

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND CASE APPEAL NO. 8 OF 2015

(from the decision of the District Land and Housing Tribunal of Kilombero/Ulanga District Land in land case Appeal No. 113 of 2013 and Original Ward Tribunal of Utengule in Land Application No.269 of 2012)

LADISLAUS MBIFILE.....APPLICANT

VERSUS

ANTHONIA MNYAGAN.....RESPONDENT

JUDGMENT

R.E.S MZIRAY

This is an appeal against the decision of the District Land and Housing Tribunal of Kilombero/Ulangain Land Case Appeal No 113 of 2013 which originated from the Ward tribunal of Utengule in Application No 269 of 2012. The subject matter is a piece of shamba in which the herein appellant sued the respondent for trespass.

Upon hearing the parties and their witnesses and upon a visit to the locus in quo the trial tribunal found in favour of the respondent. Discontented by the said decision the appellant appealed to the District Land and Housing Tribunal where he lost again. This is now a second appeal where he appeals on the following grounds;

1. The appeal chairman erred in analyzing the evidence of the respondent and her witnesses and did not consider the controversy

that the banana plant was not a solution of the boundary but a cause of the dispute and it was planted elsewhere not as the boundary.

2. That the appeal chairman did not weigh the evidence of the witnesses for the respondent in a required standard and consider the fact that the same had full of controversies and inconsistencies.
3. That the appeal chairman erred in law in not considering the fact that some witnesses such as the man who was divorced from the family in issue had a grudge to quench against the family of the appellant hence his evidence ought to be tested highly.
4. That the appeal chairman failed to analyze the evidence on the required standard hence ended in a wrong decision.

Mr. Luguwa represented the appellant while the respondent appeared in person. This court thus ordered that the appeal be heard by way of written submissions. This court also ordered that the parties address it on the composition of the ward Tribunal. Mr. Luguwa therefore raised an additional ground of appeal that;

1. The proceedings of the ward Tribunal and the District Land and Housing Tribunal are a nullity for being improperly constituted.

Citing section 14 of the Land Disputes Courts Act Cap 216 RE 2002 Mr. Luguwa argued that, from the record of the ward Tribunal it is not clear as to the assessors who took part in the proceedings. According to him the record shows that mjumbe 1, mjumbe 2, mjumbe 3 and mjumbe 4 put questions to the witnesses. It is therefore Mr. Luguwa's contention that the said numbers may connote the number of assessors who took part in the

said proceedings thus, the number of assessors exceeded the statutory minimum number which requires the chairman to sit with only three members of which three should be women.

The learned counsel argued further that when the tribunal recorded the mediation order on 3rd May, 2013 a total of 5 members took part in the proceedings. Again Mr. Luguwa contended that such proceedings were a nullity because the coram is only three members. In his further argument Mr. Luguwa stated that one Michael Mhenga who is just a member has once presided as chairman. According to him it was improper because a member cannot preside as a chairman. Mr. Luguwa also added that the trial tribunal violated Rule 14. He stated further that the first appellate tribunal has also committed the same problem as the assessors did not give their opinions.

On the grounds of appeal raised in the petition of appeal Mr. Luguwa combined ground 2, 3 and 4 and argued them jointly. He submitted that the land in dispute was originally owned by the Gaganda family which subsequently offered the said land to several people including one Chesco who is the husband of Anthonia Mnyagane the herein respondent. Mr. Luguwa cited the case of Mbumbumbu Ngwale Vs Ally Said Kidowe (PC) Civil Appeal No 12 of 1992 (Unreported) in which it was held that; in cases involving trivial claims to a shamba it is advisable to hear evidence of those who own adjacent pieces of land since they are better placed to see over the years who their neighbor is.

It is MrLuguwa's further submission that the person who owned the neighbouring pieces of land are among others SelemanigaBaganda who later reverted to LadislausMbifile the appellant in this case. According to him all the neighbours testified for the appellant before the trial Tribunal while the respondent did not call any neighbor to testify. It is stated further that the respondent called one Anna Mwavika who was yet to be born when the land was parceled to the said neighbours.

On the first ground of appeal Mr. Luguwa submitted that, none of the kitongoji members talked about there being a banana planting ceremony as a boundary mark thus it was erroneous for the first appellate tribunal to rely on the banana as to the boundary between the two farms.

In reply thereto the respondent started by arguing that the additional ground of appeal is pre-empting what the respondent had already replied to the petition of appeal. According to her, raising a ground of appeal along with submissions in support of appeal is unprocedural practice in law hence be unconsidered as well by this honourable court.

Arguing on the said additional ground of appeal the respondent stated that constitution of the ward Tribunal is per requirement of section 11 of the Land Disputes Courts (Land Disputes Settlement) Act, Cap 216 RE 2002. According to her the Ward Tribunal was constituted by six members thus the number of members was within the required number of members by the law. She stated further that the member's votes were unanimous that is why they issued their signatures to verify the decision. The respondent also argued that section 14 is only applicable when the ward tribunal is

conducting mediation proceedings and not in proceedings under section 13(2) of CAP 216.

In her further submission the respondent stated that the District Land and Housing Tribunal did comply with the law under section 23 of CAP 216 as it was presided by the chairman and two assessors.

On the grounds of appeal it is submitted in reply that the respondent has been occupying the disputed land since 1998 and had been in peaceful enjoyment and ownership of it until 2012. It is further contended that, the appellant called his relatives as witnesses while the respondent's witnesses were people who occupies land neighbouring the one in question.

I have gone through the rival submissions of both parties as well as the entire record of this case. Before I embark into the merits of appeal let me start with the issue of composition of the Ward Tribunal. The record of the Ward Tribunal shows that the assessors who presided over the matter as shown in the proceedings of 3/05/2013 when the tribunal delivered its decision were;

1. Michael Mhenga-Chairman
2. George Kihava- secretary
3. YoelLihame- member
4. Grace Mnyagaa- member
5. TunuWaziri- member
6. RevocatusMponji- Member
7. CleophasNjemi- Member

Since the secretary is not a member the total number of members who presided is six. The law governing composition of the tribunal in mediation proceedings is section 14 of the Land Disputes Courts Act Cap 216 RE 2002. It provides interalia that;

14. (1) The Tribunal shall in all matters of mediation consist of three members at least one of whom shall be a woman.

From the above provision of law the statutory number of members who are required to preside in matters of mediation is three and atleast one of them shall be a woman. As I stated hereinabove the members who presided at the trial ward tribunal were six. In his submission Mr. Luguwa argued that since the number of members exceeded the statutory limit the proceedings were a nullity. With due respect to Mr. Luguwa I do not think if that was a proper argument, I say so because the law requires three members YES. But is it fatal if the members exceeded the required limit? The answer is definitely NO because the important thing is that the statutory requirement of 3 members one of whom shall be a woman was met. Thus, to me I do not find any anomaly in the excess number of members so long as the minimum number was met, if they were less than three it would be otherwise.

Now embarking to the merits of the appeal it is apparent that this appeal is heavily based on the weight of evidence. I will therefore determine the rights of the parties basing on evidence and record of the lower tribunals. The appellant's case at the trial tribunal is that, the disputed shamba was bought by his wife one Agnes Gaganda who bought the shamba from

JumaMatambalila, the later having purchased the shamba from one SelemaniGaganda. It appears that the appellant's land neighbours the respondent's land and the appellant's allegation is that the respondent exceeded the boundary and trespassed in his land.

The respondent's story is that she started to cultivate on the land in dispute since 1999 to 2012 peacefully and undisturbed. It is also on record that some years back there was a boundary dispute over the suit land between herself and SelemaniGaganda. According to her the dispute was resolved by the local Government leaders of the area and boundaries were clearly set. This was also corroborated by the testimony of one Paul Nyaluchi who was the then Kitongoji chairman who added that the dispute over the boundary was resolved in 1998 and the boundary passed besides the "kichuguu" which is within the respondent's Land.

The ward Tribunal which had an opportunity to hear the testimonies of witnesses and their witnesses and visited the Locus in quo found the respondent's evidence to be more probable over that of the appellant hence found in favour of the respondent. Further to that, on appeal the District Land and Housing Tribunal confirmed and upheld the trial tribunal's decision. It is trite law that where the appeal is based on the weight of evidence it is the trial court which is better placed to determine the right of the parties because it gets an opportunity to hear the witnesses and read their demeanor. This position was articulated by the Court of Appeal in the

case of **Jumanne s/o Busingo and Another Vs. R. (C.A. Mwanza) Criminal Appeal No. 137 of 2002** (unreported) in which the Court of Appeal, KAJI, J.A. quoted from the case of **Ali Abdallah Rajab v. Saada Abdallah Rajabu and Others [1994] TLR 132** where the court had held:

"Where the decision of a court 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 transcripts of the record".

The Court went on the quote from another case of **Omar Ahmed v. R [1983] TLR 52** when it had held.

"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on the record which call for a reassessment of their credibility".

Also in **Criminal Appeal No.69 of 2006 Jimmy Zacharia versus Republic** (unreported) the court of Appeal held that,

The practice is that in a second appeal, the Court rarely interferes with the concurrent findings of fact by the courts below. It is only

when there are misdirections or non-directions on the evidence by the first appellate court that the Court can interfere.

In the line of the above cited authorities I do not find any circumstances or issue whatsoever which calls for redetermination by this court which would come up with a different finding from that of the lower tribunals. I therefore endorse the decisions of the lower tribunals and go ahead to dismiss this appeal and I do so with costs.

R. MKUYE

JUDGE