IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.93 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni in Land Appeal No. 102 of 2019, originating from Kwembe Ward Tribunal in Land Case No. 48 of 2018)

OMARY MOSI ..... APPELLANT

VERSUS

MARIAM OMARY ISMAIL ..... RESPONDENT

JUDGMENT

Date of Last order: 20.05.2022

Date of Judgment: 25.05.2022

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 351 of 2018. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them as follows. The appellant filed an application before the District Land and Housing Tribunal for

Kinondoni at Mwananyamala in Land Application No. 351 of 2018. The material background facts to the dispute are briefly as follows; Mariamu Omary Ismail, the respondent instituted a case at Kwembe Ward Tribunal against Omary Mosi, the respondent. The respondent claimed that the appellant invaded her land. The respondent testified that she bought the suit land from Vaileth Primo Mbutuli and later noted that the land was also allocated to the appellant, then she reported the matter to the street government. On his side, Omary Mosi claimed that he bought the suit land from Valieth Primo Mbutuli in 2013. The trial tribunal in its findings held that the vendor of the suit land was the same whereas Mariamu Omary Ismail bought the suit land in 2008. The vendor testified to the effect that the suit land belongs to Mariamu Omary Ismail and Omary Mosi land is invaded by one Abdallah Said. The trial tribunal decided the matter in favour of Mariamu Omary Ismail.

Aggrieved, Omary Mosi appealed to the District Land and Housing Tribunal for Kinondoni at Mwananyamala vide Land Appeal No. 102 of 2019 complaining that the trial tribunal failed to include the vendor who was a necessary party to the suit, the trial tribunal was improperly constituted, the trial tribunal failed to consider the documentary evidence and the trial tribunal had no pecuniary jurisdiction to determine the matter

before it. The District Land and Housing Tribunal uphold the decision of the trial tribunal and dismissed the appeal with costs.

The District Land and Housing Tribunal decision did not amuse Omary Mosi, hence he decided to challenge it by way of appeal before this court on amended five grounds as follows:-

1. *That the Honourable Chairman erred in law and fact by upholding the decision of the Ward Tribunal while during the hearing of the case the ward Tribunal was not properly constituted.*
2. *That the Honourable chairman erred in law and fact by holding that he vendor of the disputed land was not a necessary party to be joined in the case.*
3. *That the Honurable Chairman erred in law and fact when he upheld the decision of the Ward Tribunal without considering the strong evidence adduced by the appellant and his witnesses on the ownership of the disputed land.*
4. *That the Honourable Chairman erred in law and fact by relying on the case of Askari Kawinda Mapunda VS. Joseph Masaligeni Mapunda PC Civil Appeal No. 10 of 2006 HC and the case of Bakari Salum Mkwinda and 3 others v Kurwa Mwenda Land Appeal No. 1 of 2016 HC (all unreported) while these cases are distinguishable.*
5. *That the Honourabe Chairman erred in law and fact in confirming the decision of the Ward Tribunal without considering the fact that the Ward Tribunal did not visit the locus in quo to check on evidence which were adduced by the parties.*

When the matter came up for hearing on 22nd April, 2022, the appellant had the legal service of Mr. Masinde Kisumo, learned counsel and the respondent appeared in person. By the court's consent, the appeal was argued by way of written submission whereas both parties complied with the court order save for the appellant waived his right to file a rejoinder.

In his submission in support of the appeal, the appellant opted to abandon the first ground of appeal. On the second ground, he contended that it was wrong for the learned Chairman to hold that the vendor of the suit land was not a necessary party to be joined in the suit. He claimed that the vendor was in place to assist the trial tribunal to find out which piece of land was sold to the appellant and the respondent since both of them bought the suit land from the same person. He went on to submit that failure for the respondent to join the vendor was fatal and the appellate tribunal was required to set aside the judgment of the trial tribunal. To bolster his submission, the appellant cited the case of **Hosea Emmanuel v Sophia E. Rintenge**, (PC) Land Appeal No. 9 of 2020 HC, **Registered Trustees of the Seventh Day Advents Church of Tanzania v Philemon Otieno & another**, Land Appeal No. 230 of 2020 HC, **Esha Haji v Romanus Haule & another**, Misc. Land Application No. 105 of 2021 HC and the case of **Mohamed Masoud Abdallah & 42 others v**

Tanzania Road Haulage (1980) Ltd Consolidated Civil Appeal No. 150 * 158 of 2019 (all unreported).

Concerning the third ground, the appellant argued that the appellate tribunal upholds the trial tribunal judgment without considering strong evidence adduced by the appellant and his witnesses. He stated that he had two witnesses; Vailethi Primo Mbutuli, the vendor of the suit land, and Abdaham Mbutuli. He went on to state the vendor testified to the effect that she sold pieces of land to the appellant and respondent. He went on to submit that the vendor differentiated the plots by size; 25 x 30 feet for the appellant and the respondent plot measured 20 x 30 feet. In his view, the appellate tribunal ought to have considered the strong evidence when determining the appeal and come to the conclusion that the appellant was not a trespasser to the respondent's land.

Arguing for the fourth ground, he faulted the Chairman's findings in relying on the cases of **Askari Kawinda Mapunda v Joseph Masaligeni Mapunda**, PC Civil Appeal No. 10 of 2006, HC of Tanzania in Songea and **Bakari Salum Mwinda & 3 Others v Kurwa Mwenda**. Land Appeal No.1 of 2016 HC at Mtwara (all unreported).in his view the cited case was distinguishable from the appeal at hand, in the cited cases the trial court visited locus in quo while in the instant appeal the trial tribunal did not visit locus in quo.

On the 5th ground, the appellant continued to submit on the matter related to visit *locu inquo*. He claimed that the visit locus inquo was important considering the fact that the vendor testified to the effect that the suit land sold to the respondent was 20 x 30 feet and the one she sold to the appellant measures 25 x 30 feet.

It was his view that the vendor was required to show the said plots and the boundaries to assist the trial tribunal to make proper findings on whether or not the appellant trespassed on the respondent's land. He further submitted that the stress village leaders called upon the parties and the vendor whereas the respondent refused to accept the piece of land which was sold to her by the vendor. To support his submission he referred this court to page 1 of the trial tribunal judgment. To support his submission the appellant cited the case of **Philibert Mahenda & another v Y.P Investment Co. Ltd**, Land Appeal No. 72 of 2019 HC at Mwanza (unreported), the judge cited the case of **Avit Thadeus Masawe v Isidory Asenga**, Civil Appeal No.06 of 2017.

In conclusion, the appellant urged this court to allow the appeal, quash and set aside the judgment and orders of both tribunals and order the trial to be heard de novo and order the vendor to be joined and visit of locus in quo be conducted.

Opposing the appeal, the respondent strongly objected the submission of the learned counsel for the appellant. On the second ground, She submitted that the decisions of both tribunals were sound even though the vendor was not joined to the suit. The respondent submitted that the records reveal that the seller of the suit land is aware of the dispute since at the trial tribunal the vendor was called to testify and she agreed to have sold the land in dispute to the parties and the respondent was the first purchaser in 2008 while the appellant bought the same in 2013. It was her view that, there was no need for the vendor to join the case since the expected information was availed to the trial tribunal. He added that in case the vendor could have joined the case, she could have nothing new to testify than what she testified at the trial tribunal.

She continued to submit that the interest of the seller was not going to affect the matter. To support her submission she cited Order 1 Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019] and cited the case of **Omary Hamis Ungaunga v Mbaraka Miraji & another**, Misc. Land Appeal No.11 of 2017. Insisting, the appellant submitted that since the vendor Vaileth Primo Mbutuli was summoned as a witness to testify in the present matter then there was no need to join her as a necessary party. She added that the cited case of **Hosea Emmanuel** (supra) is distinguishable in the matter at hand since in the cited case the vendor sold the land in dispute

while he has no title to sell the same, thus, there was a need to join the seller. In the present case issue of title is not in dispute.

As to the 3rd ground, the respondent was brief and focused. She contended that the appellate tribunal decision was sound and reasoned. She stated that the appellate tribunal was correct to uphold the trial tribunal decision since the trial tribunal evaluated the evidence on record properly hence he reached a fair decision he added that since the vendor testified that she sold the suit land to the respondent in 2008 and then sold the suit land to the appellant in 2013. She added that the vendor did not deny the fact that he sold the suit land to the respondent. The respondent went on to submit that the appellant did not tender any documentary evidence to prove that his land is measuring 25 x 30 feet. To support her submission she referred this court to page 8 of the appellate tribunal.

With respect to the fourth and fifth grounds, the respondent opted to argue them together because they are intertwined. She submitted straight to the point that the cited case by the appellate tribunal was relevant to the matter at hand since the trial tribunal visited locus in quo. To support her submission she referred this court to page 2 of the appellate tribunal judgment. She distinguished the cited case of **Avit** (supra) by stating that in the case at hand the location of the suit land was well identified by both

parties. He also contended that the issue of *locus in quo* was not part of the grounds of the appellate tribunal thus in her view this court cannot be moved to determine a new ground.

On the strength of the above submission, the respondent counsel beckoned upon this court to dismiss the appeal for being meritless and upheld the decision of the appellate tribunal.

In his brief rejoinder, the appellant reiterated his submission in chief. The appellant insisted that non-joinder of parties is fatal.

I have subjected the rival arguments by the learned counsels to the serious scrutiny they deserve. Having so done, I think, the bone of contention is whether *the appeal is meritorious.* The appellant has locked horns with the respondent on the issues of non-joinder of a party, visit *locus in quo,* and evidence on record. Each part opposes the version of the other. In my determination, I will address the fourth and fifth grounds will be argued together because they are intertwined. Except for the second and third grounds which will be argued separately in the order they appear.

It is worth noting that this is a second appellate court. Thus, I am 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. Therefore, this court must be cautious when deciding to interfere with the lower court's decision as was propounded in the case of ***Edwin Mhando v R*** [1993] TLR 174. It is a settled principle that the second appellate court has to deal with the question of law. 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."*

On the fifth ground, the appellant contended that the appellate tribunal erred in law to find the trial tribunal did not visit *locus in quo*. As rightly pointed out by the respondent this is a new ground that was not raised at the appellate tribunal. 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. 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.

With respect to the second ground, the appellant has submitted in length the issue of non-joinder of the vendor in the instant case. The record at the trial tribunal reveals that the Vailethi Parimo was the vendor. She sold pieces of land to the parties and the record shows that the vendor was called to testify at the trial tribunal, the fact which is not disputed by both parties.

I understand the argument made by the respondent's counsel that had it been that the vendor did not testify in court then the appellant's ground could have merit but as long as the vendor was called to testify in court then the issue of non-joinder of a necessary party cannot arise. However, I have scrutinized the trial tribunal records and noted that Violeth Primo, the vendor was certain that she sold the suit land in 2008 to Mariamu Omary, a land measuring 20 x 30 feet and she also sold a piece of land

measuring 25 x 30 feet to Omary Mosi in 2013, the appellant in the matter at hand. I fully subscribe to the respondent's submission that since the vendor was required to be involved in the matter at hand as a necessary party.

In my view, the vendor was a necessary party to the matter at hand since she admitted that she sold two different pieces of land to both parties. I have considered the fact that the appellant tendered a sale agreement to prove his ownership while the respondent did not produce any cogent sale agreement. Therefore, it is prudence to solve the matter by including the vendor who is in a better position to identify the said pieces of land. In my view, the better solution and fair game for the vendor be joined to suit. I have also considered.

In the upshot, I allow the appeal and quash the judgment, proceedings, and subsequent orders of the trial and appellate tribunals. Parties are at liberty to lodge a new suit. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 25th May, 2022.

A.Z.MGEYEKWA
JUDGE
25.05.2022

Judgment delivered on 23rd May, 2022 in the presence in the presence of Masinde Chisumo, learned counsel for the appellant and the respondent.

A.Z.MGEYEKWA

JUDGE

23.05.2022

Right of Appeal fully explained.