IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A, MZIRAY, J.A, AND MWANGESI, J.A.)

CIVIL APPEAL NO. 53 OF 2015

KHALID BAKARI.....APPELLANT

VERSUS

SAMWEL GREYSON MPINGA.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated the 11th day of April 2013

in

Land Appeal No. 62 of 2011)

JUDGMENT OF THE COURT

10th & 14th August, 2017

MWANGESI, J.A.:

The matter giving rise to the appeal at hand has got a chequered history. Much as the records in the case file could unfold, it started way back in the year 2002, when the respondent herein, instituted a civil suit at the primary court of Arusha Urban against the appellant herein and one Melinyo Kalembu claiming that, they had blocked his right of way. The suit

was determined in favor of the respondent against the appellant only. Thereafter, the matter went through the district court up to the High Court, where all the proceedings were nullified for want of jurisdiction that, the dispute was founded on landed property of which ordinary courts had no jurisdiction.

Subsequent to the nullification of the proceedings by the High Court of Tanzania at Arusha, Land Application No. 79 of 2007 was instituted by the respondent against the appellant on the same claims that, the appellant had blocked his right of way. The Chairman of the District Land and Housing Tribunal being assisted by gentlemen assessors upon hearing evidence from both sides, were convinced on preponderance of probabilities that, the respondent had managed to establish his claims. The dispute was therefore decided in favor of the respondent. Unwavering, the appellant did unsuccessfully challenge it at the High Court of Tanzania at Arusha. In his second appeal to this Court, the appellant is armed with three grounds namely:

> *"**First,** that, the honorable Judge erred in law by relying on oral evidence made by the respondent*

and his witnesses to contradict written document as a result ended up making unfair and erroneous decision.

Second, *that, the honorable Judge erred in law and in fact, by failure to realize that, there has been no land left by the vendor to carter for specified road for the respondent's use.*

Third, *that, the honorable Judge erred in law and in fact, by ignoring to consider the size of land purchased by the appellant as per exhibit R2 vis a vis land occupied by the appellant to resolve whether the appellant squeezed the alleged specified road."*

During the hearing of the appeal, the appellant was ably represented by Ms Christina Kimale, learned counsel and he was personally present in Court, whereas, the respondent had the services of learned counsel Mr. Dismas Lume, and he was as well personally present in Court. On taking the floor, the learned counsel for the appellant did implore us to adopt the written submissions, which she had earlier on filed on the 08th day of April 2015, in compliance with Rule 106 (1) of the Court of Appeal Rules 2009,

(the Rules), and had nothing more to add. In the same vein, the learned counsel for the respondent did request us to adopt his written submissions in reply, which he did lodge on the 12th day of May 2015, with nothing more to add.

The learned counsel for the appellant did preface her written submission by giving a brief account of the facts giving rise to the appeal, which was acceded by his learned friend that, both the appellant and the respondent, purchased plots of land of different sizes in 1997 and 1998 respectively, from one Merinyo Kilembu of Sombeteni in Arusha. The two plots of land purchased, which did not share a border, had a space spared at the southern part, which was to be used by the respondent and other people, for passage towards their respective places. In 2002, the appellant constructed a wall fence around his plot of land, which triggered the dispute at hand whereby, the respondent claimed the appellant to have blocked part of the road, a contention which was strongly resisted by the appellant. The appellant lost both at the trial District Land and Housing Tribunal as well as in the High Court on appeal, and hence this appeal.

Amplifying the first ground of appeal in the written submission, the learned counsel for the appellant did challenge the first appellate Judge for upholding the admission of the oral evidence that was received from the witnesses of the respondent to contradict the documentary evidence that was tendered by the appellant in his testimony in deciding the matter in favor of the respondent. Relying on the provisions of sections 101 of the Law of Evidence Act, Cap 06 R.E. 2002, as expounded in the decisions in the cases of **Khalfani Vs Kichwa** [1980] TLR 309 and **Katebeleza Vs Kazungu** [1971] HCD No. 172, she did fault such findings of the two lower courts, and requested us to quash them by allowing this appeal.

The first appellate court has as well been faulted in the second ground of appeal, for believing that, there had been a road leading to the respondent's plot of land basing on the contradicting versions of the respondent's witnesses, while there had been none. Referring this Court to the decision in the case of **Emanuel Abraham Nanyaro Vs Peniel Ole Saitabau** [1987] TLR 47**,** the learned counsel for the appellant, has requested us to resolve such conflicting, inconsistency and unreliable evidence from the respondent's witnesses in the favor of the appellant.

With regard to the third ground of appeal, the learned counsel for the appellant did argue that, during trial of the dispute under discussion, the District Land and Housing tribunal did visit the locus in quo, where it took some measurements whereby, it was established that, the length of the plot of land occupied by the appellant was 13.90 meters, while the width of the road was 1.25 meters. With such measurements, the appellant was in occupation of less piece of land than the one which he had purchased, which is clear proof that, there was no any portion of the road which he did block. In that regard, we have strongly been urged to find so, and allow the appeal.

On his part, the learned counsel for the respondent did submit to the effect that, the issue which stood for determination by the District Land and Housing Tribunal was whether the appellant had blocked the path road leading to the plot of land that had been purchased by the respondent. Besides, the evidence received from the witnesses that were summoned by the respondent, the Tribunal did as well visit of the locus in quo, where it took some measurements from the disputed area in the presence of both disputants and their counsel. From such measurements, the Tribunal was

sufficiently satisfied that, the portion that had been reserved for the road measured only 1.25 meters whereas, 1.75 meters had been blocked by the appellant. It was on that basis that, the appellant was required to demolish his wall on the part that had protruded to block the road for use by the public, the respondent inclusive.

What stands for our deliberation and determination, is the issue as to whether the appellant did indeed block the road as held by the two lower courts. While deliberating on this appeal, we were mindful of the fact that, we were dealing with a second appeal of which its findings in the two lower courts were concurrent. In the premises, we had to warn ourselves bearing in mind the wisdom of this Court contained in the decision in the case of **Amrathlar Damadar and Another Vs A. H. Jariwalla [1980]** TLR 31, and followed in the case of **Qamunga Vs Bi Bura Nade,** Civil Appeal No. 93 of 2013 (unreported) that:

> *"Where there are concurrent findings of facts by the two courts below, the Court of Appeal, as a wise rule of practice should not disturb them unless, it is*

clearly shown that, there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or practice."

The complaint by the appellant in the first ground of appeal is to the effect that, the Judge in the first appeal did err in relying on oral evidence and disregarding the written evidence. Nonetheless, our perusal in the court record, has failed to enable us to find any material documentary evidence that could have assisted the Court in arriving at a different decision from the one based on the oral testimony of the witnesses. The termed documentary evidence contained therein, is from the sale agreements between the seller and the appellant dated the 25th November 1997, and between the seller and the respondent dated the 06th March 1998. Both sales did involve an un-surveyed area and hence therefore, their description has to be made orally. Furthermore, even their sizes were measured with the use of human paces (hatua). In the circumstances, we have faced some difficulties in appreciating the documentary evidence

alleged by the learned counsel, to have been disregarded by the Honorable Judge in the first appeal.

In the second ground of appeal the Honorable Judge in the first appeal has been castigated for failing to realize that, there had been no land left by the vendor to carter for special road for the respondent's use. In answering this complaint, we wish in the first instance to remind the appellant and his learned counsel that, a right of way is a basic necessity to every person, and that is why under the provisions of section 148 (1) of the Land Act, Cap 113 R.E. 2002, a person in a landlocked area, can apply to the court for an order of passage through the properties of other persons. Such legal requirement notwithstanding, the matter at hand did not reach to such an extent. Going by the document that was tendered by the appellant himself at the trial Tribunal as exhibit, that is, the sale agreement between the appellant and Merinyo Kelembu, that was formally prepared at the Ward Office of Sombetini dated the 25th August 1998, it contains a sketch plan of the sold piece of land wherein, it has explicitly been indicated that, on the south, there is a road. With such fact, it is

evident that, the complaint by the appellant on this ground is as well baseless.

And lastly, the complaint by the appellant in the third ground of appeal that, the size of the piece of land purchased by the appellant was not considered by the Honorable Judge in the first appeal, is as well without founded basis. It has been stated while discussing the first ground above that, the piece of land purchased by the appellant had neither conspicuous permanent boundaries nor accurate measurements. Under the circumstances, it was practically not easy to ascertain the size of the plot of land purchased by the appellant other than depending on the oral testimonies from the witnesses.

Incidentally, we have failed any misapprehension of evidence, miscarriage of justice and or any violation of any principle of law or practice in the entire proceedings of the lower courts. In that regard, in line with the principle enunciated in the case of **Amrathlar Damadar and Another Vs A. H. Jariwalla** (supra), we find no justifying reasons, to disturb the concurrent findings of the two lower courts. To that end, the

appeal before us lacks merits and has to flop. We hereby dismiss it and the respondent will have his costs.

Order accordingly.

DATED at **ARUSHA** this 11th day of August, 2017

M.S. MBARCUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL