IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

PC. CIVIL APPEAL NO. 40 OF 2020

(C/F Civil Appeal No 08 of 2018 Ngorongoro District Court at Loliondo, Originating from Civil Case No. 42 of 2018 at Loliondo Primary Court)

MANDILE KINAYO.....APPELLANT

VERSUS

NGOYARE KONEREI.....RESPONDENT

JUDGMENT

04/11/2021 & 04/02/2022

GWAE, J

The appellant, Mandile Kinayo is aggrieved by the decision of both Loliondo Primary Court in Civil Case No. 42 of 2018 ("trial Court") and District Court of Ngorongoro at Loliondo (1st appellate court), he is now before this court for the second appeal.

To better appreciate the context of the case, it is pertinent to narrate the factual landscape though in brief, the respondent herein filed a civil case at Loliondo Primary Court claiming Tshs. 2,372,000/= against the appellant herein being costs for destruction of his crops by the appellant. After hearing of the parties, the trial court was satisfied that the respondent proved his claim that the land belonged to him and that the appellant had trespassed

into his land in which he had planted maize and beans and destroyed them. The appellant was therefore ordered to pay the costs for the destruction as prayed by the respondent and the costs of the case.

Dissatisfied with the trial court's decision the appellant lodged his appeal to the Ngorongoro District Court (1st appellate court) where he also lost his case, he is now before this court seeking for an order that judgments of both trial court and the 1st appellate court be quashed and set aside and this appeal be allowed. In the petition of appeal the appellant has raised seven (7) grounds of appeal however in his written submission grounds number 4 and 7 were abandoned and therefore the following grounds are subject to the determination by this court;

1. That the learned appellate Magistrate erred in law and fact for finding that it was not the duty of trial magistrate to guide parties during presentation of their evidence.
2. That the learned appellate Magistrate erred in law and in fact in failing to find that the evidence of witnesses was not properly evaluated by the trial magistrate before reaching his decision.

3. That the learned appellate magistrate erred in law and in fact for failure to find that there was still land dispute on the subject when the trial magistrate reached his flawed and unjust decision.
4. That the learned appellate magistrate erred in law and fact in failing to appreciate improper admissibility of exhibit P1 which was solely relied by the trial magistrate.
5. That the learned appellate magistrate erred in law and fact for referring the evidence of witnesses which were not in trial records.

When the matter came for hearing, the respondent herein did not enter appearance and therefore hearing of the appeal proceeded ex parte. The appellant enjoyed legal services of the learned counsel **Mr. Yonas Masiaya Laiser** and the appeal was disposed by way of written submission.

On the first ground of appeal the learned counsel submitted that the trial magistrate ought to have ensured that the appellant herein understands the evidence that was adduced in court taking into account that he is a pure maasai who does not know Swahili language. The counsel went further to state that had the trial Magistrate made an inquiry as to the status of the

land in dispute he would have noticed that ownership of the said land was yet to be determined.

The second ground was argued together with ground number six where the appellant argued that the evidence of the respondent was contradictory and further added that the trial magistrate misdirected himself to have discussed on the copy of the judgment of the Ward tribunal while the same is not reflected in the trial court proceedings. More so, the learned counsel complained that the trial magistrate relied on the evidence of witnesses who was not in the trial records. He went further to state that on records there is only the evidence of SMI and SMII however the trial magistrate relied on the evidence of PW1 PW2 and PW3.

As to the third ground of appeal the learned counsel submitted that the trial magistrate determined the matter which he did not have power to do so as there was still a pending land dispute between the parties. According to him it was improper for the trial magistrate to state that there was a land dispute between the parties and the same was finalized at Oloirien Ward Tribunal where the respondent was declared the owner of the disputed land without inquiring the copy of the said judgment. To cement

his arguments the learned counsel cited the case of **Said Juma vs R** (1968) H.C.D No. 158.

As to the fifth ground Mr. Yonas complained that the exhibit P1 which was relied by the trial Magistrate was wrongly admitted and according to him the proper person who was to tender it was the Ward Executive Officer who conducted the valuation.

Having taken into consideration records of both the trial court and the 1st appellate court and having read carefully the appellant's submission, this court wishes to begin with ground number one on the complaint that the learned magistrate ought to have ensure that the appellant herein was aware of the evidence. This court had time to go through the proceedings of the trial court and noted that through out the hearing the appellant herein was fully involved including cross examination of the respondent and his witnesses. If at all the appellant was able to cross examine the witnesses impliedly, he understood every business that was going on in court. With due respect, this court wonders as to what guidance did the appellant's counsel wanted the trial magistrate to have given the parties when presenting their evidences. As the duty of the court is to ensure that parties are given equal rights to present their cases and not to guide them on how

to present their evidence. That being said this court finds no merit in this ground of appeal hence dismissed.

As to the 2nd and 6th grounds of appeal which I need not repeat them, this court is of the view that the same are also bound to fail on the following reasons; on these two grounds of appeal the appellant is complaining that the fact that the trial magistrate in his judgment did not specifically mention the names of the witnesses but only mentioned that "the appellant and his two witnesses" is contradictory, with due respect this is a misconception by the learned counsel as the proceedings are very clear that the respondent herein brought only two witness and as they were testifying their particulars were recorded. The fact that the trial magistrate referred them as "two witnesses" does not in any way occasion any injustice to the appellant as the truth would still be reflected by the proceedings.

On equal footing, the counsel has also complained on the reliance of the copy of judgment from the ward tribunal. According to him the said judgment is not reflected in the evidence at the trial tribunal. As I have perused the whole of the trial court's file, I have found neither the judgment of the ward tribunal nor the valuation report, however as I glanced at page 3 of the typed proceeding it is evidently that the respondent here in tendered

the said exhibits and were admitted without objection from the appellant and were collectively marked as exhibit P1, perhaps we let the proceedings speaks for themselves;

> ".....naomba kutoa nakala ya tathmini iliyofanywa na afisa kilimo pamoja na hukumu ya baraza la ardhi kuonesha kuwa shamba hilo ni mali yangu.
>
> Mdaiwa: sina pingamizi zipokelewe tu.
>
> Mahakama: nakala ya hukumu kutoka baraza na tathimini ya mazao vyote kwa pamoja vimepokelewa kama kielelezo P1"

Even when composing the judgment, the trial magistrate in arriving at his findings made reference to the said exhibit by stating that and I quote;

> "Mahakama inachokiona baina ya wadaawa na pia kwa kuzingatia ushahidi wa mdaiwa ni kuwa wadaawa waliwahi kuwa na mgogoro wa ardhi ambao uliamuliwa na baraza la ardhi kata ya Oloirien na kumpa mdai ushindi kuwa ndiye mmiliki halali was shamba hilo. Kitendo cha mdaiwa kulima eneo ambalo anajua kuwa sio lake na kuamua kuharibu kwa makusudi mazao ya mdai kinaipa mahakama hii kuona kuwa madai ya mdaiwa yana uhalali kisheria."

There is always a presumption that the court record accurately represents what actually transpired in court. In **Halfani Sudi v. Abieza Chichili** [1998] TLR 527, at 529 it was observed that:

> "We entirely agree with our learned brother; MNZAVAS, J.A. and the authorities he relied on which are loud and clear that court record is a serious document. It should not be lightly impeached" **Shabir F.A. Jessa v. Rajkumar Deogra,** [CAT- Civil Reference No. 12 of 1994 (unreported)] and that "There is always the presumption that a court record accurately represents what happened": **Paulo Osinya v. R.** [1959} EA 353]. In this matter, we are of the opinion that the evidence placed before us has not rebutted this presumption."

With the foregoing position of the law this court cannot buy the appellant's counsel proposition that the said exhibit was improperly relied and that the same is not reflected by the evidence before the trial court. The interest of justice so demands, follow the court's record. It is the court's record which accurately represents what transpired in court. Given an account of what transpired this court is justified to hold that even in the absence of the said records in the court file for reasons which I need not speculate but guided by the principle of the sanctity of court records, it is the view of this court that the said exhibit was properly relied upon by the trial magistrate. That being said ground number 2 and 6 are dismissed for want of merit.

As far as ground number 3 is concerned this court wishes to comment that whenever in a matter it is noted that there is another matter of the same nature going on in another court of law, it is the duty of the parties to notify the court as to such status so that the trial court could be in a better position to decide on the way forward. In the instant case neither of the parties herein notified the trial court that there is still a land dispute pending at an appeal stage nor did they give any evidence to that effect nevertheless this court has observed the presence of a copy of the judgment at the District Land and Housing Tribunal for Ngorongoro at Loliondo in Appeal No. 03 of 2018 arising from the land complaint filed at the Magaiduru Ward Tribunal. The records further reveal that the appeal of the decision of the Ward Tribunal was filed to the DLHT on the 14th June 2018 meanwhile the civil case at the trial court appears to have been filed on the 26th September 2018, meaning that at the time the respondent was filing his case the dispute between the parties over the ownership of the land was yet to be determined.

As to the 5th ground, the appellant is complaining on the admissibility of the exhibit P1, according to him the same ought to have been tendered by the person who conducted the valuation. With due respect to the learned

counsel, he should bear in mind that in this case we are dealing with proceedings of the Primary Courts where there are no hard or fast rules on procedures in the manner the hearing is conducted. Bearing that in mind this court is of the view that the fact being that the document that was tendered by the respondent having established that after destruction of his crops' valuation was conducted by the agricultural officer and the fact that the appellant herein was given an opportunity to state whether he objects it or not, that itself suffices to its admissibility by the trial court and it is the view of this court that the same was properly considered by the trial court.

In the light of ground of appeal number three and taking into account that the former case before ward tribunal, the respondent's claims were on trespass and damages to property (destruction of maize crops), this appeal is allowed, the trial court had no jurisdiction to determine the civil case while the ownership together with a claim of destruction of crops were entertained by quasi-judicial bodies of competent. Parties to bear their own costs.

It is so ordered.

M. R. GWAE
JUDGE
04/02/2022