

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**LAND CASE APPEAL No. 6 OF 2020**

*(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in Land  
Application No. 141 of 2017)*

**APOLINARY ZACHWA ----- APPELLANT**

**Versus**

**FROLA KATALAIYA ----- RESPONDENT**

**JUDGMENT**

02/06/2021 & 08/06/2021

**Mtulya, J.:**

On 2<sup>nd</sup> of March 2020, Land Case Appeal No. 6 of 2020 was registered in this court attached with six (6) grounds of appeal preferred by Mr. Apolinary Zachwa (the Appellant) disputing a judgment in **Land Application No. 141 of 2017** (the Application) rendered down by the **District Land and Housing Tribunal for Kagera at Bukoba** (the Tribunal).

The record of appeal shows that the Appellant had filed the Application in the Tribunal on 4<sup>th</sup> October 2017 claiming ownership of a land located at Buyekera within Bukoba Municipality in Kagera Region. In his brief statement of facts constituting the claim, the Appellant claimed that:

*The respondent encroached my land after changing the building of his house in the new house whereby he closed the way to my area which is behind his area causing rain water to fall on my house. I have no way to pass building materials and he has blocked my built foundation, the act which is bad in law.*

The Appellant's statement of claim was not specifically clear on whether the Appellant was claiming easement or part of his own land which was encroached. The brief statement of facts displayed in item 6 (a) of the Application is also silent on size of the land in dispute or neighbors surrounding the land.

I also scanned the proceedings conducted at the Tribunal between 4<sup>th</sup> October 2017 to 17<sup>th</sup> January 2020 and I found that on 29<sup>th</sup> October 2019, the Appellant testified to have bought the suit land from Mr. John Patrick on 22<sup>nd</sup> August 2000 sized 116 paces in length and 60 paces in width, and had produced land sale agreement in P.1. to substantiate his claim. With the intruded size of the land, at page 18 of the proceedings the Appellant testified that it was 2.5 paces. However, the evidence in P.1 was disputed by the Respondent for having two different contractual dates as depicted at page 21 of the proceedings. The Tribunal without replying the Respondent or

involving the parties, or providing reasons for admission of P.1, it ruled that the copy of the land sale agreement is marked P.1.

Again, during Tribunal's Inquiry as displayed at page 19 of the proceedings, the Appellant admitted that:

*I bought the suit land at a purchasing price of Tshs. 250,000/=. I did not involve the neighbors when I was purchasing the suit land. I found the Respondent, but I do not know when she bought.*

It is unfortunate that during the hearing of the Application Mr. John Patrick was not summoned by the Appellant, and no reasons were displayed in the proceedings. It was unlucky that the Tribunal did not take steps to inquiry on where about of Mr. John Patrick, who would have been a key witness to assist the Tribunal in arriving at justice. However, a witness during sale agreement in P.1, Mr. Cyprian Kamwagwa Rwakatare, was summoned to testify on the agreement.

The Respondent on her part as displayed at page 23 of the Tribunal's proceedings testified that she purchased the suit land from Mr. Mohamed Ally on 20<sup>th</sup> March 2013 measured 146 paces and registered D.1 to substantiate her claim. However, the evidence in D.1 is silent on precise land size and location. During Tribunal's

Inquiry as shown at page 25 of the proceedings, the Respondent stated that:

*The seller showed me the boundaries of the area which I bought. Mohamed Ally was the first one to construct on the suit land. At the time of the sale the neighbors were there. The neighbors were Edwin Ezron and Salama Haruna, and the street chairman Felician Bigambo...our dispute is concerning water fallen to his land... I have no title deed. I know it is square meter 146 because we were told by land officer.*

During the proceedings in the Tribunal, Mr. Edwin Ezron and Ms. Salama Haruna were marshalled by the Respondent to testify on land sale in exhibit D.1 and boundaries of the disputed land. However, the seller of the land Mr. Mohamed Ally was not called in the Tribunal to state the precise size he sold to the Respondent. It is also unfortunate that record is silent on calling this key witness.

After a full hearing in the Tribunal, the Application was dismissed with costs. The Appellant was not satisfied with the decision of the Tribunal hence preferred the present appeal with six (6) grounds. When the appeal was scheduled for hearing, the parties appeared themselves without any legal representation. As the parties were lay

persons, and had no legal representation, their submissions were very brief. The Appellant submitted that he is claiming is land measured 116 feet in length and 60 feet in width as he bought it from Mr. John Patrick and that the Respondents house was extended from four (4) to six (6) bed rooms just after the earthquakes which attacked Bukoba area in 2016. According to the Appellant, the two (2) additional rooms encroached into part of his land.

In replying the submission, the Respondent admitted attacks of 2016 earthquakes. but stated that it was the Appellant's house which was most attacked and destructed. With the intrusion into the Appellant's land, the Respondent submitted that there is no any trespass save for stones of the Appellant which were preserved in Respondent's land after the earthquake attacks.

This court after perusing the record and going through the submissions of the parties, it found out that there is no certainty on the size of the disputed land. The record shows that the parties are disputing on exact size of boundaries which separate them, but also the size is not reflected in the record. The record shows further that sellers of the lands to the Appellant and Respondent, Mr. John Patrick and Mr. Mohamed Ally, were not summoned to testify in the Tribunal. The record is also silent on why these key witnesses were not called

to assist the Tribunal in arriving justice. As the issues were raised *suo moto* by this court, the parties were invited to state on two (2) issues as part of the right to be heard to cherish article 13 (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and explained in the precedents of **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2002 and **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44. The two (2) issues were to explain exact size of the demarcation and defects in their contracts.

On his part the Appellant briefly stated that the Tribunal did not measure the size of his land which is justified in the land sale agreement in terms of the stated feet and if the feet are measured, the dispute will be settled. With the defects on dates in the contract, the Appellant submitted that it was signed in different dates to distinguish from buying and execution dates.

I have gone through the land sale agreement in P. 1 and found out that the agreement was entered on 22<sup>nd</sup> August 2000, signed by learned counsel for execution on 29<sup>th</sup> February 2012 and certified by the Resident Magistrate of the Resident Magistrates' Court of Bukoba at Bukoba on 5<sup>th</sup> October 2017, although was in its original form. The

reasons for certification were not displayed in the record. The agreement also does not display neighbors who are surrounding the land or witnessed the sale agreement.

On the other hand the Respondent stated that she bought the land legally in presence of neighbors and the land was distinguished in demarcations with *Kilamula trees* and that the land had no dispute since 2013 when it was bought to 2017 when the Appellant initiated the suit in the Tribunal. I scanned the evidence in D.1 which depicts that the land sale agreement was entered on 20<sup>th</sup> March 2013 in presence of neighbours Mr. Edwin Ezron and Ms. Salama Haruna, and the agreement was witnessed, signed and stamped by Street Chairman Felician Bigambo.

It is fortunate that the Tribunal visited the scene of dispute and at page 7 of the decision observed that:

*...when the Tribunal visit locus in quo, it was observed that there is a path between the respondent's house and the applicant's land which was also separated by a foundation of wall constructed by the applicant. Therefore, there is no any structure constructed by the respondent which extend to the applicant's land...the*

*respondent has not encroached to the applicant's land to the extent of obstructing him to pass through.*

Finally, the Tribunal dismissed the Application and stated that the Respondent built her house on her land which she legally purchased from Mr. Mohamed Ally.

On my part, I would rather think that in ordinary dealings in land disputes of two or three human steps, feet, paces or meters would have not brought parties up to this court. However, I understand the scarcity of lands in some regions of this country, including Kagera Region, where one (1) or two (2) human steps may take parties to our final court in judicial hierarchy.

This court in all disputes of civil nature will be abided with the provisions of section 3 (2) (b) of the **Evidence Act** [Cap. 6 R.E 2019] (the Evidence Act) and precedent in **Daniel Arael Urio v. Exim (T) Bank**, Civil Appeal No. 185 of 2019. The provision in section 3 (2) (b) of the Evidence Act provides that: *in civil matters the existence of fact is established by a preponderance of probability* whereas the precedent in **Daniel Arael Urio v. Exim (T) Bank** (supra), the Court of Appeal stated at page 17 that:

*This position has been stated by the Court in a number of decisions. In **Mathias Erasto Manga v. Ms. Simon Group (T) Ltd**, Civil Appeal No. 43 of 2013...the Court held that 'the yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance on way or other. Departing from this yardstick by requiring corroboration as the trial court did is going beyond the standard of proof in civil cases'.*

In the present appeal, the evidences available on record show that the Respondent proved her evidences on the balance of probability, save for details of the boundary in dispute, which in any case was supposed to be stated by the Appellant who alleged that his land was intruded by the Respondent. The Respondent had produced D.1 in the Tribunal, called neighbours who were present during the sale and went through the Street Chairman of Mtoni Street within Bukoba Ward in Bukoba Municipality, the steps which were avoided by the Appellant. I understand adverse inference may be drawn as against both parties for failure to summon the sellers (see: **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113), but presence of neighbours surrounding the lands of the Appellant and Respondent may remedy that fault.

Again, the Appellant had summoned one witness in the Tribunal Mr. Cyprian Kamwagwa Rwakatare who testified before the Tribunal that he witnessed the land sale agreement between the Appellant and Mr. John Patrick. However, Mr. Rwakatare did not state the size of the land bought and does not appeared in P.1 as a witnesses. I also understand in measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence. It was stated in the precedent of **Hemedi Saidi v. Mohamedi Mbilu** (supra) categorically stated that:

*In measuring the weight of evidence in such cases as the present one it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence. In this connection the evidence of a single witness may be a lot heavier than that of ten witnesses.*

In the present appeal, the weight of the evidence on the part of the Respondent is heavier than that of the Appellant. In any case, the Tribunal visited the scene of the dispute and said it all as depicted in its reasoning at page 7 of the decision. In a situation where the Tribunal saw all the witnesses, considered all the evidences, and concluded the dispute based on the evidence tendered, this court may not reverse the

decision unless there are good reasons to do so (see: **Shah v. Aguto** [1970] EA 263).

Having said so, I have formed an opinion to dismiss the appeal with costs and uphold the decision of the **District Land and Housing Tribunal for Kagera at Bukoba** in **Land Application No. 141 of 2017**.

It is so ordered.

Right of appeal explained.



F.H. Mtulya

**Judge**

08.06.2021

This judgment was delivered in chambers under the seal of this court in presence of the Appellant Mr. Apolinary Zachwa and in the presence of the Respondent, Ms. Frola Katalaiya.



F.H. Mtulya

**Judge**

08.06.2021