

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL No.116 OF 2021

(Appeal from the decision of the District Land and Housing Tribunal for Morogoro in Land Appeal No.33 of 2020. Originating from Tungi Ward Tribunal in Shauri No. 01 of 2020)

SHABANI SAID.....APPELLANT

VERSUS

BAHATI MOHAMED.....RESPONDENTS

JUDGMENT

Date of Last Order: 24.03. 2022

Date of Ruling: 12.05.2022

MASOUD, J.

Being aggrieved by the decision of the District Land and Housing Tribunal for Morogoro (1st Appellate Tribunal) dated 22/09/2020, the appellant Mr. Shabani Said, decided to appeal before this court on the following grounds;

1. That the appellate Tribunal erred in law and in fact by upholding the decision of the trial Tribunal and holding that the second appellant's wife had no interest in the disputed property hence

the appellant has to vacate his second wife from the suit land with an immediate effect.

2. That the appellate Tribunal erred in law and fact by failing to consider the water tight evidences as they were tendered by the appellant during the trial.

By order of the court, this appeal proceeded by way of filing written submissions. The parties adhered to the schedule for filing written submission. Both parties appeared in person and unrepresented.

Submitting in support of the appeal the appellant submitted that, in 2005 he married his two wives, namely the respondent herein and the second wife. He used to live with his two wives in a single room in the family house (the property of the appellant's mother). In 2010 he bought a plot of land situated at Tungi street, Kingurowila ward, Morogoro region. He signed a sale agreement as a buyer and his first wife (the respondent) signed it as his witness. The fact as to signing the said agreement was never disputed by the respondent in the trial Tribunal. Sometimes later they started building a house on the disputed plot. That Everyone in the matrimonial home contributed and after the completion of the construction they started living in that house.

The appellant continued to submit that being the 1st appellate Tribunal, the Chairman had a duty to re-evaluate the entire evidence on record and arrive at its own findings. However, when evaluating evidences, the Chairman ignored all undisputed facts that in 2005 the appellant herein married his two wives on the same date and started living with his wives in a single room. Thus the said property was acquired during the subsistence of their marriage in which the second wife was also a legal wife, who also contributed her efforts in the construction of the suit property and after completing the construction of the suit property (their house) they all moved in the suit property and lived there together.

The appellant added further that, the general rule requires that no fresh evidence which is allowed to be admitted during appeal. But in the case at hand the 1st appellate Tribunal admitted fresh evidence. To support his argument, he cited the case of **Idrisa R. Hayeshi vs. Emmanuel Elinami Makundi, Civil Application No. 113/08 OF 2020, CAT**, where the Court held that;

"Except on grounds of fraud or surprise the general rule is that appellate court will not admit fresh evidence, unless it was not

available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available"

The Chairman thus failed to re-evaluate the evidence hence decided the appeal basing on the trial Tribunal's imaginations the appellant argued. He added that the 1st appellate Tribunal was supposed to re-evaluate the evidences adduced before the trial Tribunal and arrive at its own decision. He supported his argument, by citing the case of **DPP Vs Stephen Gerald Sipuka, Cr. Appeal No. 373 Of 2019, CAT**, at DSM. Where the Court held that;

"...a first appeal is in the form of a re-hearing and such, this being the first appellate court, it is duty bound to reevaluate the entire evidence on record by reading it together and subjecting it to critical scrutiny and if warranted arrive at its own conclusions of facts."

The appellant finalized his submission by praying to this court to quash the decision of the 1st appellate Tribunal for reasons of irregularities, in appropriateness and incorrectness.

Replying on the 1st ground of appeal, the respondent submitted that, it was the respondent who purchased the suit property on 22/04/2011 and

the appellant appeared in the sale agreement as the witness. The respondent added that during this period she was not living with her co wife, but she was only living with her husband and their children. She continued to submit that after purchasing the plot, she started constructing a house on it, and after completing constructing the suit property, on the 15/11/2011 she moved in the suit property. Sometime in 2014 the appellant begged the respondent to live with her co wife (the appellant's 2nd wife) for a short time so that the 2nd wife could be able to save money, buy a plot and construct her own house. She reiterated that the 2nd wife did not contribute money, property or works towards acquiring the suit property.

The respondent submitted further that the Chairman did not error in law and in fact by upholding the trial Tribunal's decision as it is correct that the appellant's 2nd wife did not contribute anything in acquiring the suit property. To support her argument, she cited the provision of Section 114 (2)(b) of the Law of the Marriage Act, Cap 29 R.E 2019.

Submitting on the 2nd ground of appeal she submitted that, it is not true that the 1st appellate Tribunal failed to consider the water tight evidence adduced by the appellant before the trial Tribunal. In her view, the appellant failed to prove the extent of contribution of his 2nd wife in

obtaining the suit property. It is a cardinal principle of the law that in civil case, the burden of proof lies on the plaintiff and standard of proof is on balance of probabilities. And that who alleges must prove. To support her argument, she cited the provision of Section 112 of the Tanzania Evidence Act, Cap 6 R.E 2019 which provides that;

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person"

Having gone through the party's submission, the main issue for determination is whether the appeal at hand is meritorious.

Going through the record of this appeal, I have found out that, it is not in dispute that the suit property/ plot was jointly acquired by the parties (as they started by purchasing the land plot and later constructed a house which is the subject of the dispute) and also, it is not in dispute that the appellant has two wives who live together in the disputed property. The only dispute as between the parties is whether the appellant's 2nd wife (not a party to the case at hand) contributed in the acquisition of the disputed property.

The record reveals further that, Mr. Omary Athumani Kingo testified at the trial Tribunal that he was the one who sold the plot to the parties and that while the respondent herein (the Applicant before the trial Tribunal) signed the sale agreement as the buyer of the said plot, the appellant signed as her witness. My perusal of the record of the trial Tribunal, reveal that, the respondent herein (the Applicant in the trial Tribunal) testified that the Appellant's 2nd wife was temporarily invited (by the appellant) to stay in the disputed property so that she could be able to save money enough to build her own house. The Respondent herein complained before the trial Tribunal that, after the lapse of 5 years (from the date the 2nd wife started living in the disputed property) the appellant started to claim that the suit property is equally owned by him and his two wives, as he claimed that it was acquired during the subsistence of their marriage.

The records reveal also show that the appellant herein (the respondent before the trial Tribunal) claimed that the 2nd wife also participated during the construction of the suit property as he testified that, the 2nd wife purchased building materials.

Having heard both sides the trial Tribunal entered a verdict in favor of the respondent herein. The appellant being aggrieved appealed to the 1st

appellate Tribunal which, after hearing the parties also entered a verdict in favor of the respondent herein, as the 1st appellate Tribunal decided to uphold the decision of the trial Tribunal. The appellant was not happy with the findings hence this appeal.

In my view, the dispute between the parties is not related to land matter. Rather, it is a matrimonial one. As earlier said, ownership of the disputed property as between the parties herein is not in dispute. The only issue in dispute is whether the appellant's 2nd wife contributed in the acquisition of the disputed property, and if so, to what extent.

It is the appellant's argument that the disputed property was acquired during the subsistence of their marriage (existence of his marriage with the two spouses). Therefore, his 2nd wife is also entitled to the share/ownership of the disputed property.

Given the nature of the complaint, the jurisdiction of both the trial and the first appellate Tribunal to have entertained the matter is in question. According to **Halsbury's Laws of England, 4th Edition, re issue Vol 10 para.314**, jurisdiction is defined as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters

*presented in a formal way for its decision. **The limits of this authority are imposed by the statute, charter or commission under which is constituted, and may be extended or restricted by similar means**"*

Jurisdiction of the Ward Tribunals is provided for under the Land Disputes Courts Act, Cap. 216 R.E 2019 ("**The Act**"), Land Act, Cap. 113 R.E 2019 ("**The Land Act**") and the Ward Tribunals Act, No. 7 of 1985, Cap. 206 R.E 2019 ("**The ward Tribunals Act**"). It is important to explain the extent of jurisdiction of the Ward Tribunal provided for under the respective laws listed.

Section 3 of the Ward Tribunals Act established a Ward Tribunal for every ward in Mainland Tanzania. The general jurisdiction of the Tribunal is defined under Section 8 of the same Act, which is to secure peace and harmony in the area. Specific jurisdiction of these Tribunals is defined under Section 9 of the same Act. This jurisdiction includes enquiring and determining disputes relating to the offences and civil disputes specified in the schedule to the same Act.

On the other hand, the specific jurisdiction of the Ward Tribunal to determine land matters is conferred under section 167 of the Land Act. It is also provided for under section 3 of Cap 216, jurisdiction which is

defined under Section 10 of the Act. Notably, the Ward Tribunals have multiple jurisdictions on different matters. They have different jurisdiction when they are sitting under the Section 8 and 9 of the Ward Tribunals Act. Their jurisdiction is different when they are sitting under the Land Act and the Cap. 216.

It is important to scrutinize, while determining the dispute in the case that led to the appeal at hand, the nature of the dispute that was referred for determination at the Ward tribunal. If it is found that the issue was concerned land, then the trial Tribunal would have had jurisdiction under the Land Act and Cap. 216, it would also mean that the first appellate Tribunal had jurisdiction. If the matter that was tabled before the Ward Tribunal did not pertain to land and the Ward Tribunal sat as a land court, it was wrong because it would have usurped jurisdiction not conferred to it by a statute.

While the respondent herein (applicant before the trial Ward Tribunal) alleged that the 2nd wife of the appellant never participated in the acquisition of the disputed property, the appellant herein (respondent before the trial Ward Tribunal) alleged that due to the fact that the disputed property was acquired during the subsistence of his marriage with his two wives, then the 2nd wife is also the owner of the same. This

is not in any manner a dispute, action or proceeding concerning land as defined under the laws above, to have conferred jurisdiction to the Ward Tribunal to sit as land court. The mere fact that the records of the Tribunal are titled as *"Baraza la usuluhishi Ardhi, Nyumba na Makazi Kata ya Tungi"* does not automatically confer jurisdiction of the Ward Tribunal in land matters because jurisdiction is a creature of statute and is not created by mere title of the Tribunal. The matter beforehand not being a land issue, the trial Tribunal was wrong to sit as a land court, which automatically made the first appellate Tribunal to have no jurisdiction to entertain the appeal.

Therefore, if that was not a land matter, then the Ward Tribunal sitting as a land court had no jurisdiction to entertain the matter. Its decision cannot therefore stand.

In the results, and for reasons already stated, the appeal is incompetent before the court and is hereby struck out. I invoke my revisional powers to nullify the proceedings and decision of the Tungi Ward Tribunal. I consequently also proceed to nullify the subsequent proceedings, judgment and decree of the 1st appellate Tribunal, as it never had jurisdiction to entertain an appeal on issues not related to land. Should

dispute, then a fresh complaint should be instituted at a court with competent jurisdiction to determine the claim. Given the nature of the decision I made, it is only fair that each party bear its own costs.

It is ordered.


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B. S. MASOUD
JUDGE.
12/05/2022

