

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

MISC. LAND CASE APPLICATION NO 43 OF 2020

(Arising from the decision of the District Land and Housing Tribunal for Tanga District at Tanga in Land Appeal No. 28 of 2019)

KASIMU OMARIAPPLLENT

VERSUS

OMARI DARISUDIRESPONDENT

JUDGMENT

MRUMA,J.

This is a second appeal. The Respondent herein Omari Darisudi instituted a land dispute in Mkuzi Ward Tribunal complaining that the Applicant Kasimu Omari had trespassed onto his land by encroaching his land for about three paces away from the boundary. According to the Respondent the boundary between his land and that of the Appellant was marked with a sapphires tree (Msufi) and a jack (Mfenesi). He was later on informed by one Mzee Kisumu that the whole area up to the grave yards which seven steps into the appellant's field was his area.

After hearing the evidence from both sides, the Ward Tribunal declared the Appellant Kasimu Omari the lawful owner of quarter an acre

of that land on the grounds that there was evidence that Kasimu Omari's son had cut down a permanent tree in a disputed area and the Respondent herein didn't complain. The present Respondent was not satisfied with that verdict and he appealed to the Tanga District Land and Housing Tribunal . After hearing the Appeal, the District appellate tribunal was satisfied with the grounds of the appeal as argued by the present Respondent to be the rightful owner of the disputed land.

The Appellant herein Kasimu Omari who was the Appellant in the District council, was aggrieved by the decision of the District appellate tribunal and he has appealed to this Court on the following grounds:

1. That the District appellate tribunal declared the Respondent rightful owner of the disputed land based on the Appellant's testimony and that of the Mgeni Mohamed Zuberi who didn't testify;
2. That the District appellate tribunal deviated from the law on the grounds that the Respondent's evidence was substantial when in fact it was weak evidence.
3. That the District appellate tribunal erred in law by failing to interpret the Respondent's evidence on the existence of grave yards and stating that the cemetery was under his care;

4. That the District appellate tribunal erred in law and it facts in finding that the Respondent acquired ownership of the disputed land by prescription despite the fact that there was no evidence to substantiate that finding;
5. That the District appellate tribunal failed to take into account the fact that the Ward Tribunal did not have a Coram at the time of hearing and at the time of passing verdict.

At the hearing of the appeal the Appellant was represented by Counsel Mpandangongo, while the Respondent was represented by Counsel HassanKilule. Appeal was argued by way of written submissions.

Submitting in support of the first ground of the appeal the Appellant's counsel contended that the District appellate tribunal erred in law as there was no evidence adduced by the Respondent herein to prove his ownership of the disputed land. Counsel states that what were on the records of the Ward Tribunal are the Applicant's (the Respondent herein) complaints and the reply of the Respondent(the Appellant herein). It is the learned counsel's argument that even the witness of the Appellant herein who was the Applicant in the Ward Tribunal one Mgeni Mohamed Zuberi did not testify before the Ward Tribunal therefore the appellate

tribunal only considered the evidence of the present Appellant who was the Respondent.

The learned counsel contends that there were irregularities which should have invalidated the proceedings which were before the Ward Tribunal. He wants this Court to see that the District appellate tribunal should have seen the irregularities and annul the entire proceedings of the trial tribunal.

Submitting respect of the third ground of the appeal, learned counsel for the appellant states that the appellate District tribunal failed to interpret the evidence of the Appellant which was presented before the Ward Tribunal in which he said:-

"... After a while his father Omari was given a piece of land by my aunt in order to build a house for his sister. Behind that house there was a " Mkwakwa" and the area has many graves that are in my land."

Counsel contends that the appellate District Tribunal wrongly interpreted that piece of evidence when it said that it was clear from that evidence that the Appellants aunt gave the land to the present Respondent. He said that actually the evidence shows that the person who said the graves are in his land is the Appellant and not the

Respondent. It is therefore the Appellant's contention that the District appellate tribunal's interpretation of that evidence was misconceived.

The learned counsel says that even the complaints lodged with the Ward Tribunal clearly show that the graves are on the side of the Appellants Land. He quoted part of the complaint which reads as follows:

" My claim is that Kasimu Omari has encroached into my land and has entered about three paces from the boundary. There was a msufi tree and a jack tree."

The learned counsel says that based on those information two things can be deduced. The first thing is that the trespass was only on three paces and the second thing is that the Respondent never said that the graves were on his land's side. The Appellant's counsel say that when the appellate District appellate Tribunal came out with a conclusion that the graves belonged to the Respondent's family that was misconception because he himself did not say so.

Submitting on the second and fourth grounds of the appeal, the Appellant's counsel contended that the District appellate Tribunal came to a wrong assumption that the land in dispute belonged to the Respondent's family because looking at the records of the trial tribunal, the Respondent

'claim before that Tribunal and the evidence, the presented, the Respondent was not claiming a family land but his own land.

The learned advocate submitted that looking at the records there is no dispute that the Respondent's father was given a piece of land by the Appellant's Aunt to build a house for his sister and that piece of land is adjacent to the land owned by the Appellant's father. The learned Advocate contends that the argument here is that the Respondent had claimed that that Appellant had trespassed onto his land but he dint show how he had acquired the land in dispute which was in fact owned by the Appellant's father and is completely different from the land which was given to the Respondent's father in order to build a house for his sister. He said that the ownership argument has never been proved or debated.

Submitting on the Ward Tribunal's lawyer, said that although the motion was not part of the original appeal, he as, a court official, was responsible for assisting the court to reach a fair decision. Responding to the arguments of the Appellant's Attorney, the Appellants' Attorney Mr. Hassan Kilule requested that the appeal be dismissed. The lawyer argues that it is not appropriate for the attorney to blame the appellate court for allegedly failing to find that the Respondent and his Quest witness Mohamed Zuberi did not provde evidence. He states that Guest Mohamed

Zuberi never testified although he was listed as a witness but failed due to illness. He says the Defendant's case was substantiated by his own testimony and that of his witness Zuberi Mhando. With regard to complaints of irregularities in the records of the Ward Tribunal, the Advocate stated that in accordance with Article 15 (1) and (2) the Ward Tribunals are not bound by the rules of evidence law applicable to other Courts and may make its own procedures and regulations.

I have carefully reviewed the records of both lower tribunals. I have also looked at the reasons for the appellant's appeals and the arguments of the lawyers of both parties.

From the records of the Ward Tribunal there is no dispute that the current Respondent filed a land dispute in Mkuzi Ward Tribunal claiming in Kiswahili that:-

" Namdai Kasimu Omari ameingia kwenye eneo la shamba langu na ameingia kama hatua tatu kutoka kwenye mpaka. Na mpaka huo kulikuwa na msufi na mfenesi. Baada ya muda Mzee Kasimu tarehe 16/01/2019 alikuja kupanda mgomba na kuniambia kwamba hata eneo la makaburi pia lipo kwangu na kutoka kwenye makaburi hadi mpakani kuna hatua

*saba(7) ambapo zipo kwenye eneo langu
.....Sisi tulikuw tunaishi mindu
nie eneo la urith wa marehemu baba
mzazi."*

In English in my informal translation the Respondents claims literally mean:-

" Kasimu Omari has trespassed about three steps from the boundary into my land. And on the border there was a Bomex (Sufi) tree and a Fenesi tree, after a while Mzee Kasimu came to plant bananas and told me that even the cemetery area as well. Is there for me and from the cemetery to the border there are seven steps that are in my area. Please tell me how did he get this place?

On behalf of the Respondent who was a debtor to the Ward Tribunal, he told the tribunal that the land was given to him by his paternal grandmother. When his grandmother died he left two children, his father and his aunt. After a while the farm was divided, one side took his aunt and one side took his biological father, the right is for him and the left is for Mr. Omari (Respondent herein).....after a while his Respondent father asked his aunt appellant Kiwanja to build a house for his sister. The house was occupied by Mkwakwa. And the area has only so many cemeteries that are located in its own area.

From the details of the two sides it is clear that the dispute is not for land or land but for the boundary. I draw that conclusion from the statement made by the Appellant before the Country Council stating that the Appellant Omar Darisudi was trespassed three steps in his area. And that he was later told by Kasimu that even where there are graves where it is about seven steps from the border and it is his area.

It appears that the Ward Tribunal visited locus in quo and drew a map which however I find to be of little help as it was not drawn in dimensions or compass. In short it is not easily understood.

Defendant Omar Darisudi had one witness named Zuberi Mohamed Muhando. He told the Ward Tribunal that the appellant and the respondent are relative but as far as he is concerned the disputed area belongs to Mzee Darisudi and the area is separated from Msufi tree which is the boundary between the appellant's area and the appellant's area. When the appellant was given the opportunity to cross-examine the witness, he said he had no question. In other words he had agreed with the testimony of this witnesses Zuberi Mohamed Mhando.

Regarding the existence of cemeteries, both parties agree that there are cemeteries in the area. And the defendant said they are seven steps away from the border. The appellants did not object to the statement and

while answering question from Ward tribunal members as to what action he has taken when he saw the graves being dug by the Appellant (who was the complaint before the Ward Tribunal) replied that he did not take any action.

Neither side claimed that the tombs belonged to their family. However, the action of Appellant Kasimu Omari to see the graves he claims to be in his area being destroyed by Appellant Omari Darsuid without taking any action is proof that the graves were not in his area because even if he was not in pain he would not allow his land to be disturbed by Respondent. According to Appellant's witness John Mgeni, even Appellant's father did not complain about the demolition. It should be noted that according to the evidence Appellant Kasimu himself and that of his witness John Mgeni the father of Appellant died in 1981. This means that Defendant Omar Darisudi has been believing that the graves are on his side for a long time.

It is judgment the appellate court found that the evidence of the current Defendant Omari Darisudi and his witness was weightier than the evidence presented by Appellant herein and his witnesses. I agree with the findings and conclusions reached by the District Council. I likewise agree with his decision to reverse the decision of the Ward Tribunal. I

even see that after reversing the decision of the Ward Tribunal District appellate tribunal it was reviewed not to look at the reality of the judgment that overturned it. If it had been more careful with the Court Tribunal's decision, the District Appellate Tribunal would have found that when the plaintiff in his claimed his land to be trespassed by the three and seven steps from the border, the Ward Tribunal declared without source that the land in dispute was a quarter of a . This statement was erroneous in that it lacked the basis for the Respondent's complaint(Respondent herein). His claim was three steps invaded and seven from the border. Either way since the three steps were also from the border it is clear that they are within seven steps. So then the area that was in conflict is seven steps which I declare to be owned by the Respondent Omari Darisudi.

Having said all that I dismiss Appellant's appeal with the costs.



A. R. Mruma

Judge

Dated this 24th September , 2021

Delivered by virtually (ie by video link) From the High Court of Tanzania Dar es Salaam District Registry to the parties who are in open court at the High Court Tanga District Registry at Tanga.