IN THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. LAND CASE APPEAL NO.14 OF 2019

(Originates from Sengenya Ward Tribunal in Land Case No. 20 of 2019 and Land Appeal No.63 of 2019 in the District Land and Housing Tribunal of Mtwara)

AMOS RIKADO NAMAHALA.....APPELLANT

VERSUS

MBARAKA ALFAN.....1ST RESPONDENT

MUSA EMANUEL MBWENI .....2ND RESPONDENT

JUDGEMENT

Hearing date on: 15/5/2020
Judgement date on: 29/6/2020

NGWEMBE, J:

The appellant, Amos Rikado Namahala filed a land dispute before Sengenya Ward Tribunal of Nanyumbu within Mtwara region complaining against Mbaraka Alfan, the first respondent and Musa Emanuel Mbweni, the second respondent. The appellant was complaining that the respondents trespassed to his parents' piece of land in year 2016.

However, reading carefully the records Ward Tribunal and 1st appellant Tribunal, it seems the real controversy of the disputants is on boundaries between the two pieces of land.

Upon hearing the disputants, the Ward Tribunal of Sengenya decided the complaint in favour of the respondents. The appellant was aggrieved and appealed to the District Land and Housing Tribunal for Mtwara having four grievances, namely; **one** the trial Ward Tribunal erred in law and in fact in not considering the testimony of one RASHID IMMUNI who sold the suit land to the second respondent; **two** the Ward Tribunal erred both in law and in fact in not considering the strength of the testimonies of the appellant's witnesses who specifically stated and did show the borders of the appellant's land against the respondent's piece of land; **three** the Ward Tribunal erred in law and fact in declaring that the entire suit land belonged to the first respondent, while the dispute was on boundaries; **four** the Ward Tribunal erred in law and in fact in not taking into account the fact that the disputed piece of land has been used by the appellant's family since 1972 undisturbed.

At the District Tribunal the appeal proceeded in the absence of the second respondent and eventually, the appeal was dismissed for lack merits, thus confirmed the decision of the Ward Tribunal. Again the appellant was dissatisfied with such decision thus, appealed to this court pegged with two grounds summarized as follows:-

1. That the District Tribunal erred both in law and in fact in not faulting the Ward Tribunal's decision on ownership of the entire land instead of confining itself on the issue of boundaries;

2. The District Tribunal erred both in law and in fact in failing to determine all three grounds of appeal. Alternatively, the Tribunal failed to tackle, analyse and give reasons for rejecting all grounds raised.

On the hearing of this appeal, the second respondent did not appear in court, but the appeal proceeded between the appellant and the first respondent. Both being unrepresented, their arguments were just brief. As such the appellant argued that the gist of his appeal is centered on boundaries as opposed to the ownership of the disputed pieces of land.

That the District Tribunal failed to answer all three issues he raised. The dispute is only related to five (5) meters wide of land to forty-seven (47) meters length of land. Finally, prayed this court to quash all the decisions of the Tribunals and declare that the appellant is the rightful owner of the disputed area of 5 meters wide to 47 meters' length.

In response the respondent therein distinguished all grounds of appeal as irrelevant because both Tribunals visited the *locus in quo* and verified that the claimed piece of land is owned by the 1st respondent. Consequently, asked this court to dismiss the appeal and order the appellant to pay costs.

He further submitted that the appellant has built a structure and installed a flour machine, which strongly disturbs his house. Above all and without his consent the appellant built a fence into the respondent's land. In those interferences, the respondent cannot continue with the intended development of his land including his unfinished house.

In brief rejoinder, the appellant reiterated to his submission in chief and further submitted that what was stated by the respondent are inapplicable.

This being a second appeal, this court rarely interferes with the concurrent findings of facts by the lower courts, save only where there is misapprehension of the nature and quality of the evidence and other factors occasioning miscarriage of justice. This was ably emphasized in the case of **Wankuru Mwita vs. Republic, Criminal Appeal No.219 of 2012** (unreported) where the Court held:-

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and the first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of the principle of law or procedure or have occasioned a miscarriage of justice."*

Notably, the District Land and Housing Tribunal was the first appellate court in the case at hand and had a duty to re-evaluate the entire trial evidence on record by reading it and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions. This position traces back to the precedent laid down by the East African Court of Justice in the case of **D. R. PANDYA v. R. [1957] EA 336.**

Guided by the stated principles, governing appeals, both before the High Court and the Court of Appeal, and having carefully reviewed the grounds of appeal, the evidence on record, and submissions by both parties, I find two important issues are calling for determination. First, whether the District Land and Housing Tribunal determined ownership of the entire land instead of confining itself to the alleged boundaries? Second, whether or not the District Land and Housing Tribunal failed to tackle, analyse and give reasons for rejection of every ground raised by the appellant?

Starting with the first issue, it is important to observe what were the grounds of appeal raised by the appellant in the first appellate Tribunal. Of course, the second and third grounds of appeal at the District Tribunal invited the Tribunal to determine the issue of boundaries, bordering the two disputants. For ease of reference those two grounds are quoted hereunder:-

> 2. *That the ward Tribunal erred both in law and in fact in not considering the strength of the testimonies of the appellant*

witnesses who specifically stated and did show the borders of the appellant land against the 1st respondent land.

3. *That the ward tribunal erred in law and fact in declaring that the entire suit land belongs to the first respondent while the dispute which was presented by the* ***parties was about boundaries.***

In view of the grounds of appeal at the District Tribunal, the gist of the dispute was boundaries between the two pieces of land. Even upon critical review of the whole evidences recorded by the Ward Tribunal, obvious the dispute is centered on the boundaries of those two plots of land. Accordingly, the first appellate Tribunal had a statutory duty to reevaluate the whole evidence recorded by the Ward Tribunal before arriving into a considered conclusion. This position was emphasized in various precedents including in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** (Unreported) where the Court of Appeal held:-

"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first appellate court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"

In the same vein former Chief Justice Nyalali in the case of **Matha Michael Wejja V Hon. Attorney- General and three others [1982] TLR 35,** held *inter alia,* that:-

> *"In first appeal the court is entitled to look at and evaluate the evidence afresh and come to its own conclusion, particularly where the learned trial judge adopts a wrong approach in evaluating the evidence or omits to evaluate some of the witnesses or to consider some vital piece of evidence"*

This being the legal position as of now, then the first appellate Tribunal had uncompromised duty to reevaluate the whole evidences recorded during trial by the Ward Tribunal. However, reading the proceedings and judgement of the District Tribunal, same was abdicated, instead the learned Chairman ended up determining the ownership of the two pieces of land, leaving aside on the crucial issue holding the disputants in loggerheads, that which boundaries of the two pieces of land?

At page 5 of the District Tribunal's judgement is recorded that:-

> *"This dispute is just initiated by the appellant without justifiable cause. We cannot believe the appellant in any way who just came at the suit plot after the death of his mother and brothers who were participated when 1st respondent purchased the suit plot from Musa Emanuel Mbweni @ Mandela. The ward tribunal decision is hereby confirmed for the 1st respondent to own the suit plot after he purchased it rightly from the second*

respondent in participation of the appellant's mother and brothers."

I am settled in my mind that such conclusion was a misdirection, because as I have said, the issue was boundaries not ownership of those two pieces of land. In essence, there are two pieces of land, each disputant owns one piece of land, but the two are neighbours, and the two plots are adjacent to each other. Understandably, the dispute holding the disputants in loggerheads is related to which boundaries separating those two pieces of land as opposed to the ownership as a whole.

In view of the above consideration I find that the findings of the learned Chairman the District Tribunal did not resolve the dispute of the boundary between the parties but left it untouched.

Coming to the second issue, whether or not the District Land and Housing Tribunal failed to tackle, analyse and give reasons for rejection of every raised ground of appeal. In view of the findings of the first issue the answer to this ground is also in affirmative, since the learned appellate chairman did not tackle, analyse and give reasons for rejection of the grounds of appeal.

I have critically reviewed the whole proceedings of the Ward Tribunal and of the appellate Tribunal, nowhere is recorded that the Ward Tribunal visited *locus in quo*. Likewise, the first appellate Tribunal ought to visit or direct the Ward Tribunal to visit locus in quo with a view to clearly see the

two pieces of land with their boundaries. That alone would have solved the whole dispute. The same position was considered by East African Court of Appeal in the case of **Mukasa, Vs. Uganda (1964) E.A 698** at 700, which was relied by the Court of Appeal of Uganda in **Matsiko Edward Vs. Uganda C.A. Crim. Appeal No. 75 of 1999,** where Sir Udo Udoma C.J (as he then was), held:-

> *"A view of locus in quo ought to be I think, to check on the evidence already given and, where necessary and possible to have such evidence accurately demonstrated in the same way a court examines a plan or map on the same fixed object already exhibited or spoken of in the proceedings."*

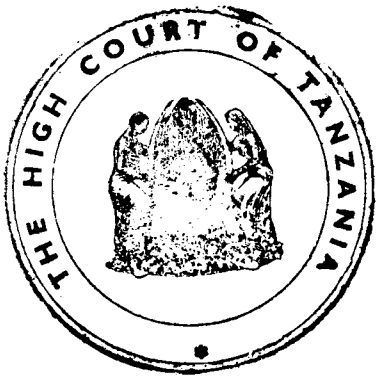
I think disputes related to land matters ought to be handled with due care and visiting *locus in quo* during trial is inevitable unless the evidence adduced therein leaves no doubt on the issue in dispute. Where the dispute is related to boundaries, visiting *locus in quo* is a must. Since there is no record indicating that the Ward Tribunal or District Tribunal visited *locus in quo*, therefore, the quest of boundaries was not decided and the parties are still in loggerheads. In order to settle this dispute once and for all, should the parties so agree, I find important to order visiting *locus in quo* and ascertain the boundaries of the two pieces of land will solve the dispute.

From the foregoing reasons, this appeal is party allowed to the extend so stated and I proceed to quash and set aside the judgment and orders of the first appellate Tribunal. Subsequently uphold the decision of the Ward

Tribunal to the extent of ownership of the two plots of land. Consequently, I direct the Ward Tribunal of Sengenya to *visit locus in quo*, identify the boundaries of the two pieces of land and put permanent boundaries demarcating the two pieces of land. In the circumstances each party to bear his own costs.

I accordingly Order.

Dated at Mtwara in Chambers this 29th day of June, 2020.



P.J. NGWEMBE

JUDGE

29/06/2020

Court: Judgement delivered at Mtwara in Chambers on this 29th day of June, 2020 in the presence of both parties.

Right to appeal to the Court of Appeal explained.

P.J.NGWEMBE

JUDGE

29/06/2020