

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.133 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.94 of 2020, originating from Ward Tribunal of Wazo in Land Case No.107 of 2020)

ELIREHEMA OBED MEJOOLI APPELLANT

VERSUS

MICHAEL MALLEKO JOHN 1ST RESPONDENT

ZAKARIA NJILEZO KISIMA 2ND RESPONDENT

JUDGMENT

Date of last Order: 26.01.2022

Date of Judgment: 31.01.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Wazo in Land Case No.107 of 2020 and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 94 of 2020. From the scanty information borne out by the record, the background of this matter can be traced way back to the year 2020, when

the parties herein appeared before Wazo Ward Tribunal contesting over the ownership of a piece of land. The respondent claimed that the appellant encroached on his piece of land and constructed a wall claiming that he is the lawful owner of the suit land. The respondent testified to the effect that the Kilimahewa Local Government Authority explored the respondent's claims by involving neighbours who informed them that the respondent is the lawful owner of the suit land. That finding prompted the respondent to institute a case at Wazo Ward Tribunal urging the Ward Tribunal to declare him a lawful owner of the suit land.

On his side, Elirehema Obed Mejooli, the 1st respondent denied the respondent's claims. He testified to the effect that he is the lawful owner of the suit land which he bought in 2000. He claimed that the respondent invaded the suit land. Zakaria Kisima was the 2nd respondent; he testified to the effect that he bought a piece of land from Anna Kulingwa in the year 1992. He claimed that the 1st respondent has trespassed the suit land. In 2012, the 2nd respondent decided to sell the suit land to the 1st respondent but he ended up to sale the same to the respondent an in 2020, the appellant forcefully decided to build in the suit land. The trial tribunal visited *locus in quo* and decided the matter in favour of the respondent. The appellant was ordered to demolish the wall.

The matter went on appeal to the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 94 of 2020. The appellant claimed that the trial tribunal had no jurisdiction to determine the matter. He complained that the trial tribunal failed to consider the appellant's evidence, did not invite the land surveyor officer to measure the boundaries and the seller was a necessary party to the suit. The District Land and Housing Tribunal for Kinondoni upheld the decision of the trial Tribunal and maintained that the respondent is the lawful owner of the suit land. The first appeal irritated the appellant. In this appeal, the appellant has accessed the Court seeking to impugn the District Land and Housing Tribunal decision through a memorandum of appeal premised on five grounds as follows:-

- 1. That the Honourable District Land and Housing Tribunal erred in law and in fact in basing its decision on the judgment of the Ward Tribunal without considering the testimonies and exhibits tendered in the Ward Tribunal of Wazo which were not before the District Land and Housing Tribunal.*
- 2. That Honourable District Land and Housing Tribunal erred in law and in fact by dismissing the Appeal without taking judicial notice that the judgment ward tribunal lacks the signature of one member.*

3. *That the Honourable District Land and Housing Tribunal erred in law and fact for entertaining an appeal that emanates from the ward tribunal which lacks jurisdiction.*
4. *That the Honourable District Land and Housing Tribunal erred in law and facts by upholding the decision of the ward tribunal.*
5. *That the decision of the Honourable District Land and Housing Tribunal is otherwise faulty and wrong in law for holding that the Appellant did not tender any exhibits before the Ward Tribunal.*

When the appeal was called for hearing on 16th December, 2021, the appellant enjoyed the legal service of Ms. Dora Mallaba and the respondents were absent. Hearing of the appeal took a form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant's Advocate filed her submission in chief on 5th January, 2022. The respondents' Advocate filed his reply on 19th January, 2022. The appellant's Advocate filed a waived her right to file a rejoinder..

In her submission, the appellant's Advocate started with a brief background of the facts which led to the instant application which I am not going to reproduce in this appeal. Ms. Mallaba opted to abandon the third ground and argue the second and third grounds of appeal together.

On the first ground, the appellant contended that the District Land and Housing Tribunal erred in law and fact in basing its decision on the judgment of the Ward Tribunal without considering the testimonies and exhibits tendered at the Ward Tribunal of Wazo which were not tendered at the District Land and Housing Tribunal. Ms. Mallaba argued that at the trial tribunal the appellant tendered a certificate of occupancy and other documents, Sale Agreement to prove that he purchased the suit land on 28th January, 2000 which were not listed by the trial tribunal. Supporting her submission she referred this court to page 3 of the Ward Tribunal decision.

Ms. Mallaba valiantly argued that the appellant could not trespass the respondent's land since he bought the suit land in 2000 and obtained a Certificate of Occupancy in 2006, while the 1st respondent purchased the piece of land in 2012. She added that the appellant's piece of land was surveyed way back in 2004 and he obtained a Certificate of Occupancy in 2006, while the respondent bought the suit land in 2012 thus means they were present when the appellant was surveying his piece of land. Stressing on the point, she argued that the appellant piece of land was surveyed in 2004 and he obtained a Certificate of Occupancy in 2006.

The learned counsel for the appellant continued to submit that there are copious authorities of this court that aggrieved parties must be accorded an opportunity to be heard. Fortifying her submission, she cited the case of **Iddi Omar Mkamabu & another v Appeal Committee for Local Government & Others** (2004) TLR 5.

On the second ground, Ms. Mallaba faulted the District Land and Housing Tribunal for failure to take judicial notice that the judgment of the trial tribunal lacks the signature of one member. The learned counsel for the appellant simply insisted that a judgment must be signed, however, the judgment of the Ward Tribunal lacks signatures of one of the members who participated in the proceedings.7856387

Regarding the fourth and fifth grounds, the learned counsel for the appellant contended that the appellate tribunal faulted itself to uphold the trial tribunal decision. She further argued that the evidence on record is clear that the appellant tendered his exhibits but the trial tribunal did not consider those exhibits. To support her submission she referred this court to page 6 of the District Land and Housing Tribunal, the Chairman stated that during his testimony, the appellant did not tender any exhibit to prove the number and size of his plot.

Ms. Mallaba urged this court to evaluate the trial tribunal records since the evidence reveals that the appellant purchased the suit land in 2000, the land was surveyed and he obtained a Certificate of Occupancy in 2006 at that time the 1st respondent had yet purchased their landed property. Stressing, Ms. Mallaba submitted that the piece of land which has been alleged to have been trespassed is within the appellant's Certificate of Occupancy.

She valiantly argued that the appellate tribunal had a duty to evaluate the trial tribunal evidence. To buttress her position she cited the cases of **Michael S/O Joseph v R**, Criminal Appeal No. 506 of 2016 and **John Mghandi @ Ndovo v R**, Criminal Appeal No. 352 of 2018 (unreported) CAT.

In conclusion, the appellant beckoned upon this court to reverse the decision of the District Land and Housing Tribunal and allow the appeal with costs.

Opposing the appeal, on the first ground, the respondent's Advocate contended that the trial tribunal did not consider the exhibit tendered in court. He added that the dispute was not on ownership of land but it was on boundaries encroached by the appellant. It was his view that the

appellant's thinking is unfounded and an afterthought by saying that the principle of *aud alteram partern* was not followed. Mr. Mafie went on to state that the appellant was afforded an opportunity to state his case whereas the appellate tribunal considered his testimonies and admitted his exhibits which were tendered at the trial tribunal. Supporting his submission he referred this court to page 7 of the appellate tribunal and page 4 of the trial tribunal judgment. In the trial tribunal the Chairman on page 7 of his judgment stated that "*Kwa upande wa Mdaiwa Na.1 shahidi hakuwa na shahidi yeyote maelezo ambayo aliyatoa mbele ya baraza akayaandika mwenyewe na kuyatilia saini akisema hana shahidi.*"

The learned counsel for the respondent went on to submit that a certificate of occupancy does not give the appellant automatic right to encroach another person's land. He contended that there is no dispute that the appellant purchased his land in 2000 and surveyed the same in 2006. However, the issue at hand is regarding demarcation of land whereas neighbour were not involved. The learned counsel for the respondent urged this court to refer to the case of **Materu Lesion & Another v R. Sospeter** (1988) TLR 102, the court held that:-

"... appellate courts may in rare circumstances interfere with trial court findings of facts. It may do so instance where the trial court had

omitted to consider or had misconstrued some material evidence or had acted on a wrong principle or had erred in its approach to evaluating evidence.

Mr. Mafie continued to submit that the appellant at the trial tribunal presented his case and the trial tribunal visited *locus in quo*, heard evidence from both sides, and observed the demeanour of witnesses. He urged this court to disregard this ground of appeal.

As to the second ground, the appellant contended that the issue of District Land and Housing Tribunal taking judicial notice is a new fact that was not raised at the District Land and Housing Tribunal while exercising its appellate jurisdiction. Stressing, Mr. Mafie submitted that it is trite law that a ground that was not raised at the first appellate court cannot be raised at the appellate court. Fortifying his position he referred this court to the case of **Mariam Kondo v Fatuma Said Kondo** PC Civil Appeal No.64/ 2017. The Court of Appeal of Tanzania cited with approval the case of **Richard William Saw v Waitara Richard Sawe**, Civil Appeal No. 38 of 1992 [1998], it was held that

“ The claim is being made for the first time on appeal in this court. It was never raised at the trial... as such it would not be proper for us to consider...”

Guided by the above authority, the learned counsel for the respondents urged this court to disregard this ground of appeal.

Submitting on the fourth and fifth ground, the learned counsel for the respondents contended that the appellate tribunal considered the documents presented at the trial tribunal. He added that the appellate tribunal held that since the documents and exhibits tendered were against the procedure then the same is good as nothing. Stressing on that point, the learned counsel for the respondent heroically submitted that the appellant's Certificate of Occupancy cannot change the position since the dispute was not based on ownership instead the same was based on boundaries which could be determined by the seller of the plot by showing the size and demarcations of the plot which he sold he faulted the appellant for failure to call all witnesses who could support his case.

On the strength of the above submission, the learned counsel for the respondents beckoned this court to dismiss the appeal with costs.

I have considered the rival arguments by the learned counsels for the appellant and respondents. In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant this

court to overrule the findings of the District Land and Housing Tribunal for Geita.

I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, see **Salum Mhando v Republic** [1993] TLR 170 and the decision of the Court of Appeal of Tanzania in **Nurdin Mohamed @ Mkula v Republic**, Criminal Appeal No. 112 of 2013, Court of Appeal of Tanzania at Iringa (unreported).

However, this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

“ An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice.”

In my determination, I will consolidate the first, fourth, and fifth grounds because they are intertwined. Except for the second ground which will be argued separately in the order they appear.

With respect to the second ground, I have gone through the records of the District Land and Housing Tribunal for Kinondoni at Mwananyamala, the appellant contended that the Chairman of the appellate tribunal did not take judicial notice that the judgment of the trial tribunal lacks the signature of one member. I respectfully agree with the learned counsel for the respondents that this is a new ground. Generally, 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 **Bihan Nyankongo & Another v Republic**, Criminal Appeal No. 182 of 2011 (unreported) the Court of Appeal of Tanzania held that:-

“ The court on several occasions held that a ground of appeal not raised in the first appeal cannot be raised in a second appeal.”

Applying the above authority, it is ordinarily, in order 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 this ground was not raised at the appellate tribunal. Therefore, I am not in a position to entertain the new ground which was raised for the first time before this court. Thus, I proceed to hold that this ground is demerit.

Next for consideration are the first, fourth, and fifth grounds, the appellant's complaints are related to exhibits tendered at the trial tribunal and evidence adduced at the trial tribunal. The Chairman in his judgment stated that the appellant did not tender any exhibit, I have revisited the appellate trial tribunal proceedings and the tribunal judgment and noted that during the hearing of the case at the Ward Tribunal, the appellant who was the 1st respondent tendered a Certificate of Occupancy regarding Plot No. 385 Blok 'K' situated at Kunduchi area in Dar es Salaam and the Sketch Map indicated the measurement of the said Plot contrary to the analysis of the appellate tribunal.

The records reveal that the matter before the Ward Tribunal was based on boundaries whereas the appellant was alleged to have encroached the respondent's land. It is the appellant's concern that in accordance to the Certificate of Occupancy which was admitted at the Ward Tribunal, it shows that the suit land is located within his land. The records of the Ward Tribunal reveal that the Certificate of Occupancy was admitted while the appellate tribunal faulted the admission process of the said CT without determining the issue of boundaries in detail.

As long as the issue of controversy between the parties was based on boundaries, in the circumstances of this case, the trial tribunal visited *locus in quo* in since there were some doubts and ambiguity, therefore, the tribunal had to assess the situation on the ground and to verify the evidence adduced by the parties during the trial. During *locus in quo*, the tribunal proceeded to measure the respondent land which measured 28.4 m x 37.40 x 9 m x 35 x 14 m. The respondent also showed the suit land which measured 22.90 m x 21.50 x 9. On his side, the appellant also was able to show his land which measured 77 m x 21.50 m x 73.60 m x 42.70 m and there is a house surrounded by a fence. The trial tribunal ruled out that the appellant has encroached on the respondent's piece of land to

the extent that the appellant's house is within the respondent's piece of land.

However, what I have noted is that based on evidence on record, it is difficult to ascertain whether the appellant has encroached on the respondent's piece of land. I am saying so because the trial tribunal decision was based on the evidence of the parties in exclusion of the expert evidence or opinion. The suit plot is a surveyed plot therefore it was easier for a surveyor to clarify whether the appellant encroached on the respondent's land.

In other words, in the instant case, there is lack of involvement of the Land Surveyor while the unsanctioned variations and boundary adjustments of the parties were required to be accessed by a Land Surveyor. In my respectful view, this kind of dispute could have been easily and fairly been resolved by a Land Surveyor instead of depending on the parties' evidence since the members of the tribunal were not professionals in a matter related to the land survey.

The Land Surveyor was in a better position to assist the trial tribunal to reach a fair decision and determine whether the appellant encroached on the respondent's piece of land. I believe the Land Surveyor's findings will

amicably settle the dispute on the boundaries. Therefore, it is my considered opinion that failure to involve the Land Surveyor in a matter of boundaries of this nature renders the whole proceedings of the trial tribunal null and void.

The above finding sufficiently disposes of the appeal. Consideration of other complaints stated in the third ground will not affect the above finding. I accordingly refrain from delving on it.

On the way forward, I invoke the power vested on this court under section 43 (1), (b) of the Land Dispute Courts Act, Cap.216 [R.E 2019] and hereby quash the judgment, proceedings, and subsequent orders of the trial and appellate tribunals. I, therefore, remit the file to the Ward Tribunal of Wazo for retrial.

Order accordingly.

Dated at Dar es Salaam this date 31st January, 2022.


A.Z.MGEYEKWA
JUDGE
31.01.2022

Judgment delivered on 31st January, 2022 in the presence Ms. Dora Mallaba, learned counsel for the appellant and Mr. Twahir, learned counsel holding brief for Mr. Mafie, learned counsel for the respondent.




A.Z. MGEYEKWA

JUDGE

31.01.2022

Right of Appeal fully explained.