IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 14 OF 2021
(Originating from Land Application No.66 of 2020of District Land and Housing Tribunal of Kinondoni)

ROSELINE LEONAD SHIRIMA.....APPLICANT

VERSUS

MWAJABU SAID.....1st RESPONDENT

JOSEPHAT S. ISUJA.....2nd RESPONDENT

KIBANGO GENERAL BUSINESS (T) LTD.....3rd RESPONDENT

RULING

21/10/2021 & 11/01/2022
Masoud, J.
When the applicant herein filed the present application, and counter affidavit was filed by the first and the second respondents, this court ordered the matter to proceed for hearing by filing written submissions. The rival submissions were filed pursuant to the order of the court.

As the application was for revision having been brought under section 43(1)(a)&(b) and (2) of the Land Disputes Courts Act, cap. 216 R.E 2019, and Order XXXIX, rule 5(1) and (2) of the Civil Procedure Code cap. 33 R.E 2019 and under a certificate of urgency, the key issue was whether

I concur with the wise assessors' opinion that the appeal has no merit because the appellant's grounds of appeal have this failed to convince their Tribunal toa fault with the trial tribunal's findings. The evidence adduced at the trial Tribunal show that the respondent is a lawful owner of the piece of land in dispute and it clearly show that the appellant has unlawful entered into possession of the land that he does not own. (sic)

Therefore the trial tribunal decision is upheld and this appeal is hereby dismissed for lack of merit.

Aggrieved by the decision of the first appellate tribunal, the appeallant preferred a second appeal in this court. He challenged the appellate tribunal's decision on five grounds of appeal. The five grounds of appeal were evident in the petition of appeal. In my consideration, however, the grounds of appeal boiled down to two grounds of complaints relating to the failure of the appellate tribunal to consider and evaluate the evidence. The first ground of complaint was on the alleged failure of the appellate tribunal to consider the evidence of the appellant. And second was on the alleged failure of the appellate tribunal to find that the evidence of the respondent was contradictory, and unclear and did not prove the size of the disputed land.

In so far as the first ground of complaint is concerned, the appellant's allegation focused on the claim that there was strong evidence proving the appellant's ownership of the disputed land including the evidence relating to the electricity pole, which was not considered, and that there was evidence showing that the appellant has been in peaceful occupation of the disputed land for 28 years which evidence was not considered. As to the second ground of complaint, the allegation only focused on the claim that the evidence of the respondent was not only contradictory and unclear, but also the claim that the evidence felt short of proving the size of the disputed land.

Rival written submissions filed by the parties pursuant to the leave of the court dealt with the evidence on the record. The submissions referred to the evidence on the record, and authorities on principles showing how the second appellate court should approach the grounds which were not part of the pleadings and which were not raised in the first appeal. There were also authorities to the effect that an allegation of acquisition of title over a disputed piece of land by adverse possession must be proved by evidence including evidence of undisturbed continuous occupation and possession of the disputed land.

The appellant's submissions in a nutshell had it that there was adequate evidence as to his ownership of the disputed land which he purchased from one Hassan Ally Ngamia, the evidence as to when exactly he purchase the disputed land and being on the disputed land for 28 years, and the evidence as to the size of the land. He complained about the failure of the trial tribunal to record his evidence, and the failure to evaluate the evidence and thereby disregarding the evidence of the appellant that the area in disputed contained electricity pole which was removed following his follow up to TANESCO.

As to the complaints against the respondent's evidence, the appellant had it in a nutshell that there was no evidence establishing that the respondent is the lawful owner of the disputed land. In the course of submission, the appellant raised another complaint that the locus in quo was not properly conducted alleging that the tribunal did not inquire into the size of the disputed land in relation to pieces of land held by the parties. Reliance was made on **Nizar M.H. v Gulamali Fazal Jonmohamed** [1980] TLR 29, and **Sikuzani Said Magambo and Kirioni Richard vs Mohamed Roble**, Civil Appeal No. 197 of 2018.

The submissions by the respondent disputed the allegations by the appellant. They were characterised by the claim that the submissions by the appellant were misconceived for raising new facts which were not part of the record. He relied on **Kisanga Tumainiel vs Frank Pieper and Another**, Civil Appeal No. 139 of 2008, which restated the settled position of the law prohibiting the appellate court from taking up new matters which were not part of the pleading.

He further told the court that the evidence of the witness who alleged to have sold a piece of land to the appellant did not affirm that the disputed land belongs to the appellant. He relied on **Hemed Said v Mohamed Mbilu** [1984] TLR 113, saying that his evidence was heavier than that of the appellant.

He went on to say that there was no evidence adduced that the appellant was in the disputed land for or over 28 years. Item 22 of the Schedule to the Law of Limitation Act, cap. 89 R.E 2019 was inapplicable. He invoked **Rhoda Sobe (As Administratrix of the estate of the late Sobe Masirori) v James Fredy Sagaria (As administrator of the estate of the late Wilson Wanusu**, Land Appeal No. 69 of 2019 (unreported). He added that there was no

contradictory evidence from four witnesses of the respondent and the two neutral witnesses which goes to the root of the dispute. Rather, all witnesses, as was one Hassan Ally Ngaima, consistently, maintained that the disputed land belongs to the respondent.

In addition, he contended that the allegation relating to electricity pole and TANESCO compensation in relation to the pole was a new allegation which was not transacted in the trial proceedings. There was as such no witness called in respect of the allegation. He furthermore dismissed the issue of *locus in quo* on the reason that it was a new matter which was not raised in the appellate tribunal. In relation to this argument, he cited **Godfrey Wilson v Republic** Criminal Appeal No. 168 of 2018, CAT, where the principle was applied and restated. In this case, grounds of appeal which were not raised in and determined by the first appellate court were not considered by the second appellate court for lack of jurisdiction.

In rejoinder, it was stated that there was no dispute that it was Hassan Ally Ngaima who sold to the appellant the piece of land he currently owns. He contended that his argument was that the respondent was time barred to institute the suit against him after expiry of 12 years

having acquired the disputed land in 1993. There was evidence that the appellant was in possession of the disputed land all along without any interference from the respondent. There was also evidence as to electricity poles in the trial tribunal's proceedings evidencing his ownership of the disputed land. The evidence according to the appellant was not considered by the trial tribunal and the first appellate tribunal. He contended that it was neither in locus in quo nor at the hearing that the respondent managed to prove the size of the land that he owns.

Since this is a second appeal in which there is concurrent findings of the tribunals below as to the respondent's ownership of the disputed land, the law requires me not to disturb or interfere with the findings unless it is shown to me that there was misdirection or misapprehension of evidence or violation of some principle of law or relevant procedure that has occasioned failure of justice. I was in relation to this principle aware of a number of authorities, including **Amiratial Damodar's Maltase and Another t/a as Zanzibar Silk Stores v A.H. Jariwalla T/a Zanzibar Hotel** [1980] TLR. 31; and **Bushangila Ng'onga v Manyandamage** [2002] TLR 335 (HC)

In view of the grounds of complaints considered herein above which relate to the evidence, the issue is whether there is misdirection or misapprehension of evidence relating to failure to consider the evidence of the appellant proving his ownership of the disputed land; evidence showing that the appellant had been in peaceful and undisturbed occupation for on over 28 years; failure to consider and find that the evidence of the respondent was contradictory and not clear; and failure to find that the evidence of the respondent felt short of proving the size of the disputed land.

The obvious question therefore is whether the record bears any such misdirection or misapprehension or violation of any relevant principle or procedure. In dealing with this question, I will be mindful of the grounds of appeal raised by the appellant which boil down to two grounds of complaints summarized herein above.

The record is clear that the first appellate tribunal considered the evidence on the record in relation to the decision of the trial ward tribunal. In so doing, the appellate tribunal was of the view that the decision of the trial tribunal cannot in view of the grounds of appeal raised be faulted in any way.

In the light of the grounds of complaints stated, I have had opportunity to look at the proceedings of the trial tribunal against the backdrop of the findings of the first appellate tribunal. There was a general complaint by the respondent that there were matters raised by the appellate which were not raised in the first appeal. They were matters relating to locus in quo and matters relating to failure to consider the evidence adduced by the appellant that the disputed land comprised of electric poles belonged to the appellant. There was also a complaint about failure of the trial tribunal to record the evidence of the appellant.

My perusal of the record of the first appellate tribunal proceedings left me in no doubt that the matters were not raised as amongst grounds of appeal in the lower tribunal. In the light of the authorities cited above on the raising a new matter which I hereby subscribe to, I would proceed to decline considering the issues relating to locus in quo and evidence on electricity poles raised by the appellant in this appeal.

If I may in line with the foregoing add, I was also satisfied that the complaint as to failing to take into consideration that the respondent failed to prove the size of the disputed land and failure of the trial tribunal to record the evidence of the appellant were all equally not

raised in the first appellate tribunal. In respect of all such matters, this court being the second appellate court is constrained not to consider the matters at this stage which means that they should respectively fail.

The record of the trial tribunal is evident of the witnesses which adduced evidence in the trial conducted by the trial tribunal, and whose evidence was considered by the two tribunals below. Clearly, it was after the consideration of the evidence of all witnesses that the finding that the disputed land was under ownership of the respondent was entered and upheld by the second appellate tribunal.

Indeed, one of the complaints was that the evidence of the appellant was stronger than that of the respondent, and the first appellate court should have faulted the trial tribunal for failure to find that the appellant was the lawful owner of the disputed land. Looking at the evidence as a whole, and the evidence of one, Ally Hassan Ngaima who had sold his piece of land to the appellant, and whose evidence was clear that the disputed land belonged to the appellant, I find nothing showing that the evidence of the appellant was stronger than that of the respondent as alleged by the appellant.

In any case, what was raised was purely on matters of evaluation of evidence which is within the mandate of the lower tribunals. In the absence of a showing of an error amounting to misappropriation or misapprehension of evidence or violation of a principle, there is no room for this court to disturb or interfere with the concurrent of findings of the two lower tribunals.

As to the claim that the appellant had been in the occupation of the disputed land for 28 years or for over 28 years, I was quick to consider whether or not there was a misapprehension or misappropriation of evidence or a principle relating to the complaint. First and foremost, I was satisfied that this was not an issue which was clearly raised and argued in the course of the trial proceedings. In other words, there was nothing raised suggesting a defence of adverse possession which as a matter of practice requires to be established by evidence.

The issue was only picked and raised as a ground of appeal by the appellant when he was dissatisfied by the decision of the trial ward tribunal. There is however evidence adduced by the appellant that he had bought his piece of land sometime in 1993 from one, Hassan Ally Ngaima. This evidence was apparently not given in connection to any

pleading advancing a defence of acquisition of the disputed piece of land by adverse possession.

The above evidence is however not supported by any other evidence, let alone the evidence of the appellant's wife, one, Bi Zainab Msumi, who could not remember when the piece of land belonging to the appellant was purchased from Hassan Ally Ngaima and could not testify on undisturbed occupation of the disputed land by the appellant. It was not also supported by the evidence of Hassan Ally Ngaima whose evidence ran short of evidence of undisturbed occupation by the appellant and the evidence as to when the appellant acquired his piece of land as was the evidence given by Bi. Zainab Msumi.

Of significance to underline, there was no evidence of undisturbed occupation of the disputed land from the appellant or any other witness throughout the alleged period of 28 years or at least for a period of 12 years. With such consideration, I do not find anything in relation to such complaint to fault the concurrent findings of facts as to ownership of the respondent of the disputed land.

The appellant wanted this court to fault the concurrent findings of the lower tribunals by reason of the alleged failure of the first appellate tribunal to find that the evidence adduced by the respondent's witnesses was contradictory and unclear. The submissions in this respect by the appellant went beyond the scope of matters that were raised in and determined by the first appellate tribunal in relation to the alleged contradictory and unclear evidence. Whereas the appellant wanted the first appellate tribunal to find contradictions in the evidence of the first witness of the respondent (Porela Rashid Mustafa) as to matters relating to boundaries and neigbours of the respondent, the appellant in this appeal raised new allegations of contradictions in evidence.

The raised new allegations of contradictory evidence involved the purchase of the piece of land owned by the respondent as they related to the testimony of one, Hassan Ally Ngaima. They also involved matters of boundaries and neighbours of the respondent involving the testimony of one, Baraka Yunus. Clearly, the evidence of one, Hassan Ally Ngaima and one, Baraka Yunus was not a subject of the claim that the evidence was contradictory and unclear.

In view of the authorities cited in relation to raising matters in the second appellate court which were not raised in the first appellate court/tribunal and which were not part of the pleadings, I find it appropriate to disregard the submissions on the claim of contradictory and unclear evidence, and find that there was nothing sufficiently brought to my attention to fault the findings of the lower tribunals in this respect.

At this juncture, it is my considered view that in relation to the complaints raised by the appellants, there is nothing that would in my finding entitle me to interfere with or disturb the concurrent findings of the tribunals below. Accordingly, the complaints are without merit and are dismissed.

In my judgment, therefore, the appeal fails and is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Dar es salaam this 11th day of January 2022.

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B. S. Masoud

Judge