

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)**

**CRIMINAL APPEAL NO. 233 OF 2016**

**KUSEKWA NYANZA ----- APPELLANT**

**VERSUS**

**CHRISTOPHER MKANGALA ----- RESPONDENT**

**(Appeal from the judgment of the High Court of  
Tanzania at Mwanza)**

**(De-Mello, J.)**

**dated the 17<sup>th</sup> day of June, 2015**

**in**

**PC Criminal Appeal No. 9 of 2015**

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**JUDGMENT OF THE COURT**

**28<sup>th</sup> Nov. & 7<sup>th</sup> Dec. 2018**

**MWANGESI, J.A.:**

This is a third appeal which originated from the primary court of Magu District at Nyashimo. In terms of the provisions of section 6 (7) (b) of the Appellate Jurisdiction Act, CAP. 141 R.E 2002 **(the AJA)**, an appeal of this nature lies to the Court upon certification by the High Court that, there is a point of law involved. The point of law which was certified by the learned High Court Judge (Gwae, J), which calls for the deliberation of the Court was couched in these words:

*"Whether the second appellate Court did not legally err, for failure to observe that, there was a land dispute between the parties which ought to have been instituted and resolved first, before the criminal charges could be preferred against the appellant."*

At the primary court, the current appellant was charged in Criminal Case No. 192 of 2013, with two counts. In the first count, he stood charged with the offence of criminal trespass contrary to the provisions of section 299 (1) of the Penal Code CAP. 16 R.E. 2002 (**the Code**). It was alleged on behalf of the complainant (respondent) that, on the 23<sup>rd</sup> day of October, 2013 during day time, at the village of Bulima within Magu District in the Region of Mwanza, willfully and unlawfully, the appellant did enter into a plot of land belonging to the respondent with intent to commit an offence therein.

In the second count, the appellant stood charged with the offence of malicious damage to property contrary to the provisions of section 326 of **the Code**. The particulars of the offence were to the effect that, on the same date time and place as in the first count above, after having entered

into the landed property of the respondent, willfully and unlawfully, the appellant did cut down thirteen trees and pulled down a house which had been built thereon, taking away the iron sheets which had roofed it to an unknown place, for purposes known to himself.

The brief facts of the case as could be gleaned from the testimony of the respondent was to the effect that, he purchased a plot of land measuring about two acres at the price of TZS 3,630,000/= from six different people of the same family, that is, Tizila Michael, Michael Nyanza, Kalumbete Nyanza, Elizabeth Nyanza, Holo Nyanza and Annaliberate Nyanza. Thereafter, he travelled for religious business. When he returned from his trip, he discovered that the house which had been inside the plot of land which he purchased, had been pulled down and also trees from the farm had been cut down. On inquiring from neighbours, he was informed that it was the appellant who occasioned the damage. And, indeed when the appellant was asked about such a thing by the village leadership where he reported the incident, he readily conceded to have done so for the reason that, the plot of land and the properties therein were his property. Since he believed that, such story by the appellant was false, he preferred

criminal proceedings against him, which culminated into the current appeal.

In his defence, the appellant conceded to have pulled down the house and cut down trees grown on the alleged disputed plot of land, because the plot of land and the trees grown thereon were his properties and that, he had never assigned it or any part thereof, to any other person.

In establishing the criminal charges against the appellant, the respondent summoned five witnesses himself inclusive. The witnesses went by the names of Christopher Makangala (himself), Abel Yohana, Stella Mathew, Ndalanghwa Makaranga and Eliza Kusekwa. For his part in defence, the appellant depended on his own testimony which was not supplemented by the testimony of any other witness.

The trial after evaluating the evidence which was received from both sides, was of the view that the case against the appellant was established to the hilt that, the appellant committed both counts. He was accordingly convicted as charged and sentenced to imprisonment for a term of six months on each count, which had to run consecutively. Additionally, the

appellant was ordered to pay compensation to the respondent to the tune of TZS 7,600,000/=.

Dissatisfied by the finding of the trial court, the appellant successfully challenged it at the District court of Magu. In reversing the finding of the trial court, the first appellate court held that the evidence on record, revealed that there was a dispute over ownership of the plot of land alleged to have been trespassed onto by the appellant. In the circumstances the learned Resident Magistrate opined that, there was need to resolve the question of ownership under civil litigation first, before the issue of criminal charges against the appellant could be dealt with. As a result, the conviction of the appellant of the charged offences was quashed, and the imprisonment sentences meted out and the order for compensation were set aside.

The respondent felt aggrieved by the decision of the first appellate court and preferred a second appeal to the High Court. In that Court, the decision of the first appellate court was reversed and that of the trial court restored save the order for compensation. It was the holding of the second appellate Court that, there was no justification for the trial court to award the compensation of TZS 7,600,000/=, because there was no proof of such

a loss by the respondent. It was on the basis of such finding of the second appellate Court, which triggered the current appeal to the Court by the appellant. We take liberty to reproduce the grounds of appeal by the appellant which read in extenso as hereunder:

- 1. That, the second appellate Court Judge erred in law for failure to observe that, the appeal was bad in law for want of the right of ownership on the landed disputed.*
- 2. That, the second appellate Court Judge erred in law for failure to observe that, there was no charge of criminal trespass relating to disputed land, without bona fide claim of right first.*
- 3. That, the second appellate Court Judge erred in law, to allow the appeal and failure to advise the parties to institute a land dispute suit for determination of the rightful owner of the disputed plot of land.*

When the appeal was called on for hearing before us, both the appellant and the respondent entered appearance in person legally unrepresented and hence, fended for themselves. In prosecuting his appeal, the appellant requested us to adopt his grounds of appeal in the

way they had been presented in his memorandum of appeal and had nothing more to add.

In response to the grounds of appeal by the appellant, the respondent forcefully argued before us that, there was no question of dispute of ownership over the disputed plot of land because, it had legally been sold to him by the children of the appellant as evidenced by their testimonies during trial at the primary court. He thus impressed us to find no merit in the appeal and as a result, we be pleased to dismiss it in its entirety.

In the light of what has been highlighted above, the issue that stands for our determination as it was pointed out by the learned Judge of the High Court, is as to whether the second appellate Court, failed to note that there was a dispute arising from the ownership over the disputed plot of land, between the appellant and the respondent.

According to the testimony of the respondent and his witnesses before the trial court, the respondent had purchased the disputed plot of land measuring about two acres at the price of TZS 3,600,000/= from six people all coming from the same family of Nyanza. As earlier indicated

above, among the witnesses of the respondent was one Eliza Kusekwa, who happened to be a daughter of the appellant and also among the people, who sold the disputed plot of land to the respondent.

On his part in defence, the appellant told the trial court that, he was the lawful owner of the disputed plot of land which he acquired since the year 1937. He told the trial court further that, during his arrest, he was cutting old trees from his farm for the purpose of replacing them with fruit seedlings, which he had bought from Mwanza. He went on to tell the court that, he was surprised to find that he was being put under arrest, while he had committed nothing wrong.

What could be discerned from the testimonies of the appellant and that of Eliza Kusekwa on behalf of her brothers, is the fact that, there was a problem of ownership over the disputed plot of land between the appellant who was the original owner of the plot of land and his children. While the children claimed that, the disputed plot of land had been assigned to them by their father (the appellant), such contention was strenuously resisted by the appellant. Under the circumstances, it is evident that Eliza Kusekwa and his brothers, sold the disputed plot of land to the respondent before the dispute over the ownership with their father



had been resolved. In that regard, they had no good title over the plot which they could pass over to the respondent. With such situation, as it was correctly held by the District court on first appeal, neither the criminal charges of trespass nor of malicious damage to property could stand against the appellant before the issue of ownership over the disputed plot of land had been resolved.

A scenario of the like was encountered by the Court in the case of **Simon Mapurisa Vs Gasper Mahuya**, Criminal Appeal No. 221 of 2006 (unreported). In the same, the appellant was charged with trespass at the instance of the respondent, who was his neighbor while the boundary between their plots of land had not been ascertained. In allowing the appeal, the Court after considering various decisions of the High Court including **Sylivery Nkanga Vs Raphael Alberto** [1992] TLR 110 and **Ismail Bushaija Vs Republic** [1991] TLR 100, held that:

*"Disputed ownership of land is not resolved in criminal proceedings. The law on that issue is that where there is a dispute regarding boundaries of adjacent private land or the ownership of a part or the whole of adjacent land, such dispute is resolved*

*in a civil court. From then onwards, encroachment onto the land of the other could be a trespass and a criminal charge can be brought against the offending party."*

Back to the appeal before us, as it was apparently evidenced by the contradicting testimonies of the appellant on the one hand and his daughter Elizabeth Kasekwa on the other hand, the court could not ascertain as to who was telling the truth in regard to the ownership over the plot of land that was sold to the respondent. Under the circumstances, the law required a civil suit to be instituted to resolve as to who was the rightful owner of the plot of land between the appellant and his children. And once that was resolved, it would be cleared as to whether the sale of the plot of land to the respondent by the children of the appellant was lawful or not. From then, the respondent would be certain as to whether he was to institute criminal proceedings against the appellant or not.

To that end, we are in agreement with the grounds of appeal which were raised by the appellant that, the second appellate Court erred in not finding that there was an issue of ownership over the plot of land alleged to have been trespassed and thereby, reversing the correct position which

had been taken by the first appellate court. Such finding is hereby reversed and that of the first appellate court restored. We accordingly allow the appeal by quashing the decision of the second appellate Court and set aside the imprisonment term of twelve months, which was meted out to the appellant on the two counts, and the consequential order of compensation.

Order accordingly.

**DATED at MWANZA** this 6<sup>th</sup> day of December, 2018.


K. M. MUSSA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**