

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPEAL NO. 03 OF 2020

(Arising from the District Land and Housing Tribunal for Mwanza in Land Appeal No. 6 of 2019 Originated from the Ward Tribunal for Isamilo in Land Case No. 39 of 2018)

JOYCE GIDEON APPELLANT

VERSUS

CHAKUA AHMED RESPONDENT

JUDGMENT

Last order: 25.03.2020

Judgment Date: 03.04.2020

A.Z.MGEYEKWA, J

At the first instance, the appellant had successfully lodged his complaints at the Ward Tribunal of Isamilo claiming for ownership over the suit land located in Geita. The respondent being dissatisfied by the said decision appealed to the District and Housing Tribunal of Mwanza *vide* Land Appeal No. 06 of 2019, where the appellate Tribunal allowed the appeal and ordered a retrial on the ground that the matter was

determined against the wrong party. The appellant was not pleased with such an order hence this second appeal on the following grounds:-

- 1. That the Honourable appellate Chairperson grossly erred in law for misdirecting the available evidence that the suit had been wrongly instituted against the respondent.*
- 2. That the Honourable appellate Chairperson grossly erred in law for misdirecting the available evidence and as well for misapprehension of evidence that the seller of the land in dispute had to be joined.*

At the hearing, the appellant enjoyed the service of Mr. Mushobozi, learned counsel and the respondent enjoyed the service of Mr. Nasimire, learned counsel.

The learned counsel for the appellant opted to combine the two grounds of appeal and argued them together. It was his submission that the Chairman of the District Land and Housing Tribunal for Mwanza misdirected himself for deciding that the appellant sued a wrong party thus quashing the decision of the trial tribunal. He went on arguing that the appellant sued the respondent for trespass. He stated that the appellate tribunal decided that the appellant lodged a suit against a person who had no interest over the disputed land.

Mr. Mushobozi continued to argue that the appellate tribunal misdirected itself for not analyzing the facts otherwise it could have found that the claim did not concern the deceased because he is not the one who invaded the appellant's land. In the learned counsel's opinion, it was the respondent who trespassed the appellant's land and hired

surveyors to survey the area. He went on to submit that the appellate tribunal ought to consider the respondent's evidence that after the passing of their father the land is currently owned by the whole family.

Mr. Mushobozi further argued that the respondent was responsible for supervising the disputed land, thus she is the one who ordered surveyors to map the area and that was the reason why the appellant instituted the suit against the respondent after noting that the deceased passed away on 3rd July, 2013 and the dispute arose in 2018 and the administrator of the estate of the late Hussein was not yet appointed.

The learned counsel for the appellant went on submitting that the appellate tribunal could find that the appellant was the rightful owner because the respondent's defence was that the disputed land belonged to her late husband without stating reasons as to why she invaded the appellant's land and how her late husband acquired the disputed land. He continued to argue that the appellant narrated how she obtained the disputed land while the respondent's witness DW1 one Sudi Mkoko was not able to state cogent evidence. He urged this court to find that the land belongs to the appellant thus the appellate tribunal decision be set aside and in case of any misapprehension this court to step into the shoes of the appellate tribunal and analyse the evidence on record and allow the appeal with costs.

In reply thereto, the learned counsel for the respondent opted to argue the grounds of appeal generally. He submitted that the appellant instituted a suit at the Ward Tribunal for tort and ownership over the

disputed land. Mr. Nasimire further submitted that the appellate tribunal found it was prudent to nullify the decision of the Ward tribunal and ordered parties to start afresh after including the necessary parties.

Mr. Nasimire stated that the evidence adduced at the trial Tribunal cannot support ownership over the disputed land as the appellant tendered a sale agreement dated 27th August, 1991 the agreement did not show the location, dimensions, and boundaries of the said land. He added that the person who witnessed the contract one Matrida Magoti did not mention the name of the seller and one Ambwene did not witness the agreement. Mr. Nasmire forcefully argued that the said agreement lacked a stamp duty. He fortified his argument by referring this court to the case of **Zacharia Barie Bulra v Terecia Maria John Mbiru** (1995) TLR 211. He further argued that the aforesaid agreement was the base of the appellant's evidence which does not entitle the appellant's ownership over the disputed land.

It was Mr. Nasimire's further submission that the respondent's husband one Hussein Mkoko (deceased) was the owner of the said disputed land and it was revealed that an administrator of the estate of the deceased was not appointed to administer the deceased estate, therefore, the respondent was not supposed to be sued. He avers that the late Huseein Makoko bought the suit land from one Mashauri Sungura and it seems Mzee Hussein occupied the disputed land since August, 1991, thus he had a better title than the appellant. He argued further that the respondent tendered a charge sheet concerning criminal trespass and malicious destruction to property and the appellant

tendered building tax receipts in the totality of evidence reveals that the disputed land belonged to Hussein Makoko and not the appellant.

The learned counsel for the respondent continued to submit that one Everist Masele, the seller of the disputed land was supposed to be joined to the suit. To support his submission he cited the case of **Juma Kadala v Laurent M. Mkande** (1993) TLR 103 and the case of **Stanslaus Kalokola v Tanzania Building Agency and Another** Civil Appeal No.45 of 2018 Court of Appeal at Mwanza (unreported) held that failure to join a necessary party was fatal.

In conclusion, Mr. Nasimire prays for this court to find that the appellate tribunal decision and order for a retrial was justified thus the appeal be dismissed with costs.

In his brief rejoinder, the learned counsel for the appellant reiterated his submission in chief and argued that the issue of non-joinder of the party was not among the grounds of appeal instead they claimed that the respondent sued a wrong part, therefore, the issue of non-joinder was new.

He proceeded arguing that the issue of exhibits and building taxes chargers adduced by the respondent was to prove that the respondent's husband had two houses which were not in the disputed land and the sale agreement is in relation to the said two houses. Mr. Mushobodzi went on stating that the criminal case was genuine and it was revealed that Makoko has his own land and the appellant also owned a plot but

the sale agreement was vague because one Mashauri Sungura appeared on both sale agreements because he was their neighbour.

Responding to the issue of the necessary part, Mr. Mushobozi argued that the seller was not required to be joined unless if he could be the one who sold the land to both parties. He valiantly argued that the issue of stamp duty is a new issue it was not raised at the trial tribunal and both agreements lack stamp duties. He added that the court can order parties to stamp the documents otherwise the agreement met all the essential ingredients of a contract.

He argued that it was the duty of the adverse party to cross-examines the appellant on the issue of boundaries failure to that means he admitted. Mr. Mushobozi ended by saying that the appellant's evidence was heavy enough than the respondent's evidence he prayed this court to quash the decision of the appellate tribunal and uphold the trial tribunal decision.

After a careful perusal of the submissions made by the learned advocates for both parties and after having gone through the records of the two tribunals below, I have come to the following firm conclusions.

In the first place, I have noted that the appellate tribunal quashed the trial tribunal's proceedings and the decision thereof and ordered a retrial on the ground that the matter in the ward tribunal was tried against the wrong party and that it was necessary to join the vendor in the said proceedings.

I have been wondering why the appellate tribunal even dared to entertain and proceeded to allow the appeal which was brought before it by the person who was the "wrong person" in the original proceedings? In my view, if at all the respondent herein was a wrong part of the original proceedings, and if he had no interests over the subject matter, what forced her to appeal to the DLHT? I am forced to hold that if the respondent had no interests over the subject matter, the appellate tribunal ought to have dismissed his appeal on the ground that the respondent had no interest over the subject matter.

I have also perused the records of the trial Tribunal and realized that the appellant sued the respondent at the Ward Tribunal after having found the respondent having invaded her parcel of land. In my view, the act of the respondent to encroach into the appellant piece of land raised a cause of action against the present respondent. It should also be noted that the choice of who to sue, lies on the plaintiff who has the duty to show the cause of action against the person who she/he sues. In the matter at hand, the appellant chose the respondent as the proper person to sue for trespass which was committed by the respondent in a personal capacity. The records of the trial tribunal show clearly that the appellant successfully proved the alleged trespass.

I have examined the records of both tribunals below and found that in the circumstance of this case, the question of suing the vendor cannot arise the land was already been transferred from the vendor to the appellant. In the case like this one, it is enough to call the vendor as a witness where the need arises and not necessarily be made a party to

the suit on the same reason that, the plaintiff may fail to establish a cause of action against the vendor.

I have also found some arguments in the submission that the appellant ought to have sued the administrator of the estate of the late Hussein Mkoko. In fact, the appellant could not sue the administrator of the estate of the late Hussein Mkoko because it was not the deceased who invaded the appellant's land rather, the respondent on her personal capacity. If at all the respondent thought that the administrator was a necessary part to defend her interests, it was upon the respondent who had the duty to apply to the trial tribunal for the vendor to be joined possibly through third party notice. I thus hold that in the circumstance of the case at hand neither the vendor nor the administrator of the estate of the late Hussen Makoko were necessary parties to the matter.

Additionally, it was wrong for the appellate tribunal to nullify the proceedings of the trial tribunal on the ground of misjoinder of parties because, in law, a suit cannot be defeated by mere non-joinder of parties. Order 1 Rule 9 of the Civil Procedure Code Act, Cap 33 provides thus:-

"...No suit shall be defeated by reason of the misjoinder or no-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it".

Though the Civil Procedure Code, does not apply in Ward Tribunals, the principle remains intact that a suit cannot be defeated by the reason

of non-joinder of a party. In other words, the matter was not a nullity by non -joinder of the vendor. If the case could be unmaintainable without joining the other party then it could make sense, as it was held in the case of **Stanslaus Kalokola v Tanzania Building Agency and another** (supra). What matters is which party has proved a better title over the other in the suit land.

In the upshot, I find merits in the appeal. I proceed to allow the appeal without costs. In consequence thereof, I quash and set aside the decision of the appellate tribunal and uphold the decision of the trial tribunal that is the Ward Tribunal for Isamilo.

It is so ordered.

Dated at Mwanza this date 3rd April, 2020.


A.Z. MGEYEKWA
JUDGE
03.04.2020

Judgment delivered on 3rd April, 2020 in the presence of Mr. Mwita Emmanuel, learned counsel for the appellant and Mr. Anthony Nasimire, the learned counsel for the respondent.




A.Z. MGEYEKWA
JUDGE
03.04.2020

Right to Appeal explained.