IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

MISC. LAND APPEAL NO. 7 OF 2020
(Originating from the Decision of the District Land and Housing Tribunal for Mbulu at Dongobesh in Land Appeal No. 91 of 2018, Original Land Application No. 4 of 2017 at Gehandu Ward Tribunal)

TLUWAY TLEHHEMA ..... APPELLANT

VERSUS

TLEHHEMA GADIYE ..... RESPONDENT

JUDGMENT

26th August & 18th September, 2020

Masara, J.

Tluway Tlehhema, the Appellant herein, has preferred this second appeal against the decision of the District Land and Housing Tribunal for Mbulu at Dongobesh (the appellate Tribunal), in Land Appeal No. 91 of 2018 which was adjudged in favour of the Respondent herein. The Respondent sued the Appellant before Gehandu Ward Tribunal (the Trial Tribunal) claiming for recovery of piece of land measuring ½ an acre, with 91 trees, located at Marangw hamlet in Qatesh Village, Gehandu Ward. The trial Tribunal decided that the suit land partly belongs to the Appellant and that the other belongs to the Respondent. The Appellant was dissatisfied, he appealed to the appellate Tribunal. The appellate Tribunal upheld the trial Tribunal's decision. Further dissatisfied, the Appellant has approached this Court seeking to set aside the decisions of the two lower Tribunals on the following grounds:

a) *That, the Trial Tribunal and the First Appellate Tribunal erred in law and fact to hold that failure to properly identify the suit land in dispute was not fatal;*
b) *That, the two lower Tribunals failed to find out that the evidence of ownership of the land in dispute was of more weight on the part of the Appellant than that of the Respondent; and*
c) *That, the Trial Tribunal and the First Appellate Tribunal erred in holding that part of the ½ acre land in dispute belonged to the Respondent while the sale agreement tendered by the Appellant and the evidence of the seller referred to the whole ½ acre land sold to the Appellant.*

At the hearing of this appeal, the Appellant was represented by Mr. John Lundu, learned advocate, whereas the Respondent engaged the services of Mr. Omary B. Gyunda, learned advocate. The appeal was heard through written submissions.

Submitting on the substance of the appeal, Mr. Lundu contended that the Respondent and his witnesses failed completely to identify the suit land before visiting the *locus in quo*. He argued that the Respondent, his second witness, Nangay Lala, and his third witness, Amnay Munde made different descriptions of land in dispute, as their evidence on the neighbours to the suit land contradicted each other. He added that the Respondent was not certain of what he was claiming because while he claimed that the Appellant cut his trees and built a boma in his land, the Tribunal held that the Appellant had built the boma in his land he bought in 2014, but at the same time it held that the land with trees belongs to the Respondent.

Mr. Lundu submitted on the second and third grounds of appeal jointly, arguing that the Respondent and his witnesses contradicted themselves

when testifying at the trial Tribunal. To him, the Respondent's testimony was self-contradictory as he stated that he has been in occupation of the suit land for a long time even before the Appellant's birth, but at the same time he stated that he bought a piece of land from one Bea Lala. He therefore argued that the land bought by the Respondent is different from the ½ acre land the Appellant bought from Loema Mohondi. In his view, the evidence of the Appellant on the ownership of the suit land was cemented by the sale agreement which was agreed by the trial Tribunal, but the trial Tribunal misdirected itself in dividing the land to the two litigants. He asked the Court to reverse the decisions of the trial and appellate tribunals and declare the Appellant the lawful owner of the suit land.

Contesting the appeal, Mr. Gyunda contended that the boundaries themselves do not prove ownership over land given that the trial Tribunal visited the *locus in quo*, examined the parties and their neighbours, and decided the way it decided. He added that the contradictions on the boundaries did not cause any miscarriage of justice. He labelled them baseless as courts are urged to deal with substantive justice and do away with technicalities. He cited the case of ***Yakobo Magoiga Kichere Vs. Peninah Yusuph***, Civil Appeal No. 55 of 2017 (unreported) to back up his argument.

Submitting against the second and the third grounds of appeal combined, Mr. Gyunda was of the view that the Respondent's evidence before the trial Tribunal was weightier to that of the Appellant. He fortified that the

purported sale agreement tendered by the Appellant during trial along with the evidence of the Appellant and that of his witness were contradictory. That, while the Appellant testified that the agreement was witnessed by the hamlet chairman known as Joseph Maganga, his witness testified that it was witnessed by the hamlet chairman known as Bura Darabe and at the same time that witness agreed that Bura Darabe was not the hamlet chairperson at that time. On that account, it was Mr. Gyunda's contention that the Appellant failed to prove that he bought the suit land as he alleged. It was the learned advocate's view that the sale agreement creates a lot of doubts about its authenticity. He invited the Court not to rely on that exhibit.

Mr. Gundya added that when the tribunal visited the locus in quo, more than 10 neighbours of the parties attended and most of them testified that the suit land belongs to the Respondent, despite the fact that the trial Tribunal's judgment is contradictory. On the basis of the submission made, the learned advocate prays that the appeal be dismissed with costs in this appeal and in both lower Tribunals.

I have carefully gone through both Tribunals' records, the grounds of appeal and the written submissions in support and against the appeal. I will hereunder determine the grounds of appeal in the same manner adopted by the advocates for the parties. I will begin with the second and third grounds of appeal jointly.

As argued by Mr. Gyunda, this being a second appeal, this Court, as a matter of principle, is not expected to interfere with the concurrent findings on matters of facts unless there is a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. This was stated in the case of ***Amratlal Damodar Maltaser & Another t/a Zanzibar Silk Stores Vs. A. H. Jariwalla t/a Zanzibar Hotel*** [1980] TLR 31 at page 32 where it was held that:

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

I have gone through the trial Tribunal's record. The evidence adduced shows that the Respondent bought the suit land from Bea Lala orally, but their sale was witnessed by two witnesses Nangay Lala and Amnaay Munde who also testified at the trial Tribunal. It further shows that the Appellant bought the suit land from Loema Mahondi on 24th February, 2014. The said Loema Mahondi also testified disclosing how he got the suit land, stating that he inherited it from his parents and he tendered family minutes as evidence. The Appellant also tendered the sale agreement which was witnessed by a Village Executive Officer.

Based on the record and evidence tendered during the trial, the trial Tribunal found that both the Respondent and the Appellant are lawful owners of the land in dispute. In its judgment, the trial Tribunal, after visiting the *locus in quo*, found out that part of the suit land belongs to the Appellant since 2014

and the other piece of land with trees belongs to the Respondent since 1990. It further found out that the piece of land where the Appellant had constructed his house is his land which he claimed to have bought, so he was ordered to continue with its occupation. But, as to the land with trees, the trial Tribunal made a finding that it belongs to the Respondent, and the Appellant was ordered to give vacant possession of that piece of land. The appellate Tribunal upheld these findings.

Evidently, the trial Tribunal judgment had some contradictions. It does not state the size of land each part was awarded which would make its execution rather difficult. The evidence on record shows that the Appellant bought a piece of land measuring ½ acre from Loema Mahondi, and it is within that piece of land that he built his house. The Respondent also claimed to have bought the suit land measuring ½ acres from Bea Lala. When cross examined by the assessors, he responded that his claim is on the suit land, trees and the house. The task before the Tribunals was to ascertain who the lawful owner of the suit land is after having scrutinized the evidence on both sides.

In my view, declaring part of the disputed land the Appellant's lawful property and the other part the Respondent's property may have been appropriate had it been that the record was clear as to the size each one was to get. The trial Tribunal made a visit to the *locus in quo* and thus was in a better position to ascertain who of the two has trespassed to the other's land. Unfortunately, the record of the *locus in quo* is not part of the records

before me. This would have assisted in knowing what the neighbours thereat testified in terms of the size of the land. It is also common knowledge that visiting a *locus in quo* goes hand in hand with taking measurements of a land in dispute. It is not apparent whether that was done.

What is contained in the record is that after the closure of evidence on both sides, the trial Tribunal arranged that it would visit the suit land. The only clue of what transpired at the *locus in quo* features in the judgment which shows that after hearing witnesses from both sides, the trial Tribunal visited the land in dispute and took the opinion of the public and neighbours to that land. Such opinion was not made apparent. The Court of Appeal had the opportunity of outlining the procedure on visiting the *locus in quo* in the case of ***Nizar M. H. Ladak Vs. Gulamali Fazal JanMohamed*** [1980] TLR 29 where it stated:

> *"When a visit to a **locus in quo** is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, with such witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of a road is a matter in issue, have the room or road measured in the presence of the parties, and notes made thereof. When the court reassembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated..."*

This position was reaffirmed by the Court of Appeal in ***Avith Thadeus Massawe Vs. Isdory Assenga***, Civil Appeal No. 7 of 2017 (unreported). I am aware that the law gives powers to Ward Tribunals to regulate their own procedures and they are not bound by technicalities in their endeavours.

However, that latitude is not a waiver does not entail jeopardising the rights of any party. It only extends to relaxing procedural hiccups that would hinder the attainment of a just decision. From the decisions cited above, the proceedings of the *locus in quo* were supposed to be part of the records of the trial Court because it is expected that they contained actual demarcations and size of the piece of land allotted to each of the parties herein.

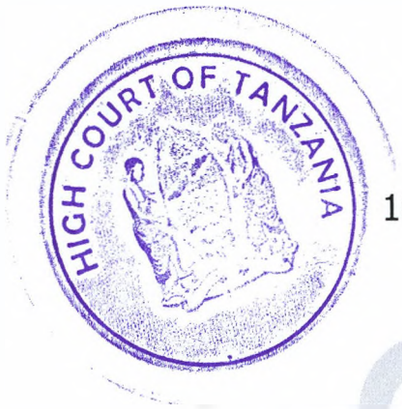
On that basis, it is important to note that the trial Tribunal did not resolve the dispute herein satisfactorily because even the Respondent does not know the exact size of the land he was declared to be the lawful owner. The appellate Tribunal should have noted this anomaly and address it at the earliest stage. Consequently, the judgment of the trial Tribunal cannot be left to stand. It also follows that the judgment of the appellate Tribunal would suffer the same fate as it condoned a wrong decision of the trial Court. The second and third grounds of appeal are found to have merits and are accordingly allowed.

A decision on the two grounds above militates against a need to determine the first ground of appeal, since it emanates from the fairness of the trial Tribunal's judgment which is at the end nullified.

Based on the above observations, this Court is not in a position to declare either the Appellant or the Respondent as the lawful owner of the suit land. Pursuant to powers vested to this Court under section 43 (1) (b) of the Courts (Land Disputes Settlements) Act, Cap. 216 [R.E 2019] I hereby quash

the proceedings and set aside judgments of both the appellate Tribunal as well as those of the trial Tribunal. I order that the matter be referred back to the trial Tribunal to be determined afresh. Appeal partly allowed with no orders as to costs.

It is so ordered



Y. B. Masara

JUDGE

18th September, 2020