

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPEAL NO. 85 OF 2021**

(Arising from the District Land and Housing Tribunal for Kibaha in Land  
Appeal No.79 of 2020, originating from Ward Tribunal for Msata in Land  
Case No.76 of 2020)

**HALFANI CHARLES ..... APPELLANT**

**VERSUS**

**1. HALIMA S. MAKAPU**

**2. JUMA S. MAKAPU**

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**..... RESPONDENTS**

**JUDGMENT**

Date of Last order: 21.10.2021

Date of Judgment: 28.10.2021

**A.Z.MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Msata in Land Case No.76 of 2020 and arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No. 79 of 2020. The material background facts to the dispute are briefly as follows, the respondent instituted a case at the Ward Tribunal for Msata to recover his

land which was taken and developed by appellant. The respondents claimed that they inherited the suit landed property from his late grandfather. The appellant denied the respondents' claims. The trial tribunal decided the matter in favour of the respondents.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kibaha vide Land Appeal No.79 of 2020 complaining among others that the respondents did not tendered a document related to inheritance to prove that they are administrators of the estate of the late Omar Said Makapu. The appellate tribunal decided the matter in favour of the respondents

The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on two grounds of grievance, namely:-

- 1. That the Chairman misdirected himself in fact by failing to take note that the Respondent's inheritable plots are distinguishable (not the same) from the plot occupied by the Appellant.*
- 2. That the Chairman misdirected himself in Law and fact by drawing fallacious conclusions that the all Land occupied by the Appellant forms part of the estate claimed by the Respondents.*

When the appeal was called for hearing on for hearing on 28<sup>th</sup> October, 2021, the appellant had the legal service of Mr. Asherafu, learned counsel and the respondents enjoyed the legal service of M. Domnicus Mkwera, learned counsel the respondent.

On the first ground, the appellant's Advocate contended that the respondent's inherited pieces of land from his grandfather who was the original owner of the suit land. He submitted that the appellant's grandfather gave the 1<sup>st</sup> respondent piece of land while he also left a child behind but she did not inherit the said suit land. He claimed that in 2020, the 1<sup>st</sup> respondent instituted a suit claiming that the appellant has invaded her piece of land which he inherited from her grandfather. He wondered how the 1<sup>st</sup> respondent claimed that she is the lawful owner while she inherited the piece of land from her grandfather and there was no any proof of how she inherited the said suit land considering that there was no evidence of transfer of ownership. He valiantly contended that it was not clear how the 1<sup>st</sup> respondent inherited the suit land as an administrator of the estate. He concluded by stating that the 1<sup>st</sup> respondent had no *locus standi* to institute the said case.

Submitting further, the appellant's Advocate contended that claiming that she is the lawful owner does not add up why the 1<sup>st</sup> respondent did

not file her complaints earlier. He added that there was a criminal case and the witness of the 1<sup>st</sup> respondent one Joseph Masenga instituted a case claiming that the appellant's grandfather trespassed on his piece of land. He went on to state that it is not clear as to who is the lawful owner of the disputed piece of land between the 1<sup>st</sup> respondent and Joseph Masenga.

As to the second ground, Mr. Asherafu contended that the appellate tribunal was supposed to visit the disputed land to prove the issue of boundaries since the 1<sup>st</sup> respondent did not prove her ownership. He went on to submit that there are two distinguishable plots. He went on to submit that he wonders whether the same form part of the disputed land or the one mentioned in the WILL.

In conclusion, the appellant's Advocate urged this court to allow the appeal and quash the decisions of both tribunals with costs.

Opposing the appeal, the respondent started by complaining that being the second appellate court, it has only jurisdiction to entertain the grounds which were raised by the appellant in the first appellate court, it cannot entertain a new ground which was not raised the appellant at the appellate tribunal unless it involves a serious point of law. The learned counsel for the respondents contended that parties are bound by their pleadings. To

buttress his position he cited the case of **Funke Gwagird v AG** TLR (2001) 455. It was his view that the tribunal was right to decide the case in favour of the 1<sup>st</sup> respondent he claimed that the appellant did not prove how he acquired the suit land. He added that the law requires the one who alleges must be proof. Fortifying his submission he cited the cases of **Abdul Karim Haji v Raymond Nchimbi Aloyce and another** (2006) TLR 419. He stated that the tribunals found that the respondents' evidence was heavier compared to the appellant's evidence.

Arguing for the second ground, the learned counsel for the respondent contended that in practice appellant's Advocate was required to submit what is stated in his grounds. He lamented that the learned counsel for the appellant submitted on the issue of inheritance and *locus standi* contrary to what he raised in the grounds of appeal. He went on to submit that the 1<sup>st</sup> respondent grandfather was the lawful owner of the suit land, he passed away and among his heirs were his grandchildren. Insisting, he contended that the appellant's Advocate was in position to amend his grounds of appeal.

On the strength of the above submission, the respondent beckoned upon this court to dismiss the appeal for being meritless and upheld the decision of the appellate and trial tribunals.

In a short rejoinder, the appellant reiterated his submission in chief. He valiantly argued that the grounds of appeal are not new. Insisting, he submitted that both tribunals failed to consider the oral and documentary evidence. It was his view that the grounds raised at the appellate tribunal are the same raised before this court, the main difference being the wording but the contents or the meaning are the same. To substantiate his claims he referred this court to the third ground of the trial tribunal that the trial tribunal erred in law and fact by failure to consider documentary and oral evidence adduced by the appellant equivalent to the grounds of appeal before this court. To support his submission he referred this court to an example of a new ground such as *locus standi* which was not raised at the appellate tribunal.

On the strength of the above submission, he urged this court to consider the grounds of appeal stated in the memorandum of appeal and allow the appeal

I have considered the rival arguments by the learned counsels to this appeal. The appellant's Advocate is complaining that the Chairman misdirected himself in fact by failing to take note that the respondent's

inheritable plots are distinguishable from the plot occupied by the appellant.

The first ground argued by Mr. Asherefu, learned counsel for the appellant was that the Chairman misdirected himself in fact by failing to take note that the respondent's inheritable plots are distinguishable from the plot occupied by the appellant. The respondents' Advocate in his submission strongly opposed the appellant's first ground, he contended that the same is raised for the first time in this Court. It was not raised and canvassed before the trial tribunal neither appellate tribunal. He argued that it was not proper to raise it for the first time in this Court. Raising new ground at the time of submission is not acceptable, as will only prejudice the respondent, who will be taken by surprise.

I respectively agree with the learned counsel for the respondents 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. Ordinarily, in order for the Court to be clothed with its appellate powers, the matter in dispute should first go through lower courts or tribunals. The Court of Appeal of Tanzania in the case of **Haji Seif v Republic**, Criminal Appeal No.66 of 2007 held that:-

*“ Since in our case that was not done, this Court lacks jurisdiction to entertain that ground of appeal. We, therefore, do not find it proper to entertain that **new ground of appeal** which was raised for the first time before this court.” [Emphasis added].*

Applying the above authority in the instant appeal it is vivid that the first ground which relates to distinguished inherited plots was a new ground that was not raised at the appellate tribunal. Therefore, I am not in a position to entertain a new ground of appeal which was raised for the first time before this court.

Next for consideration is the second appeal, the learned counsel for the appellant in his submission went awry and submitted much on *locus standi* which was not stated in his second grounds. I must state at the outset that, I have observed that, in his submission, the appellant's Advocate has raised new grounds which never featured in the grounds of appeal. This is not acceptable in law, as a case is built up by pleadings that are before the Court. It is a principle of the law that parties are bound by their pleadings and are required to stick to their pleadings. In the case of **Philips Anania Masasi v Returning Officer Njombe North Constituency and Others**, Misc. Civil Cause No. 7 of 1995, Songea (Unreported) where Samatta, J stated that:-

*"Litigation is not a game of surprise"*



Likewise, the appellant in this appeal is required to stick to his grounds of appeal submitted with the Memorandum of appeal, raising new grounds and issues at the time of submission. The appellant's Advocate was required to obtain leave of the court to add a new ground of appeal instead of submitting the same from the bar. The appellant's Advocate in way or another prejudiced the respondent, who was taken by surprise.

Apart from the submission at bar the learned counsel complained that the appellate tribunal did not visit the disputed land otherwise they could find that the dispute was based on boundaries. Again this is a new ground the same cannot be entertained at this juncture. In order for the Court to be clothed with its appellate powers, the matter in dispute should first be discussed at the trial tribunal. Failure to that this Court lacks jurisdiction to entertain that ground of appeal.

Guided by the authority stated in the case of Haji Seif (*supra*), I have found that the appellant has introduced a new issue. Therefore, the same is an afterthought. As a generally applicable rule, new issues cannot be raised on appeal. As such, all matters submitted by the appellant's Advocate, which are not part of the grounds of appeal, will be disregarded by this Court.

With respect to the second ground raised by the learned counsel for the appellant is that the appellate tribunal misdirected himself fallacious conclusion that land occupied by the appellant forms part of the estate claimed by the respondent. I have perused the appellate tribunal and noted that both parties have not produced any documentary evidence to prove their case. In a situation where both parties could not produce documentary proof to ascertain their ownership, the trial tribunal finding including the circumstance of the case, facts, and evidence, will lead this court to determine the matter before it. The appellate tribunal records show that the 1<sup>st</sup> respondent was given the suit plot by her grandfather. However, after going through the tribunal records I noted to the contrary that the 1<sup>st</sup> respondent testified to the effect that she gave Halfani, his grandfather a piece of land and a house was built therein. She also testified to the effect that she inherited the suit land from her grandfather.

The evidence at the tribunal shows that the 1<sup>st</sup> respondent claimed that the property was in form of inheritance. But she did not show whether the probate procedure was fulfilled and the investor which listed the beneficiaries of the late Halfani was not tendered in court to prove her assentation.

As rightly pointed out by the learned counsel for the appellant, there was no evidence to prove that there was any administration of the estate of the 1<sup>st</sup> respondent's grandfather. Having said so the trial tribunal was required to subject the 1<sup>st</sup> respondent to proof how she inherited the piece of land from her grandfather. One of the canon principles of civil justice is for the person who alleges to prove his allegation. The said principles are stipulated under section 110 of the Evidence Act, Cap.6 [R.E 2019] which places the burden of proof on the party making the assertion which that partly desires a Court to believe him and pronounce judgment in his favour. For ease of reference, I reproduce section 110 (1) of the Evidence Act, Cap.6 [R.E 2019] as hereunder:-

*"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of ant fact, it is said that burden of proof lies on that person."*

Similarly, in the case of **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, it was stated that:-

*" He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "*

Applying the above authorities and provision of law, it is clear that the respondents were required to prove their case at the trial tribunal, in the absence of proof of inheritance, the trial tribunal was required to dismiss the case.

In the premise, I resort to nullify Judgments and proceedings of the District Land and Housing Tribunal for Kibaha in Land Appeal No. 79 of 2020 and the Ward Tribunal of Msata in Land Application No. 76 of 2020.

No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 28<sup>th</sup> October, 2021.



A.Z.MGEYEKWA

**JUDGE**

28.10.2021

Judgment delivered on 28<sup>th</sup> October, 2021 in the presence of Mr. Asherafu. Learned counsel for the appellant and Mr. Mkwera, learned counsel assisted by Ms. Kalunde, learned counsel for the respondents.



A.Z.MGEYEKWA

**JUDGE**

28.10.2021

Right of Appeal fully explained.