IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MUSOMA
AT MUSOMA
PC CIVIL APPEAL NO 18 OF 2021

KITENKENI RYOBA .....APPELLANT

VERSUS

JUMA ITUNDURA .....RESPONDENT

(Arising from Civil Appeal No 24/2020 of Bunda District Court. Original Civil Case No. 22/2020 of Mugeta Primary Court)

JUDGMENT

19th August & 16th September, 2021

Kahyoza, J.

This a second appeal. The matter commenced in the primary court where **Kitenkeni Ryoba** sued **Juma Itundura** claiming compensation of Tzs. 218,000/= being the value of his destroyed trees. Ryoba alleged that Itundura damaged his 5 guava trees. The primary court found that the damaged trees were planted on Itundura's land and dismissed the claim.

Aggrieved, Ryoba appealed to the District Court. The District Court uphold the decision of the primary court. Still aggrieved, Ryoba appealed to this Court. Itundura raised five grounds of appeal as follows;

1. That, trial court erred both in law and in fact in deciding the case in Respondent's favour while in fact the Respondent called no witness to prove that appellant's Guava trees destroyed by the respondent were in 5 acres of land awarded to the respondent by Ikizu primary court in Civil Case No. 109/2009 and in High Court Civil Appeal No. 137/2014 during execution of court's decree.

2. That, trial court went wrong in deciding the case in respondent's favour without visiting the *locus in quo* while in fact there was dispute whether or not guava trees in dispute were planted in five acres of land awarded to the respondent by the court or in appellant's land.
3. That, trial court erred both in law and in fact in dismissing appellants claim on ground that field Agriculture officer was not called to testify to verify valuation report while in fact the respondent did not dispute damages suffered by the appellant.
4. That, the lower court erred both in law and in fact in deciding the case in respondents favour while in fact the respondent did not dispute to destroyed appellant's Guava trees in dispute valued at Tshs. 218,400.
5. That, Appellate District Court erred in law in deciding the case on respondent's favour on ground that trial court had no jurisdiction to entertain the matter while in fact appellants claim against the respondent was compensation for damaged Guava trees and not land.

It is settled law that a second appellate court cannot entertain grounds of appeal not raised and considered by the first appellate court. See the case of **Simon Godson Macha** (Administrator of the late Godson Macha) v **Mary Kimaro** (Administrator of the late Kesia Zebadayo Tenga) Civil Appeal No 393/2019 **Juma Manjano v R**. Cr. Appeal No. 211/2009, **Sadick Marwa Kisase v. R**. Cr. App. No. 83/2012 and **George**

Mwanyingili V. R. Cr. App. No. 335/2016. In **Juma Manjano v R**. the Court held-

> *"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court. The record of appeal at page21 to 23 shows that this ground of appeal was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athumani v. R*** *[2004] TLR 151 the issue o 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 is therefore struck out."*
>
> *"the Court has repeatedly held that matters not raised at the first appellate court cannot be raised in the second appellate court"*

Ryoba, the appellant raised to this Court for the first time the issue of the trial court failed to visit the *locus in quo*. He did not raise it before the district court. I will not entertain that complaint which the appellant raised as the second ground of appeal.

I will now consider the first, third, fourth and fifth grounds of appeal jointly. Ryoba's complaint in the grounds of appeal is that the two courts erred to find that the damaged trees were planted on Itundura's land and that Ryoba did not prove the value of the trees.

It is trite law that the second appellate court *where there are concurrent findings of facts by two courts, the second appeal court should not disturb them unless it is clearly shown that there has been a misapprehension of evidencing a miscarriage of justice or violation of some principle of law or procedure.* See the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla tla Zanzibar Hotel** [1980] T.L.R 31.

In this case, the District Court and the primary court found in favour of Itundura that the land where the damaged trees were planted was adjudicate long time ago to be the property of Itundura, for the reason Ryoba had no colour of right to be compensated. Ryoba has failed to show either a misapprehension of evidence, or a miscarriage of justice or violation of some principle of law or procedure that would justify this Court to interfere with the concurrent findings of fact on issuance of notice on the increase of rental charges. I find no justification on the appellant's complaint at this second stage of appeal.

The record is clear that Ryoba and Itundura had a land dispute and according to Ryoba's witness, January Nyikingiru (Pw2) the land dispute lasted for over 20 years. Both parties agree that the land dispute went up to the High Court vide Pc. Civil Appeal No. 137/2004. The High Court declared Itundura the owner of the disputed land. I see no reason to vary the two courts' finding that Ryoba had no title over the land in question and therefore, that whatever is on that land is part of the land and is the property of Itundura. For that reason, Itundura cut his own trees and he cannot be judged for destroying his own trees.

Ryoba complained that Itundura called no witness to establish that the damaged trees were planted on his (Itundura) land. It is our cherished principle of law that, generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. See the case of ***Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)*** Civil Appeal No. 118 of 2014 CAT (Unreported) and ***Sections 110 and 111 of the law of Evidence Act, [Cap. R.E. 2002]***.

The record shows that Itundura's defence was that the trees and the land where the trees were planted on belonged to him. Itundura tendered the judgment of the High Court showing that the disputed land belonged to him. Ryoba's claim for the value of the destroyed trees, implied that he had title over the land where the damaged trees were planted on. A trespasser to someone's land cannot own trees on that land. Ryoba had therefore, a duty to prove that he had undisputed title over the land where the damaged trees were planted on. I did not find any such evidence. Ryoba failed miserably to establish that he had unquestionable title over the land to justify his claim for the value of the destroyed trees. I see no reason to interfere with the concurrent finds of the two courts.

Having found that Ryoba had no unquestionable title over the land on which the destroyed trees were planted on, I see no reason to consider whether Ryoba established the value of trees.

All in all, I wish to state that the primary court was right to hold that Ryoba should have summoned the field agriculture officer to testify. The field agriculture officer was the vital witness to establish and convince the

primary court how he arrived at Tzs. 218,000/= and not less or more. It was important also that the field agriculture officer is cross-examined to test his veracity. Thus, the primary court cannot be faulted in its holding. I wish to insist that even if the field agriculture officer was summoned to testify and established the value of the destroyed its tree that alone would not have given Ryoba the right to the claimed amount. Ryoba's right to compensation relied upon establishing that he (Ryoba) had unquestionable title over land. As shown above Ryoba had no unquestionable title over the land hence he cannot claim the value of the trees Itundura destroyed.

In the end, I uphold the decision of the District Court and the dismiss appeal for want of merit with costs.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

16/9/2021

Court: Judgment delivered in the presence of the parties in person. B/C Ms. Millinga Present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza
JUDGE
16/9/2021