she has failed to prove that at the material time she had good title in the suit land.

In the final analysis, I find that in as much as the records speaks for itself, there is no sufficient or strong reasons to warrant this court overturn the findings reached by the lower Tribunals. I thus, hereby uphold the decisions of the first Appellate Tribunal and the trial Ward Tribunal and confirm the orders stemmed therein and proceed to dismiss the appellant's appeal for lacking merits with costs. **It is so ordered.**

DATED at MOROGORO this 31st day of August, 2022.

M. J. CHABA

JUDGE

31/08/2022