

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

LAND APPEAL NO. 48 OF 2021

(Originating from Land Application No. 54 of 2017 at the District Land and Housing Tribunal for Muleba at Muleba)

MAGRETH KAJUNA ----- APPELLANT

VERSUS

HUUDS JUMA----- RESPONDENT

JUDGEMENT

Date of Last Order: 20/09/2021

Date of Judgment: 01/10/2021

Hon. A. E. Mwipopo, J.

Magreth Kajuna, the Appellant herein, instituted a suit (Application No. 54 of 2017) in the District Land and Housing Tribunal for Muleba against the Respondent namely Huuds Juma for encroaching into her plot with No. 97, Block "H", at Kanengo, Muleba Township, by 1.85 meters. She moved the Tribunal to make an order for the Respondent to remove his erected structure within the plot and to order compensation for prohibiting her to use her land and for wasting her time. The Tribunal dismissed the application for want of merits and declared the Respondent as a lawful owner of the land in dispute. Aggrieved by the Judgment

of the Tribunal, the Appellants filed the present appeal which contains 4 grounds of appeal in the Memorandum of Appeal. The Appellants grounds of appeal are as follows hereunder:-

1. That, the trial Tribunal erred in facts and law for having failed to properly frame and determine the issue in dispute as between the Appellant and Respondent.
2. That, the trial Tribunal erred in law for having reached at judgment without paying regard to the tendered Appellant's documentary evidence.
3. That, the trial Tribunal erred in law for entertaining the suit without joining Muleba District Council through which both the parties claims to have been allocated the land in dispute.
4. That, the trial Tribunal erred in law for having neglected the crucial evidence tendered by the public servants within the land department of Muleba District Council.

On the hearing date, Applicant was represented by Mr. Dastan Mutagahywa, Advocate, whereas Respondent appeared in person unrepresented.

Mr. Mutagahywa submitted on the first ground of appeal that the first issues framed by tribunal as to who is the rightful owner of the land in dispute was not the proper issues for determinate as the issues for determination was supposed to be whether the Respondent encroached to the Appellant's land by 1.8 miters. He

said that the evidence in record proves that both parties are neighbours who own land in the area and there is no dispute that the area is a surveyed area. He is of the view that the only issue in dispute was whether the Respondent encroached into the Appellant's land by building a house and this was the only issues to be framed.

The Counsel stated that it was wrong for the Tribunal to hold that the area in dispute is owned by the Respondent and the Respondent was the first to reside on the area. The evidence relied by the tribunal does not reflect the dispute in question. To support the position he cited the case of **Khadija Ally Almasi V. The Tabora Municipal Council and 2 Others, Land Appeal No. 39 of 2018, High Court, Land Division at Tabora, (Unreported)**, where it was held that the framing of proper issue is important in determination of the dispute before the court.

On the second ground of Appeal the Appellant submitted that the letter tendered by the Appellant from District Executive Director of Muleba District Council to the Respondent dated 08.06.2017 – Exhibit P1 shows that the issue in dispute is the encroachment of the Respondent in the Appellant's plot. The failure of the Tribunal to consider this letter has made the Tribunal to determine the wrong issue of ownership of disputed land instead of the issues of encroachment.

He added that even the evidence from land officers which prove that there is encroachment was not considered.

The Appellant's last ground of appeal where he submitted ground No. 3 and 4 in the Petition of the Appeal together is that the tribunal erred to determine the matter without joining the Muleba District Council as both parties were granted the surveyed plot by the District Council. He said that the Tribunal was supposed to join the District council since the decree is going to affect the town planning of the Muleba District in the disputed area and referred to the cited case of **Khadija Ally Almas** where the court demonstrated test for the necessary parties to be joined in this dispute. He argued that non- joinder of Muleba District Council was fatal and has infringed the right of the District Council without being heard. The fact that the Land Officers from the District Council testified does not mean that the District Council was given right to be heard.

Replying to Appellants submission, Mr. Huud S. Juma submitted that he was granted plot 129 block "H" Muleba by the District Council on 1995 with 38 meters length by 20 meters width. He built his house on the plot after obtained a building permit from the District Council and the sketch plan was approved by the respective committee of the District Council. After construction of his house, he lived in the house for 10 years before the Appellant was granted Plot No. 128 and built her house in 2006. The Respondent said that in the year 2017, the Appellant

alleged that he encroached in her plot. He said that the Appellant alleged that there was a change of survey plan which increased the size of her plot. She instituted the land dispute in the Tribunal claiming for the increased land. The Respondent averred that Appellant's witnesses promised to bring evidence to prove that he encroached into the Appellants land but they never tendered the said surveyed plan of the area. He is of the view that if there was any amendment of the survey plan then the District Council was supposed to consult him before effecting changes of the surveyed plan, thus the Tribunal rightly held that there is no proof that he encroached into Appellant's land.

On the Appellant's issue that the tribunal was supposed to join the District Council in the case before it, he responded by saying that it was the Appellant who instituted the case in the tribunal, hence he was the one who was supposed to join the District Council and not to shift the burden to the Tribunal.

On the Appellant's submission that the letter from the District Council concerning the dispute over suit land which was tendered as exhibit, the Respondent averred that the letter is in respect of Plot No. 97, but his plot is number 129 and the plot is not next to Plot No. 97. He added that the Appellant did not tender any document to prove that her plot was encroached by him.

In his rejoinder, Advocate Mutagahywa retaliated his submission in chief and insisted that Plot No. 97 block H at Muleba which is owned by the Appellant borders

Plot No. 129 block H at Muleba which is owned by the Respondent. He insisted that the facts that the Respondent who own Plot No. 129 has all building permits is not a justification for encroaching into Appellant's land. He added that the surveyed plan was supposed to be tendered by the District Council who was not joined by the Tribunal.

After hearing submissions from both parties, reading the record and judgment of the District Land and Housing Tribunal, I'm now in a position to determine the merits of this Appeal.

Starting with the Appellant's first ground of appeal that the trial Tribunal erred for failure to properly frame and determine the issue in dispute, it is in record that the trial Tribunal framed three issues for determination. The first issue was about the lawful owner of the suit land; the second one is whether the Respondent encroached into the Applicant's land by 1.85 meters; and the last issue was about the reliefs. Failure to frame issue is irregularity which is fatal only when the parties to the case failed to know the real question between them to be considered by the Court as it was held in **Norman V. Overseas Motor Transport (1959) EA 131**. The Appellant herein argued that the first issue framed by tribunal was not the proper issues for determinate as the dispute was the act of the Respondent to encroach into Appellant's land by 1.85 meters, thus issues for determination was supposed to be whether the Respondent encroached to the Appellant's land by

1.85 meters. He said that the evidence in record proves that both parties are neighbours who own land in the area and there is no dispute that the area is a surveyed area. In his response the Respondent said that the Appellant is his neighbour since 2006 who own plot No. 128 and that he never encroached in her land. The claims emerged ten years later after the Appellant alleged that there was amendment of the surveyed plan.

The land in dispute in this case is 1.85 meters which the Appellant alleges that the Respondent encroached into her plot No. 97 Block "H" Kamanengo, Muleba Township. The trial tribunal held in its decision that the suit land is owned by the Respondent and it gave its reason for the decision. The tribunal found that the Appellant failed to prove the ownership of the suit land and it was the Respondent who proved that he acquired the suit land from the District Council and erected his building on the area. Thus, I find that there is nothing wrong with the first issue framed by the trial tribunal concerning the ownership of the land in dispute. After all, the evidence adduced by both parties prove that they knew the real question to be determined by the tribunal between them, hence there is no injustice which is occasioned. Therefore, the Applicant's first issue has no merits.

The Appellant's second issue is that the trial Tribunal erred in law for having reached at judgment without paying regard to the tendered Appellant's documentary evidence. The Appellant submitted on the issue that the letter from

District Executive Director of Muleba District Council to the Respondent dated 08.06.2017 – Exhibit AE1 which she tendered shows that the issue in dispute is the encroachment of the Respondent in the Appellant's plot and the trial tribunal failed to consider it. She is of the view that the failure has made the Tribunal to determine the wrong issue of ownership of disputed land instead of the issues of encroachment.

Looking at the Judgment of the trial tribunal, I'm satisfied that the Chairman considered the Exhibit AE1 in his decision as seen in page 10 of the judgment. The Chairman held that the said letter explains about failure of reconciliation between the parties and it advised them to refer the dispute to the Court. I read the Exhibit AE1 which was addressed to the Respondent. The letter which is about reconciliation of the boundary by rectifying the survey of the plots at the cost of Respondent and it advised them that in case they do not agree they have to resolve the dispute by referring it the land disputes courts. This letter does not at all establish whether or not the Respondent encroached into the Appellant's plot but the District Council was responding to the blame put forward by the Respondent that the Council is responsible for the dispute. Thus, the letter was considered by the tribunal and the tribunal has sufficient reason not to rely on it in its decision. This ground has no merits.

The last Appellant's issue where he submitted grounds No. 3 and 4 together is that the tribunal erred to determine the matter without joining the Muleba District Council as a party to the suit. The Appellant argued that the Tribunal was supposed to join the District council which granted the plots to the parties as the land in dispute is a surveyed area. She added that the decree is going to affect the town planning of the Muleba District as result the Council rights has been infringed. The appellant cited the case of **Khadija Ally Almas** in support of her argument. The Respondent on his side contested the Appellant's submission and said that it was the Appellant who instituted the case in the tribunal, hence she was the one who was supposed to join the District Council and not to shift the burden to the Tribunal.

The trial tribunal has discretion to add the name of the party to the suit whose presence may be necessary for adjudication and settlement of the issues in dispute. Non joinder of necessary party in the suit is fatal. A necessary party is the party whose presence in Court is necessary for effective and complete determination of the issue involved in the suit as it was held by this Court in the case of **Christine Jalison Mwamlima and Another V. Henry Jarison Mwamlima and 6 Others**, Land Case No. 19 of 2017, High Court, Mbeya Registry at Mbeya, (Unreported). There are two tests for determination whether the party is necessary one or not which were developed by the Court of Appeal in

the case of **Abdullatif Mohamed Hamisi V. Mehboob Yusuph Athuman and Another**, Civil Revision No. 6 of 2017, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported). The said tests are the presence of right or relief against such party involved in the suit and the passing of Court's decree must not be possible in absence of such party.

Applying the test to the present case, the Appellant in her application did seek for two main reliefs. The first one is the order of the Court for the Respondent to remove his erected structure within Appellant's plot No. 97 Block "H", Kamanengo, Muleba Township; and the second relief is compensation for prohibiting her not to use her land and for wasting her time. The reliefs sought by the Appellant does not show the presence of right or relief against Muleba District Council which was involved in the suit. Even relief granted by the trial tribunal to the Respondent whom the judgment was delivered in his favour does not contain any right or be directed to the Muleba District Council. Thus, the first test fails.

Moreover, the passing of Court's decree was possible in absence of such party. For that reason even the second test fails. Since both test to see whether or not the Muleba District Council as necessary party have failed, the Council could only be joined as non- necessary (proper) party by the party who instituted the suit. Thus, it was the duty of the Appellant to join the Muleba District Council as

non – necessary party and should not blame the tribunal for her own mistakes and omission.

Therefore, I find that the appeal is devoid of merits and I hereby dismiss it with cost. The decision of the trial tribunal is upheld.



A.E. MWIPOPO

JUDGE

01.10.2021

Court: The Judgment was delivered today this 01.10.2021 in chamber under the seal of this court in the presence of the Appellant and the Respondent.



A. E. MWIPOPO

JUDGE

01.10.2021