

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL No. 123 OF 2021**

(Appeal from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Case No.64 of 2020. Originating from Kwembe Ward Tribunal in "Shauri" No.13 of 2020)

**JULIAS STEPHEN TINDWA.....APPELLANT**

**VERSUS**

**ABDALLAH SWAZI..... RESPONDENTS**

Date of Last Order: 21.04. 2022

Date of Ruling: 6.06.2022

**JUDGMENT**

**Masoud, J.**

Aggrieved by the entire judgment and decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala ("**1<sup>st</sup> appellate Tribunal**") dated 13/04/2021, the appellant Mr. Julias Stephen Tindwa decided to appeal before this court on the following grounds;

1. The Hon. Appellate Tribunal erred in law and in fact in failing to evaluate the evidence adduced by the appellant thereby making decision in favor of respondent.

2. That the Hon. Appellate Tribunal erred in law and in fact in inventing new facts regarding respondent's purchase of land from one Omari Kadhumari who appears nowhere in the records of the hon. Trial Tribunal.
3. That the Hon. Appellate Tribunal erred in law and in fact in considering and eventually making decision in favor of the respondent despite the fact that the petition of appeal was drawn by a fictitious drawer which renders it incompetent.
4. That the Hon. Appellate Tribunal erred in law and in fact in acting on the written submission in chief which was drawn and filed by a fictitious drawer and thereby incompetent drawer.
5. That the Hon. Appellate Tribunal erred in law and in fact in determining the appeal without being duly constituted to wit without wise assessors.

Due to reasons above, the appellant asked this court to allow the appeal and reverse the judgment and decree of the 1<sup>st</sup> Appellate Tribunal, declare the appellant the lawful owner, costs of this appeal and any other orders the court may deem fit and just to grant.

Both parties were represented. While the appellant was represented by Mr. Edsoni Kilatu & Mr. E Nkashu Advocates, the respondent was represented by Benedicto Makelani Fungo, Advocate from the Legal and Human Right Centre (under legal aid).

By an order of the court given on the 24/04/2022, hearing of this appeal proceeded by way of filing written submissions. Whereas the appellant was ordered to file written submission in chief on 7/12/2021, the respondent was to file his reply by 20/12/2021. A rejoinder by the appellant if any was supposed to be filed on 27/12/2021.

Unfortunately, it is only the appellant who adhered to the submissions filing schedule. The respondent instead of filing his reply on the 20/12/2021, he filed on 20/01/2022 out of time without leave of the court.

On the 3/3/2022 the appellant's advocate, Mr. Nkashu, addressed the court on the issue that the respondent filed his reply out of time. He stated that he filed his submissions a month after the scheduled date. In this regard, he called upon the court not to consider the submission which was

filed out of time. In his reply the respondent submitted that he was on the legal aid assistance from the Legal and Human Right Center. That on Dec 2021 they were on holiday. He continued to submit that he brought a letter informing the court on the issue, that he also informed the appellant's advocate. When rejoining Mr. Nkashu conceded to the fact that he was informed about the delay but he added as long as it was filed out of time and without leave of the court, it should be disregarded.

It is now settled law that filing written submissions is equal to a hearing and; therefore, failure to file the submissions as ordered by the court is equivalent to non-appearance at a hearing. The subsequent consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend a case. In that respect, the respondent's failure to file his written submissions as ordered by the court means that he has failed to appear and defend his case. Accordingly, this appeal proceeded ex parte against him.

Submitting in support of the appeal, Mr. Kilatu decided to consolidate the 3<sup>rd</sup> and 4<sup>th</sup> grounds and argued them together. He did so as he was of the view that they both question the competence of the person who prepared the respondent's documents which were filed before the court. In addition, Mr. Kilatu abandoned the 5<sup>th</sup> ground of appeal.

As regard to the 1<sup>st</sup> ground, Mr. Kilatu submitted that, the 1<sup>st</sup> Appellate Tribunal failed to properly evaluate the evidence adduced before it as it clothed itself with legal technicalities. The failure occasioned miscarriage of justice. He added that the 1<sup>st</sup> appellate Tribunal had no reason of faulting the decision and orders of the trial Ward Tribunal which was arrived at after evaluation of evidence on the record. He argued that at the trial Ward Tribunal the appellant managed to prove his case to the required standards, unlike the respondent herein whose evidence was rather doubtful and incredible.

It was, according to the appellant, shocking that the 1<sup>st</sup> appellate Tribunal faulted the findings of the trial Ward Tribunal simply because there was no documentary proof to prove that Shabani Rajabu Kazumali had power to dispose of the land in dispute. Mr. Kilatu submitted further that worse enough the issue was raised suo moto by the 1<sup>st</sup> Appellate Tribunal, in total disregard of the fundamental principle that the trial Ward Tribunal should not be bound by any rules of evidence or procedures applicable in any court. To support his argument, he referred me to the provision of section 15 (1) of the Ward Tribunal Act,1985.

Mr. Kilatu submitted further that, the fact that Mr. Shabani Rajabu Kazumali testified before the trial Ward Tribunal that, he has been empowered by his father(owner) to dispose of the said land, such evidence was sufficient and reliable unless there was other evidence to the contrary.

It was shown that the matter was instituted in 2020 after the lapse of about 15 years as from 2005 when it was disposed of. It suffice that the appellant was left to enjoy the suit land uninterruptedly for such a long time. As a result, the appellant is to rightful ownership of the suit land.

As regard to the 2<sup>nd</sup> ground, Mr. Kilau submitted that, the 1<sup>st</sup> appellate Tribunal invented new facts which were not in the record of the trial Ward Tribunal. It was thus shown that at page 5 of the judgment of the 1<sup>st</sup> Appellate Tribunal, reference was made to Omari Kadhumari who is quite different from one referred to in the record of the trial Ward Tribunal. It was also shown that the 1<sup>st</sup> Appellate Tribunal invented a new person, namely, Shabani Kadhumari, as the one who sold the land in dispute to the appellant which is not true. The said inventions amounted to errors

which go to the root of the case. In the end, I was told that the 1<sup>st</sup> Appellate Tribunal was required to confine itself within the record of the trial Tribunal, and not otherwise.

Submitting on the combined 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, it was stated that the memorandum of appeal that initiated the first appeal was drawn by Legal and Human Rights Centre without naming the drawer. It was added that a similar irregularity was repeated in the written submission in support for the first appeal which was drawn by the Legal and Human Rights Centre and filed on 7/09/2020 by a stranger namely Costa Tarimo.

It was added that the two documents were prepared by a fictitious person who may be unqualified one. The anomalies are thus serious and incurable. He insisted that one, Costa Tarimo, does not fall within the parameters of the law, and the records of the 1<sup>st</sup> Appellate Tribunal go without saying anything about this stranger who filed the written submission that the Legal and Human Right Centre in itself had no capacity to draw.

It was further argued that disclosure of the drawer of a document is of essence as it gives a room to ascertain whether a document is drawn by a qualified person or not. He submitted that it is now a settled law that any court document drawn by unqualified person is a nullity. In this submission, he relied on the case of **UA Industrial Group Limited vs. WIA Group Limited, Civil Case No. 44 of 2019, High Court of Tanzania**, Dar es Salaam Registry, at DSM (unreported), where at page 3 the court granted an order rejecting the plaint. Mr. Kalau finalised his submission inviting the court to allow the appeal and reverse the judgment and decree of the 1<sup>st</sup> Appellate Tribunal in its entirety.

Having gone through the records of this appeal, the main issue for determination is whether the appeal is meritorious.

The first ground of appeal was on the alleged failure of the first appellate tribunal to properly evaluate the evidence adduced before the trial ward tribunal. Going through the records of this appeal, particularly, that of the trial Ward Tribunal, it is evident that, at first, the suit land belonged to Omari Malechela Kazumari/Kadhumari, and on 17/08/2003 he vended the area to Zuberi Sadala Kiwango. In 5/2/2004 Zuberi Sadala Kiwango sold the same to the respondent herein.



The records show further that on the 2/1/2005, Shabani Rajabu Kadhumari, vended the same land in dispute to another person i.e Abdallah Swazi (the Respondent herein). The sale agreement does not disclose much on how the vendor/Shabani Rajabu Kadhumari came into possession of the same. It is however apparent on the face of record that the area used to belong to his father, Omary Kadhumari, who by the time the 2<sup>nd</sup> sale agreement was being effected, he (Omari Kadhumari) had already vended the land in dispute to Zuberi Sadala Kiwango.

In the absence of the evidence of ownership on the side of Shabani Rajabu Kadhumari, the sale agreement between him (Shabani Rajabu Kadhumari) and the Appellant herein signed on the 2/1/2005 becomes null and void due to the fact that, at the time they entered into the sale agreement, the vendor (Shabani Rajabu Kadhumari) had no better title to pass to the Appellant herein. See **Farah Mohamed vs Fatuma Abdalla [1972] T.L.R 205.**

Mr. Kilatu also submitted on the issue that he was surprised why the matter was preferred in 2020 after the lapse of 15 years and that the

appellant is supposed to be left to fully enjoy his rightful ownership of the suit land.

Having perused the records of the trial ward tribunal, I was clear that the dispute between the parties did not start on 2020. Rather, the matter started in 2011 when the respondent herein heard the rumors from the first person to trespass into the disputed area and cultivated crops (matuta ya viazi) without seeking permission from him. Having so been notified, the respondent decided to construct one roomed house in order to satisfy himself if there is another person claiming ownership of the disputed area. After he started constructing a house, the appellant appeared claiming to have purchased the area in 2005 from Shabani Rajabu Kadhumari.

The appellant as a purchaser had an obligation to have knowledge of the status of the property he was purchasing from Shabani Rajabu Kadhumari. That is, the appellant was bound by the principle of "*buyer beware*" (caveat emptor) which assumes that buyers will inspect and otherwise ensure that they are confident with the integrity of the product

or land before completing a transaction. In fact, a buyer of landed property is supposed to make search, make on-site inspections of the property and make enquiries if there are any existing disputes over the property, boundaries, right of way, maintenance of roads and the like. It was therefore the duty of the appellant to make such enquiries and search before proceeding with the sale between him and Shabani Rashid Kadhumari so as to satisfy himself of the transaction. If the appellant had gone into to trouble to know what he was buying he could have known that the suit land had already been bought by the respondent way back in 2004, and also he could have discovered that, in the first place the suit land never belonged to Shabani Rashid Kadhumari but to his father. He could have therefore demanded any document authorizing him (Shaban Rashid Kadhumari) to sale the land in dispute and/ or he could have desisted from subsequent purchase.

As regard to the 2<sup>nd</sup> ground of appeal, Mr. Kilatu submitted that, the 1<sup>st</sup> appellate Tribunal invented new facts which were not in the records of the trial Ward Tribunal. The appellant alleged that names of the people/persons mentioned at page 5 of the 1<sup>st</sup> Appellate Tribunal typed

Judgment were wrongly written/recorded, that instead of Kazumali, it was recorded as Kadhumari.

My perusal of the records of the trial Ward Tribunal, particularly, the sale agreement between Omary Malechela Kadhumari and Zuberi Sadala Kipande, and also, the two sale agreements between Shaban Rajabu Kadhumari and the appellant herein, revealed that there is no any invention of new facts or names on the part of the 1<sup>st</sup> Appellant Tribunal.

The 1<sup>st</sup> Appellate Tribunal recorded their names as they appear in the records of appeal, particularly, the sale agreements attached thereto. However, the appellant had a chance of challenging it before the trial Ward Tribunal, but he chose not to do so. It is a trite law that new grounds of appeal on matters that were not raised on the trial Tribunal cannot be raised in appeal. See **Abdi M. Kipoto vs Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017.

Lastly, the appellant's allegations as regard to the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, are merely assumptions without any proof. However, the

appellant had a chance to raise objection regarding the issue before the 1<sup>st</sup> Appellate Tribunal, but he chose to remain silent. The Court of Appeal in **Godfrey Wilson vs R Criminal Appeal No.168 of 2018**, held that;

*"Points not raised in the 1<sup>st</sup> appellate Tribunal cannot be entertained because we cannot know where did the 1<sup>st</sup> appellate court go wrong or right".*

In the upshot of the above findings, it is my holding that the grounds of appeal are all without merit. Consequently, the appeal fails and is dismissed as there is no basis of faulting the judgment and decree of the tribunal. I will not make any order as to costs in view of the record that the respondent was a beneficiary of legal aid.

It is so ordered.

Dated at Dar es Salaam this 6<sup>th</sup> day of June 2022.

  
**B.S. Masoud**  
**Judge**

