IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

MISC. LAND CASE APPEAL NO. 10 OF 2006

(Originating from the District Land and Housing Tribunal or Dodoma in Land Appeal NO. 6/2006))

MOLLEN MNDEWA.....APPELLANT

VERSUS

LAMECK NDAHANI .....RESPONDENT

06/09/2021 & 17/09/2021

JUDGEMENT

KAGOMBA, J

This is a second appeal by MOLLEN MNDEWA (the 'Appellant') who is aggrieved by the decision of the District Land and Housing Tribunal for Dodoma at Dodoma (hereiafter referred to as 'Dodoma DLHT') in Land Appeal No.6 of 2006. The Appellant had previously appealed to Dodoma DLHT against the decision of Makutupora Ward Tribunal. In both previous appeals LAMECK NDAHANI (the "Respondent") emerged victorious.

The Dodoma DLHT visited the *locus in quo* and found that the piece of land in dispute belongs to the Respondent as it was previously held by the Ward Tribunal. As such there is a concurrent finding of the two lower tribunals that the Respondent is the owner of the suit land.

In this Court the Appellant filed a Petition of Appeal with four (4) grounds of appeal. She stated in her grounds of appeal that the Dodoma DLHT erred in law and fact by ruling that *ex-parte* hearing at Makutupora Ward Tribunal was lawful; by not giving the Appellant notice of date and time for the visit to *locus in quo*; by not considering the fact that the secretary of the Ward Tribunal participated in deciding the matter while he was a member of the village land council at Veyula, and by ordering eviction of the Appellant without notify her. She thus prayed this Court to allow the appeal with costs and quash the decision of the Dodoma DLHT.

On the date of hearing the Appellant appeared in person while the Respondent enjoyed the service of Mr. Paul Nyangarika, learned advocate. The Appellant informed the Court that she bought the suit land at Veyula area in Dodoma from the Respondent's mother, one Darasarai Ndahani in 1994. She said during the sale the Respondent was a witness.

Regarding the first ground of appeal, she submitted that she was in maternity leave when demolition of her house was done.

On the second ground she submitted that the Respondent had agreed with her husband that the Respondent will notify the Appellant about the date the Dodoma DLHT will be visiting the suit land. However, she said, the Respondent did not notify her but proceeded alone when the Dodoma DLHT made the visit.

On the third ground of appeal, the Appellant submitted that the Secretary of the Ward Tribunal was involved in drafting the sale agreement when the Appellant was buying the suit land from Respondent's mother. That, the seller Darasarai Ndhahani was a mother-in-law to the Secretary of the Ward Tribunal. She further submitted that despite the earlier decisions being made against the Respondent, who was fined for denying the Appellant right of way, the Secretary who is the Respondent's brother-in-law decided to take the matter to some other authorities and cooked records to show that the Appellant did not enter appearance while she in fact attended.

On the fourth ground of appeal, the Appellant submitted that during eviction from her hut in 2006 she was not given prior notification before the demolition was done.

Based on the above stated grounds, the Appellant prayed the Court to allow the appeal and order that the suit land be returned to her.

Mr. Nyangarika responding on behalf of the Respondent submitted that records of the Makutopora Ward Tribunal show that the Appellant was served three times with summons to appear but refused to do so deliberately. He challenged the argument that the Appellant was on maternity leave, saying the same has not been proved. He submitted that it was for such reasons the matter was thus determined *ex-parte*.

Regarding the second ground of appeal that the Respondent did not inform the Appellant about the date the Dodoma DLHT was to visit the suit land, Mr. Nyangarika said that this ground was also not proved by the Appellant. He expressed his view that the Appellant committed one mistake, that instead of applying to set aside the *ex-parte* judgment of the Ward Tribunal, she decided to appeal to Dodoma DLHT. He went on submitting that the Dodoma DLHT unfortunately did not see this procedural shortfall. In this respect Mr. Nyangarika referred this Court to the case of **YARA TANZANAI LTD VS D. B. SHAPRIYA & CO. LTD.,** Civil Appeal No. 245 of 2018 where the Court of Appeal guided that one has to exhaust available remedies before preferring an appeal.

It was Mr. Nyangarika's further submission that the Ward Tribunal made a good decision based on evidence adduced *ex-parte*. He said, the Dodoma DLHT equally made a good decision after analyzing the evidence on record on each ground of appeal. He further submitted that both tribunals considered the available evidence in their respective judgments. He said the complaints by the Appellant needed evidence, which was unfortunately not adduced by her as she was absent.

On the other hand, Mr. Nyangarika reckoned that the present land dispute between the parties had been ongoing for very long time since 2006 when the Appellant was being represented by an advocate. He said it is now 15 years when the matter is resurfacing. He said there is no evidence in Court that the Appellant bought the land in dispute. He argued that the long silence of the Appellant implied that she had acquiesced with the ownership of the dispute land by the Respondent. Mr. Nyangarika offered a piece of advice to the Appellant that if she wanted to go further in this matter, she had to first deal with procedures for setting aside the ex-parte judgment of the Makutupora Ward Tribunal. He concluded his submission by praying for dismissal of the appeal for impropriety so that the Appellant can follow proper procedure in the interest of the law and justice.

In her rejoinder the Appellant submitted that the Respondent is her close relative and both live in the same village and as such the Respondent knows the Appellant was on maternity leave. She also submitted that when her butchery was being demolished, she was not notified.

Regarding the advice made by the Respondent's advocate, she submitted that the advocate was to advise her during that time and not now. She said that an order for retrial will not help her as she cannot get justice in the lower tribunals. She urged this Court to give her right.

After reflecting on the parties' submissions, it is my view that there is one issue for my determination. The issue is whether the appeal has merit. As I stated in the first sentence of this judgment this is a second appeal. Before this Court, two lower tribunals found in favour of the Respondent. It is trite law that on a second appeal, the Court is only supposed to deal with the question of law. Such was the holding of the court in **DIRECTOR OF PUBLIC PROSECUTIONS VS JAFFARI MFAUME KAWAWA [1981] T.L.R. 149** and in numerous other decisions of this Court and the Court of Appeal. Further, this being the second appellate court, it is not expected to make its own finding of fact except if the findings of the lower tribunals were based on incorrect appreciation of evidence or if both lower courts completely misapprehended the substance, nature and quality of the evidence. (see ***Salum Bugu V. Mariam Kibwana, (CAT) Civil Appeal No. 29 of 1992 (unreported)*** **as well as Shabani Daudi Vs. The Republic,** Unreported Criminal Appeal No. 28 of 2001 **(unreported).** As it was correctly submitted by the learned counsel for the Respondent both the Makutupora Ward Tribunal and the Dodoma DLHT heard the matter *ex-parte* by considering the evidence adduced by the Respondent. As such the justice output rightly relied on its input.

I have noted from records, that both tribunals visited *locus in quo* and came up with a common finding that the suit land in fact belonged to the Respondent. I must confess that during hearing of the appeal it came unto my mind that the Appellant could have a point worth considering, especially her absence on maternity leave. However, there is no evidence whatsoever that she had delivered a baby and was on maternity leave. What this Court

has is the records of the lower tribunals which despite my thorough perusal the same do not show that the Appellant proved what she was submitting. She could for once be forgiven because the matter was determined *ex-parte*. However, if it was a fact that she had delivered a child and was in fact on maternity leave, the best she could do was to use her labour evidence to set aside the *ex-parte* judgment of the Ward Tribunal. As correctly submitted by Mr. Nyangarika, the Appellant's case suffered a heavy blow when she preferred an appeal to Dodoma DLHT instead of applying to set aside the impugned *ex-parte* judgment of the Makutupora Ward Tribunal. The cited case of **YARA TANZANIA LTD Vs DB SHAPRIAY & CO. LTD. (Supra)** discussed an important procedure and provided important guidance on the need to exhaust available remedies before preferring appeals. Indeed, this is where the Appellant unfortunately missed the road to justice.

This being a court of law, its decisions are to be based on nothing but evidence adduced and the applicable law as interpreted by the Court. The Dodoma DLHT found that the Appellant had failed to prove that she was on maternity leave. I cannot fault that finding and the decision made thereon since there is no evidence to show that the Appellant could not attend trial of her case at the Ward Tribunal because of she was on maternity leave.

I have tried to look for merits by reading all the grounds of appeal. I have reviewed those grounds as were submitted before the Dodoma DLHT and the way they were determined. Again, I cannot fault the Tribunal because it based its decision on the evidence available on record. Since the Appellant was absent during hearing at the trial tribunal, her evidence could

not be on record. She could have a chance to adduce her evidence if she had applied to set aside the *ex-parte* judgement of the Ward Tribunal for hearing of the case to proceed inter-partes.

The second ground of appeal that the Dodoma DLHT did not notify the Appellant on the date and time of its visit to *locus in quo* could be meritorious. However, as submitted by Mr. Nyagarika this ground was also not proved. This Court has been left with words of the Appellant against the words of the Respondent. It is trite law that he who alleges must prove. The Appellant has just made an allegation that the Respondent promised to notify her on the said visit but did not keep the promise. This allegation has not been proved. It is therefore disregarded.

On participation of the Secretary of the Ward Tribunal in determining the matter in which he was member when the matter was with the Village Land Council at Veyula, all what I have seen is a signature of the secretary of the village land committee in the Judgement of the Land Case No. 2/2005 between **VEYULA VILLAGE EXECUTIVE OFFICER VS. MNYASA MARWA AND LAMECK NDAHANI**. The name of the Secretary here is JACOB KASUPA. In this case however, the Appellant was not a party. I have not seen as record, or received evidence from the Appellant on how the Secretary participated in decision making in the Ward Tribunal and in village Council as alleged. Again, this third ground of appeal is found to have no merit.

The fourth ground is about demolition of Appellant's hut/butcher without notice. This ground like the previous one has not been proved. On further reflection, the Appellant has not said who did the demolition so as to allocate appropriate blame to him. The court has not been assisted by the submission of the Appellant who did not state when the demolition was done and who ordered it. At this stage of the case, this court cannot even ascertain if demolition was done at all. Without proper details as to who conducted the demolition under whose order when why this court has been availed with just an allegation. In the final analysis, I find no merit in all four grounds of appeal. As such my decision is to dismiss it with cost.

It is ordered accordingly.

ABDI S. KAGOMBA

JUDGE

17/09/2021