IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. LAND APPEAL NO. 41 OF 2018

(Arising from the decision of the District Land and Housing Tribunal for Iramba, at Kiomboi in Land Case Appeal No. 89 of 2017, Original Land Case No. 8 of 2017 of the Ward Tribunal of Kinampanda)

WANSWEKULA SAMWELI BALILA.....APPELLANT

VERSUS

HAGAI WILSON MASISANGA.....RESPONDENT

JUDGMENT

11/01/2019 & 15/01/2019

KITUSI, J.

This matter commenced at the Ward Tribunal of Kinampanda within Iramba District, where Wanswekula d/o Samwel Balila, the appellant, sued Hagai Wilson Masiganga, the respondent, for a piece of land measuring about 40 to 26 feet allegedly a part of her shamba encroached upon by the said respondent.

At the trial the appellant narrated how she became the owner of the suit land. She stated that the original owner of the suit land was one Mzee

Masuza who sold it to her uncle one mbaga Balila. When the latter died, ownership of that land passed to Mbaga Balila's younger brother Samwel Balila, apparently the appellant's father. According to the appellant, the land became a family property and was being used by the whole family until one Daud Samwel, presumably her brother, moved to Arusha and left it (land) into the appellant's sole control and use.

On his part the respondent claimed ownership of the suit land on account of being given the same by his late father in 1990 and that he started to use the land uninterrupted even as of 1993 when his father died. The respondent's position is that the fact that no one came forth to make any claim over the land in 1993 when his father died, not in 1999 when his aunt died, is proof of there having been no adverse claim over that land.

According to the appellant, it was as recent as 2015 when Daud Samwel and the appellant trespassed upon the land by felling boundary plants but the dispute was resolved amicably before a ten cell leader who found the appellant and her brother guilty, ordering them to offer a sheep as fine. The respondent had earlier raised this fact to the appellant by way of cross-examinations seeking an explanation why she paid the fine if she was the owner of the land. The appellant did not provide the explanation.

There were testimonies to support the respective two versions, Mkama Kionko supporting the appellant's story that she is the lawful owner of the land. He said that the appellant inherited it from Daud Samwel upon

his death. Sprian Isack Shigyula supported the respondent's version stating that the land passed to the respondent from his clam.

The appellant lost the case before the Ward Tribunal which accepted as true the respondent's story that he had been using the land since 1990 undisturbed. The respondent was declared the rightful owner. The appellant's appeal to the District Land and Housing Tribunal (DLHT) was unsuccessful because the said appellate Tribunal concurred with the Ward Tribunal's finding that the respondent's case was the more cogent.

This now is a second appeal by the appellant who is convinced that the scales of justice should not have been tipped in favour of the respondent. She has raised three grounds which I paraphrase as thus;

1. *That the DLHT was wrong in making a finding that the respondent had been in occupation of the suit land since the Operation Vijiji in 1974 while the truth is that he was given by his uncle Cyprian Issack a piece of land on which to build a house in 1990.*

2. *That the DLHT erred in its finding that the appellant has never used the suit land while there was evidence that she was using the land since her father's death in 1960 till 2014 when the respondent encroached upon it.*

3. *That the DLHT erred in not making a finding that the pathway was the boundary separating the parties respective pieces of land on the West for the appellant and on the East for the respondent.*

When the appeal came up for hearing Mr Cheapson Kidumage learned advocate stood for the appellant and argued grounds 2 and 3 of the appeal, having dropped the first ground. The learned counsel informed himself with the fact that this is a second appeal therefore the court should not interfere with the concurrent findings of the two Tribunals below unless there was misapprehension of the evidence. He cited the case of **Amratlal Damodar Maltaser & Another t/o Zanzibar Srik Stores V. A.H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31. He submitted that the first appellate Tribunal misapprehended the evidence, but when he was required to pinpoint the misapprehension he submitted, instead, that the DLHT that sat on first appeal failed to re-evaluate the evidence.

The learned counsel went on to submit that had the appellate DLHT re-evaluated the evidence it would have noted that the appellant's case was supported by a more coherent evidence than that of the respondent which suffered from contradictions as to how the respondent acquired the disputed land. He pointed out that the appellant's version as to her title to the land being through inheritance was supported by one Nkoma Kionka a member of the clan that had originally owned it before selling the same to Mbaga Balila, the said appellant's paternal uncle.

As to the contradictions in the respondent's story, Mr Kidumage referred to the account of the said respondent, supported by that of Martin Mtwali that he acquired the land from his father who had inherited it from his mother (bibi). Yet Cyprian, the respondent's paternal uncle stated that the respondent acquired the land from him. During his submissions, the respondent stated that Cyprian is his uncle (a younger brother to his father) and that the two of them gave the land to him.

The learned counsel invited the court to rely on the decision in **Emmanuel Abraham Nanyaro V. Peniel Olesaitabahu** [1987] TLR 47 to conclude that the contradictions in the respondent's case rendered it less probable.

The third ground of appeal seeks to challenge the DLHT'S findings on the boundaries. According to the appellant, the pathway that cuts across the piece of land is the boundary that separates the two pieces of land. Mr. Kidumage submitted that the boundary separating the two plots is not a line of trees known as "minyaa" as contended by the respondent. The respondent's version of the matter is that the pathway cuts across his piece of land but that pathway it is not the boundary between his parcel of land and that of the appellant. It is therefore one's word against the other's.

It is clear from the foregoing proceedings that the parties are owners of adjacent parcels of land which are not subject of this case as the titles to them are not disputed. The historical background as to how each of the parties acquired their respective pieces of land is not material, in the

circumstances. At issue in my view is the boundary separating the two pieces of land.

Mr Kidumage is quite right in his submission that the DLHT had a duty to re-evaluate the evidence, it being a first appellate Tribunal. The learned advocate has alleged that the DLHT misapprehended the facts, and on that basis invited this court to interfere. For the reason that will soon be clear, I accept the invitation. Let me demonstrate.

The Wad Tribunal's decision runs thus;

> *"Baada ya baraza la Kata Kinampanda kuchungua kwa kina na kiundani, Baraza linatamka kuwa Eneo/Shamba lililokuwa na mgogoro hapo awali lenye ukubwa wa Ekari 0.153 ni mali halali ya Mdaiwa Hagai Wilson..."*

The DLHT agreed with the assessors;

> *"... The land was the property of the respondent before the passage of the road which divided the same into two parts..."*

The Court of Appeal has ever cautioned against sweeping consideration of evidence in **Leonard Mwanashota V. Republic** Criminal Appeal No. 226 of 2014 CAT (unreported) cited in **Abel Masikiti V. Republic** Criminal Appeal No. 24 of 2015, CAT (Unreported).

Their Lordship observed:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to* ***separate the chaff from the grain****..." (underscore mine).*

The essence of the case was a claim for a parcel of land measuring 40 to 26 feet, but in its decision the Ward Tribunal referred to the suit land as measuring 0.153 acres. This begs the question whether the suit land was property described.

The size of the land as being 0.153 acres is first seen in what purports to be a sketch map of the locus. When I invited Mr Kidumage to address me on the competence of the proceedings at the locus he submitted that the proceedings were inadequate and rendered them null.

I agree with Mr Kidumage that the Ward Tribunal's decision seems to have been informed by what was seen at the locus. However the proceedings are silent as to who was in attendance and whether one party was allowed to cross-examine the other regarding the boundaries, as it should have been.

In an almost similar situation, my sister Sehel, J held;

> *"I am settled in mind that such an omission occasioned a miscarriage of justice and cannot be saved by section 45 of the Land Disputes Courts Act, CAP 216."*