

IN THE HIGH COURT OF TANZANIA
[LAND DIVISION]
AT SUMBAWANGA

MISC. LAND APPEAL NO. 26 OF 2019

**(From the Decision of the District Land and Housing Tribunal of
Rukwa District at Sumbawanga in Land Appeal No. 38/2019 Muze
Ward Tribunal Original Civil Case No. 2/2019 Ward Tribunal)**

GODFREY S/O NDOLOMI.....APPELLANT

VERSUS

JENIRODHA D/O ALIMASI.....RESPONDENT

JUDGEMENT

04th May -28th June 2020

MRANGO, J

The appellant has preferred this appeal against the judgement and decree of the District Land and Housing Tribunal for Rukwa (henceforth the appellate tribunal) which was delivered on 10. 10 2019. The same has its genesis from land dispute No. 2 of 2019 from Muze Ward Tribunal (henceforth the trial tribunal). At the trial tribunal respondent successfully sued the appellant for trespass over a piece of land (disputed land). Dissatisfied the appellant appealed to the appellate tribunal which unfortunately maintained the decision of the trial tribunal.

Aggrieved by the appellate tribunal decision, the appellant has preferred this appeal with a petition of appeal lodged to this court containing two grounds of appeal which are hereunder quoted;

- 1. That appellate tribunal erred in deciding the dispute in favour of respondent while the respondent has no locus stand to institute the matter.*
- 2. That the proceeding and judgement of the ward tribunal is nullity for failure to show the members who heard the matter at the proceeding day to day.*

When the appeal was called before me for hearing, the appellant was represented by Mr. Peter Kamyalile – learned advocate whereas the respondent appeared in person, unrepresented. Mr. Kamyalile prayed to argue the appeal by way of written submission. Respondent conceded. I made a schedule and each party filed his respective submission as ordered by this court.

Before submitting in support of this appeal, Mr. Kamyalile with leave of the court under **Order XXX1X Rule 2 of the Civil Procedure Code, [CAP 33 R.E. 2019]**, prayed to draw the attention of this Court on some the irregularities of the appellate tribunal as well the trial tribunal. He

supported his prayer by citing the case of **Adelina Koku Anifa and Another versus Byarugabaalex, Civil Appeal No. 46 of 2018, CAT at Bukoba** (unreported) at page 6 – 7 where it was held that:-

"Ground hinged on a point of law as such, the second appellate court ought to have addressed and determined it on merit.

"It is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of the parties.

The duty of the Court is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below. Where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals"

He submitted that it was wrong for the appellate tribunal to hear the appeal which was filed premature before making the application for setting

aside the ex-parte decision. Rationale is, it affords both parties in the case equal opportunity to be heard at the full trial. Also it was the duty of the appellate tribunal to advise the appellant since he was unrepresented that the proper course was to make application for setting aside ex-parte decision and not to appeal. The position was held in the case of **Mtondo versus Jane Mohamed, (1970) HCD NO. 326**, this Court held

"The position, however, is rendered difficult by the fact that the appellant was, and is, unrepresented by counsel and has not had any legal advice. I think that the appellant should have been advised by the Court of the Resident Magistrate Lindi, before which he appeared on the 30th of July, when he notified his intention of appealing, that his proper course was to apply to set aside the ex-parte decree. I would go further and say that, as the appellant was unrepresented by counsel, it was the duty of the court to give him such advice. As the court has, in my view, failed in its duty to assist a litigant unaided by counsel, I propose to make good such failure of the court, and now advise the appellant to file an application in the Court of the Resident Magistrate Lindi, to set aside the ex-parte judgment and decree, under Order 9 Rule 13 of the Civil Procedure Code, and I duly extend the time for him to do so."

With regard to the second point of irregularity he submitted that the claim was not signed by the complainant. The law requires that every complaint at the Ward Tribunal either made orally or in writings shall be signed by the complainant and the person to whom it is made. This is by virtue of **Section 11(3) of the Ward Tribunals Act, [CAP 206 R.E. 2002]**, which provides that:-

"A complaint may be made orally or in writing, but if made orally shall be reduced in writing by the person to whom it is made and, in either case, shall be signed by the complainant and the person to whom it is made."

With regard to the third point of irregularity he submitted that the decision does not show how it was arrived. It is the principle of the law under **Section 4(4) of the Ward Tribunals Act, [CAP 206 R.E. 2002]**, that the decision of the majority of members present shall be deemed to be the decision of the tribunal. The Section provides that:-

"Section 4(4) at any sitting of the Tribunal, a decision of the majority of members present shall be deemed to be the decision of the Tribunal, and in the event of an

equality of votes the Chairman shall have a casting vote in addition to his original vote."

Submitting with regard to the first ground of appeal he argued that it is the trite law that it is only the lawful appointed legal representative of the deceased can sue or be sued for or on behalf of the deceased. Also allowing parties to institute suits while they lacks *locus stand* are fatal and makes the proceedings and judgment of the trial a nullity.

He further argued that the evidence of Geriphas Balili, alleged that the disputed land belongs to Mzee Ndolomi the husband of the respondent and after the death of her husband is when the farm was left to the respondent. And when cross examined by Anna Kiatu he testified that the disputed land is the estate of Mzee Ndolomi. Since the owner of the disputed land was her late husband and after his death, being a deceased husband's wife does not automatic occupy the land. Also has no *locus stand* to sue personally. The position was articulated in the case of this court of **Peter Ngalapi versus Fainesds Mwabukusi, Misc. Land Appeal No. 90 of 2012** at Dsm (Unreported) at page 5, the Court held that:-

"It is therefore obvious that the owner of the suit land was her late husband and after his death, being the deceased husband's wife she occupied it. I find very hard to adopt the reasoning adopted by the District Tribunal Chairman that there was no reason for the appellant to lack a mandate to occupy it.

At this juncture I find it is not in dispute that the respondent is not an appointed administratrix of the estate of her late husband. Having found that the issue to determine is whether the appellant had a cause of action against her personally and not administrator of the estate of her late husband if any. I entertain no doubt that even the appellant was wrong to institute a suit at the trial tribunal against her as she was not appointed administratrix of her deceased husband estate."

With regard to the second ground of appeal he submitted that it is trite law that the records of the Ward Tribunal should be self-explanatory as regard to the members who sat in that session to hear evidence and determine the dispute. The position was laid down in the case of this court of **Amelesiana Kalyila versus Caristo Kalipesa Kilapi, Misc. Land Case Appeal, No. 21 of 2018**, at Sumbawanga (Unreported) at page 8, where it was held that:-

"The records of the Ward Tribunal should be self-explanatory as regard to the members who sat in that session to hear evidence and determine the dispute."

He submitted further that this Court has also stated that the names and gender of the members participating in a case in the Ward Tribunal must be shown in order to ascertain whether there were three female members in the composition. This position was held in the case of this court of **Daluwes Lusambo versus Daudi Mwanisenga, Misc. Land Case Appeal No. 18 OF 2010**, (LAND DIVISION) at Sumbawanga (Unreported) at page 2 where it was held that:-

"It is difficult to determine whether there were three female members in the said Sandulula Ward Tribunal's quorum because most of those six names are pronounced with female rhythms. When Hon. R.E.S. Mziray, J. faced a similar situation like the current on in Jane Kisonga Vs Said Mohamed, Dar es Salaam Zone Misc. Land Case Appeal No. 59 of 2009 (Unreported) his Lordship opined in a very persuasive approach that:-

"My interpretation of the cited law is that, the names and gender of members participating in a case in the Ward

Tribunal must be shown in order to ascertain its composition as to whether it is in compliance with the law"

So long as it is difficult to construe from any source in the proceedings of this Court and two lower Tribunals whether there were at least three female members in the quorum of Sandulula Ward Tribunal, it follows that the proceedings therein were a nullity and are quashed."

He submitted that this Court has stated that the omission of indicating the names of the members and their signatures contravenes the mandatory requirements under **Section 11 of the Land Disputes Court Act**. The position was provided in the case of this court of **Juma Mohamed Salum versus Sophia Selemeni, Misc. Land Appeal NO. 92 of 2009**, (Unreported) page 2 where it was held that:-

"The omission of indicating the names of the members and their signatures contravenes the mandatory requirements of Section 11 read together with section 14(1) of the Land Disputes Court Act."

He argued that the record of the Ward Tribunal does not show the names, gender, and their signatures of the members who heard the matter

day to day which is fatal and render the whole proceeding a nullity per above authorities cited.

Finally he said based on the submission above and the plethora of relevant authorities pinned in, he prayed this appeal be allowed, revise and quash the decision of both appellate and trial tribunal and order *trial de novo*.

In reply, respondent submitted that this is a second limb the appellant is appealing to this Honorable Court after losing at the appellate tribunal. He said this second leg of appeal has all new grounds of appeal of which were not raised and determined at the first appellate tribunal. The appellant has abandoned all what he appealed at first limb hence coming to seek sympathy of this court through procedural irregularities.

With regard to the 1st irregularity he argued that it is improper or/and unjustifiable in law for the appellant to prefer an appeal instead of an application to set aside the ex-parte judgment. This was submitted also at the 1st appellate tribunal and the respondent in her submission prayed the appellate tribunal to dismiss the appeal on that ground. He said the appellant has conceded in his submission that he has approached this Honorable Court or the appellate tribunal improperly. Instead of application

to set aside ex-parte judgment he appealed against it and now again appealing to this court on what he knows to be improper.

Further he submitted that he fall short of what does the appellant want this Honourable Court to consider; is it an appellate tribunal fault of not skipping into advocacy shoes or the appellant's improper approaching the appellate tribunal?

He ascribed to the attached decision by the appellant; **Adelina Koku Anifa and Another versus Byaruga Alex, Civil Appeal No. 46 of 2019, CAT at Bukoba** at page 7 that; ".....an appellate court is duty bound to take judicial notice of matters of law relevant to even if such matters are not raised in the notice of appeal...."

He further argued that this honorable Court has nothing to do other than dismissing this appeal as it is improperly before it and the appellant knows that he is not properly brought before it. The appellant is complaining for an appellate tribunal not being his advocate for improper filing appeal in instead of application to set aside ex-parte judgment. Therefore he said this appeal has no merit to stand, it should be dismissed.

With regard to the 2nd irregularity depicted that the claim was not signed by the complainant, he has referred this court to **section 11(3) of the Ward Tribunal Act [CAP.206 R.E. 2002]**.

He submitted that the governing law on land disputed is the **Land Disputes Courts Act, No.2 of 2002**. It provides its procedure on how to lodge complaints to the ward tribunal. Section 17(3) of the Act provides;

"Where the complaint is received orally from the complainant, the Secretary shall immediately put it in writing and produce a copy for a complaint"

He said sections of this act prevail over the Ward Tribunal Act. Therefore he is of the view that there is nothing of merit on this issue.

With regard the 3rd posed irregularity also falls under the same Ward Tribunal Act and cured under **section 14(3) of the Land Disputes Courts Act, No. 2 of 2002**.

However, he argued that the appellate Tribunal directed its mind on this issue and satisfied that the ward tribunal was well constituted and members who sat for decision were listed. Therefore, the 2nd and 3rd irregularities are to be disregarded by this court.

Submitting with regard the first ground of appeal he said the ground of appeal is new. It cannot be entertained by this court being a second leg of appeal. Also it is misleading on the truth of evidence adduced by the respondent on the disputed land.

The appellant has attached the decision of **Peter Ngalapi versus Fainess Mwabukusi, Misc. Land Appeal NO. 90 of 2012**. He submitted that the above cited case has different facts and evidence, hence distinguishable to the present case. In the cited case above the respondent testified clearly that the land belonged to her late husband. The court made it clear also at page 4 before making its holding at page five that her testimony was that it was her husband who owned the disputed land. And that after his death she was automatically the possessor and owner without being appointed to be administratrix of the estates of her husband.

He submitted further, in the present case the respondent testified that the disputed land belonged to her, and her late husband. She vividly explained how they got it together and used it. Throughout her evidence she was calm to explain and all her witnesses had the same tone that the

respondent and her husband cleared the bush and started using the disputed land in 1996.

To that end he is of the firm view that there is no room in this case where this court can entertain to argue on a new ground ever since it is baseless. The attached authority is not applicable to our situation at hand hence, distinguishable. It has different facts and which is not covered by that decision. Hence he said it is liable for dismissal only.

On the 2nd ground of appeal he submitted that the names of the members who constituted the ward tribunal are seen and had time to ask questions to witnesses who testified. The appellate tribunal also dealt with this issue and satisfied that members were listed and all signed.

He finally said it is his humble submission that this honourable court should join and uphold the ward tribunal's decision that the appellant has no right over the disputed land and dismiss the appeal for being incompetent and declare the respondent a lawful owner with costs.

In my part, having carefully considered the rival arguments as submitted by advocate for the appellant and the respondent and

scrutinized the records of appeal, now the main issue for this court to determine is whether the present appeal has merit.

At the very beginning, I would like to agree with the respondent argument that both the two grounds of appeal herein submitted and the irregularities advanced by the advocate for the appellant herein are new issues which were neither raised nor discussed in the appellate tribunal. There is a number of authorities which have taken the stance that matters not canvassed by the lower courts cannot be raised in the higher courts. See the cases of **Juma Manjano versus Republic, Criminal Appeal No. 211 of 2009, Sadick Marwa Kisase versus Republic, Criminal Appeal No. 83 of 2012, George Mwanyingili versus Republic, Criminal Appeal No. 335 of 2016**. In **Juma Manjano** (supra) the court held that;

*"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of **Abdul Athuman vs. R. [2004] TLR 151** the issue on whether the Court of Appeal may decide on a matter not raised in and decided*

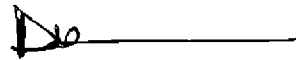
by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal therefore struck out."

"The Court has repeatedly held that matters not raised at the first appellate court cannot be raised in a second appellate court."

In this regard, and on the basis of the above cited authorities, I do not hesitate to concede to the argument as raised by the respondent that all the grounds of appeal as contained in the petition of appeal are new one. Consequently, I decline to deal with them.

Having said and as discussed above, I find the present appeal is of no merit and it is hereby dismissed entirety with costs.

Order accordingly.



D. E. MRANGO

JUDGE

28. 05. 2020

Date - 28.05.2020
Coram - Hon. D.E. Mrango – J.
Appellant - Present & represented by Ms. Neema Charles – Adv.
Respondent - Present in person
B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 28th day of May, 2020 in presence of both the parties in persons, and Ms. Neema Charles – learned Advocate for the Appellant.

Right of appeal explained.


D.E. MRANGO
JUDGE
28.05.2020