

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 19 OF 2021

SIXTUS MATONDWA.....APPELLANT

VERSUS

1. FERNARD SIKAZWE

2. SAVERY MONELA

3. GRASIA PAULO



.....RESPONDENTS

JUDGMENT

13th November 2023 & 20th March, 2024

MRISHA, J.

This appeal by the appellant **Sixtus Matondwa**, has been brought to this court as a first bite. It emanates from the judgment and decree of the trial tribunal namely the District Land and Housing Tribunal for Rukwa at Sumbawanga which was handed down on the 13th day of July, 2021, in favour of the first respondent, Fernard Sikazwe.

Other persons sued by the appellant thereat included Savery Monela, Grasia Paul Monela, Godwin Mzurikwao and Devis Mwamnyange who

stood as the first, second, fourth and fifth respondents respectively. However, the fourth and fifth respondents are not part of the present appeal.

The dispute between the appellant and the above three respondents was about a piece of land estimated to be of about 260 acres and located at Nkutwe, Tonga Suburb area of Sopa Ward within the District of Kalambo in Rukwa Region.

It was the allegation of the appellant that the first appellant herein invaded that piece of land which he claimed to be his property due to the fact that he inherited it from his late father one Petro Musumeno who purchased it from one Remi Simsonga who is currently the deceased person.

Before the trial tribunal the appellant testified as indicated above, but he also informed the said tribunal that since the year 1987 when his late father bought the suit land, he had been using the same peacefully until in 2006 when the first respondent invaded it claiming that he purchased it from Savery Monela and Grasia Paul Monela, now the second and third respondents respectively.

To the other side, the first, second and third respondents who in the lower court stood as the third, first and second respondents respectively,

disputed those allegations by the appellant stating that the said suit land belongs to the now first respondent (who was the third by then) as it was purchased by him in 2006 through a sale agreement between him and the second respondent (who was the first respondent before the trial tribunal).

After a full trial, the trial tribunal found that the appellant had failed to discharged his legal duty of proving his claims against the respondents on the balance of probabilities on the reasons that first, the appellant's/ applicant's witnesses failed to tender in evidence any document in order to prove existence of a sale agreement between the appellant's late after and one Remmy Simsonga compared to the respondents whose evidence was supported by a sale agreement which was tendered during trial and admitted as exhibit P1.

The second reason was that the appellant/applicant failed to summon one Lemi Simsonga whom he claimed to have been the one who sold the suit land to his late father, in order to support his claim and because of those reasons, the trial tribunal decided that the appellant/applicant is not the lawful owner of the suit land and proceeded to declared the third respondent (now the first respondent) as the lawful owner of the

said suit land. Consequently, the appellant/applicant was order to pay costs of the suit.

Having being aggrieved by the above decision, the appellant filed a Petition of Appeal comprising of five grounds of grievance. They are:

1. That the Tribunal chairperson erred in law and fact in giving right over the disputed land to the 1st Respondent using a sale agreement between the 1st Respondent (buyer) and the 2nd Respondent (seller) dated 5/7/2006 and disregarded the sale agreement between the father of the Appellant one Petro Msumeno (deceased) and one Lemi Simsonga (deceased) dated 15/10/1987 and hence reaching to the wrong decision.
2. That the Tribunal chairperson erred in law and fact in deciding that the Appellant did not tender any exhibit proving the ownership of the said land while the Appellant tendered a sale agreement dated 15/10/1987 (annexture B) in the Application, between Petro Msumeno and Lemi Simsonga hence reaching to the wrong decision.
3. That the Tribunal chairperson erred in law and fact in deciding that the Appellant failed to summon Lemi Simsonga to testify for him

without considering that the said Lemi Simsongaa is a deceased person hence reaching to the wrong decision.

4. That the Tribunal chairperson erred in law and fact in giving right over the disputed land to the Respondent without considering the fact that the Appellant has stayed at the Disputed land since 1987 when the root of title is traced in lieu of the Respondents who claim ownership since 2006 and hence reaching to the wrong decision.
5. That the Tribunal chairperson erred in law and fact in giving right over a disputed land to the Respondent in disregarding completely the Appellant evidence and hence reaching to the wrong decision.

The manner in which the appeal was heard was through written submissions. This came as a result of the consensus between both parties that the instant appeal be heard by way of written submissions and luckily, both of them complied with an order of the court dated the 29th day of August, 2023 by filing the same as per the scheduled dates. Hence, this judgment.

The appellant had no legal representation whilst the respondent had it from Mr. Mathias Budodi, learned Advocate. Submitting in respect of his first ground of appeal, the appellant narrated that the trial chairperson

erred in law and in fact as she disregarded the sale agreement between the appellant's father one Petro Msumeno who is now the deceased, and one Remmy Simsonga, also the deceased, dated 15.10.1987 and upholding the sale agreement between the first respondent and the second respondent.

It was his argument that since his counterparts did not dispute the credibility of the sale agreement dated 15.10.1987, hence the said sale agreement cannot be superseded by the sale agreement dated 05.07.2006 unless there are two land disputes.

Regarding the second ground in which the trial chairperson is faulted for holding that the appellant did not tender the sale agreement dated 05.10.1987, the appellant submitted that the records of the trial tribunal particularly, the application form reveals clearly that a copy of the said sale agreement was annexed as Annexure B.

Stressing on the same ground, the appellant submitted that given the available trial tribunal proceedings, he was of the view that the court can draw an inference that so long as the sale agreement was attached with the application form and was relied upon by the appellant during trial, then the same forms part of the submission in chief on the part of the appellant.

His submission was supported by the case of **Bruno Wenceslaus Nyalifa vs The Permanent Secretary Ministry of Home Affairs and the Honourable Attorney General**, Criminal Appeal No. 82 of 2017 (unreported) which he referred to the court.

Coming to the third ground which carries the complaint that the trial tribunal's chairperson erred in law and in fact by holding that the appellant failed to summon one Remmy Simsonga as the seller of the disputed land, it was the submission of the appellant that the Application Form which he filed with the trial tribunal, shows at the first instance that both the seller and the buyer of the disputed land whom he mentioned as Remmy Simsonga and Petro Msumeno, are deceased persons. Hence, it could be a nonsense for him to argue contrary to what he had stated previously through the status of the said persons in his application form.

Also, through his fourth ground of appeal which is to the effect that the appellant has stayed at the disputed land for a long time since 1987 after the execution of the Sale Agreement, the appellant submitted that regardless the purported sale agreement of the two deceased persons, the long stay of the appellant at the disputed land form part of the ownership of the landed property by adverse possession. He referred

the case of **Rupiana Tundu and 3 Others vs Abdul Buddy and Halik Abdul**, Civil Case No. 115 of 2004 and the case of **Bhoke Kitang'ita vs Mkuru Mahemba**, Civil Case No. 222 of 2017, to back up his argumentation.

Finally, in the fifth ground it was alleged that the chairperson of the trial tribunal erred in law and in fact by disregarding the appellant's evidence and in lieu thereof, upheld the respondents' evidence which was not credible, cogent and which formed the weak and contradictory defence.

In challenging the evidence of the respondents, the appellant submitted that despite being aware that Remmy Simsonga is the deceased person, the second respondent did not testify before the trial tribunal that he is the administrator of that deceased person.

He further submitted that failure by the respondents to summon the wife and children of Remmy Simsonga to testify before the trial tribunal draws an inference that had those people being called, they could testify against the party who called them. He cemented that argument by citing the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113.

From the above submissions and authorities, the appellant humbly prayed that the court be pleased to set aside the judgment and decree of the trial tribunal, declare that the appellant is the lawful owner of the

disputed land, order the vacancy possession in favour of the appellant, order that costs to be borne by the respondent and make any other remedies as it will find fit and just to grant.

In responding to the above submissions, particularly on the first and second grounds of appeal which he opted to combine and argue together, Mr. Budodi submitted that the appellant had misled himself by submitting that the sale agreement of 15.10.1987 was tendered before the trial tribunal because it is revealed at pages 7 and 8 of the trial tribunal proceedings that the appellant did not tender the alleged document.

He made reference to the case of **Jica vs Khaki Complex Ltd** [2006] TLR 343 where it was principally stated that the court cannot rely on the evidence which is not part of record and the document which is not tendered remains an annexure hence it becomes a mere assertion.

The respondents' counsel also submitted that since the case of the appellant in the trial tribunal rested on proof of existence of the alleged sale agreement, his claim could not be proved in absence of a sale agreement. **The case of Aziz S. Masasi vs Emmanuel T. Makene** was referred to the court in support of the above proposition.

Another point from the respondents' counsel was that as a matter of law when two persons are competing over the interest on land, the one with title or documentary proof must win unless it is proved that the said document is fraudulently made, as it was held in the case of **Amina Maulid Ambali & 2 Others vs Ramadhan Juma**, Civil Appeal No. 35 of 2019, CAT at Mwanza (unreported).

Submitting against the third ground of appeal, Mr. Budodi contended that the main reason relied by the trial tribunal was the issue of absence of a sale agreement. Thus, the issue of material witness was complimentary to the main issue.

He alternatively, argued that in other words, even if the said Remmy Simsonga would have come to testify before the trial tribunal, but without tendering the sale agreement the same conclusion reached by the trial tribunal could not be changed.

In regards to the fourth ground of appeal, the respondents counsel submitted that that ground is a clear manifest of misapprehension of the principle of adverse possession because despite the fact that during trial the appellant did not prove the issue of adverse possession, he also did not prove that possession of the disputed land was due to abandonment of the same by the true owner, as it was stated in the case of **Idrissa**

Ramadhan Mbondera(Administrator of the estate of the late Ramadhan Ally Mbondera) vs Allan Mbaruku & Another, Civil Appeal No. 177 of 2020, CAT at Dar es Salaam.

Turning to ground five of the appellant's Petition of Appeal, Mr. Budodi submitted that his clients join hands with the findings of the trial tribunal's chairperson that on the balance of probabilities, the respondents' evidence was heavier than that of the appellant due to the following reasons: -

- i. The respondents' witnesses were able to describe the land in dispute and its boundaries unlike the appellant's case whose witnesses' evidence were shod and failed to describe the boundaries of the land in dispute which is contrary to the principle established in the case of **Ernest Munishi vs St,. Mary's International Academy Ltd & Others**, Land Case No. 30 of 2019, HCT at Dar es Salaam (unreported).
- ii. The respondent managed to bring witness who was bordering the land in dispute and his evidence managed to establish that the respondent is the owner of the land in dispute.
- iii. The appellant called a witness who testified to be a witness of the document (sale agreement); however, the same was not tendered

before the trial tribunal thus his evidence was not supportive to his allegations.

- iv. The respondents' witnesses managed to prove by documentary evidence that the first respondent acquired the land in dispute by way of purchase.

It was due to the above reasons and submission that the counsel for the respondents humbly submitted that this appeal has no merits as the appellant in the trial tribunal failed to prove his case to the required standard and, on the basis of the arguments and authorities cited above, it was the respondents' prayer that the appeal be dismissed with costs for want of merit.

Those were the submissions and authorities which I have passed through and considered. Now the court's determination regarding the present appeal. As it has been indicated above, there are five grounds of appeal in which the appellant has come up with in order to challenge the judgment and decree of the trial tribunal.

Having gone read and considered all such grounds, it is my settled view that the instant appeal can only be disposed of by the first, second and third grounds of appeal. This is because in the fourth ground, the appellant is faulting the honourable learned chairperson for not

considering the issue of adverse possession, but my careful perusal on the typed proceedings of the trial tribunal shows that that issue was neither raised by the appellant at the hearing of his application before the trial tribunal, nor was it determined by the said tribunal.

It is the trite law that matters which were not raised at the lower court and decided by the lower court cannot be dealt with by the appellate court; see **Seifu Mohamed Seifu vs. Zena Jaribu**, Misc. Land Case No. 84 of 2021, High Court Land Division(unreported) and **Hassan Bundala @Swaga vs Republic**, Criminal Appeal No. 386 of 2015 (unreported).

In the latter case, the Court of Appeal had the following to say: -

"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided and not on new matters which were not raised or decided by neither trial court."

Although the above case was at the Court of Appeal level and it was about a Criminal Appeal case, it is no doubt that the principle stated therein is indeed applicable to other appellate courts including the High Court and it also applies to civil appeals as the one at hand.

Guided by the above principle of law, I am of the considered opinion that since it is ostensibly clear that the issue of adverse possession or the long occupation of the disputed land by the appellant was neither raised at the trial tribunal, nor was it decided by the said tribunal, there is no way for the same to be dealt with by this first appellate court. This is why I constrained to refrain from determining the merits or otherwise of the fourth ground of appeal.

Likewise, in the fifth ground of appeal in which the appellant has complained that the learned trial chairperson erred in law and fact in giving right over a disputed land to the third respondent and disregarded completely the appellant's evidence, it is my settled view that the appellant has misdirected himself on that complaint.

I am certain to say so because looking on the impugned typed judgement of the trial tribunal particularly from page 6 to page 7, it is crystal clear that the honourable chairperson of the said tribunal considered the evidence adduced by both parties before reaching to her decision which is the subject of the present appeal. That alone suffices to make this court find that the applicant's complaint contained in the fifth ground of appeal is without merit.

Back to the other grounds of appeal, I propose to address them seriatim. In the first ground, the appellant has complained that the honourable learned chairperson of the trial tribunal erred in law and fact by giving right to over the disputed land to the first respondent (who then was the third respondent) using a sale agreement between the first respondent and the second respondent and disregarded the sale agreement between the appellant's father one Petro Msumeno and one Lemi Simsonga dated 15.10.1987.

In his submission in chief, the appellant has argued that the sale agreement between the first and second respondents cannot supersede the one made between his late father and one Lemi Msumeno. He has also submitted that the fact that the said sale agreement was not tendered during trial, cannot be a ground to disregard such agreement because the same was attached by him with his application form, as Annexure B when instituting Application No. 07 of 2019 with the trial tribunal. He has referred the court to the case of **Bruno Wenceslaus Nyalifa** (supra) to back up his argumentation.

On the other hand, the respondents' counsel has contended that since the proceedings of the trial tribunal are silent as to whether the alleged sale agreement dated 15.10.1987 was tendered by the appellant during

trial, then that is contrary to the cardinal principle of law which is to the effect that the court cannot rely on the evidence which is not part of record and that the document which is not tendered remains an annexure hence remain merely unproven assertion.

He has made reference to the case of **Jica Khaki Complex Ltd** (supra) to support his proposition. If the above is not enough, the counsel for the respondents has submitted that since the appellant's case relied solely on proof of existence of alleged sale agreement, then he was duty bound to prove his case on the balance of probabilities.

The learned counsel has also submitted that principally when two persons are competing over the interest on land, the one with title or documentary proof must win, unless it is proved that the said document is fraudulently made, as it was held in the case of **Amina Maulid Ambali** (supra).

From the above rival submissions, two immediate issues come to the fore; first whether the trial tribunal was right when it held that the appellant failed to tender the sale agreement between his late father and one Lemi Simsonga, and the second issue is whether the appellant failed to discharged his legal duty as far as civil claims are concerned.

Starting with the first issue, there is not doubt that the appellant did not tender the alleged sale agreement between his late father and one Lemi Msumeno during trial. However, it is not in disputed that the same was attached by his as Annexure B in the Applicated form. Also, when adducing his evidence before the trial tribunal the appellant who was the applicant in Application No. 7 of 2019, told the trial tribunal that his father bought the disputed land in 1987.

Not only that, but also when cross examined by the respondents' counsel, he unhesitant responded that there is a sale agreement showing that his father purchased the suit land. All that can be gleaned from pages 7 and 8 of the typed proceedings of the trial tribunal. However, it appears to me that despite disclosing the fact that there was such sale agreement, neither the appellant, nor his counsel prayend to tender the same for it to be admitted as an exhibit.

This is why the counsel for the respondents has argued that there is want of proof of existence of the same documentary evidence on the part of the appellant. I had enough time to read the impugned judgment of the trial tribunal. At page 2, the honourable chairperson of the said tribunal wrote the following: -

"Wakati wa usikilizwaji wa shauri hili wajibu maombi walikuwa na uwakilishi wa wakili msomi Mr. Deogratias Sanga na Mleta maombi aliwakilishwa na Wakili Msomi James Lubusi"

In a literal translation, the above excerpt reveals that when the Application No. 7 of 2019 was called on for hearing, the respondents had the legal services of Mr. Deogratias Sanga, learned advocate whereas the appellant/applicant was represented by Mr. James Lubusi, also learned advocate.

If that was the case, it means the appellant was led by his advocate throughout the hearing of his application before the trial tribunal. In the circumstance, one would have expected his advocate, being a trained mind, to assist him properly so that he could urge the trial tribunal to admit the sale agreement between his late father and one Lemi Msumemo. Had that been done, the appellant could have made his case against the respondents properly, and his argument that the sale agreement tendered by the first respondent and admitted by the trial tribunal as Exhibit P1, could have hold water.

However, it is unfortunate that the above well-known procedure of tendering documentary evidence was not complied with by the appellant thereby leaving his oral evidence unsupported by such important

documentary evidence. In the circumstance, I agree with the respondents' counsel that it could be hard for the trial tribunal to rely on the evidence which is not part of the record.

Concerning the case of **Bruno Wenceslaus Nyalifa** (supra) relied by the applicant in his submission, I am unable to find its proper application here because the circumstances of that case are distinguishable to the ones in the present case.

This is because in that case the application the subject of appeal before the Court of Appeal, was made by way of chamber summons supported by the applicant's affidavit and the respondents filed their counter affidavits, but in the application before the trial tribunal being a land case, was made by an application form and neither affidavit, nor did the respondents file their counter affidavits. In the circumstances, it is obvious that the authority cited by the applicant in his respective written submission has no room in the present case. I would therefore, answer the first issue in the affirmative.

Coming to the second question which is whether the appellant failed to discharge his legal duty as far as civil claims are concerned, it is a trite law that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, he

must prove that those facts exist; see **Standard Chartered Bank (T) Ltd vs Samwel Nyalla Nghuni**, Civil Appeal No. 45 of 2020, CAT at Mwanza (unreported).

As stated above, the appellant's submission indicates that the suit land was purchased by his late father from one Lemi Simsonga and that the said sale was reduced into writing. That being the case, and given the above principle of law, it was the duty of the appellant to prove existence of such sale agreement before the trial tribunal.

However, as I have pointed above, the appellant failed to do so compared to the first respondent who successfully tendered a sale agreement between him and the second respondent.

Hence, based on the principle of law stated above which is also paraphrased under section 110 (2) of the Evidence Act, Cap 6 R.E 2019, I am of the settled view that the appellant failed to discharge his legal duty of proving his case against the respondents on the standard required by the law. The second issued is therefore answered in the affirmative.

The above discussion and the reasons assigned thereto makes the court to find merit in the first ground of appeal. This takes me to the second ground of appeal which I also find to be meritorious. This is because

while dealing with the first issue, I pointed out that the appellant failed to comply with the procedure of tendering documentary evidence and the honourable chairperson was justified to find out that failure by the appellant/applicant to tender the sale agreement dated 15.10.1987 amounted to his failure to prove his case against the respondents on the balance of probabilities.

The last for my determination is the third ground of appeal in which the appellant has complained that the Tribunal chairperson erred in law and fact in deciding that the Appellant failed to summon Lemi Simsonga to testify for him without considering that the said Lemi Simsonga is a deceased person hence reaching to the wrong decision.

This ground cannot detain the court in determining it. It is on record that the said person had passed away long time ago. In other words, he is currently the deceased person, just as the appellant's late father who is alleged to have sold the disputed land to the former. In the circumstances, it was not right for the honourable chairperson to throw a ball to the appellant for not summoning a person whom it is apparent that he is no longer alive. I would therefore find merit only on that ground.

However, in the totality of the foregoing reasons, it is my finding that the present appeal has no merits. Consequently, the same is dismissed with costs.

Order accordingly.


A.A. MRISHA
JUDGE
20.03.2024

DATED at **SUMBAWANGA** this 20th day of March, 2024.




A.A. MRISHA
JUDGE
20.03.2024