

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

**MISC. LAND APPEAL NO.138 OF 2021**

(Arising from the District Land and Housing Tribunal for Kinondoni at  
Mwananyamala in Land Appeal No.118 of 2020 originating from Ward  
Tribunal for Saranga in Case No.07 of 2919)

**GODFREY ZAGAMBA ..... APPELLANT**

**VERSUS**

**HAMZA ATHUMANI ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 17.02.2022*

*Date of Judgment: 22.02.2022*

**A.Z.MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Saranga and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 41 of 2018. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the respondent lodged his claims at the trial tribunal

complaining that the appellant has constructed on the road reserve. The respondent prayed for a declaration order for the respondent to vacate his bricks from the road reserve area and the respondent alleged that the appellant has uprooted his trees which were planted along the boundary. The appellant on his side disputed the respondent's claims. The trial tribunal evaluated the evidence on record, visited *locus in quo*, and decided the appellant has encroached and built on the road area. The trial tribunal decided in favour of the respondent whereas the respondent was ordered to remove his brick from the suit land and plant the uprooted trees.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kinondoni, at Mwananyamala vide Land Appeal No.118 of 2020 among others the appellant complained that the trial tribunal did not consider the sale agreement, failure to consider that the appellant occupied the suit land for 20 years and that the trial tribunal decision is based on fabricated evidence. The District Land and Housing Tribunal upheld the decision of the trial Tribunal and maintained that the trial tribunal orders. The first appeal irritated the appellant. Thus, he filed an appeal before this court which was registered as Misc. Land Appeal No. 138 of 2021 on two grounds of grievance, namely:-

1. *That, both tribunals erred in law and fact by reaching into a decision in favour of the respondent without taking into consideration of the appellant's evidence and his witnesses.*

2. *That, both tribunals erred in law and fact by delivering a judgment without considering that the composition of Saranga Ward Tribunal was not properly construed.*

When the matter came up for hearing on 27<sup>th</sup> January, 2022, the appellant appeared in person and the respondent enjoyed the legal service of Mr. Omary Abubakar. The Court acceded to the appellant's proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

In his submission, the appellant began with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal. On the first ground, the appellant contended that *both* tribunals erred in law and fact by reaching a decision in favour of the respondent without taking into consideration of the appellant's evidence and his witnesses. He claimed that during the trial he was denied a right to call his witness and testify. He claimed that he had a sale agreement a drawing map of the purchased land which shows the size of the land. He lamented that the trial tribunal in its decision relied only on a beacon and concluded that the appellant has encroached and built on the road area. He further

contended that the trial tribunal did not recognize that there was insufficient evidence proving that the appellant built on the road area since there was no any mark spotted from the roadside. He urged this court to quash both tribunal's decisions as he was the only one who was ordered to pave a way for other users. Stressing on the point, the appellant contended that the whole judgment was based on mere evidence since there was no proof of urban planning map indicating that the appellant has exceeded or built on the road area. To buttress his contention, he cited the case of **Hemedi Said v Mohamed Mbilu** [1984] TLR 113 HC. He added that the respondent did not provide any evidence showing the actual measurement of the road which was ordered to be left aside.

Arguing for the second ground, that both tribunals erred in law and fact by delivering a judgment without considering that the composition of Saranga Ward Tribunal was not properly construed. The appellant briefly contended that the trial tribunal delivered its decision in the presence of 7 members whereas five of them were male and the remaining two were female. He submitted that the Ward Tribunal decision was delivered while the composition was not in accordance with the law as it consist of seven members whereas two of them were women instead of three women. It was his view that the defect rendered the Ward Tribunal proceedings nullity. Fortifying his submission he referred this court to Section 11 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and the case of **Kidanha Bagasa**

**v Masalu Lukanga**, Land Appeal No.10 of 2020 HC at Shinyanga (unreported). The appellant faulted the appellate tribunal for failure to rule on the matter of illegality.

On the strength of the above submissions, the appellant beckoned upon this court to quash the proceeding of the trial tribunal and set aside both tribunals' decisions.

Opposing the appeal, on the first ground, Mr. Abubakar, learned counsel for the respondent in his submission was brief and focused. He submitted that both tribunals considered and analysed the evidence on record. He went on to submit that the issue before the trial tribunal was whether the appellant built in the roadside which blocked the pathway used by the respondent and other neighbors as a result they could not access their plots. Mr. Abubakar went on to submit that the trial tribunal visited the disputed land and discovered that the appellant has built on the roadside. Supporting his submission, he cited the case of **Jovent Clavery Rushaka and Devoths Yipyana Mponzi v Bibiana Chacha**, Civil Appeal No. 236 of 2020.

He distinguished the cited case of Hemedi Said (supra) from the instant appeal for the reason that the trial tribunal considered the evidence of both sides and visited locus in quo whereas there was no doubt that the

appellant illegally built in the roadside. Mr. Abubakar urged this court to find that this ground lacks merit, the same be dismissed.

On the second ground, that relates to the composition of Saranga Ward Tribunal was not considered. Mr. Abubakar, in his submission, was brief and focused. He valiantly contended that this is a new ground that was not raised at the appellate tribunal. He added that it was not proper for the appellant to raise a new ground in the first appellate court. To bolster his contention, he cited the case of **Halfani Charles v Halima S. Makapu & James S. Makapu**, Misc. Land Appeal No. 85 of 2021 HC Land Division (unreported). Replying to the appellant's submission, he contended that the Ward Tribunal was properly composed as there were six members as stated under section 4 (3) of the Ward Tribunal Act, Cap. 206 which state that:-

*" The Quorum at sitting of a tribunal shall be one-half of the total number of members."*

Mr. Abubakar continued to submit that the above provision provides for members who shall be present in adjudication or determination of a dispute and is silent on the issue of gender balance. Insisting, he submitted that Saranga Ward Tribunal complied with the law as it was more than one-half of the total number of members. To support his

position he referred this court to the case of *Mapinduzi Mbaruku v Hussein Sufian*, Land Appeal No. 14 of 2019 whereas Hon. Mruma, J held that:-

*" Thus, section 14 (1) of the Ward Tribunal Act, Cap. 206 of 2019 and section 11 of the Land Disputes Act, Cap. 216 [R.E 2019] has nothing to do with the composition of the quorum at the sitting of the tribunals. The two provisions are related to creation or establishment of the Ward Tribunals by Ward Tribunal's gender must be observed."*

On the strength of the above submission, Mr. Abubakar beckoned upon this court to find that the appellant's appeal is demerit and proceed to dismiss the appeal in its entirety with costs.

I have considered the rival arguments by the parties to this appeal. I will address the two grounds separately because they are not intertwined.

With respect to the second ground, I have scrutinized the trial tribunal's records and noted that the issue of composition of the Ward Tribunal is a new ground that was raised for the first time at the appellate tribunal. I respectively agree with the learned counsel for the respondent that 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. It is settled position of law that issues not raised and canvassed by the appellate court or tribunal cannot be considered by the second appellate court. The Court

of Appeal of Tanzania in the case of **Farida & Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

*“ It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court.”*

However, since the new ground is based on point of law then I will determine it to find whether there was a proper composition of the Ward Tribunal. From the outset, I have to say that I fully subscribe to the submission made by the learned counsel for the respondent that the cited section 11 of the Land Disputes Courts Act, Cap.216 is related to the establishment of the Ward Tribunal whereby the same is made by not more than 8 members and not than 3 women. Section 11

*“11. Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act.”*

The issue of quorum of Ward Tribunal members is well articulated under section 4 (4) of the Ward Tribunal Act, Cap. 206 .state as follows:-

*“4.-(1) Every Tribunal shall consist of-*



*(a) not less than four nor more than eight members elected by the Ward Committee from amongst, list of names of persons residenting the Ward compiled in the prescribed manner. Tribunal.*

*(4) The quorum at a sitting of the Tribunal shall one half of the total number of members.*

Applying the above provisions of the law, and the holding in the case of **Mapinduzi Mbaruku** (supra) it is clear that the issue of composition of Ward Tribunal was not an issue in the instant matter since the same is related to establishment of the Ward Tribunal. I have gone through the Ward Tribunal and noted that the quorum of sitting at the tribunal was observed whereas two women were present in adjudication of the matter at the trial tribunal. Therefore, the issue of gender balance is demerit.

On the first ground, the appellant complained that both tribunals did not consider the appellant's evidence on record. I have revisited the record of the trial tribunal and found that the appellant's case was adjourned several times to allow him to bring his witnesses and state his case, however, the appellant did not bring his witnesses. The issue was not based on the sale agreement rather on whether the appellant built in the road reserve. The trial tribunal visited *locus in quo* it found that the road's beacon No. DMC 470 was within the appellant's land. In the circumstances at hand, it was

not important to involve the land planning officers since they witnessed that the appellant build on the roadside.

I find reason to differ from the tribunal findings even if the appellant admitted that he proceeded with construction without obtaining a building permit, the main issue for determination was whether the appellant encroached the road reserve area. The parties have locking horns on the issue whether the beacon was inside the appellant's plot or whether the appellant has built a house on a road reserve. Unfortunately, it is not borne in the record of appeal and trial if the appellant encroached the respondent's piece of land or road reserve area since there was no any cogent evidence to prove the same. In such a situation, it was prudence to an expert or a land surveyor to prove the allegations. I am saying so because the trial tribunal decision was based on parties and neighbours evidence in exclusion of the expert evidence or opinion. One neighbor Alfa did not know anything about the pathway, therefore, it was not clear if the appellant encroached the road reserve by relying on the neighbours averments while on the other hand, the appellant argued that the beacon does not indicating the boundaries. If the suit land was a planned area then these qualms were required to be addressed by a land surveyor who could be better position to resolve the matter.

In my respectful opinion, I insist that the unsanctioned variations and boundary adjustments of the parties were required to be accessed by a land surveyor or any other authority. Therefore, it is my considered opinion that failure to resolve the issue of boundaries renders the whole proceedings of the trial tribunal null and void.

In the upshot, I quash, set aside the proceedings and judgment and decree of both tribunals. The appeal is allowed. No order as to costs.

Order accordingly.

Dated at Dar es Salaam on 22<sup>nd</sup> February, 2022.

**A.Z.MGEYEKWA**

**JUDGE**

22.02.2022

Judgment delivered on 22<sup>nd</sup> February, 2022 in the presence of the appellant and Mrs. Christabela Madebwe, learned counsel holding brief for Mr. Abubakar Omary, Advocate for the respondent.

**A.Z.MGEYEKWA**

**JUDGE**

22.02.2022

Right to appeal fully explained.

In my respectful opinion, I insist that the unsanctioned variations and boundary adjustments of the parties were required to be accessed by a land surveyor or any other authority. Therefore, it is my considered opinion that failure to resolve the issue of boundaries renders the whole proceedings of the trial tribunal null and void.

In the upshot, I quash, set aside the proceedings and judgment and decree of both tribunals. The appeal is allowed. No order as to costs.

Order accordingly.

Dated at Dar es Salaam on 22<sup>nd</sup> February, 2022.

  
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A.Z.MGEYEKWA  
**JUDGE**  
22.02.2022

Right to appeal fully explained.