

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MZIRAY, J.A. MWAMBEGELE, J.A. And KEREFU, J.A)

CIVIL APPEAL NO. 240 OF 2018

RAPHAEL ENEA MNGAZIJA

(Administrator of the estate of the late

Enea Mngazija)APPELLANT

VERSUS

ABDALLAH KALONJO JUMA.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Masoud, J.)

dated the 19th day of December, 2016

in

Land Appeal No. 23 of 2016

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JUDGMENT OF THE COURT

21st February & 8th April, 2020

MZIRAY, J.A.:

The appellant, acting as the administrator of the estate of the late Enea Mngazija, is challenging the decision of the High Court of Tanzania at Tanga (Masoud, J.) in Land Appeal No. 23 of 2016 delivered on 19th day of December, 2016. The suit commenced as Application No. 74 of 2013, in the District Land and Housing Tribunal for Tanga at Tanga, wherein the respondent, Abdallah Kalonjo Juma, claimed for a declaration that he is the rightful owner of plot No 372 Block D Makorora, in Tanga City (the suit

plot). He at the same time sought for an order to remove a caveat lodged by the appellant in the Land Registry at Tanga.

The brief facts of the case are as follows; the respondent purchased the suit plot from the late Enea Mngazija, the father of the appellant, sometimes in October, 2002 and built an outer house thereto. In 2010 when he started to process the transfer of the suit plot in his name, the appellant in his capacity as the administrator of the estate of the late Enea Mngazija objected to the transfer. He (the appellant) lodged a caveat in the Land Registry to block the transfer, alleging that the suit plot was part of the estate of the deceased. He denied knowledge that the suit plot was sold to the respondent.

During the trial, the respondent called three witnesses and produced the deed of sale to show that the deceased sold the suit plot to him. Among the witnesses who witnessed the sale and testified before the Tribunal were PW3 Hassan Rajab and PW4 Hamad Mikidadi. They confirmed the assertion that the suit plot is owned by the respondent on account of the fact that he purchased it from the appellant's deceased father. Both PW3 and PW4 witnessed the sale and had appended their respective signatures on the sale agreement (exh. P3) which they

recognized when testifying. On the other hand, the appellant in his testimony denied the existence of the sale and contended that the deed of sale was a forged document.

At the end of the trial, the District Land and Housing Tribunal declared the respondent the legal owner of the suit plot and dismissed the allegation of forgery by the appellant.

Being dissatisfied, the appellant unsuccessful appealed to the High Court. Vide Misc. Land Application No. 125 of 2016, he obtained leave to appeal to the Court of Appeal and thereafter lodged a memorandum of appeal with four grounds of complaint as hereunder;

- "1. That, the High Court erred in law by failure to appreciate that the trial tribunal's decision was reached out while the tribunal was not properly constituted hence the same was nullity.*
- 2. That, the High Court erred in law by failure to appreciate that during the trial in the tribunal, the appellant was denied a right of fair hearing.*
- 3. That, the High Court erred in law by misapplying the principle of adverse inference which on the face*

of it ought to have been drawn against the respondent herein.

4. That, the High Court erred in law by affirming the trial tribunal's decision while the same decision was reached out of contradictory and unreliable evidence from the respondent's witnesses."

When the appeal came up for hearing, Mr. Atranus Method, learned advocate represented the appellant. The respondent had the services of Mr. Alfred Akaro, learned advocate.

In his submission the learned advocate for the appellant argued the first, third and fourth grounds of appeal. He abandoned the second ground. Making his submission in support of the first ground of appeal, the learned advocate submitted that at the trial the tribunal was not properly constituted as there is no opinion of assessors in the record. He said that, the absence of the assessors' opinion rendered the proceedings of the tribunal a nullity because the same were in effect, conducted without opinion of assessors. When asked by the Court to make reference to the original record, the learned advocate was quick and admitted that the opinion of assessors were there but the same were not read over in the presence of the parties:

He said, failure to read the opinion of assessors to the parties was fatal as parties were prejudiced.

With regards to the third ground, the learned counsel citing the case of **Azizi Abdallah v. Republic** [1991] TLR 71, submitted that the principle of adverse inference was wrongly invoked in the present case because the adverse inference was supposed to be drawn on the respondent's side for failure to call Agnes Enea, one among the persons who witnessed the sale agreement.

On the fourth ground of appeal, the learned counsel submitted that in the instant case, there are material discrepancies and contradictions in the evidence. He submitted that the contradictions observed was on the purchase price of the suit plot and on the actual date of the sale transaction. He pointed out that in some parts the evidence shows that the purchase price of the suit plot was Tshs 500,000/= and in other parts Tshs 1,200,000/=. He submitted further that the other contradictions was to the actual date of the sale transaction between 18.9.2002 and 16.10.2002.

Mr. Akaro, learned advocate, on his part, supported the decision of the High Court. He opposed the first ground of appeal stating that the same is baseless and unfounded. He submitted that the opinions of the

assessors in this case were given but the same were not read over to the parties. At any rate, such failure to read over the opinion did not prejudice the parties, he argued.

As to the third ground, the learned counsel submitted that the complaint to that effect is of no merit at all. He submitted that the principle of adverse inference was not wrongly invoked as alleged. He pointed out that as the appellant was the one who alleged fraud, he was duty bound to prove the same. In so doing, Agnes Enea was considered a material witness for the appellant. She was alleged to have witnessed the sale agreement. As she was not called to testify, the judge was proper in the circumstances to draw adverse inference, he argued.

As to the issue of contradictions and discrepancies on the purchase price and the actual date of sale of the suit plot, the learned advocate was of the view that there were no material contradictions. He maintained that in all places the purchase price was indicated to be Tshs 500,000/= and Tshs 1,200,000/= was to clear the debts of the deceased.

In rejoinder submission, Mr. Method reiterated what he submitted in chief.

We have carefully considered the evidence on record, the proceedings, as well as the arguments both in support and against the appeal. In determining the appeal, the first ground of appeal will not detain us. Failure to read the opinion of assessors to the parties is a new ground of complaint which was not raised and considered by the High Court. This Court in the case **Galus Kitaya v. Republic**, Criminal Appeal No 196 of 2015(unreported) was confronted with the issue whether it can decide on a matter not raised in and decided by the High Court on first appeal. It stated as follows:

*"on comparing grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, ground one to five are new grounds. As the court said in the case of **Nurdin Mussa Wailu v. Republic** (supra), the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal."*

On the basis of the preceding cited authority, it is therefore settled that this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by

neither the trial court nor the High Court on appeal. (See also, **Athumani Rashid v. Republic**, Criminal Appeal No. 26 of 2016 (unreported). On our part, we subscribe to the above decisions. After having looked at the record critically we find that, the first ground is new. As was stated in **Galus Kitaya v. Republic** and **Athumani Rashid v. Republic** (supra), we think that this ground being a new ground for having not been raised and decided by the first appellate court, we cannot look at it and determine the same. In other words, we have no jurisdiction to entertain it. We would have entertained it if it was a point of law.

With regard to the third ground of appeal, where the appellant is challenging the principle of adverse inference to have been wrongly invoked, we should be guided by the decision of this Court in **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported) where it was stated;

"...in civil cases, the burden of proof lies on the party who alleges anything in his favour..."

We have carefully gone through the record, there is no evidence to suggest that the burden of proof shifted. It was the appellant who alleged

fraud hence he was the one to prove the same. On that basis therefore, the third ground of appeal fails.

As to the fourth ground of appeal, we are in agreement with the submission of Mr. Akaro that in the whole proceedings there was no contradictions as the sale price was indicated to be Tshs 500,000/= and that the amount of Tshs 1,200,000/= had reasonable explanation that the same was for clearing the debt of the deceased. On that basis therefore, this ground of appeal is also without merit.

In the light of the above, this appeal is bound to fail. We therefore dismiss it with costs.

DATED at TANGA this 12th day of March, 2020.

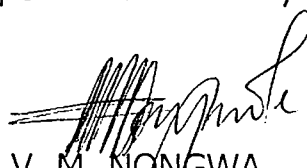
R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 8th day of April, 2020 in the presence of Ms Maria Baliyima learned Advocate for the Appellant and Mr. Erick Akaro learned Advocate of the Respondent is hereby certified as a true copy of the original.




V. M. NONGWA
Ag. DEPUTY REGISTRAR
COURT OF APPEAL