IN THE HIGH COURT OF TANZANIA
AT IRINGA

PC CIVIL APPEAL NO. 1 OF 2008

ATILIO MALULI ..... APPELANT

Versus

ZACHARIA MAKETA ..... RESPONDENT
(From the Decision of the District Court of Iringa in Civil Appeal No. 27 of 2001 and Original Mazombe Primary Court Civil Case No. 57 of 1999)

2nd & 5th May, 2014

JUDGMENT

MWAMBEGELE, J.:

The dispute between the appellant Atilio Maluli and the respondent Zacharia Maketa is over a patch of land measuring 3 x 50 paces located at Kitumbuka Village, Kilolo District in Iringa Region. The case the subject of this appeal first landed in the Primary Court of Mazombe on 23.09.1999 where the appellant had filed a suit claiming for the disputed land. The appellant lost. Dissatisfied, he appealed to the District Court where Kwariko, DRM i/c (as she then was) dismissed the appellant's appeal. Undeterred, the appellant has come to this court by way of appeal filing two grounds of complaint through Mr. Mushokorwa, learned Advocate. The grounds of complaint are:

1. That the decision of the District Court did not properly evaluate the evidence nor give sound points for the decision. Hence it was not a proper judgment; and
2. That the District Court erred in not faulting the trial court for not visiting the *locus in quo*.

The appeal was argued before me on 02.05.2014 during which the appellant did not appear but had the services of Mr. Kingwe, learned Counsel. The respondent appeared in person and unrepresented.

On arguing this appeal, Mr. Kingwe, learned Counsel for the appellant opted to drop the second ground of appeal. He felt that the ground was now redundant as this court had ordered that the *locus in quo* be visited a sketch plan drawn which order of the court has since been complied with. He argued the remaining first ground which states that the decision of the District Court was not a proper judgment in that it did not properly evaluate the evidence nor give sound points for the decision. Learned Counsel for the appellant submitted that the seller of the parcel of land; one Titus Kihalalwa testified in the Primary Court that he sold a parcel of land to the respondent but was categorical that the 3 x 50 paces patch was not sold to the respondent. In the Primary Court, the learned Counsel went on, the appellant tendered a letter from the seller whose contents was that the respondent should leave the 3 x 50 paces disputed land as passage for the appellant. The letter was admitted in evidence as Exhibit A but the trial magistrate did not consider it, he submitted. The learned

Counsel submitted further that the letter was the words of the seller himself to the effect that the 3 x 50 paces disputed land was reserved as passage for the appellant. He submitted that the Primary Court was wrong in holding that if the 3 x 50 paces disputed land was not sold to the respondent, the sale agreement between the seller Titus Kihalalwa and the respondent Zacharia Maketa would have stated so clearly.

In response, the respondent submitted that he bought a parcel of land including the 3 x 50 paces disputed land claimed by the appellant to be a passage from Titus Kihalalwa in 1998 and that nothing was mentioned over it during the transaction and in the sale agreement. The respondent submitted further that he started to build a house thereon and that was the point in time when the appellant surfaced and told him that the 3 x 50 paces disputed land was reserved as a passage for him. After he told him that he was not told by the seller that he should reserve the 3 x 50 paces disputed land as passage for him and that he bought the whole parcel of land including what is claimed as passage, the appellant went to the seller where he got the letter which was tendered at the trial court as Exhibit A. The respondent submitted further that the High Court ordered that a sketch plan be drawn which was done and that there is a passage to the appellant; it is not that the 3 x 50 paces disputed land has blocked the appellant's access to his residence.

Mr. Kingwe had nothing to rejoin.

I have gone through the record of this case particularly the proceedings and judgments of both lower courts and proceedings of this court before the file landed on my desk for hearing of this appeal. The basic reason why the trial court decided in favour of the respondent was that the sale agreement between the respondent and Titus Kihalalwa did not state anything on the 3 x 50 paces disputed land. The finding of the trial court was upheld on appeal to the District Court. I am in full agreement with the findings of both lower courts. As per record, the evidence before the trial court was loudly clear that the 3 x 50 paces disputed land did not feature in the sale agreement between the respondent and the seller Titus Kihalalwa who testified in the trial court as SM II. The main body of the sale agreement reads:

> "Mimi Titus Kihalalwa nimeuza kiwanja changu kwa Nd. Zakaria S. Makete kwa bei ya Sh. 25000 kilicho katika eneo la kijiji cha Kitumbuka eneo la madukani jilani (sic) na Mzee John Mtete. Ni mali yake".

The agreement was executed on 22.06.1998 and witnessed by three witnesses on the same date and endorsed by the Kitumbuka Village Executive Officer two days later; on 24.06.1998. Nothing is mentioned in the agreement of the 3 x 50 paces disputed parcel of land to be left as passage for the appellant.

This court having felt it imperative to have the *locus in quo* visited, ordered the first appellate court; the District Court to visit the scene with a view to seeing the 3 x 50 paces disputed patch of land and other boundaries between the appellant and respondent. The scene was visited twice; first pursuant to the order of this court (Mrema, J.) dated 08.03.2007 which directed that the *locus in quo* be visited in the presence of the parties and Mr. Mushokorwa, learned Counsel for the appellant and a sketch plan drawn. The order was not complied with to the letter in that the *locus in quo* was visited but the respondent was absent. This prompted this court (Mkuye, J.) to make yet another order on 31.01.2012 to the effect that the previous order of the court should be complied with to the letter. In compliance with this order, the scene was once again visited on 19.07.2013 and a sketch plan was drawn in the presence of the parties and Mr. Kingwe, learned Counsel for the appellant. The sketch plan was forwarded to this court by the first appellate court; the District Court of Iringa.

I have seen the sketch plan which was drawn pursuant to the order of this court. I examined it in court quite closely together with the respondent and Mr. Kingwe, learned Counsel for the appellant. The sketch vividly shows that the 3 x 50 paces disputed patch of land is marked "EF" which is 2½ paces overlapping the respondent's unfinished structure. The sketch also shows the passage which gives access to the appellant's residence and is still used to date; it is marked "njia isiyo rasmi". The access to the appellant's residence passes between the respondent's unfinished structure which has been marked "A" and the residences of Ididory and Rosana

Mgata Mwen have been marked "D" and "C" respectively. I showed this sketch to the respondent and appellant's Counsel and both agreed that the sketch depicts what is on the ground. This being the case, the dispute is not one on easement. The appellant has an easement to his residence which is marked "njia isiyo rasmi". This, as observed, is a passage between Isidory's house marked "D" and Rosana Mgata's house marked "C". The appellant has therefore access to his residence marked "B" through this passage. The dispute for the 3 x 50 paces disputed land is therefore not one on easement and, to my mind, uncalled for. It is part of the parcel of land bought by the respondent from Titus Kihalawa. If the appellant wants it, he will get it from and only with the consent of the respondent who legally acquired it after buying it together with another parcel of land from Titus Kihalalwa, not through a court of law.

I wish to restate at this juncture that this is a second appeal. The decision of the trial court was founded on findings of fact. It is on very rare and exceptional circumstances an appellate court will interfere with findings of fact of a lower court. An appellate court will only interfere with such findings in situations where a trial court had omitted to consider or had misconstrued some material evidence, or had acted on a wrong principle, or had erred in its approach in evaluation of the evidence. Quoting from the headnote in ***Materu Leison & J Foya Vs R. Sospeter*** [1988] TLR 102 this court (Moshi, J.) it was held:

> "Appellate courts may in rare circumstances interfere with trial court findings of facts. It may

do so in instances where trial court had omitted to consider or had misconstrued some material evidence, or had acted on a wrong principle or had erred in its approach to evaluating evidence".

The above principle was reiterated by the Court of Appeal in ***Ali Abdallah Rajab Vs Saada Abdallah Rajab and Others*** [1994] TLR 132, again, I quote from the headnote in the following terms:

> "Where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion".

In the case at hand, I am satisfied that the first appellate court quite correct to concur with the findings of fact of the trial court in that it (the lower court) approached and evaluated the evidence before it correctly. All material evidence in the case was subjected to proper scrutiny after which it (the trial) court arrived at a conclusion that the appellant's story was not conceivable. As the trial primary court is the one which heard and saw the witnesses testify, it is the very court which was better placed to assess their credibility. This is a guidance provided by the Court of Appeal

in the *Ali Abdallah Rajab* case (supra), in which it was held again quoting from the headnote, as follows:

> "Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record".

The trial court observed and assessed witnesses for both parties. The assessors A. Ngaga and U. Luhwago who assisted the magistrate – A. G. Kiswegwe – to determine the suit both arrived at a conclusion that the appellant admitted that he had sold the disputed land to the respondent. They according so advised the trial magistrate and hence the verdict of the trial court.

In the light of the foregoing discussion, I find and hold that the appellate District court was justified in not meddling with findings of fact of the trial court, for it is the latter tribunal which was better placed to assess the credibility of witnesses upon which the findings were based.

What of the second appeal? This is the question to which I now turn. As already state above, before me is a second appeal by the appellant who lost in both courts below. In instances of a second appeal, like in the present instance, it is the law in this jurisdiction founded upon prudence that the second appellate court must attach more seriousness to the

position that findings of fact of a trial court must not be meddled with unless there are special reasons to do so. This position has been laid in a string of decisions of the Court of Appeal. One such decision is ***Neli Manase Foya Vs Damian Mlinga*** [2005] TLR 167 in which the Court of Appeal, held:

> **"It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact.** The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."
> [Emphasis supplied].

The Court of Appeal, at page 172, went on to quote the words of the President of the erstwhile Court of Appeal for East Africa - Sir Kenneth O'Connor - in ***Peters Vs Sunday Post Limited*** [1958] 1 EA 424, 429 as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.
> (see also: ***Watt or Thomas v. Thomas*** [1947] AC 484)".
> [Bold and italic mine].

The combined effect of the foregoing discussion is the finding that, in the light of the referred to authorities, this court, being a second appellate court in the present case, will not interfere with the concurrent findings of fact of both lower courts unless there are strong reasons to do so. In the present instance, as already observed above, court's approach to the evidence and the analysis thereof, and as endorsed by the appellate District court, was quite apposite. I find strong reasons to warrant this court meddle with such concurrent findings of fact of both lower courts wanting.

In the event, I find and hold that this appeal was filed without any speck of merit and therefore must fail. It is accordingly dismissed with costs. Order accordingly.

DATED at IRINGA this 5th day of May, 2014.

J. C. M. MWAMBEGELE
JUDGE