

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND APPEAL NO.30 OF 2022**

(Arising from the District Land and Housing Tribunal for Mkuranga at  
Mkuranga in Land Appeal No.12 of 2021, originating from Ward  
Tribunal of Mipeko Land Cause No.12 of 2020)

**DEOGRATIAS EDWARD KIHULU ..... APPELLANT**

**VERSUS**

**ENEA NEMENSI NGASAKWA ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 24.06.2022*

*Date of Judgment: 29.06.2022*

**A.Z.MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Mipeko in Land Cause No.12 of 2020 and arising from the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Appeal No. 12 of 2021. From the scanty information borne out by the record, the background of this matter are as follows; the respondent instituted a suit

at the trial tribunal against the appellant contesting the ownership of a piece of land. The respondent claimed that the appellant encroached on his piece of land. On his side, the respondent denied the allegations. She testified that she is the lawful owner of the suit land. The trial tribunal visited locus in quo and decided the matter in favour of the respondent.

Believing that the trial tribunal's decision was not correct, the appellant appealed to the appellate tribunal. The appellant among others claimed that the trial tribunal did not consider his documentary evidence. He claimed that the respondent's sale agreement was not valid since the person who endorsed the sale agreement was not the vendor. The District Land and Housing Tribunal for Mkuranga 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 three grounds as follows:-

- 1. That, the District Land and Housing Tribunal erred in law and facts by deciding the matter in the favour of the respondent without*

*considering that the Ward Tribunal in its decision relied upon the respondent's sale agreement bearing the name of a person who is not the actual vendor.*

- 2. The District Land and Housing Tribunal erred in law and in facts by deciding the matter in favour of the respondent without considering that the measurements in the respondent's sale agreement differed from the measurements discovered during the site visit.*
- 3. That the District Land and Housing Tribunal erred in law and in facts by deciding the matter in favour of the respondent without considering that the trial tribunal did not consider the appellant's sale agreement.*

When the appeal was called for hearing on 9<sup>th</sup> June, 2022, the appellant appeared in person, unrepresented and Ms. Mwamtum Jongo, learned counsel appeared for the respondent. 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 6<sup>th</sup> June, 2022. The respondent filed his reply on 22<sup>nd</sup> June, 2022. The appellant waived her right to file a rejoinder.

On the first ground, Deogratias Kihulu contended that the appellant at the trial tribunal testified to the effect that he bought the suit land from

Abdallah Zuberi Malenda (now the deceased) but she lost the original sale agreement to support his claims the respondent tendered a loss report. Therefore, he tendered a new sale agreement dated 28<sup>th</sup> May, 2020 which was issued by the son of the original vendor. To buttress his submission Mr. Deogratias cited the case of Farah Mohamed v Fatuma Abdallah (1999) TLR 205 the court held that:-

*"He who has no legal title to the land cannot pass good title over the same to another."*

The learned counsel for the appellant went on to argue that Jumanne Zuberi Malenda was the vendor, however, he had no good title to pass the suit land to the respondent because the suit land was owned by his late father. Insisted that the sale agreement was void.

On the second ground, Mr. Deogratias contended that the respondent's loss report shows that the respondent's land was measuring one acre while in the sale agreement the measurement is stated 90 feet x 100 feet and during the trial, the respondent testified to the effect that the suit land size was 100 feet x 100 feet. He added that during the site visit the respondent's land extended to the appellant's house while in his testimony he testified that there is a boundary, therefore, his land did not extend to

the appellant's house. Mr. Deogratias argued that the contradiction of the size of the plot proved that the original sale agreement did not contain the size of the plot, hence, the same should not be considered by this court.

With respect to the third ground, the learned counsel for the appellant contended that the trial tribunal considered the measurement indicated in the sale agreement of the respondent in exclusion of the appellant's sale agreement. To support his submission he referred this court to pages 15 and 17 of the trial tribunal proceedings. He forcefully argued that the respondent admitted that the measurements in her sale agreement were not actual measurements since after noting that her piece of land extended to the appellant's house she decided not to take the piece of land.

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

Opposing the appeal, on the first ground, the learned Advocate for respondent confutation was strenuous. Ms. Mwantumu came out forcefully and defended both tribunals' decisions as sound and reasoned. The learned counsel for the respondent argued that the appellant had no

tangible evidence to support his claims. He submitted that both tribunals evacuated the evidence and found that the respondent's evidence was watertight since he proved his case on the standard required by law. Ms. Mwantumu went on to submit that the appellate tribunal discussed the respondent's sale agreement and found no reason to differ from the trial tribunal. The learned counsel contended that the appellant made two different statements in the same proceedings. She added that the appellant claimed that he purchase the suit land and the measurements were in meters and during the site visit, the appellant said the suit land was measured in feet. He asserted that the tribunals in its decision based not only on the sale agreement but as well other factors were considered.

Ms. Mwantumu continued to submit that the trial tribunal visited *locus in quo* thus it had an opportunity of hearing witnesses and seeing the site in the vicinity and the measurement were taken at the suit land. She distinguished the cited case of **Farah Mohamed** (supra) since the matter at hand is not related to land ownership while in the case at hand the appellant was a trespasser.

As to the second ground, the appellant's Advocate reiterated her submission that the trial tribunal visited *locus in quo* and the appellate

tribunal confirmed the findings of the trial tribunal this the appellant's claims are baseless. The learned counsel for the respondent averred that the trial tribunal found that there was a clear mark demarcating the parties' lands and it was proved that the appellant trespassed into the respondent's piece of land and the trial tribunal considered the oral evidence of both parties and their witnesses. Insisting, she contended that the appellant's evidence was contradicting thus the trial could not believe his evidence.

As to the third ground, the learned counsel for the respondent contended that this ground is a new ground that was not raised at the appellate tribunal. She added that since the appellant wants to challenge the decision of the trial tribunal by not considering the measurements of the appellant's land then she was supposed to prefer this ground before the appellate tribunal. She went on to submit that this court has no jurisdiction to entertain appeals from the Ward Tribunals. Supporting his submissions he referred this court to section 19 of the Land Disputes Courts Act, Cap. 216 and section 110 of the Evidence Act Cap.6.

On the strength of the above submission, the respondent' Advocate 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 both counsels. 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 Mkuranga.

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 **Nuridin 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."*



I have opted to combine and address the first and second grounds of appeal because they are intertwined and the third ground will be argued separately.

As to the third ground, the appellant is complaining that the District Land and Housing Tribunal erred in law and in facts by deciding the matter in favour of the respondent without **considering that the trial tribunal did not consider the appellant's sale agreement**. I have gone through the appellate tribunal records and noted that the appellant raised his concern at the appellate tribunal. At the trial tribunal, the appellant testified to the effect that he bought the suit land on 22<sup>nd</sup> August, 2011 measuring 13 steps x 17 steps. His evidence was not supported by any witness even the vendor was not called to testify. The appellant's sale agreement stated that Abdallah Zuberi sold a piece of land to the appellant and the size of the plot is 13 steps x 30 steps.

Concerning the second and third grounds, the appellant is complaining that the District Land and Housing Tribunal erred in law and facts by deciding the matter in the favour of the respondent without considering the trial tribunal's decision was based on the respondent's sale agreement bearing the name of a person who is not the actual vendor. The appellant

claims cannot stand that the sale agreement bears the name of Jumanne Zuberi Malenza respondent and not the actual vendor because the matter before the trial tribunal was concerning boundaries and not ownership. The respondent is the one who lodged the suit claiming that the appellant has trespassed her suit land. The proof was based on whether or not the appellant has trespassed the suit land.

The issue of proofing ownership is relevant. In case the appellant had any dispute on the matter of ownership then he could lodge a separate suit. In my considered opinion, this is a new issue which was not determined at the trial tribunal, therefore, the same cannot be entertained at this juncture. 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 this Court lacks jurisdiction to entertain the issue of ownership.

Concerning the issue of the measurements, I will determine whether or not the measurements in the sale agreement differ from the actual physical visit. I have examined the trial tribunal proceedings dated 9<sup>th</sup> February, 2021, and found that the appellant testified that the size of his land measured 4 feet x 100 feet, and on 16<sup>th</sup> March, 2021, the respondent testified to the effect that the size of his plot on the Southside is 90 feet

x 90 feet while in her testimony the respondent testified to the effect that the size of his plot was 90 feet x 100 feet. I have scrutinized the respondent's sale agreement, it reads Northside 90 feet, Southside 90 feet, West side 90 feet x Eastern side 100 feet.

I have noted that the respondent contradicted himself in stating that his plot was measuring 90 feet x 100 feet. However, in my view, it was a minor inconsistency, the same did not go to the root of the case. In **Luziro s/o Sichone v. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal of Tanzania held that:-

*" We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory or account of passages of time should always be disregarded. **It is only fundamental discrepancies going to discredit the witness which count.**"* [Emphasis added].

Applying the above authority in the instant case, it clear that the inconsistency was minor. I have considered the fact that the trial tribunal visited *locus in quo* and had an opportunity seeing the site in the vicinity and the measurement were taken at the suit land. Therefore, the trial tribunal was in a better position to evaluate the evidence on record.

Therefore, I am not in accord with the appellant's advocate submission that the original sale agreement does not contain the size of the plot.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the findings of both tribunals. Therefore, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 29<sup>th</sup> June, 2022.



A.Z.MGEYEKWA

**JUDGE**

29.06.2022

Judgment delivered on 29<sup>th</sup> June, 2022 in the presence of the appellant and Ms. Mwantumu Jongo, learned counsel for the respondent.



A.Z.MGEYEKWA

**JUDGE**

29.06.2022

Right of Appeal fully explained.