

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 456 OF 2018

LUCAS S/O BURA @ AMNAAY APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Maige, J.)

dated the 13th day of November, 2018

in

Criminal Appeal No. 48 of 2017

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JUDGMENT OF THE COURT

30th September & 6th October, 2022

MWANDAMBO, J.A.:

The District Court of Mbulu at Mbulu tried and convicted the appellant Lucas s/o Bura @ Amnaay of two counts of criminal trespass and contempt of court order both under the relevant provisions of the Penal Code. It was alleged in the first count preferred under section 299 (a) of the Penal Code that, on 8/07/2014, at a place called Waama in Mbulu District, the appellant together with another person who was acquitted, did unlawfully enter into the land owned by one Shauri

Ng'adi, henceforth the complainant by erecting a fence thereon with intent to insult and annoy. As for the second count, the prosecution alleged that on the material date, the appellant entered upon the land unlawfully with intent to repossess it with knowledge that such land had been declared by the court to be the property of the complainant.

It was not disputed before the trial court that on the material date, the appellant had engaged Casmisri Nicola (PW1), a driver to ferry stones to the land allegedly owned by the appellant for the purposes of erecting a fence. It was equally undisputed that the appellant and the complainant (PW3) had, up to 1992, been litigating over ownership of a piece measuring 3 acres which the appellant claimed to be his resulting into institution of a case before Endagikot Primary Court. The appellant who was the claimant lost to the complainant. His appeal to the District Court ended in vain. So was his appeal to the High Court at Arusha in (PC) Civil Appeal No. 45 of 1988 which concurred with the District Court and the trial Primary Court that the land in dispute belonged to the complainant.

Apparently, the appellant did not appeal against the decision of the High Court. The trial court was satisfied with the prosecution evidence that the land, subject of the charge, belonged to the complainant and that the appellant trespassed on it despite the order of the Primary Court of Mbulu at Endagikot. It sustained the charge holding the appellant guilty as charged and convicted him but acquitted the second accused for want of evidence supporting the charge against him. The trial District Court sentenced the appellant to pay TZS 80,000.00 in respect of the first count and TZS 70,000.00 in the second count failing which, he would be liable to serve two months' imprisonment in each count.

Not amused, the appellant appealed to the High Court at Arusha. The High Court found no merit in the ground challenging conviction and sentence in respect of the first count but sustained the appeal on the second count in relation to contempt of court. It accordingly quashed conviction and the sentence. Undaunted, the appellant preferred this appeal on two alternative grounds. The first ground faults the first appellate court for sustaining conviction for criminal trespass based on unexecuted decree which lasted for more than twenty-five years before

institution of a case for criminal trespass. The second ground preferred in the alternative faults the trial court for failure to make a visit on a *locus in quo* with a view to ascertaining the actual land; subject of the charge.

At the hearing of the appeal, Mr. John Jekapo Lundu, learned advocate appeared representing the appellant. The essence of his submissions was that, there could not have been any valid charge for criminal trespass because, the complainant failed to execute the decree in his favour for more than 12 years with the net effect that the ownership of the land reverted to the appellant.

Ms. Agnes Hyera, learned Senior State Attorney who represented the respondent Republic assisted by Ms. Adelaide Kasala, learned Senior State Attorney and Ms. Naomi Mollel, learned State Attorney, urged the Court to dismiss this ground. She argued that the two courts below rightly concurred in finding that the appellant was guilty of criminal trespass. The learned Senior State Attorney discounted the appellant's contention on the limitation to execute the decree in civil proceedings as irrelevant because the Law of Limitation Act did not apply to criminal

proceedings. She urged the Court to hold that the appellant was rightly convicted and sentenced.

Having examined that record of appeal, it is plain that the appellant was the plaintiff in Civil Case No. 29 of 1986 before the Primary Court at Endagikot in Mbulu in which he lost. His suit was dismissed so were his appeals to the District Court and the High Court. Simply stated, it is the appellant who sought a decree declaring him as the lawful owner of the disputed land. Since the appellant's suit/claim before the trial Primary Court for recovery of 3 acres of land did not succeed, the net effect was that the complainant remained the lawful owner of the disputed land. That notwithstanding, Mr. Lundu would have the Court hold that in so far as the complainant did not execute the decree ownership reverted to the appellant. We have asked ourselves whether there was any decree to be executed by the complainant in the first place. We respectfully hold the view that there was no decree capable of being executed at the instance of the complainant. This is so because, the Primary Court dismissed the appellant's claim for recovery of the disputed land with the net effect that the complainant's title to it was thereby confirmed.

Consequently, the argument canvassed by the appellant's advocate in support of the first ground cannot be sustained because they are premised upon an erroneous understanding that the complainant had any decree capable of being executed in the manner argued by Mr. Lundu. It did not require the complainant who, from the evidence on record particularly the judgment of the High Court (exhibit PE1), was in occupation of the disputed land.

It would have been a different thing altogether had the complainant been the plaintiff/claimant in whose favour the decree was passed. In so far as that was not the case, we find no merit in the appellant's complaint in ground one complaining that the complainant's complaint resulting into the charge for criminal trespass was based on an unexecuted decree for over 12 years was wrong is, with respect misconceived and we dismiss it.

The alternative ground should not detain us despite Mr. Lundu's attempt to argue that the trial court ought to have ordered a visit to the *locus in quo* considering the prayer in that behalf by the erstwhile learned advocate for the appellant. In our view, the appellant's

argument in this ground falls away in the face of his evidence in defence. The record shows that the appellant did not have any dispute as to the land subject of the charge on criminal trespass. His contention was that the land belonged to him because it was not handed over to the complainant after his successful litigation in civil proceedings. We shall have him speak for himself:

"no one could trespass on his own land. That land was not handed over to the complainant. All time the disputed land was [under] my own control...." [at page 22 of the record].

Unlike Mr. Lundu, we do not think it was necessary for the trial court to make a visit to the locus *in quo* because there was no dispute on the location of the land which could have afforded opportunity to see objects and places referred to in evidence physically and clear doubts arising from conflicting evidence in line with the Court's decision in **Kimonidimitri Mantheakis v. Ally Azim Dewji & Others**, Civil Appeal No. 4 of 2018 (unreported). See also; **Sikuzani Saidi Magambo & Another v. Mohamed Robert**, Civil Appeal No. 197 of 2018 (unreported).

In so far as there was no dispute as to the piece of land subject of the charge for criminal trespass, the complaint against refusal to visit a locus *in quo* lacks merit and is dismissed.

In the event we find no merit in the appeal and dismiss it in its entirety.

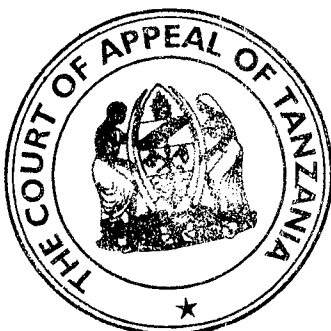
DATED at **ARUSHA** this 6th day of October, 2022.


S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2022 in the presence of Mr. John Jekapo Lundu, learned counsel for the Appellant and Ms. Eunice Makala, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL