

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

MISCELLANEOUS LAND APPEAL NO. 106 OF 2021

(Arising from the Decision of the District Land and Housing Tribunal for Kibaha at Kibaha in Land Appeal No. 120 of 2019 and originating from Land Application No. 07 of 2019 of Fukayosi Ward Tribunal)

DONALD E. MMARI **APPLICANT**
VERSUS
IBRAHIM MSIGALA **RESPONDENT**

Date of last Order: 31/05/2022

Date of Judgment: 15/07/2022

JUDGMENT.

I. ARUFANI, J

The appellant in the appeal at hand is appealing against the decision of the District Land and Housing Tribunal for Kibaha at Kibaha in Land Appeal No. 120 of 2019. The appeal originated from Fukayosi Ward Tribunal as Land Application No. 07 of 2019. Aggrieved by the decision of the District Tribunal which confirmed the decision of the Ward Tribunal, the appellant filed in this court the appeal at hand to challenge the decision of the District Tribunal basing on the following grounds: -

- 1. That, the Honourable Chairman erred in law and fact for reaching decision without properly evaluated the evidence adduced by the appellant in the Trial Tribunal.*

- 2. That, the Honourable Chairman erred in law and fact to uphold the decision of Fukayosi Ward Tribunal without considering the sale agreement entered between the appellant and one Jumanne Ally Mwanapala, who was not joined in the proceedings as a necessary party.*
- 3. That, the Honourable Chairman erred in law and fact to reach into conclusion without joining the Kidomole Village Council to whom the respondent alleged that he bought that piece of land in dispute from them.*
- 4. That, the Honourable Chairman erred both in law and fact by declaring that the respondent is the lawfully owner of the piece of land in dispute although he failed to prove how he acquired that piece of land, even a minute of Kidomole Village Council was not submitted.*
- 5. That the Honourable Chairman erred both in law and fact for declaring that the respondent is the lawfully owner without disclosing full identification of the property.*

The appellant was represented in the matter by Mr. Mathew Kabunga, learned advocate and the respondent appeared in the court in person. The respondent prayed the matter be argued by way of written submission and the court granted the prayer. In the course of arguing the appeal the written submission of the appellant was prepared and filed in the court by Mr. Mathew Bernard Kabunga, learned advocate and that of

the respondent was prepared and filed in the court by Ms. Janeth Bisanda, learned advocate.

In support of the appeal the counsel for the appellant argued the first, second and third grounds of appeal together and stated that the District Tribunal erred by failing to analyse and summarize the evidence adduced before it, and it failed to apply the evidence to the issues and principles of law guiding the suit, and therefore as a direct result of such errors it made a wrong decision borne out of the wrong conclusion not supported by evidence.

He argued that the District Tribunal erred in basing its decision on the respondent's evidence without joining the necessary parties in the dispute who were Kidomole Village Council which is alleged it allocated the land in dispute to the respondent and Mr. Jumanne Ally Mwanapala who sold the land in dispute to the appellant. He submitted that, failure to join those necessary parties in the suit rendered the whole proceedings fatally defective.

He supported his submission with the cases of **Juma B. Kadala V. Laurent Mnkande**, [1983] TLR 103 and **Leonard Peter V. Joseph Mabao & 2 Others**, Land Case No. 04 of 2020, HC at Mwanza (unreported) where the court referred the case of **Abdullatif Mohamed Hamis V. Mehboob Yusuph Othman & Another** CAT Civil Revision

No.6 of 2017 (unreported) where importance of joining necessary party in a suit was emphasized. He submitted that, it is a principle of law as stated in the case of **Juma B. Kadala** (supra) that, nonjoinder of Kidomole Village Council and Jumanne Ally Mwanapala in the suit rendered the whole proceedings of the trial tribunal fatally defective hence the same should be quashed.

He argued in relation to the fourth ground of appeal that, it is not stated anywhere in the proceedings of the trial tribunal about how the respondent acquired the land he was claiming for. He added that, the question to ask here is whether Kidomole Village Council had jurisdiction to allocate piece of land occupied by one person to another without compensation. He stated the answer will be in negative. He submitted that, as the village council was not a party in the proceedings of the trial tribunal it becomes very difficult to reach into a proper conclusion.

With regards to the fifth ground of appeal, the counsel for the appellant argued that, the respondent stated in his claim that the appellant trespassed into his piece of land measuring four acres but nowhere the suit land was properly described. He stated that is contrary to order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019 which states that, where the subject matter of a suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it.

He submitted further that the law requires a sufficient description of the property for the purpose of its proper identification. He stated in case of surveyed land a title number of the suit land shall be stated in the plaint and the purpose for requiring such a description is just to distinguish the suit land from other piece of land in the same area. He stated further that it is his view that the description of the suit land was not sufficient enough to describe the land in dispute as it contains the size of the land only. He supported his view with the case of **Abutwalib A. Shoko V John Long and Another**. Land Case No.20 of 2017 HC at Arusha (unreported) where the court rejected the plaint for failure to describe the property in dispute properly.

In reply the counsel for the respondent drew attention of the court to the fact that the second, third, fourth and fifth grounds of appeal are new grounds of appeal which were never raised nor decided at the District Tribunal which was the first appellate Tribunal. The counsel for the respondent stated it is a trite law that an appellate court will not have jurisdiction to deal with grounds of appeal not canvassed by the first appellate court. To support her argument, she referred the court to the cases of **Monica Sarah John V. Kassimu Rajabu Omour**, Land Case Appeal No.138 of 2018, HC of Tanzania, Land Division at DSM, **Kipara Hamisi Misagaa @ Bigi V. R**, Criminal Appeal No.441 of 2007 [2018]

TZCA 88, **Nazir Mohamed @ Nidi V. R**, Criminal Appeal No. 312 of 2014, CAT at Mwanza (all unreported) and **Elisa Moses Msaki V. Yesaya Ngateu** [1990] TLR 90 where it was stated that matter which was not raised or decided by the trial court cannot be looked by the appellate court.

She argued in relation to the first, second and third grounds of appeal which were argued jointly by the counsel for the appellant that, even if they were to be considered but they deserve nothing as they are baseless. She submitted that the respondent was the first person to acquire the title of the land in dispute as he was allocated the same by Kidomole Village Council on 06/05/2004 whereas the appellant alleged he bought the land in dispute on 09/12/2009 from one Jumanne Ally Mwanapala who was the only witness testified for the appellant.

She argued that the appellant had not proven the case to the required standard. She stated it is a general rule that who alleges must prove as it was stated in the case of **Lamshore Ltd & Another V. Bazanje K. U. D. K.** [1999] TLR 330 where it was held that he who alleges a fact has to prove it. She stated there is no doubt that the respondent's evidence is heavier than that of the appellant. She stated it was held in the **Hemed Said V. Mohamed Mbilu** [1984] TLR 113 that, parties to a suit cannot tie but the person whose evidence is heavier than

that of another is the one who must win. She went on submitting that, no doubt on the findings of the Ward Tribunal and the evidence on record that the respondent successfully proved that the land in dispute belongs to him basing on the ample evidence adduced by the respondent and his witnesses.

As for the ground relating to none joinder of Kidomole Village Council which it was stated it allocated the land in dispute to the appellant and Jumanne Ally Mwanapala whom is stated he sold the land in dispute to the appellant in the matter which the counsel for the appellant argued it rendered the proceedings fatally defective, the counsel for the respondent argued it is a new issue which was not raised and determined by the District Tribunal and it is also without substance. She referred the court to the case of **Hotel Travertine Limited and 2 Others V. National Bank of Commerce Limited** [2006] TLR 133 where it was held that, matters not taken or pleaded in the court bellow cannot be considered by an appellate court.

She argued that, the allegation that the mentioned parties ought to be made parties to the case is a misconception and an afterthought. She said after the appellant failed to prove the case, he came up with new issues which were neither canvassed at the trial tribunal nor in the District Tribunal. She added that, even if the appellant ought to have moved the

Tribunal to summon the Village Council and despite having not done so but still Jumanne Ally Mwanapala appeared and testified before the Ward Tribunal in favour of the appellant.

She argued that, the Ward Tribunals' proceedings are regulated by its own procedure provided under section 15 of the Ward Tribunals Act, Cap 206, R.E 2002. She argued that, there is no extraordinary circumstances that requires the court to interfere with the District Tribunal's finding as the appellant failed to prove their ownership to the land in dispute. She submitted that as found by both tribunals, the evidence of the respondent outweighed the appellant's evidence. She distinguished the case of **Juma B. Kadala** (supra) from the present case by stating that, it differs from the situation of the case at hand as it was dealing with joinder of legal representative of the deceased in the case.

As for the ground that the District Tribunal erred in law and in fact by declaring that the respondent is the lawful owner of the piece of land in dispute although he failed to prove on how he acquired it the counsel for the respondent submitted is barren of merit. She argued that the record of the Ward Tribunal shows the respondent successfully proved his case as even the minutes of Kidomole Village Council admitted in the case as evidence shows the respondent was allocated the land on 6th May.

2004 which is before the appellant who alleged to have purchased his land from Jumanne Ally Mwanapala on 9th December, 2009.

She argued that, the said Jumanne Ally Mwanapala had no good title over the land in dispute to pass to the appellant as he failed to say when and how he acquired the said land. She argued that, the respondent adduced documentary evidence which satisfied both the Ward and District Tribunals that the respondent is the lawful owner of the land in dispute. She submitted that, omission to offer proof as to his possession over the land created doubts which as stated in the case of **Jeremiah Shemweta V. R**, [1985] TLR 228 it was supposed to be resolved in favour of the respondent. She submitted that, the respondent managed to substantiate his claim at the tribunal and the appellant failed to prove his ownership to the land in dispute.

As for the last ground of appeal that the Honourable Chairman erred in law and fact for declaring the respondent is the lawful owner without disclosing full identification of the property in dispute the counsel for the respondent contended that, apart from being a new ground, but the ground is based on a misconception as well is placed on a wrong footing because the issue of the description of the land was not an issue as the document submitted by the respondent were well elaborative that the suit land was well described.

She continued to submit that the appellant referred the court to Order VII Rule 3 of the CPC which is not applicable in the circumstances of the present case as the law applicable in the Ward Tribunal is a Ward Tribunals Act, 1985 which governs administration and determination of land disputes. She went on arguing that, the disputes before the Ward Tribunal, is initiated by institution of a complaint and not a plaint. To fortify her argument, she referred the court to section 11 (1) of the Ward Tribunals Act which states proceedings may be instituted by making a complaint to the secretary of the tribunal.

She added that, the case of **Abutwalib A. Shoko** (supra) is also distinguishable from the case at hand. At the end she emphasized that the appellant failed to prove his ownership to the land in dispute and submitted the court cannot fault the tribunals' finding on the grounds of appeal raised by the appellant. she prayed the court to find the grounds of appeal raised by the appellant are devoid of merit and deserve to fail in their entirety.

Having careful gone through the written submissions filed in this court by both sides and after going through the records of the matter the court has found the issue to determine in this appeal is whether the appeal is meritorious. In determining the foregoing issue, I will be guided by the

submission made to the court by the counsel for the parties in respect of the grounds of appeal filed in this court by the appellant.

Before going to the merit of the appeal the court has found it is pertinent to start with the observation made by the counsel for the respondent that the second, third, fourth and fifth grounds of appeal are grounds which were neither raised nor decided by the District Tribunal. The court has found the record of the matter shows the appellant raised three grounds of appeal before the District Tribunal.

The record of the tribunals shows two of the grounds raised in the appeal filed at the District Tribunal which were first and third grounds were challenging the decision of the Ward Tribunal on ground that the Ward Tribunal erred in not putting into account tenable evidence adduced by the appellant and erred in reaching into a decision basing on weak evidence adduced by the respondent. The second ground taken to the District Tribunal was about composition of the members of the tribunal which the appellant argued were more than the members required by the law and this is not part of the grounds of appeal brought to this court by the appellant.

If you make a comparison of the grounds of appeal raised by the appellant before the District Tribunal and the issues determined by the District Tribunal with the grounds raised before this court by the appellant

you will find as rightly argued by the counsel for the respondent, the second, third, fourth and fifth grounds of appeal raised before this court by the appellant were neither raised nor determined by the District Tribunal. They are new grounds which as stated in the cases of **Monica Sarah John, Kipara Hamis Misagaa, Nazir Mohamed and Elias Moses Msaki** (supra) cited in the submission of the respondent this court is not required to entertain and determine them as were neither raised nor determined by the District Tribunal. The same position of the law was stated in the case of **Raphael Enea Mngazija V. Abdalla Kalonjo Juma** Civil Appeal No.240 of 2018 and **Galus Kitaya V. R**, Criminal Appeal No.196 of 2015 (both unreported) where it was held that, the court does not consider new grounds raised in the second appeal which were not raised in the subordinate court.

Even if it will be said the court has power to consider the grounds which were neither raised nor determined by the two tribunals but the court has found they are mainly challenging the decision of the District Tribunal basing on ground that both tribunals failed to properly evaluate the evidence adduced before the Ward Tribunal. That being the position of the matter the court has found proper to state at this juncture that, as this is a second appeal which is challenging concurrent finding arrived by the Ward and District Tribunals, this court cannot interfere with the

concurrent finding of the two tribunals unless the court is satisfied there is misdirection or misapprehension of evidence adduced before the Ward Tribunal by the parties.

The foregoing stated position of the law can be found in the cases of **Amratlal Damodar & Another V. A. H. Jarawalla**, [1980] TLR 31 and **Bushanga Ng'oga V. Manyanda Maige**, [2002] TLR 335 where it was held in the latter case that, in the absence of misdirection or misapprehension of evidence an appellate court should not interfere with concurrent finding of facts of the two lower courts. While being guided by the position of the law stated hereinabove, I will start with the first ground of appeal which states the Chairman of the District Tribunal erred in reaching into a decision without properly evaluated the evidence adduced before the Ward Tribunal by the appellant.

The court has found the evidence adduced before the Ward Tribunal by the parties and their witnesses shows on 06th May, 2004 the respondent was allocated the land measuring 45 acres by Kidomole Village Committee. The evidence of the respondent that he was allocated the said parcel of land by Kidomole Village Council or meeting was supported by the evidence of Mrisho Masudi, Mohamed Shaban Issa, Charles Maziku and Salum Abdallah Kihalule. On the other hand, the appellant said on 9th December, 2009 he purchased from Jumanne Ally Mwanapala 18 acres of

land which part of it measuring 4 acres are in dispute. The witnesses supported the evidence of the appellant were Hamisi Mwalimu Mrisho (As his representative), Jumanne Ally Mwanapala, Adam Shabani and Hamisi Shabani.

From the evidence of the witnesses mentioned hereinabove, it is crystal clear as stated by the counsel for the respondent that, the respondent's witnesses established the respondent was the first person to be allocated the land in dispute by Kidomole Village Council as he was allocated the same on 6th May, 2004. The court has found that, although the appellant's witnesses stated the owner of the land in dispute was Jumanne Ally Mwanapala who sold the same to the appellant on 9th December, 2009 but the decision of the Ward Tribunal states categorically that Jumanne Ally Mwanapala failed to establish before the Ward Tribunal how he acquired the land in dispute which he sold to the appellant.

The court has tried to consider the argument by the counsel for the appellant that the Chairman of the District Tribunal failed to evaluate the evidence adduced before the Ward Tribunal but find that, as rightly argued by the counsel for the respondent that argument is devoid of merit. The court has found both tribunals properly analysed and evaluated the evidence adduced before the Ward Tribunal and arrived to a correct decision that the respondent was a lawful owner of the land in dispute as

he was allocated the same by Kidomole Village Council before the date the appellant alleged to have purchased the same from Jumanne Ally Mwanapala.

The court has also considered the argument by the counsel for the appellant that the Tribunals failed to evaluate the evidence of the sale agreement entered by the appellant and Jumanne Ally Mwanapala and relied on weak evidence of the respondent to arrive to a wrong decision that the respondent is the owner of the suit land. The court has considered the evidence adduced by Jumanne Ally Mwanapala and after going through the sale agreement used by the appellant to establish his ownership to the land in dispute the court has failed to see anything establishing the two tribunals erred in finding the respondent is the owner of the land in dispute. To the contrary the court has found the decision of the Ward Tribunal shows Jumanne Ally Mwanapala failed to establish before the Ward Tribunal how he acquired the land in dispute which he stated he sold to the appellant.

The court has considered the further argument by the counsel for the appellant that the respondent failed to establish how he acquired the ownership of the land in dispute but find his argument is not supported by the evidence adduced before the Ward Tribunal. The court has found the respondent stated in his evidence that he was allocated the land in

dispute by Kidomole Village Council and he called witnesses mentioned earlier in this judgment like Mrisho Masudi, Mohamed Shabani Issa and Salum Abdallah Kihalule to support his evidence that he was allocated 45 acres of land by Kidomole Village council.

The court has also found that, although the counsel for the appellant argued there is no minutes of the Village Council tendered before the Ward Tribunal to establish the respondent was allocated the land in dispute by the Village Council but the record of the Ward Tribunal shows there is a copy of minutes of meeting of Kidomole Village Council in the record of the Ward Tribunal which states categorically that the respondent was allocated 45 acres of land by Kidomole Village Council. Therefore, the argument that there is no copy of minutes of Kidomole Village Council adduced before the Ward Tribunal to show how the respondent acquired the land in dispute is not supported by the record of the case.

As for the further argument that Kidomole Village Council had no power to allocated land of a person to another without compensation the court has found the counsel for the appellant has not stated whose land was allocated to the respondent without compensation be paid. To the contrary the court has found the evidence adduced by the witnesses testified for the respondent shows the land allocated to the respondent

was a village land and not a land of anybody else. In the premises the court has failed to see any substance in the stated argument.

The court has considered another argument raised by the counsel for the appellant that the District Tribunal erred in upholding the decision of the Ward Tribunal which was reached without joining Kidomole Village Council which is alleged it allocated the land in dispute to the respondent and Jumanne Ally Mwanapala who is alleged he sold the land in dispute to the appellant. The court has found that, although it is true that the mentioned parties were not joined in the case but that is not a sufficient ground for faulting the decision of the Ward and District Tribunals.

The court has arrived to the above finding after seeing that, the said parties were not necessary parties in the context of the meaning of necessary parties stated in the cases of **Juma B. Kadala** and **Leonard Peter** cited in the submission of the counsel for the appellant. To the view of this court and as stated in the above cited cases necessary party who if not joined in a suit can vitiate a proceeding is a party who if a decree is passed by the court, it cannot be executed without affecting him. The above view of this court is getting fortification from the wording of the Court of Appeal of Tanzania made in the case of **Abdullatif Mohamed Hamis** cited in the case of **Leonard Peter** (supra) where it was stated that: -

"... a necessary party is one whose presence is indispensable to the constitution of a suit and whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case."

From the position of the law stated in the above quoted excerpt the court has failed to see how nonjoinder of Kidomole Village Council and Jumanne Ally Mwanapala in the matter would have affected constitution of the suit and how their absence would have caused the decree or order passed by the Ward and District Tribunals to be ineffective. The court has been of the view that, if the view of the counsel for the appellant was for those parties to establish their root of title and their capacity to transfer land to the parties alleged, they acquired the land in dispute from them there were witnesses and documentary evidence adduced before the Ward Tribunal as mentioned earlier in this judgment which was sufficient enough to determine the stated issue.

As for the argument that the land in dispute was not properly described as provided under Order VII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019 the court has found as rightly argued by the counsel for the respondent the said law is not applicable in the Ward Tribunal. To the contrary the court has found as rightly argued by the counsel for the

respondent the Ward Tribunals are governed by the Ward Tribunals Act, Cap 206 R.E 2002 which its section 15 (1) states categorically that Ward Tribunals are not bound by any rules of evidence or procedure applicable to any court.

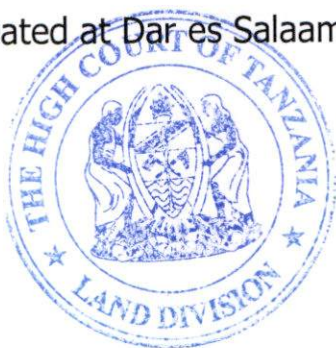
The court has found the counsel for the appellant has not disclosed anywhere in his submission which descriptions of the land in dispute were supposed to be given by the respondent and were not given so as to say the land in dispute was not sufficiently described. To the contrary the court has found the respondent gave the size of the land claimed was trespassed by the appellant was four acres. The court has also found the respondent gave the location of the land in dispute and the Ward Tribunal visited the land in dispute to see the same.

Under that circumstance the court has found it cannot be said the decision arrived by both tribunals was vitiated in whatsoever by the alleged lack of sufficient description of the land in dispute. That makes the court to find that, as rightly argued by the counsel for the respondent the case of **Abutwalib A. Shoko** (supra) cited to support the submission by the counsel for the appellant about description of the land in dispute is distinguishable and not applicable in the case at hand.

In the final result the court has found all grounds of appeal filed in this court by the appellant and the submission made by his counsel to

support them have not managed to persuade the court to find there is anything material to move it to interfere with the concurrent finding of both Ward and District Tribunals. Consequently, the appeal of the appellant is hereby dismissed in its entirety for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 15th day of July, 2022



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

15/07/2022

Court:

Judgment delivered today 15th day of July, 2022 in the presence of the respondent in person and in the absence of the appellant and his advocate. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

15/07/2022