

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO. 133 OF 2020**


(Arising from Land Appeal No. 111 of 2020 at Kilombero/Malinyi District Land
and Housing Tribunal)

SUDI MUNDU	APPELLANT
VERSUS	
JAMES MWISHAGOLI	RESPONDENT

JUDGMENT

K. T. R. Mteule, J


23rd June 2021 & 30th June 2021

The history of this matter originates in the Ward Tribunal of Mngeta, Mlimba District in Morogoro region. The instant appellant Sudi Mundu sued the Instant Respondent James Mwishagoli alleging him to have trespassed into his farm. The Ward Tribunal decided in favour of the Appellant herein who was the applicant therein, causing grievance on the part of the instant respondent, who filed Appeal No. 111 of 2020 at the District Land and Housing Tribunal of Kilombero herein after referred to as the Kilombero DLHT. The decision of Kilombero DLHT was delivered in favour of the instant respondent whereby the decision of the Ward Tribunal was quashed and set aside, declaring the instant respondent to be the lawful owner of the disputed land. Aggrieved by the decision of Kilombero DLHT, the respondent therein preferred this second appeal raised 3 grounds of appeal namely: 

1. That the chairperson of the DLHT for Kilombero erred in law in deciding the matter without joining the person who sold the land in dispute.
2. That the chairman erred in law and in fact in awarding the decree to the respondent without clearly evaluating the evidence given in the Ward Tribunal.
3. That the whole decision of the trial chairperson is unfounded and against the evidence on record.

The appeal was heard by oral submission where the appellant was represented by Mr. Kessy advocate while the Respondent was under the representation of Munuo Advocate.

In brief, in defending the appeal in his submission, Mr. Kessy Advocate for the appellant challenged the finding of Kilombero DLHT arguing that the Ward Tribunal awarded ownership of the suit land to the appellant therein basing on improper evaluation of evidence and that the Chairman of DLHT was not right to set aside the decision of the Ward Tribunal. There were some pieces of evidence highlighted by the counsel for the appellant which he thought to have been not properly evaluated in the decision of Kilombero DLHT. These included:

1. The evidence of the allocation of the disputed land to the appellant by the village council which was approved by the Village General Assembly held on 16/2/2010.
2. The receipts paid to the village council for the purchase of land which were tendered. 

3. Neighbours of the appellants testimonies that in 2012 the appellant Mr. Sudi cleared the disputed farm and cultivated it for one year and they recognized the appellant as the owner of the farm.
4. The weakness of the respondent's evidence for lacking support of the person who sold the farm to the respondent.
5. Reliance on contradictory documentary evidence showing that the farm was purchased in 2010 while receipts dated 2019

In reply to the appellant's submission, the respondent's counsel believed that the evaluation and analysis of the evidence by the appellate tribunal was proper and founded. He submitted that the appellate tribunal held that the respondent is the rightful owner of the suit property basing on the evidence and testimonies of the witnesses adduced in the Trial Ward Tribunal.

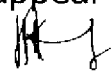
More details of what the counsels for the parties submitted will be highlighted as I continue with determining the main issue of appeal.

Before proceeding to determine disputed issues in this appeal, I would like to first make clear on the grounds of appeal. There are three grounds of appeal. However, the respondent's counsel challenged the relevance of ground No. 1 which concerns joinder of parties by submitting that since the ground was not submitted at the Kilombero DLHT, the High Court does not have jurisdiction to determine a new ground at a level of 2nd Appeal which was not raised in the appellate

court. He supported this assertion by the case of **Simon Godson Wacha vs Mary Kimambo Civil Appeal No. 393 of 2019 Court of Appeal of Tanzania of Tanga (unreported)** which stated that a second appellate court does not have jurisdiction to determine a new ground of appeal which was never raised at the first appellate court.

Throughout the submissions by the counsel for the appellant, only issues of improper evaluation of evidence have been addressed which fall under the second and third grounds of appeal. The first ground of appeal which concerns the joinder of parties was not argued by the appellant.


Indeed, as submitted by the counsel for the respondent, the issue of joinder of parties is something new at this second appellate court which was not raised in the first appellate tribunal. Being guided by the decision of **Simon Wacha**, which is cited by the respondent, I agree that since the issue of joinder of parties was not a subject matter at the first level of appeal, it cannot be considered at this stage of appeal and it is therefore disregarded.

In his submission the counsel for the appellant consolidated ground 2 and 3. By looking on these grounds they cover only one aspect of the alleged improper evaluation of evidence. Likewise, as done by the appellant's counsel, I will also consolidate them as one ground. Since ground No 1 is disregarded on the reasons aforesaid, this appeal therefore remains with only one consolidated ground of appeal which is the alleged improper evaluation of evidence by the DLHT. 

From this one ground of appeal one issue will be determined as to **whether there was improper evaluation of evidence in the decision rendered by Kilombero DLHT.**

I will address another anomaly which surfaced in the course of hearing of this appeal. From the record of Kilombero DLHT, the memorandum of appeal carried the following grounds:-

1. Purported allocation of 100 acres to the respondent by Mkangawalo Village Council which he thought to be ultra vires in the ambit of the Village Land Act No. 5 of 1999.
2. Improper analysis, evaluation and assessment of the evidence adduced at the trial tribunal.

In this appeal, one of issues challenged by the counsel for the appellant on submission was the finding by the chairman of Kilombero DLHT that the village council had no authority to allocate the land in dispute. From what was ascertained from the grounds of appeal filed herein, the tribunal's decision on the legality of the allocation of the land by the village council has not been raised. It raised during the submission. Being guided by the same authority in the case of **Simon Wacha**, in my view, this is an issue of law, totally different from the evaluation of evidence, and which does not feature in the memorandum of appeal. I will not toil to discuss this matter as it is not properly brought in the submission. It remains that the holding of the 1st appellate tribunal remains unchallenged. 

I now address the ground on the lack of proper evaluation of the evidence. To start with, the appellant criticised the first appellate tribunal in evaluating the evidence of the allocation of the disputed land to the appellant's counsel. He drew the attention of this court to the evidence of the appellants who testified in the Ward tribunal that he went to Morogoro to request for land allocation from the village of Mkangawalo where a meeting by the Village General Assembly held on 16/2/2010 approved the allocation as per the recorded minutes of the meeting. According to his submission, it is in record that the appellant paid Tshs 2,000,000 as purchase price with receipt of payment issued to him. That the record shows that both the receipt and the minutes of the committee were tendered in the Ward tribunal as exhibits.

In response, the counsel for the respondent submitted that the allocation minutes tendered by the appellant in the Ward tribunal was faulted by the evidence of DW1 and DW3 who refused to have been involved in any meeting of the village council on 16/2/2010. According to the respondent counsel DW1 and DW3 were the members of the committee which appeared on the minutes at items Na 4 and 12.

In rejoinder, the counsel for the appellant disputed the respondent's assertion that Witnesses DW1 and DW3 refused or denied to having known the council meeting and stated that the land was allocated by the village council and not the executive officer.

The dispute by the counsels for the parties needs so much desired. I did not get opportunity to see the minutes of the meeting which were tendered in the Ward Tribunal because they were not in the original


record of neither the Ward Tribunal nor the DLHT for Kilombero. What transpire in the decision of the Kilombero DLHT, the Chairman was convinced by the evidence of the village chairman who said that the respondent who is the instant appellant did not have any land in the village and challenged the authenticity of the village assembly minutes which were tendered as exhibits. At page 2 of the Judgment of the Kilombero DLHT it is confirmed that the respondent therein who is the current appellant tendered the village minutes and the receipt of payment to the village. From the preceding analysis it has not been disputed that the minutes were tendered in the Ward Tribunal. The evidence of DW1 and DW2 who testified to have never known the appellant faulted and raised doubt on the authenticity of the minutes and at this point, I agree that the chairman had reason to have not given 100% reliance to them since he may have been in a better position to see the minutes.

In the appellant's submission there is another piece of evidence purported to be in favour of the appellant which is complained to have been not properly evaluated. This piece of evidence is the purchase receipt for 2,000,000 paid to the village council for the purchase of land which was tendered by the appellant. This is also acknowledged in the Judgment of Kilombero DLHT page 2 last paragraph that the receipt was tendered. Even in this appeal, it was not disputed that the receipt were tendered as evidence. In the judgment of the Kilombero DLHT, this piece of evidence was not considered at all. Since it remains unchallenged, it is a sufficient evidence that the respondent paid for the land be it 100 acres or 50 acres depending on the amount shown on the



receipt for those who got opportunity to see it. The Kilombero DLHT ought to have considered this evidence and analyse it properly. Short of this analysis renders the judgment wanting.

Another argument raised by the appellant to fault the poor evaluation of evidence by the Kilombero DLHT at appeal level is the disregard paid to the weakness of the respondent's evidence for lacking support of the person who sold the farm to the respondent. I agree with the appellant that the evidence of the person who sold the farm to the appellant was vital to show whether he had a title transferable to the respondent or not. However, since the respondent had more witnesses who testified to have been directly involved in the sale, it does not change the fact that by standard of probability, the respondent equally did purchase the farm in dispute. And if there is any fault on this aspect, the same cannot be associated with the chairman of the DLHT. This assertion does not hold water.

Another issue of evidence challenged to have been poorly evaluated by the Kilombero DLHT is the reliance on contradictory documentary evidence showing that the farm was purchased in 2010 while receipts tendered by the respondent were dated 2019. If this is the case, then the tribunal chairman needed to iron out this contradictory situation. Nevertheless, the fault in this evidence cannot vitiate the entire evidence tendered by the respondent in the ward tribunal where the village leadership testified to be involved in the purchase contract. The chairman managed to establish that the land in dispute was sold to the respondent which was the fact. 

Going through the records from the Ward Tribunal and that of Kilombero DLHT it appears that both parties managed to establish ownership to the suit land at least on a standard of probability. Both have established to have purchased the land under the guidance of the Village council. The purchase receipt tendered by the appellant and the evidence of neighbours who saw the appellant cultivating the land proves the appellant's ownership to the land through the sale by the village council. As well the respondent's evidence given through the village leadership as well proves that the appellant purchased the disputed land being facilitated by the same village council. What I gather from the record, it appears there was a double allocation by the village council allocating the same farm to different persons.

In the results, I will rely on the already developed jurisprudence in cases of double allocation, where in principle first occupier takes precedence.

Sara Ngonyani vs Jocye Philbert Hyera, Land Appeal No.167 of 2016, Kerefu J. (Unreported), Helena Elias Choma Versus Magambo Makongoro, Land Appeal No 165 of 2019, Opiyo J (Unreported)

In the case of Helena Choma cited above, a similar situation where Hon. Opiyo J found double allocation she stated:

"And thus, in case the application of the priority principle is put into play in solving the dispute between the parties, the respondent being the first person to be allocated the suit land, and first developer, he is the rightful owner of the suit land. The contextual meaning of the principle is that

whenever there are two competing interest the earlier in time is stronger in law. Therefore, the first occupier in time prevails over the other”.

This priority principle is what I see to have been applied in the Wards Tribunal where the tribunal was of the opinion that since the instant appellant Sudi Mundu was the first developer of the land, the Wards tribunal was right to give ownership to the respondent.

I note that it is good to comment on the finding of Kilombero DLHT on the illegality of the land. I said early in this judgment that I did not see the need to disturb this finding. Nevertheless, I am of the view that whether the land was appropriately allocated or not, the finding does not change the fact that the appellant bought the land and paid the purchase price which was sufficiently established in the Ward Tribunal. The appellant cannot be punished on behalf of the authority which committed the sin of double allocation by selling the same land to different persons. Nevertheless, the land in dispute is only ten acres piece of land.

Consequently, I allow the appeal, quash the decision of the District Land and Housing Tribunal of Kilombero and uphold the decision of the Ward Tribunal of Mngeta. No order as to costs.

Dated ta DAR ES SALAAM this 2nd Day of July 2021.



KATARINA T. R. MTEULE
Judge.

Court: Ruling delivered this 2nd day of July, 2021 in the presence of Appellant in person and Francis Munuo and Hawa Tursia for the respondent.



KATARINA T. R. MTEULE

Judge

