IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY]
AT ARUSHA
MISC. LAND APPEAL NO. 22 OF 2018

(Originating from the Decision of the District Land and Housing Tribunal of Kiteto at Kibaya in Land Appeal No. 23 of 2017, Original Land Application No. 12 of 2017 at Partimbo Ward Tribunal)

JOSEPH OLETAUO..... APPELLANT

VERSUS

MOSSES PALANDA.....RESPONDENT

JUDGMENT

02/06 & 17/07/2020

MZUNA, J.:

Joseph Oletauo, (herein after the appellant) has preferred this appeal challenging the decision of the District Land and Housing Tribunal of Kiteto at Kibaya (the District Tribunal) which adjudged in favour of **Mosses Palanda**, the respondent herein. It is worth noting that before the Partimbo Ward Tribunal (the Ward Tribunal) where the matter originated for the first time, the respondent sued the appellant for trespass of his land measuring half an acre (½) located at Laalakir hamlet, Partimbo Village within Kiteto District in Manyara Region (hereafter suit land). The respondent emerged the winner both at the Ward Tribunal as well as the District Tribunal. This is the second appeal.

The facts as they stand, it is not controverted that the present appellant sold to the respondent a half acre farm (estimated as 64 X 41 paces) sometimes on 29th November, 2012 at the purchase price of Tshs 700,000/-. It is now averred that the respondent trespassed another ½ acre which was not part of the sold piece of land prompting a boundary dispute between the two. Subsequently thereafter, the appellant instituted the aforesaid case and then the appeal to this court. The Ward Tribunal adjusted the boundaries and delivered the remaining land to the respondent.

In dismissing the appeal, the District Tribunal ruled out the argument that the land was measured by GPS (Global Positioning System) not by normal human footsteps as it was not a surveyed land. The Chairperson agreed with the finding of the Ward Tribunal based on the sale agreement and found that the alleged trespass was not substantiated. Above all that the appellant opted not to attend during visiting of the suit plot (*locus in quo*) without sufficient reasons.

In this appeal, the appellant has lodged six (6) grounds of appeal. They range from failure to accord weight to his evidence including that of GPS instead based on contradicting evidence of the respondent (ground No.1,4 and 6); That he was never heard in the main case at the Ward Tribunal

(ground No 2); Denial of his right to call his witnesses by the Ward Tribunal (ground No 3); Reliance on the decision of the Ward Tribunal which visited the locus in quo in his absence and without notice (ground No. 5)

Hearing of this appeal proceeded ex parte as the respondent never showed up despite proof of service. Let me start with some preliminary points which should not detain me. First, issue that he was not heard and accorded chance to call his witnesses at the Ward tribunal; That the sale was through the GPS measurement and that the visit to the locus in quo was in his absence and there being no notice.

I have revisited the relevant records. The argument that they do not own adjoining plots is without supporting evidence. Equally unsupported evidence is the allegation that the measurement used GPS instead of human foot paces. Similarly, the argument that he was never heard during the trial or that he was not given chance to call his witnesses is not backed by the record of proceedings. He does not deny the fact that the size of his plot is only half an acre (½).

One thing which has raised my concern is on the fact that if the plot is divided into two halves, the figure cannot be as suggested by the Ward Tribunal. The said sale agreement shows that the respondent sold half an

acre plot of land to the appellant in consideration of Tshs 700, 000/=. The members who visited the suit plot divided the suit land between the parties in which the appellant was allocated 64 human foot paces length by 41 human foot paces width whereas the respondent was allocated 64 human foot paces length by 70 human foot paces width. I have my reservation on this. Reading the transcript of the record of the Ward Tribunal (ie. judgment) it says:-

> *"...wajumbe wa Baraza hili pamoja wamehakiki kiwanja hicho na kugundua kuwa ukubwa wa kiwnaja hicho urefu ina hatua za miguu 64 kwa upana wa hatua za miguu sabini 70. Hivyo Baraza kwa pamoja wamerudisha eneo hilo kwa mdai na mdaiwa kubakiwa na eneo la nusu heka kwa hatua za miguu ni urefu 64 kwa hatua za miguu na upana 41 kwa hatua za miguu."*

From the above transcript, it does not augur well if in real sense 64 by 41 human foot paces can make half an acre plot. This fact featured in the respondent's evidence but the same is not reflected in the purported sale agreement. The testimony shows further that the appellant encroached half an acre. If that is the case the division would have been expected to be 64 foot paces by 41 foot paces for both parties instead of 64 foot paces by 70 foot paces for the respondent and 64 foot paces by 41 foot paces for the

appellant. I say so based on the principle laid down in the case of **Merali Hirji and Sons vs. General Tyre** (E.A) Ltd [1983] TLR 175. The Court of Appeal held that:-

> *"...since the contract did not provide for terms the court had a duty to imply reasonable terms."*

The Ward Tribunal tried to imply reasonable terms in the sale agreement however it was not on equal basis. This court being the second appeal court cannot interfere on matters of facts unless there is "*a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure*". That was held in the case of **Samwel Kimaro vs. Hidaya Didas,** Civil Appeal No. 271 of 2018 citing with approval the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H Jariwalla** t/a Zanzibar Hotel [1980] T.L.31 at page 32 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."*

In the case at hand, there are both misapprehension of the evidence leading to a miscarriage of justice as the Ward Tribunal misdirected itself on

the exact ½ an acre size. Those who witnessed it (sale agreement) before the Chairperson Kiambwa Makomero like Balozi Teme Lengoyo ought to have been summoned as key witnesses. The omission has occasioned a failure of justice as well stated under section 45 of the Land Disputes Courts Act, Cap 216 RE 2002.

I invoke my powers under section 43 (1) (b) of the Land Disputed Courts Act, Cap 216 and hereby quash the proceedings and set aside the orders of both the District Tribunal as well as those of the Ward Tribunal. I order the matter to be referred to the Ward Tribunal to start afresh. Appeal partly allowed with no order for costs.

M. G. MZUNA,
JUDGE.
17. 07. 2020