IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO.6 OF 2020

(From the Decision of the District Land and Housing Tribunal of Lindi District at Lindi in Land Case Appeal No.77 of 2019 and Original Ward of Kiwalala Ward in Application No. 15 of 2019)

EDGAR I. MAPEMBA.......................................APPELLANT

VERSUS

SALUM SHAIBU...RESPONDENT

JUDGMENT

9 March & 3 June, 2021

DYANSOBERA, J.:

Edgar I. Mapemba, the appellant is, before this court, faulting the decision of the District Land and Housing Tribunal for Lindi at Lindi which dismissed his appeal with costs and upheld the decision of Kiwalala Ward Tribunal that had declared the respondent one Salum Shaibu as the rightful owner of the suit land.

In his memorandum of appeal, the appellant has preferred a total of seven grounds of appeal as follows:-

1. That the trial District Land and Housing Tribunal erred in law and fact for failing to properly analyse, evaluate and appreciate appellant case's evidence adduced before Kiwalala Ward Tribunal which proved his case and a result it reached at a wrong decision.
2. That the trial District Land and Housing Tribunal erred in law and fact by relying on the inconsistency, contradictory and unreliable evidence adduced by the ISSA Ngwalo who admitted in his evidence that he does not know the size of the farm he sold to the Respondent but on surprise he was aware of the boundaries.
3. That the trial District Land and Housing Tribunal erred both in point of law and facts when it failed to hold that the boundaries have been there long time ago which caused the Appellant to cultivate cashew nut trees and the respondent have been aware of the fact, however he initiated the disputed on 2019.Even taking a look on the testimony on one FAKIHI SALUM SHAIBU who testified in favour of the respondent, alleged before the

Ward Tribunal that the appellant extended the boundary in 2004,which means that up to 2019 where I filed a complaint before the village council, the Respondent claim over the disputed farm boundaries was time barred.

4. That the trial District Land and Housing tribunal erred both in point of law and facts when it failed to hold that the respondent claim over the land, in whatever way was time barred.
5. The District Land and Housing tribunal erred in law and fact relying on incredible evidence of the Respondent and ISSA NGWALO which was coupled with a lot contradictions and inconstancies exposed during questioning by the appellant and assessors at the Ward tribunal. They failed even to provide a specific year when the appellant is alleged to have trespassed by extending boundaries.
6. The District Land and Housing Tribunal erred in law by not holding that the Ward Tribunal was among other matters determining liability of ISSA NGWALO which influenced him to testify against the Appellant to avoid

liability as it can be seen on the last page of the judgment.

7. That the District Land and Housing Tribunal erred in law by failure to hold that Ward Tribunal was wrong in the way it conducted its proceedings as other Respondent's witnesses were called testified after the appellant had testified which was prejudicial.

The brief facts of the case for purposes of this appeal are the following. The appellant purchased his land in 1998 from one Issa Ngwalo the respondent's neighbour. Thereafter, he protected his purchased land by planting several trees including "Michongoma trees" which allegedly encroached the respondent's land. During the visit at the *locus in quo* the respondent's case got support from two witnesses, namely, Issa Omary Ngwalo (who sold the piece of land to the appellant) who proved trespass of the appellant and Fakihi Salum Shaibu (a son of the respondent). On his part, the appellant was, in his evidence, supported by Martin Mchingana.

In the end, the trial Ward Tribunal composed and delivered its judgment which unanimously declared the appellant to have trespassed the suit land which belongs to the respondent. The trial Tribunal further ordered the parties to convene a meeting on 13th

September, 2019 at their expenses and involve Mr. Issa Ngwalo in the exercise so as to demarcate afresh the boundaries. The appellant is challenging this finding at this court.

At the hearing of this appeal, both parties appeared in person and unrepresented. The hearing was conducted through oral submissions as per court's order. When invited to argue his appeal, the appellant informed the court that he had filed seven grounds of appeal and had nothing useful to add. In response, the respondent submitted that he had replied in writing and had nothing to add.

Having considered the record before me and the grounds of appeal together with the reply thereto, there is no dispute that this is a second appeal. The cardinal principle is that a second appellate court like the present is not entitled to readily interfere with the concurrent findings of fact of the two courts based on credibility unless there has been a misapprehension of the evidence or misdirection causing a miscarriage of justice. This principle has been echoed by the Court of Appeal in its various court decisions. For instance, in the case of **Mbaga Julius vs. R**, Criminal Appeal No.131 of 2015(unreported), the Court stated that:

> "We are alive to the principle that in the second appeal like the present one, the Court should rarely interfere with concurrent

findings of fact by the lower courts based on credibility. This is so because we have not had opportunity seeing, hearing and assessing the demeanour of the witnesses.

(See also **Seif Mohamed E. L Abadan v. R.**, Criminal Appeal No.320 of 2009 (unreported).

However, the Court will interfere with concurrent findings if there has been misapprehension of the nature and quality of the evidence and other recognised factors occasioning miscarriage of justice".

Now, basing on that settled cardinal principle the issue calling for determination is whether there is any material warranting this court to interfere with the concurrent findings of fact arrived at by the two lower Tribunals.

The first ground of appeal is basically on the failure of the first appellate tribunal to analyze, evaluate and appreciate the appellant's evidence adduced before the trial tribunal which the appellant claims to have disapproved the respondent's claim. I must inform the parties at this juncture that the evaluation, analysis and appreciation of the collected evidence was entirely in the realm of the trial Tribunal. The first appellate Tribunal was duty bound to re-evaluate, re-analyse and re-appraise the adduced evidence of the parties and their witnesses.

Did the first appellate fail in its duty? During trial, the appellant testified before the Ward Tribunal thus:-

"Shamba nimenunua mwaka 1998 kutoka kwa Issa Ngwalo wakati anaonesha mipaka alikuwepo mzee Mussa Swalehe(mmakua) shamba lilikuwa na mikorosho miwili na miembe miwili pakiwa na pori(msitu). Sehemu aliyonionesha niliifanyia kazi na nilipanda mikorosho,minazi milimau na mipera na nikaweka fensi ya michongoma na niliendelea na shughuli zangu za shamba kwa miaka yote bila buguza.Mwaka jana nilimuendea huyu mzee na kumuomba anipe kichaka ili niunganishe na shamba langu na mzee alikubali kwa masharti ya kumpa shilingi laki saba.Katika kuonesha akadai kule niliko ingia ni kwake hivyo ikazua sababu.Kwa sababu niliona sehemu ni ndogo akawa amenishanichanganya. Mwaka huu akamchukua yule aliyeniuzia ambaye alikubaliana na mawazo ya mdai nikaona hii ni njama mzee sikufika nikosane na huyo mzee nikampa mikorosho 15 na anilipe gharama ya kazi niliyofanya jumla SH.1, 000,000/= na tulifikia mwafaka nashangaa naitwa tena hapa."

The trial Ward Tribunal evaluated the evidence and was satisfied that it fell short of proving the claim of ownership. On appeal, the first appellate court endorsed that finding. With respect, I agree. It is the trial Tribunal which was best placed in a position to

analyse, evaluate and appreciate the evidence that had been unfurled before it. It could perform this task by hearing the testimonies and considering the demeanours of the witnesses so as to determine their credibility. This task was well performed. Apart from hearing the evidence it went to visit and inspect the locus in quo where it received the evidence as stated above. The District Land and Housing Tribunal for Lindi lacked that opportunity. The same applies to this court. The observation of the first appellate and second appellate court rests solely on the records made at the trial.

In endorsing the factual finding of the trial Tribunal, the learned Chairman made some observation on the evidence adduced by the appellant regarding disapproving the respondent's claim on trespass. At paragraph 3 of page 3 of the typed judgment of the appellate tribunal the learned Chairman observed the following:

> "I find the evidence of respondent at the ward tribunal being heavier than that of the appellant as even the seller of the land to the appellant testified that the appellant has taken a land which he did not sell to him and showed the boundaries of the land hich he sold to him and were well demarcated by the Ward Tribunal. I disagree with appellant's submission that he has owned the suit land for 21 years without any dispute

because the dispute before the ward Tribunal was not on the land which he has purchased since 1998 as per evidence of the seller rather it was on a part of land which he has taken it for eight years ago which is a part to respondent's land."

The evidence by the respondent, on the other hand, shows that he discovered that appellant had encroached his land by planting michongoma tree. He therefore, approached the seller who denied to have sold either the piece of land or cashew nut trees but acceded to have sold his piece of land. The evidence of the respondent shows that he approached the appellant seven times for amicable settlement but his efforts proved futile; instead, the appellant went and cut down his one cashew nut tree and constructed a house. Seeing that the respondent called the seller (Mr. Issa Ngwalo) and the appellant, the appellant requested the respondent to sell the suit land in the presence of Bomu and Fakih and at that time the respondent was with his wife. In their discussion the respondent asked the appellant about the purchase price of the suit land thus the appellant offered the respondent Tshs.600,000/= which was objected by the respondent instead he demanded Tshs.700,000/= which has not been paid till the dispute was submitted at the Ward Tribunal.

Besides, the evidence of the respondent was supported that of Issa Ngwalo who sold a piece of land to the appellant.

In his evidence the seller told the trial tribunal that he sold his piece of land to the appellant who had trespassed to the land of the respondent since he has crossed the boundary which he showed him during sale of his piece of land. For several times without reaching settlement and until 2018 when the parties agreed that the appellant should pay the respondent Tshs.700,000/= which the appellant has not paid todate. The evidence of Fakihi Salum Shaibu shows that he was given the piece of land whose boundary had been encroached by the appellant. The evidence of Fakihi depicts that the encroachment by the appellant is by way of extending the area to his land by planting trees as a demarcation of the boundary between the respondent and appellant.

With the above finding, I am in no doubt that the first appellate court discharged its legal obligation and in the end came to a concurrent finding as was the trial Tribunal. I find no material to differ.

The complaint that there was contradiction, inconsistency and unreliability of the evidence of the Issa Ngwalo on the size of the

land the appellant purchased from him has no basis because, the controversy was not on the land purchased from Issa Ngwalo, rather, it was on the piece of land which encroached into the respondent's land. The evidence of Issa Ngwalo explicitly states that the appellant had trespassed into the land of the respondent by extending the boundary and it is true that he denied to know the size of the suit land since it belonged to the respondent. Likewise, I see no inconsistency or contradiction on the evidence of the respondent and Issa Ngwalo when the appellant or the members of trial tribunal questioned them on the year the appellant has trespassed into the land of the respondent. This is due to the fact that the respondent sought amicable settlement with the appellant for seven times but his efforts proved futile necessitating the dispute to be submitted before the Village Land Council.

I find ground 2 and 5 of the petition of appeal has no merit hence dismissed.

Since it is in evidence that the respondent approached the appellant several times for amicable settlement to the extent that the appellant conceded to buy the encroached suit land before the dispute was submitted at the village land council for settlement, this is indicative that the respondent took action at the right time though

the dispute reached the Ward Tribunal a bit late. It is possible that conduct of the appellant offering the respondent to buy the trespassed land without effecting payment could amount to delaying tactics on part of the appellant hence tarrying the respondent from approaching the land settlement machineries on time. To my view, the respondent took action against the illegal act of the appellant since then and that is why the appellant wanted to be compensated Tshs.1,000,000/= or offered the respondent to purchase the suit land at the value of Tshs.600,000/= though his offer was rejected by the respondent by the act of the respondent demanding more than that amount. The appellant's grounds Nos. 3 and 4 lack legal basis.

It was not established that Issa Ngwalo influenced the trial tribunal in determining the dispute between the appellant and the respondent. The appellant did not suggest how. It is a normal practice when the judicial body visit the *locus in quo* to have some interview with the neighbours and other important persons who could not attend the trial so as to grasp the true picture of the source of the dispute. The 6th ground of appeal has no basis.

With respect to the last ground on the procedure of conducting the proceedings of the trial tribunal, it is not dispute that the Ward Tribunal is a creature of the statute, that is the Ward Tribunals' Act

[Cap 206 R.E. 2002] which established the Ward Tribunals under section 3 with the mandate of doing justice to the parties and reach a decision which will secure the peaceful and amicable resolution of the dispute, reconciliation of the parties and the furtherance of the social and economic interests of the village or ward as a whole in which the dispute originates.

Essentially the proceedings before any Ward Tribunal are not governed by any rules of evidence or procedure applicable in a normal court and the Tribunal has mandate to regulate its own procedure as clearly stipulated under section 15 of the Act. For the purpose of clarity and justice I would like to reproduce the provision of the law as follows:

"S.15 Proceedings before tribunal

(1) The Tribunal shall not be bound by any rules of evidence or procedure applicable in any court.

(2) A Tribunal shall, subject to the provisions of this Act, regulate its own procedure.

(3) In the exercise of its functions under this act a Tribunal shall have power to hear statements of witnesses produced by

parties to a complaint, and to examine any relevant document produced by any party."

In view of the above provision of the law, I am not convinced that the Ward Tribunal went wrong in the way it conducted its proceedings especially by hearing respondent's witnesses after taking the evidence of the appellant. It would seem, the complaint of the appellant is based on the respondent's witnesses who were found at the *locus in quo*. This cannot be an impropriety but a legal justification. It is common practice and law that when the court or tribunal visit the locus in quo the parties may bring their witnesses to testify on the clear size or width or demarcation of the disputed suit land. For clarity see **Nizar M. H. vs. Gulamali Fazal Janmohamed** [1980] TLR 29.

For the reasons I have endeavoured to give, the appeal stands dismissed in its entirety with costs.

It is so ordered.

W.P. Dyansobera

Judge

3.6.2021

This judgment is delivered under my hand and the seal of this Court this 3rd day of June, 2021 in the presence of the parties.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge