IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

MISC. LAND APPEAL NO. 13 OF 2020

(Originating from Decision of the District Land and Housing Tribunal for Rukwa District at Sumbawanga in Land Appeal No. 20 of 2020 Civil Case No. 10 of 2020 Nkandasi Ward Tribunal)

ALFRED KHAMIS...APPELLANT

VERSUS

SERIKALI YA KIJIJI CHA KATANI.......................RESPONDENT

JUDGEMENT

Date of last Order: 06/12/2021
Date of Judgment: 25/02/2022

NDUNGURU, J.

This is a second appeal. The matter has its genesis from Nkandasi Ward Tribunal (henceforth the trial tribunal). At the trial tribunal the respondent herein successfully sued the appellant claiming ownership of 20 acres of land. Dissatisfied the appellant unsuccessfully appealed to the District Land and Housing Tribunal for Rukwa (henceforth the Appellate Tribunal) where the respondent was declared the rightful owner of the disputed plot.

Aggrieved by the appellate tribunal decision, the appellant has preferred this appeal by lodging the following grounds of appeal;

1. *That the two tribunals ward tribunal and district land and housing tribunal erred in law by entertaining this land dispute which is time barred.*
2. *That the tribunal chairperson erred in law and fact to upheld the ward tribunal decision where by the decision tribunal did not consider the evidence of the appellant and hence reaching to the wrong decision.*
3. *That the ward tribunal and the district tribunal erred in law and fact in deciding the land in dispute which was used as mashamba ya Ujamaa in the year 1976-1980 is the property of the respondent without considering the fact that after the death of ujamaa in the year 1989 it was ordered that the ujamaa farms be returned to the citizen to continue with agricultural which was done thus the allegation of the respondent is not true.*
4. *That the ward and district tribunal erred in law and in fact in giving the right to the respondent without considering the facts that the farms in question was distributed to citizen including the appellant herein and the situation has been up to 2018 after one Jofrey kisato come into power as a village chairperson and started this dispute while the appellant been in use of the disputed land for 39 years and hence reaching to the wrong decision.*
5. *That the district chairperson erred in law and facts for failure to give reasons as to why she differed with the assessor's opinion and hence reaching to the wrong decision.*
6. *That the tribunal chairperson erred in law and fac in being biased.*

As this appeal was called on for hearing, the appellant had a legal service of Mr James Lubus learned advocate whilst the respondent had a

legal service of Julius Tinga, a District Solicitor. The learned advocate for the appellant prayed to this court for hearing of the appeal by way of written submission. This court ordered the case to proceed hearing by way of written submission and the court set a date for each counsel for them to file submission.

Mr. James Lubus submitted as regards the first ground that the appellant has been in occupation of the suit land for a longtime and the respondent has seen the appellant occupying the disputed plot without any interference from the respondent. Mr Lubus argued that it is a principle of the law that once a person has used the land for a long period of time should not be disturbed. He made the position with reference to the case **of Nassoro vs Rajabu Simba** (1967) HCD No. 233, **Augusta Mpolo vs Ramadhan Shaban Msuya**, Misc Land Appeal No. 98 of 2017 and **Juliana Rwakatare vs Kaganda** [1965] L.C.CA 43.

He further argued that it was not proper for the trial and first appellate tribunal to hold that the respondent is the lawful owner of the suit land as the appellant has been in occupation of the disputed land for more than 32 years and at all the life time the appellant continued to cultivate up to date without being disturbed, thus he said it was grossly

unfair at the trial tribunal to grant the respondent the right over the plot and disturb the appellant.

As to the ground two and five, Mr Lubus submitted that there is no evidence on record which shows that the respondent once has occupied the disputed plot.

Further, Mr Lubus was of the view that the evidence of the respondent and his witness was not sufficient enough to controvert the appellant evidence and therefore the it was wrong to uphold the respondent that the suit land is the property of the respondent.

As to the last ground, Mr Lubus submitted that the proceedings of ward tribunal does not show members who heard the matter. He referenced the case of this court **Akleus Masanja and Akleo Ntandu vs Sabas Lupia**, Land case Appeal No. 8 of 2006.

He finally prayed for the court to quash the decisions of the lower courts.

In reply, Mr Julius Tinga Council Solicitor for the respondent raised a preliminary objection that written submission by the applicant is not tenable in law for being brought to the non-existing court in Tanzania and that ground of appeal are narrative and argumentative contrary to the provision of law.

Responding to the ground of appeal, Mr Tinga submitted that the acquisition of the landed property owned by the Government or the President. The position is provided under section 38 (a) and (c) of the Law of Limitation Act, Cap 89 RE 2019. He submitted that the principle of adverse possession can not be applied to landed property owned by the government.

Furthermore, Mr Tinga submitted that the respondent has occupied the landed property since the first day of January 1970 and 31st of December 1977 as defined by section 2 of the village Land Act 1999. He argued that Katani Village Council being the legal person by virtual of section 8 of the Village Land Act has a duty to allocate land and to manage the same. He said it is unfortunate enough to aver that the Village Council has never allocated the land in dispute to the appellant. The appellant came into possession by virtual of his being the village chairperson of the Katani Village Council and confiscated the same to be his personal landed property.

Mr Tinga argued that his perusal of the Judgement of the appellate tribunal which was not challenged by any judicial reasoning shows that the appellant possessed the land in dispute by way of purchasing it from different persons. The persons who sold the land

were not brought before the tribunal to testify on the ownership of the landed property by the appellant.

As to the ground 2 and 5 of appeal, Mr Tinga submitted that neither one of the grounds of appeal was raised at the appellate tribunal.

He finally prayed that the court be pleased to order that the respondent is the lawful owner of the land in dispute, order the vacancy possession in favour of the respondent, costs and any relief which this court finds fit and just to grant.

In rejoinder, Mr Lubus submitted that the preliminary objection raised by the Council Solicitor is null and void as the solicitor failed to make distinction between pleadings in general. He said written submission is the same as actual hearing and raising preliminary objection when pleadings are complete is misleading regime.

I have keenly followed the arguments of the learned counsel for the both parties and I have read between the lines the appellant grounds of appeal and the entire proceedings of the tribunals below.

As regards the notice on point of preliminary objection to be raised by the respondent, this court is of the strong view that the respondent

has failed address on them in his written submission, hence it can be said the respondent has abandoned them.

Let me, first start addressing the first complaint by the appellant that the appellant has been in occupation of the land in dispute for a quite long time, thus he owned the land under adverse possession. This new ground of appeal falls short of merit as it is raised for the first time in this second appeal. It has been the position of the law that matter which had not been raised or discussed in the first appeal cannot be raised in the second appeal like this one. This new ground which neither raised by the trial tribunal nor on appeal by this court, therefore, the issue can be said to be of no worth to be considered and determined by the Appellate Court. There is a chain of authorities which have taken that stance, which is, matters not considered by the lower courts cannot be raised in the Higher Court. See cases of **George Mwanyigili vs Republic**, Criminal Appeal No. 335 of 2016, unreported, **Juma Manjano vs Republic**, Criminal Appeal No. 211 of 2009, unreported, **Sadick Marwa Kisase vs Republic**, Criminal Appeal No. 83 of 2012, unreported, also the case of **Alfred Nyaoza vs Salvatory Mwanabula**, Misc Application No. 3 of HC at Sumbawanga, in **Juma Manjano** (supra) the Court held that: -

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. in the case of ***Abdul Athuman vs Republic*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal therefore struck out."*

"The Court has repeatedly held that matters not raised at the first appellate court cannot be raised in a second appellate court."

The purported ground of adverse possession is of no worth at this stage as a ground of appeal, the same applies to the ground as regards members of the tribunal as raised by the counsel for the appellant in his written submission in chief for the first time.

In dealing with the remaining grounds laid down by the appellant, I would firstly quote section **110 (1)** of the law of Evidence Act, Cap 6 2019 which states as follows: -

"Whoever desires any court to give Judgement as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist."

At the trial tribunal, the records show that the applicant (now respondent) claimed the suit land to be the property of the village government. In their effort to prove that fact, the applicant paraded seven witnesses to prove such fact. All of the witnesses testified to the effect that the disputed land belong to the village government.

It is apparent, upon my perusal of the records of this appeal, that before the trial tribunal the appellant along with his witnesses failed to tender any proof as regard the allocation of the disputed land to him from village council as well as the selling of such land to him from persons, he said they sold to him. The records shows that they those persons were never called to testify as regards those facts.

On the balance of probability, the evidence on the part of the respondent tendered at the trial tribunal is weigh than that of the appellant.

Conclusively, I have not seen a misdirection or non-direction on the evidence by the trial tribunal as well the appellate tribunal that this court cannot do anything as it was stated in the case of **Materu Laison & Another vs R. Sospeter** [1988] TLR 102 as per Moshi, J as he then was;

"Appellate Court may in rare circumstance interfere with the trial Court findings or facts. It may do so in instances where

trial Court has omitted to consider or had misconstrued some evidence, or had acted on wrong principle or had erred in its approach in evaluating the evidence."

I am also aware that Court of Appeal of Tanzania held in **Ali Abdallah Said vs Saada Abdallah Rajab** [1994] TLR 132 that: -

"Where a case is essentially on one fact in the absence of any indication that the trial Court failed to take some material point or circumstance into account, it is improper for the appellate Court to say that the trial Court has come to an erroneous conclusion. Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial Court which is better placed to assess their credulity than a appellate Court, which merely reads the transcript of the record."

It is therefore, my finding that the appeal, is not fitting occasion for me to interfere with the trial tribunal findings, and for the foregoing reasons, I find no merit in this appeal.

It is hereby dismissed. I make no orders as to costs.

It is so ordered.

D. B. NDUNGURU

JUDGE

25. 02. 2022

Date	-	28.02.2022
Coram	-	Hon M. S. Kasonde - DR
Applicant	-	Present in person
Respondent	-	Mr Julius Tinga (Solicitor)
B/C	-	Zuhura

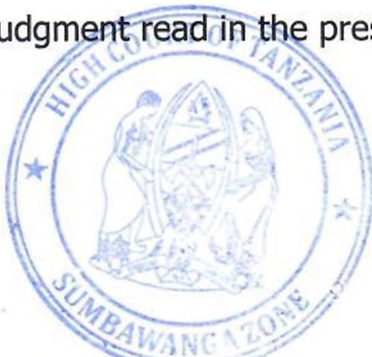
Mr Julius Tinga Solicitor

Your honour, this mater comes for judgment today and we are ready.

Appellant : I am prepared too.

Court:

Judgment read in the presence of both parties this 28th day of February 2022.



M.S. Kasonde,

DR,

28/02/2022.

Right of appeal fully explained.

M.S. Kasonde,

DR,

28/02/2022.