

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 66 OF 2022

(C/F Appeal No. 66 of 2021 District Land and Housing Tribunal of Arusha at Arusha, Original Land Case No. 5 of 2021 Kikwe Ward Tribunal)

ELIESHI NDELILIO APPELLANT

VERSUS

GONZAGA GODFREY MUSHI RESPONDENT

JUDGMENT

22nd September & 17th November, 2023

TIGANGA, J.

In Land Case No 5 of 2021, the appellant herein filed a complaint before Kikwe Ward Tribunal (the trial tribunal) alleging that, the respondent herein trespassed into her suit land measuring 25 meters long x 22 meters wide located in Kikwe Village, Luwaini Hamlet within Arumeru District and Arusha Region (the suit land.)

At the trial tribunal, the evidence showed that the respondent herein bought the suit land from one Eliudi Ndelilio Kaaya who is the appellant's alleged younger brother for the consideration of Tshs. 2,000,000/=. According to the respondent, he bought the said land after being asked and guaranteed by the appellant family that such an amount of money was needed to assist the treatment of said Eliud who was involved in a

car accident, and that, the family had no money to for his medical expenses, hence they agreed part of the family farm to be sold to pay for treatment of the said Eliud.

The appellant on the other side argued that the said Eliud is not part of their family hence, not eligible for any family inheritance following their father's demise. According to her, even the family does not recognize him as their relative, hence this is just a plot to steal their land from people they do not know. She claimed to be the rightful owner of the suit land bequeathed to her by their late father before his death. She claims that she neither recognizes the said Eliudi nor the respondent herein. In the end, the trial tribunal based on the evidence before it, was of the view that the suit land was legally sold to the respondent as there was a family meeting which ordained such sale to cater for Eliud Ndelilio Kaaya's treatment.

Aggrieved with the decision, the appellant appealed to the District Land and Housing of Arusha in Land Appeal No. 48 of 2021 (DLHT) which dismissed the appeal and upheld the trial tribunal's decision. Still disgruntled, the appellant preferred this appeal on the following four (4) grounds;

1. That, the 1st Appellate Tribunal erred in law and fact in not granting the appellant the right to be heard by not recording evidence adduced by him during the trial.
2. That, the Appellate Tribunal erred in law and fact in considering the minutes of the family meeting which was not held by family members.
3. That, the Appellate Tribunal erred in law and fact in failing to evaluate evidence in establishing ownership of respected suit land, hence reached an erroneous decision.
4. That, the Appellate tribunal erred in law and fact in considering the sale agreement between Eliud Ndelilio Kaaya and Gonzaga Godfrey Mushi while the seller had no legal capacity to sell.

During the hearing which was by way of written submissions, the appellant appeared in person and unrepresented whereas the respondent was represented by Mr. Alex M. Mmbando, learned Advocates.

Supporting the appeal, the appellant submitted on the 1st ground of appeal that, the DLHT denied her right to be heard and the right to representation which is the fundamental human right enshrined under Article 13 (6) (a) of the **Constitution of the United Republic of Tanzania, 1977** as amended from time to time. She argued that the law is settled to the effect that, a breach or violation of the principle of natural justice, renders the proceedings and decision made thereto a nullity as held in the case of **IPTL vs. Standard Chartered Bank (Hong Kong)**

LTD, Civil Revision No. 1 of 2009 which was cited in approval in the case of **Said Mohamed Said vs. Muhsin Amiri and Muramari Juma**, Civil Appeal No. 110 of 2020 CAT at Dsm.

She also submitted that there was an improper quorum constituted at the trial tribunal contrary to section 11 of the **Land Disputes Courts Act**, [Cap 216 R.E. 2019] when determining her case. However, although there were less than three women, the DHLT glossed uphold the decision of the ward tribunal the error which also amounts to the illegality of the whole proceedings and decision. She asserted that under section 43 of the same law, this Court can exercise its discretion when the matter involves injustice and revise the proceeding as well as the decision made thereto.

Submitting on the 2nd and 4th grounds, the appellant averred that, there was no proof from his estranged brother, that he legally owned the suit land before passing the same to the respondent herein. According to her, and as held in the case of **Farah Mohamed vs. Fatuma Abdallah** [1995] TLR 205, no one can transfer a better title than he has (*Nemo dat quod habet*). Therefore, both subordinate tribunals erred in holding that the said Eliudi Ndelilio Kaaya had the mandate to sell the suit land while there was no proof of him owning the same. In her view, the respondent

herein ought to have conducted due diligence and satisfied himself whether the suit land was owned by the said Eliudi Ndelilio Kaaya.

As to the 3rd ground, it was the appellant's submission that, the trial tribunal explicitly made reservation that, there is no tangible and enough proof as to whether the suit land belonged to the appellant herein or his estranged brother. Therefore, the DLHT erred in holding that there was enough proof that the suit land legally belonged to Eliudi, something which does not have an evidential foundation. She prayed that this appeal be allowed with cost by setting aside and quashing the decisions from subordinate tribunals and declaring her as the rightful owner of the suit land.

In reply, Mr. Mmbando started by pointing out the fact that, there was the issue of non-appearance of the appellant before the DLHT. The appellant was ordered to file a written submission in support of her appeal before or on 24th October 2022. When the matter was fixed for the mention, both parties appeared and the appellant did not bother to ask for an extension of time to file her submission, thus, the DLHT set a date for judgment. He argued that failure to file submission on the date fixed by the court is tantamount to failure to appear when the matter is

scheduled for hearing or failure to prosecute her case consequent of which amounts to dismissal of the appeal.

On the grounds of the appeal filed, Mr Mmbando submitted that all of them are new grounds as they are not the ones filed at the DLHT. He cited the case of **Yassin Salum Kagurukila vs. The Republic**, Criminal Appeal No. 106 of 2019 CAT at Tabora, where the Court of Appeal emphasized that new facts cannot be raised during second appeals. He argued that all these grounds are incompetent and should be dismissed. appeal which.

The learned counsel also submitted that the appellant herein sued the wrong party as the evidence clearly shows that, it was Eliudi who sold the suit land however, it was only the respondent, the buyer, that was sued while he is protected by the principle of a *bona fide* purchaser. On the 1st ground, he argued that the appellant was given the right to be heard, but she waived such right as she failed to file a submission in support of her appeal as per the DLHT directives and as required by law.

On the 2nd ground, he submitted that the respondent herein is a mere bona fide purchaser, there is no way he would know the contents of the late Ndelilios' family meetings and personal feuds. He argued that both tribunals were not duty bound to determine whether or not those

who warranted the suit land to be sold to cater for Eliudi's treatments were family members or not. What was important was the fact that it was the same family that affirmed the said Ndelilio as the family member and the fact that the suit land was his.

On the 3rd and 4th grounds, the learned counsel argued that the trial tribunal declared the respondent as a lawful owner of the suit land after tendering the sale agreement, the minutes showing consent to sell the suit land, and the letter of clan council affirming Eliudi as a son to the late Ndelilio Kaaya hence a family member with capacity to sell the suit land. He finally reminded the Court that, whenever there are two concurrent decisions from the subordinate courts, the appellate court should not disturb them unless it is necessary to do so. He prayed that this appeal be dismissed with costs.

In his brief rejoinder, the appellant reiterated her earlier submission and maintained that, she was denied the right to be heard and that, there was illegality in the impugned decision that required this court's intervention.

Having gone through the trial court's records as well as both parties' submissions, I now proceed to determine the grounds of appeal. I am aware of the trite principle that, whenever there are concurrent decisions

of the two lower Courts, the second appellate court can only interfere when the decisions of the courts below are manifestly unreasonable, or there is misapprehension of the evidence, or misdirection or non-directions on the evidence. This was emphasized in the case of **Efeso Wasita vs. The Republic**, Criminal Appeal No. 408 of 2020, CAT at Mbeya where the Court of Appeal held that;

*"...Trite law is that our interference is justified where the findings are manifestly unreasonable, there is misapprehension of the evidence or misdirection or non-directions on the evidence (See **The DPP vs. Jaffari Mfaume Kawawa** [1981] TLR 149, **Issa Kumbukeni vs. The Republic** [2006] TLR 277 and **Maneno Daudi vs. The Republic**, Criminal Appeal No. 165 of 2013 (unreported). We shall therefore consider if we are justified to fault the finding of the courts below on those basis."*

Starting with the 1st ground, the appellant challenged the DLHT for denying her fundamental right to be heard. As rightly argued by the appellant, the right to be heard is a fundamental principle in dispensing justice. In the case of **DPP vs. Rajabu Mjema Ramadhani**, Criminal Appeal No. 223 of 2020 CAT at Mbeya, the Court of Appeal had this to say with regard to that principle;

"Time without number, the Court has consistently insisted on the need to guard against contravention of the right to be heard (audi alteram partem) in adjudicating the rights of parties. It is a rule against a person being condemned unheard. Any decision

*arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard. [See-**John Morris Mpaki vs The NBC Ltd and Ngalagiia Ngonyani**, Civil Appeal No. 95 of 2013 (unreported) and **Tabu Ramadhani Mattaka vs Fauzia Haruni Said Mgaya** (supra)].”*

In the appeal at hand, on page 5 of the DLHT’s typed proceedings, it is as clear as the daylight that on 19th October 2022, the respondent herein prayed to argue the appeal by way of filing written submissions. The appellant was present and was also represented by Advocate Aikael Michael who conceded to the prayer. The DLHT therefore made the following orders;

AMRI:

-Ombi lakubaliwa.

-Rufaa Imalizwe kwa njia ya maandishi.

-Mrufani alete maelezo mnamo au labla ya tarehe 24/10/2022

-Mrufaniwa alete maelezo ya majibu mnamo au kabia ya tarehe 26/10/2022.

-Majumuisho / kama yapo tarehe 27/10/2022

-Maoni ya wajumbe 28/10/2022

-Kutaja tarehe 28/10/2022

Imesainiwa:

M.R. Makombe-M-kiti

19/10/2022

When the matter proceeded on 28th October 2022, the DLHT found the appellant to have not filed the submission in chief, but the respondent had filed his. The 1st appellate tribunal proceeded with the receiving of the assessors' opinions followed by an order of date of Judgment. It is also reflected in the DLHT's judgment that, the appellant herein failed to file her submission timely but the respondent did, thus, the tribunal proceeded to deliver its judgment based on what was filed by the Respondent before it. According to the appellant, she was denied her right to be heard as the DLHT proceeded to determine the appeal in the absence of her submission.

As rightly argued by the respondent's counsel, failure to file submission as scheduled is tantamount to non-appearance on the day fixed for the hearing. The only remedy available for the 1st appellate Court was to dismiss the appeal. In the case of **Godfrey Kimbe vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014 CAT at Dar es Salaam (unreported), the Court of Appeal referring to its decisions in **National Insurance Corporation of (T) Ltd & another vs. Shengena Limited**, Civil Application No. 20 of 2007 and **Patson Matonya vs. The Registrar Industrial Court of Tanzania & Another**, Civil Application No. 90 of 2011 (both unreported), held that:

"... failure by a party to lodge written submissions after the Court has ordered a hearing by written submissions is tantamount to being absent without notice on the date of hearing."

In the circumstances therefore, since the appellant was present on the day the schedule was set and she was also represented, I am of the considered opinion that she waived her right to be heard by not complying with the DLHT scheduling orders and filing the submission on the date fixed. I hold so for the following reasons; **first**, all documents are filed in the registry and not before the chairman. Considering the fact that, the same was not filed, the appellant's contention that she was denied the right to be heard by the chairman who reached his decision without waiting for her submission is a misconception because the court could not wait for her to file submission at her own pace.

Second, court orders (tribunal for this matter) should be obeyed. On this, I would like to associate myself with, as I am persuaded by the reasoning of this Court in the case of **John Mwansasu vs The Republic**, Cr. Review Case No. 8 of 2000, HC Dsm, where Hon. Manento, J., (as he then was) had this to say about obedience to court orders,

"The court is obliged to supervise the execution of its orders otherwise, the court would be equated with a toothless bulldog which could buck (sic) without biting."

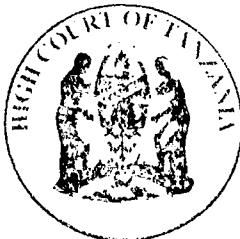
In that regard, the only remedy was for her to ask for an extension of time before the trial Court so that, she could file her submission, failure of which the appeal ought to have been dismissed for want of prosecution.

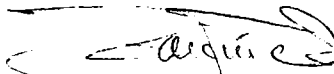
On the same note, the chairman of DLHT had no duty to determine the appeal based on the respondent's submission, he ought to have dismissed it outrightly under regulation 11 (1) (b) of **the Land Dispute Courts (the District Land and Housing Tribunal) Regulations**, G.N. No. 174 of 2003 (Land Regulations).

In the circumstances, therefore, this first ground which carries the gist of the whole appellant grievances are found without merit. I find no need to discuss other grounds of appeal as no appeal was heard and determined before the DHLT. This appeal is dismissed with costs, and the trial tribunal's decision is hereby upheld though on a bit different grounds.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 17th day of November 2023.




J.C. TIGANGA
JUDGE