IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.16 OF 2022

(Arising from the District Land and Housing Tribunal for Temeke at Temeke in Land Application No.50 of 2021, originating from Ward Tribunal of Yombo Vitukain Land Case No.01 of 2021)

HAMIS AMRI IDD ..... APPELLANT

VERSUS

MOHAMED O.MANDWANGA ..... RESPONDENT

JUDGMENT

Date of last Order: 27.05.2022

Date of Judgment: 30.05.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Yombo Vituka in Land Case No.01 of 2021 and arising from the District Land and Housing Tribunal for KinondoniTemeke at Temeke in Land Appeal No. 50 of 2021. From the scanty information borne out by the

Appeal No. 50 of 2021. From the scanty information borne out by the record, the background of this matter are as follows; the appellant instituted a suit at the Ward Tribunal of Yombo Vituka contesting over the ownership of a piece of land. The appellant claimed that the respondent encroached on his piece of land and constructed a hut without his permission. The appellant claiming that he is the lawful owner of the suit land which he bought in 1993 but he did not know the size of his plot. On his side, the respondent testified to the effect that he occupied the suit land before the appellant. The trial tribunal decided in favour of the respondent and declared him the lawful owner of the suit land.

Believing that the trial tribunal decision was not correct, the appellant lodged an appeal before the District Land and Housing Tribunal for Temeke at Temeke in Land Appeal No.50 of 2021. The appellant claimed that the trial tribunal had did not evaluate the evidence on record and the trial tribunal judgment was composed contrary to the law. 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 two grounds as follows:-

1. *That, both tribunals erred in law and fact by reaching a decision in favour of the respondent without considering the evidence adduced by the appellant and his witnesses.*
2. *That both tribunals erred in law and facts for failure to consider the authenticity of the signatures in the tendered exhibit by the respondent at the tribunal.*

When the appeal was called for hearing on 29th April, 2022, the appellant and the respondents appeared in person, unrepresented. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant filed his submission in chief on 13th May, 2022. The respondent filed his reply on 24th May, 2022. The appellant waived her right to file a rejoinder.

On the first ground, the appellant contended that the boundary between the appellant and respondent was a pathway and the same was

proved by neighbours. To support his submission he referred this court to his witness testimony who testified that " wakati mdai Amri ananunua eneo lake alikuwa shahidi na katikati ya mpaka wao palikuwa na njia". He added that the respondent's witness also testified that the boundary between the respondent and the appellant was a pathway. He blamed the trial tribunal for failure to consider the evidence on record and hence reached a wrong decision. He wondered how the respondent crossed the pathway and claimed the land of the appellant. He valiantly claimed that the suit land belongs to him. To buttress his contention he cited section 110 (1) of the Civil Procedure Code Cap.33 and the case of **Hemedi Saidi v Mohamed Mbilu** (1984) TLR 113. The appellant went on to argue that the trial tribunal ignored the weight and the concrete evidence that would have led to a fair and just decision. He strongly argued that it was not correct for the trial tribunal to consider the documentary evidence of the respondent.

On the second ground, the appellant contended that the trial tribunal failed to consider and look at the authenticity of the respondent's signatures because the appellant denied having signed the land formalization paper and both signatures in the said papers look alike. He

strenuously argued that the same create doubt about the validity of the documents tendered at the trial tribunal. Fortifying his submission he cited section 69 of the Evidence Act, Cap. 6 [R.E 2019] and the case of **Prucheria John v Wilbard Wilson and Another**, Land Case Appeal No.64 of 2019.

In conclusion, the appellant beckoned upon this court to quash the decision of both tribunals and allow the appeal.

Opposing the appeal, on the first ground, the respondent was brief and focused. He argued that the appellant's plot is surveyed, beacons were installed and during the process of survey, all neighbours were required to sign the papers whereas the appellant was not present hence he authorized her wife to sign the plots. It was his submission that as long as the appellant authorized his wife to sign the forms on his behalf then he is estopped to deny the said facts supporting his submission he cited section 123 of the Evidence Act, Cap.6 [R.E 2019]. He went on to submit that no dispute arose at the trial tribunal regarding when the beacons were installed, the same proves that all parties had no dispute with the

installation of the beacons. He valiantly contended that the trial tribunal considered all the evidence on record and the appellate tribunal had the same view.

As to the second ground, the appellant contended that both parties agreed with the trial tribunal's findings that the beacons were installed in the right place. He added that in that regard there was no need to question the authenticity of the form since the main purpose of the form was to verify the boundaries and all neighbours consented to the placement of the beacons.

On the strength of the above submission, the respondent beckoned this court to uphold the decisions of both tribunals and dismiss the appeal with costs.

I have considered the rival arguments for and against the appeal by 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 Temeke.

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."*

On the first ground, the appellant is complaining that the parties' witnesses claimed that there was a pathway that demarcates the appellant's and respondent's plots. I have gone through the appellate tribunal records and noted that the appellant did not raise this ground.

This is 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."*

Equally, 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].*

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, this court is 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 is the second ground, that both tribunals erred in law and facts for failure to consider the authenticity of the signatures in the tendered exhibit by the respondent at the tribunal. I have perused the trial tribunal records and noted that during the hearing of the matter at the trial tribunal, the respondent in defending his case tendered a form and the appellant did not object admissibility of the said document. Moreover, the appellant did not cross-examine the respondent on the contents of the said document. Such failure meant that the appellant accepted that matter. Moreover, during cross examination, the appellant did not ask the respondent about the validity of the said document. In the case of **Nyerere Nyague v Republic**, Criminal Appeal No. 67 of 2010, the Court of Appeal of Tanzania held that:-

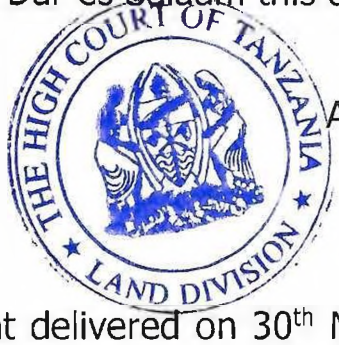
> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

Since the appellant did not object to the admissibility of the documents tendered, then the trial tribunal was justifiable to assume that the appellant had admitted the facts in respect of the evidence tendered and correctly relied on the same. Therefore this ground has no merit.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the findings of the District Land and Housing Tribunal for Temeke and the Ward Tribunal of Yombo Vituka. Therefore, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 30th May, 2022.



A.Z.MGEYEKWA

JUDGE

30.05.2022

Judgment delivered on 30th May, 2022 in the presence of the appellant and respondent.

A.Z.MGEYEKWA

JUDGE

30.05.2022

Right of Appeal fully explained.