

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO.8 OF 2021

(Arising from the District Land and Housing Tribunal for Mtwara at Mtwara in Land Appeal No.151 of 2020 before Hon. H.I. Lukeha, Chairman and originating from the Ward Tribunal of Magengeni in Land Application No.13 of 2020)

GIDION WILLIAM..... APPELLANT

VERSUS

ZAINABU MOHAMEDI KUMKANDU.....RESPONDENT

JUDGMENT

10/5/2022 & 28/7/2022

LALTAIKA, J.:

The appellant, Gidion William, was sued by the respondent, Zainabu Mohamedi Kumkandu, before the Ward Tribunal for Magengeni vide land Application No.13 of 2020 for trespassing into the suit land. The trial tribunal decided in favour of the respondent by declaring her the rightful owner of the suit land. Dissatisfied and aggrieved, the appellant lodged his appeal before the District Land and Housing Tribunal for Mtwara at Mtwara. After the hearing of the appeal the appellate tribunal delivered its judgment in favour of the respondent. Dissatisfied once again, the

appellant has filed a petition of appeal in this court comprising of four grounds as hereinbelow: -

- 1. That the chairman of District Land and Housing Tribunal erred in law and fact for considering the respondent as a rightful owner of the suit land.*
- 2. That the chairman of District Land and Housing Tribunal erred in law and fact for failure to consider the evidence adduced on the proceedings course, as the respondent failed to prove her facts covering the boundaries of the suit farm and the existence of ownership.*
- 3. That the chairman of District Land and Housing Tribunal erred in facts for not determining the crucial issue on the appeal stages just for insufficient cause of the Ward Tribunal trial proceedings.*
- 4. That the chairman of District Land and Housing Tribunal erred in law for not visiting the suit land as to satisfy itself with evidence to the disputed area rather relied on the former decision of the Magengeni Ward Tribunal.*

When this appeal was called on for hearing both parties appeared in person and unrepresented. The appellant made his submission by providing a background of this appeal before embarking on the grounds.

Arguing for the first ground of appeal, the appellant stated that the disputed land belongs to him since all the neighbours had testified that they did not know the respondent. He stressed that he is the owner because he had been using the suit land by planting plants including banana trees, cashews and other crops like cassava and pineapples.

On the second ground, the appellant argued that the appellate tribunal had erred in law and fact by failing to recognize the evidence he had adduced. He insisted that the respondent had failed to prove ownership of the suit land.

The appellant submitted further that during trial he tendered exhibits which included a letter from the local government. That letter, the appellant averred, was addressed to the trial tribunal and it stated that the suit land does not belong to the respondent. Nevertheless, the appellant maintained, the trial tribunal decided in favour of the respondent.

The appellant went further and submitted that the appellate tribunal had failed to make use of the exhibits that he tendered such as the report of the valuer over the suit land. He argued that he signed a document indicating the size of his area as well as what was in it.

Submitting on the third ground, the appellant argued that the appellate tribunal erred in law and fact by making use of the decision of the trial tribunal which was legally inadequate. He asserted that the trial tribunal did not want to call the witnesses who had testified at the level of the "Mtaa" with whom he lives in that Mtaa. The appellant stressed that the Tribunal was not fair to him because at the Ward level, his witness who is his neighbour had testified that he was the owner of the suit land.

Finally, the appellant submitted on the fourth ground that the District Land and Housing Tribunal erred in law and fact for failure to visit the locus in quo hence it based its decision on the record of the trial tribunal. He stressed that the same was the most regrettable ground on his part. He further submitted that the appellate tribunal did not take trouble to

know the nature of the conflict from the neighbours, Mtaa leaders or anyone else who was on the know on the suit land.

In response, the respondent submitted that in 2001 she got the suit land while residing at Mikindani. The respondent argued that she got the news from her late husband, Mohamed Bakari Namollela who was the councillor of Mitengo Ward that land was on sale. She stressed that she then bought two plots each at Tshs. 200/= paying a total of Tshs.400/=.

The respondent argued that she did not know the exact size of the land she had purchased but she was told it measured 70 x 30 meters. It was the respondent's submission that she used the land to cultivate crops for a long time. In 2013, the respondent averred, the government advertised that it intended to compensate her and her neighbours for the land. The government then, allegedly, took a photo of her and she was advised to wait for compensation.

However, the respondent averred, in 2020 she suffered from heart related diseases and left for medical attention at the Muhimbili National Hospital in Dar es Salaam. When she recovered, the respondent allegedly went back to her land that she had left under the care of her daughter Husna Abdallah and her neighbour one Mzee Muma only to find that it had been invaded by the appellant. The respondent averred that the respondent was asked how he had come into occupation of the suit land and he was given the land by soldiers.

The respondent averred further that she decided to take the matter to the Mtaa leadership and later to the Ward Tribunal. In the Ward Tribunal, the respondent stated, not only did her witnesses testify against

the appellant, but also the trial tribunal visited the locus in quo and eventually it decided in her favour.

To that end, the respondent averred, she started cultivating on her land, but she was estopped on allegation that the appellant had appealed to the appellate tribunal.

The respondent submitted further that the appellate tribunal ended up deciding in her favour but still the appellant lodged yet another appeal to this court. The respondent stressed that she feels so painful going back and forth in the court corridors because she never stole from anyone. She stressed further that the suit land belongs to her since she was given by the government and used to cultivate it for her subsistence. She lamented that she had grown up children who needed the land for their livelihood.

Having dispassionately considered the grounds of appeal, records of the tribunals and the submissions of parties, I will centre my deliberations on the third and fourth grounds of appeal which I consider capable of determining the appeal in its entirety.

The appellant had complained that the District Land and Housing Tribunal for Mtwara erred for not visiting the locus in quo but instead relied on the evidence of the trial tribunal to adjudge in favour of the respondent.

It is noteworthy that visiting the locus in quo is purely under the discretion of the court or tribunal. Nevertheless, at the appellate level, there is no requirement that the appellate court or tribunal visits or revisits the locus in quo for satisfaction of the evidence gathered by the lower judicial body or quasi-judicial body on boundaries, structures, and easement.

It is trite law that whenever the appellate court or tribunal discovers that the visit to the locus in quo made by the trial court or tribunal does not meet the requirements of the law, the remedy is to order a fresh visit to the locus in quo by the trial court or tribunal for compliance of proper procedures. See, the case of **Bomu Mohamed vs Hamisi Amiri** (Civil Appeal 99 of 2018) [2020] TZCA 29.

The appellant had complained further that although the trial tribunal had visited the suit land, it did not establish anything that suggested that the respondent owned the suit land. These assertions that make the third and fourth grounds of appeal prompted me to go through the record of the trial tribunal and what I realised that the proceedings of the trial tribunal do not show if the members, parties, and their witnesses went to visit the locus in quo.

Nevertheless, the decision of the trial tribunal carries a phrase which shows that the trial tribunal had visited the locus in quo. The phrase appears on the first page of the decision, and it reads: -

"Wajumbe baada ya kufika eneo la tukio walifuata taratibu zao za utendaji wao wa kazi yao kwa kumchukua mmoja baada ya mwingine kuonyesha maeneo yao, walianza na mdai kisha shahidi wake lakini kwa nyakati tofauti tofauti pia walimaliza zoezi hilo pia kwa mdaiwa ndugu Gidion William. Wajumbe baada ya kujiridhisha na zoezi hilo pia na maelezo ya mdai na mdaiwa pamoja na mashahidi wa pande zote mbili, ndipo wakatoa uamuzi yaani hukumu."

In view of the above excerpt, it is apparent that the trial tribunal did not record the proceedings at the locus in quo. This is fatal and it is as good as there was no visit to the locus in quo. As a matter of facts this

conspicuous omission makes it cumbersome for this court to make any meaningful decision. It cannot, out of its own imagination, determine issues which should have been properly documented by the trial and appellate tribunals. There is no doubt that this omission has occasioned miscarriage of justice. See **Kimonidimitri Mantheakis vs Ally Azim Dewji and Others**, Civil Appeal No.4 of 2018 CAT-Dar es Salaam at page 8.

In view of what I have observed and evaluated, it goes without hesitation that the proceedings and decision of the trial tribunal and that of the appellate tribunal were vitiated. In the circumstances, I hereby nullify the trial and appellate tribunal's proceedings, quash the decision of the trial tribunal and the judgment of appellate tribunal.

Consequently, I hereby order an expedited retrial before the appropriate tribunal. In the premises, I allow the appeal and considering the circumstances surrounding the matter, I make no order as to costs.

It is so ordered.

E.I. LALTAIKA



JUDGE

28.7.2022

