IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 128 OF 2021

(Arising from Land Appeal No.32 of 2020 at Mkuranga District Land, originating from Mwandege Ward Tribunal in Land Case No.05 of 2020)

MASOUD SHOMVI MWINCHUMU ..... APPELLANT

VERSUS

HAMISI JUMA OMAR ..... 1ST RESPONDENT

JUMA HAMIDU SEFU ..... 2ND RESPONDENT

ALLY HAMIS KAFENE ..... 3RD RESPONDENT

ZUBEDA LAURENT KEWE ..... 4TH RESPONDENT

ROSEMERY ADRIAN KISITU ..... 5TH RESPONDENT

ABILAH SAID MNIMBO ..... 6TH RESPONDENT

ASHURA ATHUMANI MUSSA ..... 7TH RESPONDENT

JUDGMENT

Date of Last order: 06.05.2022

Date of Judgment: 12.05.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Mwandege in Land Case No.05 of 2020 and arising from the District Land and Housing Tribunal for Mkuranga in Land Appeal No. 32 of 2020.

The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant lodged a suit at the trial tribunal claiming that the respondents have trespassed his suit land the suit land measuring 2 acres located at Lugwadu area and constructed houses without his permission. At the trial tribunal the appellant testified to the effect that he reported the matter at the Village Government and each respondents were instructed to pay the appellant Tshs. 200,000/= but the appellant turned down the offer.

The 2nd to 7th respondent denied the allegations. They claimed that in 2013- 2014, they bought the suit land from the 1st respondent who was directed by the appellant to sell the said pieces of land. They admitted that they agreed each of them to pay the appellant Tshs. 200,000/=, at first the appellant accepted the offer but later he demanded to be paid Tshs. 500,000/=. The trial tribunal determined the matter and ended up dismissing the suit for the main reason that the 1st respondent was instructed to sell the suit land.

Aggrieved, the appellant lodged an appeal to the District Land and Housing Tribunal for Mkuranga vide Land Appeal No.32 of 2020 challenging the judgment of the trial tribunal. The appellant complained

that the trial tribunal proceeded with hearing while the composition of the Ward Tribunal was contrary to the law. He also complained that the trial tribunal deprived the appellant's rights over the suit land.

The appellate tribunal sustained the decision of the trial tribunal and dismissed the appeal. The first appeal irritated the appellant. Hence this appeal before this court whereby she has raised three grounds of grievance, namely:-

1. *That, both Trial Tribunal and Appellate Tribunal erred in law and in fact by declaring that the 1st Respondent was authorized to sale the said property while there was no any proof by Power of attorney.*
2. *That, the Honourable Tribunal erred in law and fact by declaring the 2 to 7 Respondents lawful owner of the disputed property while the said Respondents failed to adduce sale Agreement between them and the 1st Respondent both in trial Tribunal and in the Appellate Tribunal.*
3. *That, the Honourable Tribunal erred law and in fact by deciding the case without visiting the locus in quo.*
4. *That, the Honourable Tribunal erred in law and fact by upholding the decision of Mwandege Ward Tribunal by giving weight to*

hearsay that the 1st Respondent was authorized by the Appellant to sale the disputed property to the 2 to 7 Respondents and not corroborated by any witness.

When the appeal was called for hearing on for hearing on 10th March, 2022, the appellant had the legal service of Mr. Godon Nashoni, learned counsel and the 2nd to 7th respondents appeared in person, unrepresented. By the court order, the appeal was scheduled to be disposed of by the way of written submission whereby the appellant was required to file his submission in chief on or before 25th March, 2022. The respondent was required to file a reply before or on 8th April, 2021. A rejoinder if any was scheduled on 14th April, 2022. The respondent did not comply with the court order they applied for extension of time. The court granted their prayer and ordered the respondent to file their reply before or on 28th April, 2022 and the appellant to file a rejoinder if any on 6th May, 2022. Both parties complied with the court order.

In his written submission, in respect to the first ground, the learned counsel for the appellant submitted that the purported seller did not appear at the trial tribunal to state his case and state who authorized him to sell the suit land to the other respondents He added that, the trial

tribunal and the first appellate tribunal confirmed the purported sale to be legal without questioning if there was any power of attorney. Mr. Nashon went on to submit that failure to show the power of attorney and failure of the purported seller to appear at the trial tribunal while he was the main witness creates doubt. He went on to state that the same proves that he was not authorized to sell the suit land.

As to the second ground, the learned counsel for the appellant contended that the law provides three ways of acquiring a piece of land; one is by way of sale which is proved by sale agreement. Two, by way of inheritance which is proved by way of Will and three, by way of gift which is proved by way of deed of gift. The learned counsel for the appellant contended that in the matter at hand there was no proof from the respondents adduced at the trial tribunal and the first appellate tribunal if they bought the suit land to the first respondent and did not tender any sale agreement and nor witness was called to back up his/her testimony. The learned counsel valiantly argued that in the eyes of the law, the respondents' remains to be trespassers to the appellant's land.

Submitting on the third ground, the learned counsel for the appellant argued that it is the duty of the tribunal or court whenever there is a

contradiction on the size and boundaries of the suit land to visit *locus inquo*. Mr. Nashon went on to submit that it was crucial for the trial tribunal to visit *locus in quo* to ascertain the reality on the ground since the respondents claimed that the appellant authorized the 1st respondent to sell the portion of the suit land and not the whole two acres which is in dispute. It was his submission that the trial tribunal was required to visit locus in quo and come up with concrete. He added that failure to visit *locus inquo* led anomalies and injustice to the appellant. He claimed that the tribunals' decisions based on false statements of the respondents which were neither proved.

The learned counsel for the appellant did not end there, he submitted that the essence of visiting *locus in quo* was stated in the cases of **Aronia John v Mbato Omary Kangeta & another**, Land Appeal No. 32 of 2020 (unreported) and **Avit Thadeus Massawe v Isidory Assenga**, Civil Appeal No. 6 of 2017.

Arguing for the fourth ground, Mr. Nashon contended that the evidence adduced at the trial tribunal was purely hearsay and full of lies. Insisted that the first respondent was an important party to the case thus, failure to call him to testify renders the respondents' testimony hearsay. He

added that as a result it was wrong for the trial tribunal to reach such kind of decision. He added that it was also wrong for the appellate tribunal to uphold the decision of the trial tribunal which based on hearsay evidence.

On the strength of the above submission, Mr. Nashon urged this court to allow the appeal and declare the respondents trespassers and quash the decisions of both tribunals with costs.

In his reply, the learned counsel for the respondents from the beginning submitted that the appeal lacks merit, hence ought to be dismissed with costs. Mr. Mshana opted to combine the first and second grounds and argue them together because they are intertwined. He stated that the grounds are grounded on lack of power of attorney, purported absence of sale agreement and hearsay evidence. Mr. Mshana contended that those grounds were never featured in the trial tribunal as well as the appellate tribunal. He claimed that there was no issue raised and decided on whether the lands were sold or not as sale was a de facto matter.

He added that this being a second appellate court is entitled to deal with what was argued and decided in the lower tribunals only. Fortifying his position, he cited the cases of **Hamisi Bushiri Pazi & 4 others v Saul Henry Amon & 3 others**, Civil Appeal No. 166 of 2019, **Hassan Bundala**

@ Swaga v Republic, Criminal Appeal No. 386 of 2015 (unreported). The Court of Appeal held that:-

> *" it is now settled that as a matter of general principle, this Court will only look into matters which came up in lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court an appeal."*

He went on to argue that the record of the trial tribunal and appellate tribunal are without doubt, the evidence of purchasers and appellant shows that Hamisi Juma Omary was authorised to sell the suit land.

Mr. Mshana continued to argue that, there is no any reasonable doubt that the appellant authorized the 1st respondent who is grandson to sell the suit land. To support his submission he cited the case **Neli Manase Foya v Damian Mlinga**, Civil Appeal No. 25 of 2002, the Court held that:-

> *" It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a findings of fact."*

To buttress his contention, Mr. Mshana cited the case of **Neli Manase Foya v Damian Mlinga**, Civil Appeal No. 25 of 2002.

Regarding the hearsay evidence, Mr. Mshana found himself short of words to describe how far, the appellant has gone astray. He simply contended that the respondents' evidence was of what they did, all what was transpired was explained. He wonder whether the absence of the 1st respondent makes the other respondents' evidence hearsay, then they are open to re-educate on hearsay evidence. He left it upon this court to decide what would amount to hearsay evidence in regard to the case at hand.

On the issue of visit *locus inquo*, Mr. Mshana submitted that it is a new ground, he added that there is no evidence in the record that site visit was prayed for and denied. He added that further there is no record that this ground was argued and decided in the lower tribunals. Mr. Mshana restated the position of the law in **Hamisi Bushiri Pazi** (supra). He went on to submit that it was the trial tribunal to decide on the prayer and need to make a visit just in case reasonable circumstances existed for its performance. He supported the contention in the cited case of **Avit Thadeus Massawe** (supra) that visiting *locus inquo* is not automatic, there must be a compelling circumstance.

On the strength of the above submission, Mr. Mshana urged this court to find that this appeal is devoid of merit and dismiss the appeal with costs.

In his rejoinder, the appellant' Advocate reiterated his submission in chief. He claimed that the appellant's grounds are not new grounds since the same was covered in the second ground raised at the appellate tribunal. It was his view that the said ground raised a general ground for law that the trial tribunal erred in law and in fact in deciding in favour of the respondents without due regard to the law.

Concerning the third and fourth grounds of appeal, he submitted that the same seems to be new grounds because were not raised at the appellate tribunal. Mr. Nashon, urged this court to consider the grounds because they are worthy triable and cannot deprive any injustice. Supporting his position he cited the case of **Martha A. Mwakinyali & another v Hamis Mitogwa**, Misc. Land Appeal No. 13 of 2013. He invited this court to employ persuasive principle in the above mentioned case.

The learned counsel insisted that saying that the appellant received money from the respondents was not proved by any documentary evidence. He insisted that the respondents adduced mere words and they

did not dispute that the suit land did not belong to them and the vendor had no good title to pass to the respondents.

In conclusion, Mr. Nashon urged this court to allow the appeal with costs.

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 the cases of **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."*

Having heard the submission of the appellant, and after going through the ground of appeal on which the parties have bandying words the same made me peruse the records of both tribunals to determine *whether the appeal is meritorious*. I have opted to combine the second, third and fourth grounds because they are intertwined and the first ground ground will be argued separately.

As to the second, third, fourth grounds, the learned counsel for the appellant in his submission went awry and submitted much on respondents' evidence in regard to sale agreement, hearsay evidence and visit to locus *in quo*. The appellant's Advocate also complaining that the respondents failed to tender before the trial and appellate tribunals the sale agreement between them and the 1st respondent. The learned counsel for the appellant faulted the District Land Housing Tribunal by giving weight the hearsay evidence that the 1st respondent was authorized by the appellant to sale the disputed property to the 2nd to 7th respondents. These grounds were not among the grounds of appeal at the appellate tribunal. The appellant raised them for the same time before the second appellate Court.

In his written submission, the appellant's counsel lamented that the trial tribunal did not visit *locus in quo*. The appellant's counsel has tried to convince this court that this is a point of law which can be addressed by this court. In my view, as rightly pointed out by the learned counsel for the respondent, the issue of *locus in quo* was supposed to be brought to the attention of the trial tribunal. To visit *locus in quo* is not a mandatory requirement.

The essence of a *visit to locus* in land matters includes location of the disputed land, the extent, boundaries and boundary neighbours and physical features on the land. See the case of **Akosile v Adeyeye** (2011) 17 NWLR (Pt. 1276) p. 263 and the cases of **Nazir M. H v Gulamali Fazal John Mohamed** [1980] TLR 29. The court in the case **Nizar M. H.** (supra) emphasized that only in exceptional circumstances the Court should inspect a *locus in quo* or else the Court unconsciously will take a role of the witness than adjudicator. Had it been an issue of boundaries then the tribunal could had *suo motto* ordered to visit *locus in quo*.

Moreover, the records shows that none of the parties requested for the trial tribunal to visit *locus in quo*, and the appellant did not even raise this concern at the appellate tribunal. It is cardinal principle that in order for the Court to be clothed with its appellate powers, the matter in dispute

should first be discussed at the trial tribunal. Failure to that the appellate Court lacks jurisdiction to entertain the new grounds of appeal raised by the appellant. This position has been amplified in a multitude of the Court of Appeal of Tanzania decisions, in **Melita Naikiminjal & Another v Sailevo Loibanguti** [1998] TLR 120, Abdul Athmani v R [2004] TLR 151, **Butera Isaya v Faustine Simeo**, Misc. Land Appeal No.39 of 2020 (unreported) the court cited with approval 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."*

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. The Court of Appeal of Tanzania in the case of **Farida & Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

> *" It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."*

In the subsequent decision in **Haji Seif v Republic**, Criminal Appeal No.66 of 2007, the Court 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 second, third and fourth grounds which relates to failure to visit *locus in quo*, failure to tender sale agreement and hearsay evidence are new grounds which was raised for the first time before the second appellate court.

Next for consideration is the first ground, the learned counsel for the appellant in his rejoinder claimed that the first ground falls within the second ground which was raised at the District Land and Housing Tribunal. The said ground reads; the Ward Tribunal erred in law and in fact in deciding in favour of the respondents without the regard to the law the issue of power of attorney. The learned counsel in his submission related this ground with the second ground which was raised at the District Land and Housing Tribunal.

The issue was in regard to constitution of the Ward Tribunal and the learned counsel in his written submission did not mention the issue of Power of Attorney. I had to determine this ground of appeal after Mr. Nashon prayer that even if it is a new ground which is raised at the second appellate court but it is worthy triable. Therefore, I took time to go through the trial tribunal records to find out what transpired and whether this ground is worthy triable. I have perused the Ward Tribunal records and evidence, the same shows that the appellant authorized the 1st respondent to sell part of the suit land. For ease of reference I reproduce part of appellant's testimony hereunder:-

> *"... Mimi sukuridhika kuuza shamba kwa laki 200,000 ndio maana nikaja hapa."*

From the above excerpt, it is clear that the appellant was not satisfied to sell the suit land in tune of Tshs. 200,000/=. The above wording shows that the appellant in his own testimony, he claimed that he was not satisfied to find out the suit land was sold in a tune of Tshs 200,000/=. In my considered view, the appellant authorize the 1st respondent to sell the suit land. Therefore it is not proper to shifting the burden of proof to the respondents, and demanding them to adduce documentary evidence which proves that he authorized the 1st respondent while knowing that the

suit land was subjected to sale. In my view, the issue of amount paid does not concern the vendors. If there is one to be blamed, then the appellant should blame the 1st respondent, his son. In that regard, this ground is devoid of merit for being a new ground and basing on the appellant's testimony, it is proved that the appellant authorized the 1st respondent to sell the suit land.

For the aforesaid findings and authorities of law, all grounds of appeal are demerit. I find no reason to overrule tribunals' decisions. I proceed to dismiss the appeal. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 12th May, 2022.

A.Z.MGEYEKWA

JUDGE

12.05.2022

Judgment delivered on 12th May, 2022 in the presence of Mr. Nashon, learned counsel for the appellant and 2nd to the 5th respondents.

A.Z.MGEYEKWA

JUDGE

12.05.2022

Right to appeal fully explained.