

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

PC CIVIL APPEAL NO. 114 OF 2004

(Appeal from the Decision of Kisseto, SDM at Kinondoni
District Court)

AISHA HAJI.....APPELLANT
VERSUS
SAMON KALONGA.....RESPONDENT

JUDGMENT

SHANGWA, J:

This is an appeal against the decision of the Kinondoni District Court in Civil Appeal No.86 of 2003 which reversed the decision of the Primary Court of Kinondoni in Civil Case No. 40 of 2002 wherein judgment had been entered in favour of the appellant.

The dispute between the parties concerns a boundary between the appellant's residential area and the respondent's residential area at Kinondoni Hananasif area. The appellant

got this area out of the division of matrimonial assets between herself and her ex-husband called Abdalrahman Saidl when their marriage was dissolved by the court at Kinondoni.

The dispute between the two parties started when the respondent built a wall close to the appellant's house about five steps inside her area. The appellant has all along been claiming that the respondent has trespassed on her area and she wants the court to push him back to his own area.

In the Primary Court of Kinondoni, she testified as PW1. She called four witnesses in support of her case. These are PW2 Fatuma Salehe, PW3 Juma Mwelomwe, PW4 Ally Mrisho Omari and PW5 Mariamu Muhuzi. All of them testified that the respondent has encroached on the appellant's area and built a wall inside her boundary which divides his residential area and hers.

The respondent did testify before the Primary Court of Kinondoni as DW1. He called three witnesses on his side namely DW2 Michael Mgagazi, DW3 Baisu Mohamed and DW4 Shija Malimi.

In his testimony before the Primary Court of Kinondoni, the respondent appears to be evasive. Neither did he deny nor accept the appellant's claim. He simply related the story about how he acquired his area by saying that he bought it in 1997 from one Shija at a price of Shs.1,000/=. He explained that there is a beacon which marks the boundary between his area and the appellant's area and that whereas he left a road way of one metre and twenty five centimeters wide from his house to the beacon, the appellant never left such a space at all.

None of the respondent's three witnesses appears to be of any assistance to him. None of them did testify that the appellant's claim against him is false. All of them talked about

matters which do not relate to the dispute between the parties. Even DW4 Shija Malimi from whom he bought the area which is close to the appellant's area did not give any significant testimony on his behalf. He simply told the trial Primary Court among other things that he sold the said area to the respondent on 15.6.1997 in the presence of one Selemani Mohamed and that when he sold it to him its boundaries were marked by thorn trees.

The trial Primary Court Magistrate, Mr. Mark visited the locus and was shown the wall which was built by the respondent on the appellant's area and the extent to which the respondent had encroached on the appellant's area with it.

Upon the evidence adduced by the appellant herself and her witnesses, the said trial Primary Court Magistrate was satisfied that the appellant had proved her case to the required

standards and entered judgment in her favour. Thereafter, the respondent appealed to the District Court of Kinondoni.

In his decision, the learned Senior District Magistrate of Kinondoni Mr. Kiseto held that as the respondent now appellant did not call her former husband to show the true boundaries of the area she possesses, the trial Court missed the proper evidence which could have led it to a good decision. After so holding, he proceeded to allow the respondent's appeal with costs.

It appears from the said holding that, the learned Senior District Magistrate reversed the decision of the Primary Court of Kinondoni because the appellant did not call her former husband from who she acquired the residential area which was trespassed on by the respondent to appear in Court and testify on her side. Learned Counsel for the respondent M/S S.K. Safari & Co. Advocates supported the Senior District

Magistrate's decision saying that the evidence adduced could not make her succeed in her case.

Personally, I do not think that the success of the appellant's claim that the respondent had built a wall some steps inside her area thereby violating her land rights was not wholly dependent upon calling her former husband as a witness among other witnesses.

The evidence which was given by the appellant herself and the four witnesses whom she called is sufficient to prove her claim without the evidence of her former husband Abdalrahman Saidi.

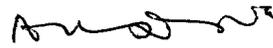
If the learned Senior District Magistrate thought that the evidence of her former husband is indispensable which of course is not, he would have directed the Primary Court of Kinondoni to take additional evidence by calling this witness

and certifying the same to him or he would have called this witness and hear him because he had powers to do so under S.21 (1) (a) of the Magistrates' Courts Act, 1984.

In general, I agree with learned Counsel for the appellant M/S Malegesi Law Chambers, Advocates in their 1st, 2nd, 3rd and 4th grounds of appeal against the decision of the Senior District magistrate of Kinondoni that he erred in law and in fact in failing to evaluate properly the evidence on record, and in holding that the trial court had missed the proper evidence which could have led it to a good decision, and in saying that the disputed area belongs to the appellant without taking into consideration the evidence on record, and in declaring the respondent the owner of the disputed area.

For this reason, I set aside the District Court's decision and I order the respondent Simon Kalonga to demolish his wall

from the appellants area as soon as possible. Therefore, I allow this appeal with costs.



A. Shangwa

JUDGE

4.3.2005

Delivered in open Court at Dar es Salaam this 4th day of March, 2005.



A. Shangwa

JUDGE

4.3.2005.