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

**(LAND DIVISION)**
**AT ARUSHA**

**MISC. LAND APPEAL NO. 56 OF 2020**

*(C/F District Land and Housing Tribunal for Arusha in Land Appeal No. 26 of 2019; Originating from Osunyai Ward Tribunal in Application No. BK/OS/KS/02/2019)*

**JOHN VICTOR KIMARO ..... APPELLANT**

***Versus***

**ALFAYO MELEMBUKI ..... RESPONDENT**

**JUDGMENT**

*5th August & 22nd October, 2021*

**Masara, J.**

## 1.0 INTRODUCTION

At Osunyai Ward Tribunal (hereinafter "the trial tribunal"), **John Victor Kimaro** (hereinafter "the Appellant") sued **Alfayo Melembuki** (hereinafter "the Respondent") for blocking the pathway, which he had been using before to pass to his premises ("the suit land"). The trial tribunal, after hearing the evidence of both parties and visiting *locus in quo*, found that it was the Appellant who trespassed into the Respondent's land and built a house therein. It declared the Respondent the lawful owner of the suit land. In addition, the Appellant was ordered to pay the Respondent TZS 500,000/= as compensation for the piece of land that he had trespassed on, in lieu of demolishing the Appellant's house. Further, the Respondent was ordered to construct a fence that would be a permanent boundary between him and the Appellant.

The Respondent was dissatisfied by that decision, he appealed to the District Land and Housing Tribunal for Arusha ("the first appellate tribunal"), vide Land Appeal No. 26 of 2019. His main ground was that the trial tribunal erred in ordering compensation instead of an order for demolishing the Appellant's house since he had no intention of selling the suit land. He also challenged the decision on the ground that the trial tribunal failed to state clear demarcations

of the suit land. Further, he was not satisfied with the order that he should erect a fence on his land; and lastly, he was aggrieved for being denied costs by the trial tribunal. The first appellate tribunal allowed the appeal and quashed the decision of the trial tribunal. It ordered the Appellant to demolish the house he built on the Respondent's land and give vacant possession of the land to the Respondent. The first appellate tribunal also issued a permanent injunction restraining the Appellant and his members from entering on the suit land. The Respondent was awarded costs as well. That decision did not please the Appellant culminating to this appeal on the following grounds:

a) *That the District Land and Housing Tribunal erred in law and on fact by failure to decide on the issue in dispute between the parties which was on the blocking of the Appellant's easement heading to his house but instead misdirected itself by venturing on the question of trespass to land;*
b) *That the District Land and Housing Tribunal erred in law and on fact by holding that the Appellant herein ought to respect the original status and respect boundaries without considering that the Respondent has never brought in court the sale agreement between him and the alleged Felician Massawe which could indicate the recent boundaries and demarcations of his alleged plot if at all he bought the same;*
c) *That the District Land and Housing Tribunal erred in law and on fact by treating the boundaries in the sale agreement between the Appellant and Felician Massawe as proper boundaries without considering that there are changes in terms of development and some of the then boundaries have totally changed;*
d) *That the District land and Housing Tribunal erred in law and on fact by declaring the Respondent as a lawful owner instead of ordering trial de novo in order to ascertain the actual size of what was the subject matter of the dispute;*
e) *That the District land and Housing Tribunal erred in law and on fact by failure to make evaluation of evidence including the contract of sale before reaching at the present impugned decision;*
f) *That the District Land and Housing Tribunal erred in law and on fact by failure to appreciate that the Respondent had no any tangible proof to show that he owns any plot of any mentioned mark during his testimony;*
g) *That the District Land and Housing Tribunal erred in law and on fact by failure to appreciate that the Appellant herein being the original owner of the entire plot was in a proper position to understand the boundaries*

*than the respondent who came later and without engaging the Appellant during the purchase if at all he purchased the same plot; and*

h) *That the District Land and Housing Tribunal erred in law and on fact by issuing demolition order against the Appellant's building on an area of land which has never been subject of dispute and which has never been a complaint in the trial tribunal.*

Consequently, the Appellant prays that the appeal be allowed by declaring that the Respondent had blocked the Appellant's easement heading to his home. Alternatively, the Appellant prays for an order of *trial de novo* with costs.

## 2.0 REPRESENTATION

At the hearing of this appeal, the Appellant was represented by Mr. Egbert Mujungu, learned advocate, while the Respondent was represented by Ms Lilian Joel, learned advocate. The appeal was heard *viva voce*.

## 3.0 APPELLANT'S SUBMISSIONS ON THE GROUNDS OF APPEAL

Before making submissions on behalf of the Appellant, Mr. Mujungu opted to consolidate grounds 1st and 4th as one ground, and the rest of the grounds were combined and argued together. Submitting in support of the 1st and 4th grounds of appeal, Mr. Mujungu contended that the issue before the trial tribunal was blocking the Appellant's easement; that, unfortunately, the issue was not dealt with by the first appellate tribunal. On the contrary, first appellate tribunal dealt with ownership of the suit land, a fact that was not in issue. Such decision, in Mr. Mujungu's view, did not ascertain the size of the disputed land which was one of the Respondent's grounds of appeal in the first appellate tribunal. Mr. Mujungu contended that the decision of the first appellate tribunal brings more confusion than solution because, in the course of execution, it may include the whole land occupied by the Appellant. He contended that the first appellate tribunal deviated from determining issues before it as its decision that the Respondent is a trespasser was not in issue. To support the assertion that a

court has to deal with issues before it, he referred to decisions in ***Tina and Company Ltd & 2 Others Vs. Eurafrican Bank (T) Limited,*** Commercial Review No. 7 of 2018 and ***Joseph Ndyamukana Vs. NIC Bank and 2 Others***, Civil Appeal No. 239 of 2017 (both unreported).

On the rest of the grounds of appeal, Mr. Mujungu submitted that there is no record showing boundaries of the land the Respondent allegedly bought from one Felician Massawe. It was Mr. Mujungu's submissions that boundaries of the area had changed due to passage of time as the land was not surveyed, the fact that the former pathway had changed from a path to a road, the demarcations could not remain intact. Further, that the Respondent did not tender the sale agreement which would have provided clear demarcations of the suit land, considering that the Appellant who was the original owner of the land was not involved during the sale of the land from Felician Massawe to the Respondent. Mr. Mujungu challenged the first appellate tribunal's for relying on the sale agreement to declare the Respondent the lawful owner of the suit land notwithstanding the fact that the Appellant lived there for a long period of time and had right of way thereto over the years. Mr. Mujungu further contended that chaos emerged when the Respondent blocked the passage (uchochoro) that the Appellant had used for seven years while the Respondent was there. Mr. Mujungu further submitted that the evidence on record favours the Appellant. He therefore prayed that the Appellant be declared victorious or, alternatively, the Court deems it appropriate to order trial *de novo* for proper decision. He also prays for costs of this appeal.

## 4.0 RESPONDENT'S SUBMISSIONS

Contesting the appeal, Ms. Lilian while submitting against grounds 1st and 4th, stated that it was the Respondent who had appealed to the first appellate tribunal and therefore the ground regarding the size of the disputed land did

not form part of the grounds for determination as they had been vacated by the Respondent. She averred that the Appellant did not file a cross appeal; as such, the issue regarding size of the suit land becomes a new ground. According to Ms. Lilian, the sold land had the same size with the land that the Appellant had sold, which measured 12×9 paces, therefore there was no dispute regarding the size of the disputed land. Ms. Lilian distinguished the cases cited by Mr. Mujungu, stating that they do not assist in resolving the dispute before this Court because there was no issue which was left undetermined. Regarding the sale agreement, the learned advocate argued that it was not an issue before the trial tribunal or the first appellate tribunal. The same applies to the issue of boundaries. Thus, according to Ms. Lilian, they are new issues.

Ms Lilian did not contest the fact that the Appellant might have used the pathway before; her assertion was that the decision of the trial tribunal declared the path as the property of the Respondent. On the contention that the Appellant was not involved in the sale of the land, Ms Lilian argued that there was no legal requirement to involve all neighbours in the sale. Regarding the issue that the Appellant had used the land for seven years before it was blocked, Ms Lilian stated that such assertion was an issue of evidence. She implored the Court to make a proper scrutiny of the records of the lower tribunals; in her view, the Court will ascertain the fact that the Appellant has no rights over the said land at all. That what the Appellant is doing is disturbing the Respondent because he is well aware of the piece of land he had sold to Mr. Massawe, who later sold it to the Respondent. She prayed for dismissal of the appeal with costs.

In a rejoinder submission, Mr. Mujungu retorted that the Court's duty is to decide over the dispute and, in doing so, it can raise any issue it considers proper for smooth determination of the dispute before it. He asserted that

whether the ground was withdrawn at the hearing, the first appellate tribunal ought to have determined it since it forms the core of the dispute between the parties. He added that the absence of the sale contract vitiates claims of lawful ownership. Mr. Mujungu insisted that the Appellant ought to have been involved in the sale of the disputed land for peaceful co-existence and considering the fact that he had right of way.

## 5.0 COURT'S DETERMINATION

Having keenly considered the grounds of appeal, the records of the lower tribunals and the rival submissions of the counsel for the parties, I am now in a position to determine the grounds of appeal, as argued by the advocates for the parties.

In the 1st and 4th grounds of appeal, I note that the Appellant's complaint at the trial tribunal was that the Respondent had blocked a path/easement that headed to his home. At the hearing and after visiting the *locus in quo*, the trial tribunal found out that the path complained of belonged to the Respondent. It further found out that the Appellant had trespassed into the Respondent's land because part of his building was erected in the Respondent's land. As stated earlier, the trial tribunal ordered that the Appellant pays TZS 500,000/= to the Respondent as compensation for the piece of land trespassed into. Following the Respondent's appeal, the first appellate tribunal quashed the decision of the trial tribunal ordered the Appellant to demolish his building and give vacant possession to the Respondent.

The decision of the trial tribunal, correctly as pointed out by Mr. Mujungu, was erroneously arrived at. In the first place, the Appellant's claim in the trial tribunal was on blockage of way/easement by the Respondent and not trespass to his land. What the trial tribunal ought to have dealt with was whether it was

true that the Respondent had blocked the Appellant's way, and not to determine ownership of the Appellant's land. Determining ownership of the suit land was not an issue before the two lower tribunals. Courts are always reminded to determine issues presented before them and not otherwise. In this stance, I am guided by the Court of Appeal decision in ***Scan-Tan Tours Ltd Vs. The Registered Trustees of The Catholic Diocese of Mbulu***, Civil Appeal No. 78 of 2012 (unreported), where it was held:

> *"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given an opportunity to address the court on those questions."*

In the case at hand, the Appellant's main complaint was that the Respondent blocked the way to the Appellant's home. Determination of ownership and in consequence thereof declaring the Respondent the lawful owner of the suit land by both lower tribunals caused miscarriage of justice to the Appellant since that was not the issue before them. Parties were not given opportunity to deal with such an issue.

Mr. Mujungu also faults the decisions of the lower tribunals for not containing the size of the suit land. It is true that both lower tribunals declared the Respondent the lawful owner of the suit land, and further found that the Appellant had built on the Respondent's land. The first appellate tribunal ordered demolition of the building that was built on the Respondent's land. However, the size of the land trespassed by the Appellant was not made known by both tribunals. The order of the first appellate tribunal, which ordered the Appellant to demolish the building built on the Respondent's land and give vacant possession, cannot easily be enforced since the size of the land that the Appellant ought to give vacant possession is not known. Further, it is not known whether the Appellant was to demolish the whole house or part of it. The decision is therefore bad for uncertainty.

I entirely agree with Mr. Mujungu's submission that the execution of the decision made by the first appellate tribunal may entail taking over the whole area occupied by the Appellant. The size of the land that was declared to be the lawful property of the Respondent ought to have been made apparent on the record, for smooth execution of the decision. Failure to indicate the size of the disputed land, and the land that was declared the lawful property of the Respondent, renders the decision inexecutable. I borrow leaf from the decisions of this Court on the same subject. In ***The Board of Trustees of the F.P.T.C Church Vs. The Board of Trustees Pentecostal Church*** (unreported), my sister Makani, J, while faced with a similar matter, had the following to say:

> *"The rationale for proper description is to make* ***execution easy and to avoid any chaos by proper identification of the suit property. The judgment of the Ward*** *Tribunal* ***is therefore not executable for failure to have proper details/description of the suit land."*** (Emphasis added)

Further, in ***Mohamed Salehe Vs. Fatuma Ally Mohamed***, Land Appeal No. 182 of 2018 (unreported) DSM H.C Land Division, Maige, J. observed the following:

> *"I would add however that, the cause of such inconsistencies is lack of clear and sufficient description of the suit property in the pleadings. The omission to clearly and sufficiently describe the suit property was violative of the mandatory requirement of order VII rule 3 of the Procedure Code, Cap. 33, R.E. 2019."*

The same decision was also made by Utamwa, J. in ***Agast Green Mwamanda (suing as the Administrator of the Estate of the late Abel Mwamanda) Vs. Jena Martin***, Misc. Land Appeal No. 4 of 2019 (unreported), where it was held:

> *"Indeed, it is the law that, court orders must be certain and executable. It follows thus that, where the description of the land in dispute is uncertain, it will not be possible for the court to make any definite order and execute it."*

From the above decisions, description of the size and the description of the suit land is paramount. In the case at hand, that omission is not evident. This vitiates the proceedings and decisions of both lower tribunals.

Before concluding, I noted two other anomalies touching the propriety of the trial tribunal records. The first anomaly relates to what is said to have been a visit to the *locus in quo*. On close perusal of the trial tribunal records, there is nothing in the proceedings suggesting that there was a visit of the *locus in quo*. Incidentally, the decision of the trial tribunal based on what was observed at the *locus in quo*. I hold this view because the trial tribunal's decision contain a statement to the effect that its decision was "after visiting the *locus in quo* and measuring the suit land". It is from that visit that the tribunal found out that the piece of land complained of by the Appellant was not his property. It also found out that the Appellant had trespassed into the Respondent's land and built a house thereon. Suffice it to say, the decision of the trial tribunal was solely based on the visit to the *locus in quo*, whose record was not made part of the proceedings before this Court. That anomaly affects the authenticity of the decision of the first appellate tribunal which based its finding on the trial tribunal's records.

A record of the visit to a *locus in quo* must form part of the trial court/tribunal records. Proceedings thereof ought to be incorporated in the records. Unfortunately, the trial tribunal records do not contain the proceedings of the alleged visit to the *locus in quo*. That is an anomaly which renders the decision thereon a nullity. The rationale behind this is that this Court as well as the first appellate tribunal cannot be in a position to ascertain the size of the land trespassed. Considering the nature of the suit that was filed in the trial tribunal which was on blockage of a path, having visited the *locus in quo*, the trial tribunal was in a better position to ascertain what they found therein, in terms

of size and the trespasser of the others' land. Such record would also assist in determining the claim justly. Failure to include the proceedings of the visit to the *locus in quo* in the trial tribunal's records renders the decision thereon nugatory.

The second anomaly that renders the decision of the first appellate tribunal nugatory relates to the way it dealt with the tribunal assessors' opinions. It is noted that prior to delivery of the judgment, the opinions of the assessors were not read to the parties as per the dictates of the law. It is a requirement of the law that the tribunal chairperson, before composing judgment, has to ensure that opinions of the assessors are read to the parties. That is per Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N 174 of 2003 which imposes a duty on the Chairperson to require every assessor present at the conclusion of the hearing to give his opinion in writing. The relevant provision provides:

> *"Notwithstanding sub-regulation (1), the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."*

Given the anomalies outlined hereinabove, I find the 1st and 4th grounds of appeal to have merits. Considering the seriousness of the anomalies pointed out in the first and fourth grounds of appeal, which are capable of nullifying the entire proceedings and decisions of the two lower tribunals, I find no compelling reasons to deal with the rest of the grounds of appeal. The first and fourth grounds of appeal sufficiently disposes the entire appeal. The decision of the first appellate tribunal cannot be left to stand since it stems from a nullity.

## 6.0 CONCLUSION

Consequently, given what I have endeavoured to discuss above, the appeal has merits to the extent above explained. It is accordingly allowed. By invoking

revisional powers conferred to me under section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019], I hereby quash and set aside the proceedings and decisions of both the trial tribunal as well as those of the first appellate tribunal. If any of the parties herein is interested to pursue the dispute afresh, he should file a fresh suit before a tribunal of competent jurisdiction. Considering that the anomalies stated hitherto are not attributable to either of the parties, I make no orders as to costs.

Order accordingly.

Y. B. Masara
**JUDGE**
22nd October, 2021