

IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND APPEAL No. 10 OF 2023

*(Originating from the District Land and Housing Tribunal of Rukwa at Sumbawanga
in Land Application No. 13 of 2021)*

ISAACK SIMUYEMBA.....1ST APPELLANT

ANDERSON SINNKAMMBA.....2ND APPELLANT

VERSUS

LEONARD CHAPELELA SIMFUKWE.....RESPONDENT

JUDGMENT

24/10/2023 & 28/11/2023

MWENEMPAZI, J.

On the 30th of May, 2023 the appellants named above filed their petition of appeal to this court after being aggrieved by the decision of the District Land and Housing Tribunal of Rukwa at Sumbawanga (trial tribunal) before Hon. J. Lwezaura, the chairlady in Land Application No. 13 of 2021. The Petition consisted of four (4) grounds of appeal which are as reconstructed hereunder;

1. That, the learned trial chairlady erred in law and in fact to institute the suit afresh in the trial tribunal while it was already decided by the Mambwe Nkoswe Ward Tribunal.

Copy of the judgment of the Ward Tribunal which is unnumbered is annexed and attached as annexure "EI" leave is craved to form part of this appeal.

2. That the learned trial chairlady erred in law and in fact when she did not consider that the alleged dispute decided before the Ward Tribunal was between the 1st Appellant and the Respondent but the said dispute at hand instituted by the Respondent against the 1st Appellant and the 2nd Appellant things which was wrongly done.
3. That the proceedings in Land Application No. 13 of 2021 at the trial tribunal are tainted with irregularities and therefore the trial tribunal erred for its institution of the said proceedings afresh instead of an appeal.
4. That, the learned Chairlady erred in law to allow the Respondent to file Land Application No. 13 of 2021 who had locus standi.

Appellants' petition prayers were: to quash and set aside the judgment entered by the trial tribunal in Land Application No. 13 of 2021.

On the hearing date the appellants appeared for themselves as they had no legal representation while the respondent was represented by learned counsel Samwel Kipesha.

However, the appellants sought leave of this court to proceed with the hearing of this appeal by way of written submissions, a mode which was not objected by the learned counsel for the respondent. It was the mode which was gladly granted by this court, and both camps adhered to the schedule set forth.

In their written submission, the appellants submitted that, they will argue the 1st, 2nd and 3rd grounds of appeal together while, the 4th ground will be argued separately.

The appellants started off that, the ownership of the land in dispute was already determined by the Ward Tribunal of Mambwe Nkoswe whereas the matter was between the 1st appellant and the respondent in which the former was declared the rightful owner of the disputed land. They further added that, as the respondent was aggrieved by that decision, the only remedy was to file an Appeal before the trial tribunal and not to file a fresh Land Application.

They did pray to quote part of the submission made by the 1st appellant at the trial tribunal, below is the quotation;

"....ambapo SM1 alianza kudai eneo gombewa kwa kufungua shauri kwenye uongozi wa serikali ya Kijiji, kabla shauri halijafunguliwa SM1 alianza kulima eneo gombewa na ndipo

*niliamua kumshtaki SM1 kwenye baraza la kata la Mambwe
Nkoswe ambapo nilipewa haki."*

Coming to the 4th ground of appeal, they submitted that the respondent failed to prove ownership of the disputed land since he himself stated in his testimony that the said land belonged to his late father, and therefore the respondent was to prove that he was appointed as the Administrator of his late father's estate. In emphasis, the appellants cited the case of **Omary Yusuph (Legal representative of the late Yusuph Haji) vs Albert Munuo**, Civil Appeal No. 12 of 2018 CAT at Dar es Salaam (unreported) at page 6 where it was held that: -

"That according to the law it is only the lawful; appointed legal representative of the deceased who can sue or be sued for or on behalf of the deceased."

In addition, the appellants further cited the case of **Malietha Gabo vs Adamu Mtengu**, Misc. Land Appeal No. 21 of 2020 HC at Kigoma at page 14 (unreported) where this court held that: -

"I agreed to the fact that while the Appellant interfered with Respondent's land upon being granted letters of administration indeed, she was sued in her personal capacity. This was an

irregularity; she was supposed to be sued in her assumed capacity as an administrator."

The appellants, again sought leave from this court to quote part of the content of the proceedings of the trial tribunal as hereunder;

"...anaapa na kusema eneo lilikuwa la chifu baadae eneo gombewa lilianza kumilikiwa na baba. Baada ya baba kufariki mimi niliendelea kutumia hilo eneo."

They added that, the respondent filed the Land Application No. 13 of 2021 without having a letter of being appointed as an administrator of his late father's estate in which the legal impact for failure to sue as a legal representative of his late father's estate makes the proceedings and judgment thereof a nullity.

Nevertheless, they insisted that the respondent's evidence at the trial tribunal was contradictory as he stated that the disputed land belonged to his late father meanwhile during cross examination, he stated that the disputed land was given to him by his father during his lifetime. In support of this argument, the appellant's cited the case of **Emmanuel Abrahamu Nanyaro vs Peniel Ole Saltabau** [1987] TLR 48 where it was held that;

"Unreliability of witnesses, conflict, inconsistencies in their evidence entitles a judge to reject their evidence."

They added that, the law is clear that parties are bound by their pleadings, pleading of the respondent and evidence adduced by him and the answers as he was examined differ. They cited the case of **James Funke Gwagilo vs Attorney General** [2002] TLR 455 where it was held that;

"It is the position of the law that parties are bound by their pleadings and what is not pleaded cannot be granted"

Conclusively, the appellants submitted that based on the submissions they had made above and plethora of relevant authorities pinned in, they pray for this court to allow this appeal with cost.

In reply, in his written submission the counsel for the respondent submitted that, in their reply to the submission in-chief of the appellant they would like to adopt their reply to the petition of appeal as part of their submission.

He proceeded that, in reply to the grounds raised and as argued in the appellants' submission they shall reply to the 1st ground, 2nd ground and 3rd ground cumulatively and the 4th ground separately.

In doing so, he submitted that, the 1st, 2nd and 3rd ground are all baseless as the appellants herein failed to establish vivid evidence before

the trial tribunal and the fact that the 1st appellant had conflicting answers on how he acquired the land raised eyebrows of the trial tribunal. He added that, it is clear on pages 3 and 4 of the typed judgment of the trial tribunal the 1st appellant stated to have received the disputed land after his father died but when crossed examined, he stated to have bought the land from Anatory Sinkamba's family, this was a serious concern and basis of the decision of the trial tribunal.

The learned counsel reminded us that, he who alleges must prove the fact he alleges exist and it is not the duty of the party to prove its case and not the court as it was the holding in the Court of Appeal case that he referred me to in **Ahmed Teja T/A Almas Autoparts Limited vs Commissioner General TRA**, Civil Appeal No. 283 of 2021 on page 6 para 1 where the court had this to say: -

"....since cases belong to the parties it is for them, not court, to prove relevant facts..."

Mr. Kipsha insisted further that, in accordance to the case above none was done by the appellants who alleged that the matter was previously held by the Mambwe Nkoswe ward tribunal but did not tender the decision of the same. The appellant then has attached the decision which was not tendered in trial tribunal as new evidence without leave of the court to allow new evidence in appellate stage or without any colour of light.

Mr. Kipsha argued further that, the trial tribunal could not act on mere words that there was another suit between some of the parties to the case without such being part of its records or even being part of the parties' pleadings, such would have been absurd. That, if the appellants had the decision of the ward tribunal, they deliberately did not tender the same or even form part of their pleadings and in our case would have been the reply to the application, the applicants did not raise any objection in the trial tribunal rather just an oral statement hence cannot be allowed to benefit from their own wrong as they did not seek leave to tender new evidence: in appellate stage since such act has requirements to be met.

The learned counsel added that, it is prohibited to introduce new evidence at appellate stage under **Order XXXIX rule 27 of the Civil Procedure Code**, Cap 33. He then referred me to the High Court case of **Florian Steven Kitiwili vs Mariam Benedict Makombe**, Civil Appeal No. 136 of 2019. He wished to quote on page 7 par 2 where the court said;

"....in this I also share hands with the respondent that the appellant is trying to introduce new evidence at the appeal stage the practice which is reprimanded by Order XXXIX rule 27 of the CPC which provides "the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in court"..... "

Submitting against the 4th ground of appeal, Mr. Kipesha submitted that, this 4th ground of appeal is a last dying donkey kick, as the respondent herein never stated at any stage of the proceedings that he is claiming the land on behalf of his late father so the cases cited by the appellants to wit; **Omary Yusuph Case, Emmanuel Abrahamu Case** and **Malitha Gabo Case** are distinguishable. That, the respondent herein stated to be given the land by his late father and after the demise of his father he continued to use the land. He insisted that, such can be seen as extracted in the typed judgment of the trial tribunal in page 2 and he would like to quote as hereunder: -

"Ni ushahidi wa SMI kuwa, eneo gombewa lilikuwa linamilikiwa na chifi na kuwa baadae eneo hilo lilianza kumilikiwa na baba yake na SMI. Kuwa, baada ya baba mzazi wa SMI kufariki, yeye SMI aliendelea kulima eneo gombewa ambalo linapakana na Isack Simpemba."

He argued that, the trial tribunal was convinced with the evidence laid upon by the respondent herein as all his witnesses checked up and were corresponding to each other on how the respondent gained possession of the land, and were unshaken by the cross examination. Contrary to the evidence of the appellants herein which was easily shaken and highly contradictory on how he got possession of the land in dispute. That, the

trial court properly relied on the case **Hemedi Said vs Mohamed Mbilu** (1984) TLR 113 as the evidence of the respondent herein was heavier than that of the appellants.

In winding up, Mr. Kipesha submitted that, in light of the above arguments together with the supporting case laws and provisions they hereby submit that this appeal lacks merit and should be dismissed with costs

The appellants had no any rejoinder to the submissions made by the counsel for the respondents. Subsequently, that leaves an ample green pitch for the court to determine this appeal whereas the only issue to be determined here is ***whether this appeal is meritorious before this court.***

On my part, this appeal accommodates four (4) grounds of appeal, and it is in my considered confirmation that the 1st, 2nd and 3rd grounds which will be determined together suffices to dispose of this appeal, and therefore the 4th ground of appeal will not be determined.

It has been emphasised time and time again that, this court being the first court of appeal it is mandated with the obligation to re-analyse and re-evaluate evidence and come to its own conclusion, if necessary, while being cautious that it has not witnessed the credibility of the witnesses when testifying. To this there are a plethora of authorities.

In this matter at hand, the three grounds of appeal grouped together suggests that the trial court erred in law to entertain a fresh application by the respondent against which there was a decision of a lower tribunal which has not been challenged by the respondent herein.

Addressing me in support of this fact, the appellants particularly the 1st appellant stated that there was a suit against the respondent herein at the Mambwenkoswe Ward Tribunal in which the 1st appellant was declared the rightful owner of the disputed land.

Having a different eye sight, the counsel for the respondent submitted that the one who alleges must prove, and that the appellants were supposed to prove that there was a suit at the Mambwenkoswe Ward Tribunal by tendering a decision thereof. That, the appellants had attached the said decision of ward tribunal at this appellate stage of which it was not tendered at the trial tribunal and thus it is new evidence, that they would have sought the leave of this court to allow them to tender new evidence at an appellate stage.

In determining what is being battled out by the two sides, I find it best to reproduce the part of the typed proceedings at page 8 of the trial tribunal where the applicant (respondent herein) was cross examined, the extract is as follows;

"

MAHOJIANO DODOSO

Mjibu majibu wa 1:

- Chifu hakuweza kutoa Ushahidi kwenye baraza la kata kwa sababu alikuwa amesafiri.

- Isack hakuweza kutoa Ushahidi kwa sababu alikuwa Tanga.

NI HAYO TU.

"

Again, I find it best to reproduce the part of the testimony of the respondent's witness (1st appellant herein) found at page 15 of the typed proceedings of the trial tribunal, who was **John Simtowe (SU3)**. The extract is as follows;

".....wadaawa hawa walikuwa na shauri kwenye Baraza la Kata la Mambwenkoswe na mimi nilikuwa Katibu. Eneo gombewa lilitembelewa baada ya Baraza la Kata kuwa limesikiliza pande zote mbili, hukumu ilitolewa tarehe 13.5.2015 ambapo SU1 alipewa haki ya kumiliki eneo gombewa. SM1 alionekana ana nia ya kukata rufaa. Sikujua kilichoendelea."

Considering the two extracts above, it is undisputed that there was a suit at the Mambwenkoswe Ward Tribunal, even the respondent himself has acknowledged that fact.

However, as rightly submitted by the counsel for the respondent that the appellants were to seek leave of this court to tender new evidence at this appellate stage to wit the judgment of the Ward tribunal instead of referring to it as evidence that supports their argument, and regard it as proof of their claim.

I should say, the document tendered by the appellants as evidence, it is not all that new evidence in this appeal considering the two extracts I reproduced above. It is well seen in the records of the trial tribunal that all the parties knew about the suit which was decided at the ward tribunal. See pages 8, 13 and 16 of the typed proceedings of the trial tribunal.

Nevertheless, it is the law under **Section 58 and 59 of the Law of Evidence Act, Cap 6 RE 2022** that there are facts which the Court can take judicial notice. The sections read as follows;

"58. No fact of which a court takes judicial notice need be proved.

59.- (1) A court shall take judicial notice of the following facts-

(a) all written laws, rules, regulations, proclamations, orders or notices having notice the force of law in any part of the United Republic;

(d) all seals of all the courts of the United Republic duly

established and of notaries public, and all seals which any person is authorized to use by any written law;

(3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

(Emphasis is added)

From the above provisions of the law, it is obvious that for a Court to be able to take judicial notice of the judicial decision, the party must produce that decision for the Court to see and recognize the seal of the Court. Otherwise, the Court would not be in a position to automatically know the case and expected to call for records seeking for the judgement supposedly concerning the case in question.

In this matter at hand, the appellants tendered the judgement of the Mambwenkoswe Ward tribunal in which they attached in their petition of appeal, and it is labelled Annexure 'E1'. In that, I take judicial notice of the said judicial decision of the Ward Tribunal of Mambwenkoswe in which the parties were the 1st appellant and the respondent herein and the suit involved the same land in dispute at hand, whereas the 1st appellant was declared the lawful owner of the same. Consequently, the Application at the trial tribunal becomes ***res judicata***, in which the entire proceedings

and the decisions thereof become null and void ***ab initio***. The proper avenue for the aggrieved party was an appeal against the decision of the Ward Tribunal of Mambwenkoswe instead of preferring a fresh application as the respondent herein did.

At this juncture, I proceed to allow this appeal for it is meritorious before me and in so doing, I hereby quash the entire proceedings of the trial tribunal, the judgment and decree thereof are hereby quashed. The matter should stand as it was decided by the Mambwenkoswe Ward Tribunal. Costs to follow the event.

It is so ordered.

Dated and delivered at **Sumbawanga** this 28th day of November, 2023.



T. M. MWENEMPAZI

JUDGE

Judgment delivered in chamber in the presence of 1st appellant and 2nd appellant reported sick by Michael Enock and Mr. Samwel Kipasha, Advocate for Respondent.



T. M. MWENEMPAZI

JUDGE

28/11/2023