

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO 109 OF 2020

BETWEEN

ALLY NYAMBWALA _____ **APPELLANT**

VERSUS

EMMANUEL WARIOBA _____ **RESPONDENT**

(Arising from the decision and orders of the District Land and Housing Tribunal for Tarime at Tarime Hon. Ngukulike, Chairman, in Land Appeal no 76 of 2019 dated 22.05.2020).

JUDGEMENT

11th December 2020 & 22nd January 2021

GALEBA, J.

This appeal is in respect of a piece of land located at Nyarombo village within Nyamtinga ward in Rorya district. The land was subject of litigation in civil case no 30 of 2019 at Nyamtinga ward tribunal where the respondent was declared the lawful owner of the land. The appellant appealed to the District Land and Housing Tribunal for Tarime (the DLHT), but still he lost. This is therefore an appeal seeking to challenge two concurrent decisions of both tribunals below.

The dispute between the parties is ownership of the land where the appellant's account is that the land was allocated to him in 1975 by Nyarombo village land allocation committee and the respondent's position

is that he was granted the land by his father during the latter's lifetime in 1972. As stated above, both tribunals below believed the evidence of the respondent and declared him the lawful owner of the land.

In this appeal the appellant raised 3 grounds of appeal but he abandoned the 3rd and retained two grounds which may be paraphrased as follows; *firstly*, that the appellate tribunal erred by disregarding the decision of the village land council and other evidence which proved that he was allocated the land in 1975 and developed it up to 2019 which is almost 45 years and *secondly*, that the appellate tribunal erred for failure to determine that the trial tribunal totally disregarded the law of evidence when it went to visit the *locus in qou* by denying the appellant a right to cross examine the hamlet chairperson.

This appeal was argued by way of written submissions and the appellant was represented by Mr. Emmanuel Gervas, learned advocate. In arguing the 1st ground of appeal Mr. Gervas submitted on one point that the appellant's evidence was more credible than that of the respondent and therefore the appellate tribunal was supposed to note that aspect of the trial and set aside the judgment of the ward tribunal. Counsel relied heavily on the evidence of **PW2 Vitalis Aduwe**, who testified that he was

in the village land allocation sub-committee and that he participated in allocating the land to the appellant. When asked as to whether they were allocating the land in writing or orally, when responding to the respondents questions 5, 6 and 7 he testified that the land was allocated to the appellant both in writing and orally and that there were documents to that effect but the documents were in office. The documents were not tendered. He argued also that the respondent would not have inherited the land from his father in 1972 while the latter was alive.

In reply to that ground Ms. Pilly Otaigo Marwa learned advocate who prepared the submissions for the respondent submitted that, proof of the appellant in the ward tribunal as to ownership of the land was wanting citing **section 119 of the Evidence Act [Cap 6 RE 2019]** that whoever alleges that he owns anything, has an obligation to prove that fact.

In deciding this ground this or the other way, this court will be guided by the principal of law that on a second appeal this cannot disturb two concurrent findings of two lower courts or tribunals unless the decisions are clearly unreasonable or they are a result of a complete misapprehension of the substance of the case or that both tribunals or courts completely misdirected themselves on the evidence or that there is a

clear violation of some principle of law or procedure which must have occasioned a miscarriage of justice. Short of that, this court cannot undo two agreeing findings of the lower tribunals including the trial tribunal which had the advantage of hearing all witnesses *viva voce* and assessed their demeanor and credibility at close range. This stand is not a creation of this court; it is the position of the Court of Appeal of Tanzania which all courts in this country must embrace; see the cases of **Salum Mhando v R [1993] TLR 170** and **Wankuru Mwita v the Republic**, Criminal Appeal no 219 of 2012 (unreported). For instance in **Wankuru Mwita** the Court of Appeal held that;

"...The law is well settled that on a second appeal, the court will not readily disturb the concurrent findings of the facts by the trial court and the first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

In other words, this court can only disagree with the concurrent findings of the two tribunals below, if in the submissions of the appellant it was demonstrated that there are legal defects and mischiefs referred to in the decision of **Wankuru Mwita** above. In this case, I mean in the submissions of counsel in support of the 1st ground, this court hardly found

any such problems with the two judgments. In this case however, there was no evidence that was shown to have been misunderstood and there was no principle of law, substantive or procedural, which was exhibited to have been offended or violated. Generally there was nothing to suggest that one or both the tribunals failed to comprehend the substance of the case leading to an unjust decision. In the circumstances, the first ground of appeal has no merit, it is dismissed.

As for the 2nd ground, Mr. Gervas argued that one of the witnesses, a hamlet chairman who attended at the *locus in quo*, was not cross examined by the appellant because the trial tribunal did not give the appellant the chance to do that. In reply, Ms. Pilly Otaigo Marwa was dismissive of that complaint because, the complaint was not raised or argued in the appellate tribunal. There are two points to note with that ground of appeal, **first** the complaint is seeking to challenge the decision or simply to challenge what was done by the ward tribunal and **secondly**, as stated by Ms. Marwa that the complaint was not raised in the DLHT, so this court has no mandate to resolve it. I must be emphatic that this court admits and handles appeals from courts of resident magistrates, district courts and other decision making bodies like the Commission for Mediation and Arbitration, tribunals like the DLHT and any other judicial bodies as

may be permitted by law. This court does not admit, hear or resolve appeals or grounds seeking to challenge decisions of ward tribunals. In other words, a complaint against what transpired in the ward tribunal cannot be resolved by the high court, it can be determined by the DLHT. That means, the issue that the ward tribunal did not accord the appellant a right to cross examine this or the other witness, falls within the domain of the DLHT and not this court. To be legal, this court has no jurisdiction to determine any ground of appeal challenging a decision of the ward tribunal.

In the same vein this court also agrees with Ms. Marwa that a point not raised in the DLHT cannot be raised or argued in the high court. As stated above, when the appellant lost in the ward tribunal, he filed an appeal to the DLHT. In that appeal he raised 4 grounds of appeal but none of them was complaining that the appellant was denied a right to cross examine the hamlet chairman. In respect of that issue, in the case of **Hassan Bundala Swaga v Republic**, Criminal Appeal no 416 of 2014 (unreported), it was held that;

'It is now settled law that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were

decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal.'

That said the 2nd ground of appeal, like the 1st fails.

Based on the above reasons this court upholds the decision of both the Nyamtinga Ward Tribunal and that of the District Land and Housing Tribunal at Tarime. This court further dismisses this appeal in its entirety with costs, but the appellant has a right to appeal to the Court of Appeal of Tanzania according to law.

DATED at MUSOMA this 22nd January 2021



Z. N. Galeba
JUDGE
22.01.2021

This judgment has been delivered in the presence of the both parties who have also been given copies of the judgment and decree today 22.01.2021.



Z. N. Galeba
JUDGE
22.01.2021