

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA
MISC. LAND APPEAL NO. 15 OF 2017**

*[Appeal from the Decision of Chato District Land and Housing Tribunal in Land
Appeal No. 1 of 2015 which originated from Ruziba Ward Tribunal]*

GERVAS SIMON APPELLANT

VERSUS

ABDILLAHIM MOHAMED RESPONDENT

JUDGMENT

16th October 2018 & 10th January, 2019

M.M. SIYANI, J.

On 29th Novmeber 2016, Gervas Simon, the Appellant herein being aggrieved by the decision of the District Land and Housing Tribunal for Chato which upheld the decision of Ruziba ward tribunal declaring the Respondent one Abdillahim Mohamed the owner of the disputed piece of land, preferred this Appeal which contains seven (7) grounds of complaint as follows:

- 1. That the alleged sale agreements of the land dated 03.07.2002 and 29.10.2002 bore a forged signature of the*

appellant since the said appellant was by then away to Kelebe Island in Muleba District.

- 2. That the alleged witness for the Plaintiff who were village leaders did not affix their official stamps to the sale agreements.*
- 3. That the alleged sale agreements did not bear stamp duty.*
- 4. That the Ward Tribunal of Ruzuba Ward erred in proceeding to hear and conclude the case without joining a necessary party one Anthony Simon who dubiously sold part of the land under dispute to the respondent.*
- 5. That the Ward Tribunal terrorized DW2 in the middle of his testimony to the prejudice of the appellant.*
- 6. That the trial Ward Tribunal erred in law in not recording evidence of the appellant's witnesses who were present when the Ward Tribunal visited the locus in quo and took notices.*
- 7. That the appellate Chairman misapprehended the evidence and as a result differed with the gentle assessors.*

Briefly and as noted earlier, parties herein are disputing over a piece of land located in Ruziba village in Biharamulo District. While the respondent claims that he purchased the disputed land in 2002, the appellant contends that having been allocated the same land by his father way back in 1985, he left Ruziba for Kelebe Muleba where he stayed for years. Upon his return in 2013, he found the respondent

cultivating the same. Although the appellant indicated through his testimony that he referred the matter to the village authorities which decided in his favour, the record indicates that it was the respondent who filed a suit (which is subject of this appeal) at Ruziba Ward Tribunal against the appellant for unlawful trespass on the disputed area. The matter was resolved in the respondent's favour who was declared the lawful owner of the disputed land.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal Chato. He lost again as the 1st appellate Tribunal upheld the ward tribunal's decision. This is therefore the appellant's second attempt to challenge the complained decision from Ruziba ward Tribunal. When the matter came for hearing on 16th October 2018, the appellant who was unrepresented prayed to dispose the appeal by way of filling of written submissions. There was no objection from counsel Merchades Rusasa who represented the respondent. As such I therefore allowed parties to file their respective written submissions.

In his written submission the appellant conceded that he left his piece of land unattended from 1990 to 2013 and when he returned after 23 years he found his land has been sold to the respondent by his brother.

It was his submission that the purported sale contained a forged signature as he was at Kerebi at the time of the sale. He went on to submit that even the sale agreement itself did not contain the seal of the village executive officer or any leader among those procured by the respondent as his witnesses during trial. The appellant was of the view that failure to affix a stamp duty amounted to economic sabotage for depriving the concerned authority of its fee.

On failure by the trial tribunal to join the seller of the land as a necessary party, it was contended that since there was no dispute that Anthony Simon was the one who sold the land to the respondent then he ought to have been joined as a party to the suit. In his further arguments, the appellant complained of the intimidation done to DW2 by refusing to record DW2's testimony following ringing of his phone while in the process of testifying. It was argued that the trial tribunal could have simply impose other penal sanctions to him rather not recording his testimonies.

The appellant contended that there was failure of justice occasioned by the trial ward Tribunal by declaring the respondent the rightful owner of the land which was matrimonial asserts and no consent was obtained

from the spouse when disposing it as required by section 59 (1) of the Law of Marriage Act Cap 29 RE 2002 and section 112 of the Land Act. The appellant referred the case of **Baclays Bank Plc Vs O'Brien and Another** (1993) 4 all ER 417 in support of his arguments.

In his conclusion the appellant believed the 1st appellate Tribunal misapprehended evidence when it differed with the gentle assessors by basing its decision on the tribunal records which were full of weakness such as failure to consider defense of alibi, refusing to record DW2's evidence, lack of seal in the sale agreements, presence of different signatures in the sale agreements and failure to record the appellant's evidence at the locus in quo.

In reply, the respondent through counsel Rusasa submitted that the trial Tribunal correctly declared that there was no forgery in the sale agreement dated 3rd July 2002 and 29th July 2002 because the appellant himself participated in the sale of the disputed land in presence of the village leaders and neighbors who were all procured and testified before the ward Tribunal. It was contended that should there be forgery those ought to be criminal issues subject of Police criminal investigation. As such the respondent believed that upon according both

parties chances to present their evidences, the ward tribunal correctly placed the ownership of land at issue to him. It was the respondent's submission that no injustice was occasion to either of the parties as the testimonies of all witnesses were taken into account in the final decision.

As to non-joinder of the alleged seller of the land, the respondent submitted that Anthony Simon who appears to be the appellant's brother, witnessed a sale agreement dated 3rd July 2002 and which was not disputed, therefore he couldn't have been joined in a suit which he was not a party. Regarding failure to affix a stamp duty in the sale agreement, it was argued that the same did not invalidate it neither was it a prerequisite for a valid contract.

Those in brief were the submissions from both parties. I wish to be very brief as well. First it should be known that this is the second appellate court which should be enjoined only to deal with matters pleaded and decided by the lower courts or tribunal. Indeed I have gone through the records of the ward and District Land and Housing Tribunal. With due respect to appellant, while the first ground of appeal cover issues of facts on whether or not the sale agreement contained forged signature,

the rest of the grounds stipulated in the petition of appeal, were not raised in the two tribunals below.

As noted the appellant alleged through the first ground of appeal that his signature was forged as he was away when the contract was concluded in 2002. This in my considered opinion is a question of facts which should only be entertained by the second appellate court where facts has been misapprehended leading to miscarriage of justice. Being a second appellate forum, this Court can only be enjoined to consider matter of laws. In **In Amratlal D.M t/a Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31 the Court stated the following in relation to what the second appellate Court should do:

The rule is that an appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice.

Again in **Joseph Leko V R** Criminal Appeal No. 124/2013 the Court of Appeal of Tanzania observed the following in similar issue:

A rule of practice established by case law in respect of second appeals is that an appellate court should not interfere with

findings of facts by the courts below unless the evaluation of evidence was not done properly hence resulting in a miscarriage of justice to the accused person or there occurred a violation of principle of law or procedure.

As to the remaining grounds of appeal, neither of them were raised in the 1st appellate tribunal. A settled position of law in our country is that a ground not raised in the 1st appellate Court cannot therefore be raised in a 2nd appellate Court. In **Seleman Rashid @ Daha Vs Republic** Criminal Appeal No. 190 of 2010 and **Bihani Nyankongo & Another Vs Republic** Criminal Appeal No.182 of 2011 (both unreported) the Court of Appeal of Tanzania held the following:

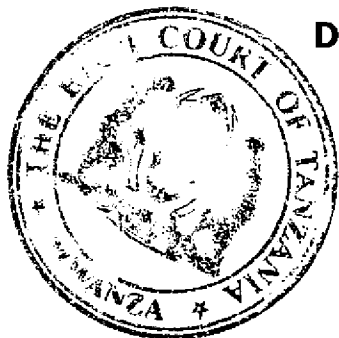
The Court has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a second appeal.

Similar stance was taken by the same Court in **Kennedy Owino Onyango & others Vs Republic**, Cr App no 48/2006 when the following was stated:

Again as a matter of general principle an appellate Court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal.

Going through the submissions as summarized above, it is obvious that what the appellant is challenging in all grounds of appeal is the analysis of evidence of which this being the second appellate Court is enjoined not to interfere unless such failure to analyze the evidence has resulted into miscarriage of justice. Indeed I have gone through the records of both Ruziba Ward Tribunal and the District Land and Housing Tribunal Chato which found that the appellant himself sold his land to the respondent and I have found nothing to fault their findings.

As such and for the reasons above, this Appeal lacks merits and consequently the same is hereby dismissed with costs. Order accordingly.



DATED at **MWANZA** this 10th January, 2019

M.M. SIYANI
JUDGE