

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

MISC. LAND APPEAL NO.7 OF 2023

(Originating from the Judgment and Decree of the District Land and Housing Tribunal of Mkuranga at Mkuranga in Land Appeal No. 37 of 2021 Originating from Land Application No.2 of 2021 at Bungu Ward Tribunal)

SAIDI SEIFU MMAKU APPLICANT

VERSUS

RASHIDI MUSA MKATA RESPONDENT

JUDGMENT

Date of last Order: 07.03.2023

Date of Judgment: 09.03.2023

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Bungu in Land Application No.2 of 2021 and arising from the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Appeal No. 37 of 2021. The material background facts to the dispute are briefly as follows, the respondent instituted a case at the Ward Tribunal of Bungu claiming that the respondent has trespassed into his land measuring 2 acres. The appellant claimed that the suit land was customary ownership

and they occupied the said land for many years. The trial tribunal determined the matter and decided in favour of the respondent.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Mkuranga at Mkuranga in Land Appeal No.37 of 2021 complaining among others that the respondent did not know the owner of the suit land instead he lodged a suit against his son, the trial tribunal did not consider the evidence of the appellant' witness.. The appellate tribunal decided the matter in favour of the respondent.

The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge the impugned decision by way of appeal on four grounds of grievance namely:-

- 1. That, the District Land and Housing Tribunal erred in law and facts by declaring the respondent a lawful owner of the suit property without any evidence to support.*
- 2. That, the Appellate Chairman erred in law and in fact in deciding the matter by giving weight to the irrelevant facts that do not establish ownership of land to the Respondent.*
- 3. That, the Appellate Chairman misdirected himself in holding that, the Respondent is entitled to the ownership of the disputed land on the ground that the said land was abandoned by the Appellant without having any evidence to support the findings.*

4. *That, the Appellate Chairman erred in law and in fact for being bias in evaluating the evidence on record a result of which made the decision, which caused a great injustice to the Appellant.*

When the appeal was called for hearing on 7th March, 2023, the appellant and respondent appeared in person, unrepresented.

The appellant urged this Court to adopt the grounds of appeal and form part of his submission. He opted to combine the grounds of appeal and argue them together. The appellant spritely argued that the respondent invaded his piece of land and the trial tribunal visited *locus in quo* whereas all his witnesses testified in his favour but astonishingly the trial tribunal in its Judgment ruled out that his witnesses did not testify. The appellant continued to argue that the appellate tribunal Chairman determined the issue of boundaries while that was not part of his claims. He contended that at the trial tribunal, he was disputing land ownership.

In conclusion, the appellant urged this Court to allow his appeal.

Opposing the appeal, the respondent started by complaining that the appeal is time-barred. The respondent contended that the trial tribunal decided in his favour, the appellant was dissatisfied and hence decided to file an appeal at the Mkuranga District Land and Housing Tribunal. He went on to submit that in September, 2022, the appellate tribunal delivered

its judgment in his favour and the appellant was given 60 days to file an appeal. The respondent contended that the 60 days ended on 7th November, 2022 but the appellant did not lodge his appeal until 22nd February, 2023.

In his conclusion, the appellant defended the tribunal's decision as sound and fair.

In a short rejoinder, the appellant reiterated his submission in chief. Stressing on the issue of ownership, he stated that he is the lawful owner of the suit land and the respondent is a trespasser. The appellant was certain that he filed the instant appeal within time.

Before the determination of this appeal, I should make it clear from the beginning that this is a second appellate court. 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, Therefore this court must be cautious when deciding to interfere with the lower court's decision as was propounded in the case of ***Edwin Mhando v R*** [1993] TLR 174. It is a settled principle that the second appellate court has to deal with the question of law. 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.”

The respondent in his submission contended that this appeal is out of time. In accordance with section 38 of the Land Disputes Courts Act, Cap. 216 any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the records showing that the impugned decision was delivered on 08th September, 2022 and the appellant lodged the instant appeal on 20th October, 2022 that means the appellant has lodged the instant application within time.

Before hearing the appeal on merit, *Suo motu* I prompted the parties at the very outset to address the Court *whether the appeal is popper before this Court*. I am saying because when I was composing my Judgment, I noted that there was a similar case at the Ward Tribunal of Bungu in Land Cause No. 1 of 2021 whereas, the respondent instituted a suit against Muharami Ramdhani Mmaku claiming ownership of the same piece of land.

The appellant and respondent admitted that there was a similar matter which involved the same piece of land at the Ward Tribunal of Bungu in Land Cause No. 1 of 2021.

After going through the records of both tribunals, I have noted a point of law that Rashid Musa Mkata, the respondent filed a Land Cause No. 1 of 2021 against Muharani Ramadhani Mmaku on the same piece of land claiming that Muharani Ramadhani has extended the boundaries contrary to their agreement. The Ward Tribunal of Bungu decided the matter in favour of Rashid Musa Mkata and Muharani did not file any appeal until August, 2021 when his father Said Seif Mmaku lodged a fresh case on the same plot at the Ward Tribunal of Bungu in Land Cause No. 2 of 2021 against Rashid Musa Mkata disputing the same subject matter and he admitted that the suit land belongs to his son, Muharani Ramadhan whereas both tribunals decided in favour of the respondents.

Dissatisfied, the appellant filed the instant appeal before this Court and both parties admitted that the subject matter in Land Cause No. 1 of 2021 and Land Cause No. 2 are the same.

It is my considered view that Land Cause No. 2 of 2021 is constructive *res judicata* because the parties in Land Cause No. 2 of 2021 litigated the same piece of land which was already been litigated in Land Cause No. 1 of 2021. The appellant in Land Cause No. 2 of 2021 alleged that his son

Muharani Ramadhani Mmaku is the lawful owner while there is a decision that declared the respondent the lawful owner of the same piece of land and Muharani Ramadhani Mmaku lost the case. Therefore, Said Seif Mmaku was barred from instituting another case involving the same subject matter. The records are clearly shown in Land Case No. 2 of 2021, Land Appeal No. 37 of 2021 and before this Court that Said Seif Mmaku insisted the suit land belongs to his son. After noting that Muharani Ramadhani Mmaku lost the case, Said Seif Mmaku decided to file a new case. This is not a proper procedure to challenge the decision of the Ward Tribunal of Bungu in Land Cause No. 1 of 2021.

In the premise, I resort to nullifying the Judgments and proceedings of the District Land and Housing Tribunal for Kibaha in Land Appeal No.37 of 2021 and Ward Tribunal of Bunguni in Land Cause No. 2 of 2021.

Appeal dismissed. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 9th March, 2023.



Judgment delivered on 9th March, 2023 in the presence of the appellant and respondent.



A.Z.MGEYEKWA
JUDGE
09.03.2023



Right of Appeal fully explained.