THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

IN THE HIGH COURT- DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 28 OF 2022

(Arising from the District Court of Tarime at Tarime in Criminal Case No. 334 of 2020)

MORDIKAE MOSETI PHANUEL ..... **APPELLANT**

Versus

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

31.10.2022 & 04.11.2022
Mtulya, J.:

This court is asked to reply an issue: *whether a charge of criminal trespass under section 299 (a) of the* ***Penal Code [Cap. 16 R.E. 2019]*** *involving a land dispute between a complainant and accused can succeed in criminal court before resolving the land dispute to the finality in a civil court.*

According to **Mr. Cosmas Tuthuru**, learned counsel for **Mr. Mordikae Moseti Phanuel** (the appellant) the issue like the present one has already been resolved by the **Court of Appeal of Tanzania** (the Court) in the precedent of **Kusekwa Nyanza v. Christopher Mkangala**, Criminal Appeal No. 233 of 2016, at page 9 where the Court stated that land disputes cannot be resolved in criminal courts.

This thinking was protested by **Mr. Tawabu Yahya Issa**, learned State Attorney for the Republic. According to Mr. Tawabu the general statement of the Court on the subject is qualified by circumstances of each particular case. In his opinion, in the present case, the directive of the Court on the subject is qualified, as the land dispute has already been resolved up to the finality in civil court called **District Land and Housing Tribunal for Mara at Tarime** (the tribunal) and the appeal was heard and determined to the finality in this court based in Mwanza.

In his submission, Mr. Tawabu stated that the land dispute was resolved to the finality and accordingly executed as per requirement of the law hence it cannot be said land dispute has not been resolved for criminal case to be initiated against any trespasser. In order to substantiate his submission, Mr. Tawabu contended that the Republic had tendered exhibits P.1, P.3, P.4, P.5 and P.6 as reflected at page 16 of the proceedings, which were not protested by the appellant during admission stage and reading at the **District Court of Tarime at Tarime** (the district court) in **Criminal Case No. 334 of 2020** (the case).

To Mr. Tawabu, the appellant was well aware that there was land dispute between **Mr. Thobias Raya** (PW1) and **Alex**

Chacha Mniko (PW2) and was resolved to the finality in favour of PW1, but the accused decided to ignore the decision of this court and criminally trespassed to the land of PW1 without any justifiable cause hence was arrested and prosecuted for criminal trespass under section 299 (a) of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code).

According to Mr. Tawabu, the appellant was finally convicted with the offence of criminal trespass and sentenced to serve conditional discharge for three (3) months that he should not commit any other criminal offence and report to the district court on every Monday of the week for assigned unpaid work without any miss. To Mr. Tawabu, this is a lenient sentence for persons convicted of the offence of criminal trespass and he is wondering why the appellant preferred the present appeal in a situation where the material facts of the case registered at the district court show that he admitted the offence, as reflected at page 30 of the proceedings. According to Mr. Tawabu, the appellant at the cited page, he admitted that he had not bought any land and has no any exhibits to register regarding land ownership.

In the opinion of Mr. Tawabu, the appellant was not part to any land dispute with the complainant (PW1), as the record

displays the disputes in land had occurred between PW1 and PW2 in one hand, and between PW1 and DW2 on the other, hence the appellant has no reason to say that there is land dispute to rescue him from criminal liability in trespass to land. In order to substantiate his submission Mr. Tawabu cited page 9, 10, 16, 30 and 31 of the proceedings of the district court which display the facts of the two indicated land disputes. To Mr. Tawabu, it was fortunate that in the present case, the district court warned itself on the contention and thinking of Mr. Tuthuru on the issue of land dispute and criminal trespass on land and the district court resolved at page 7 of the judgment that the nature of the present case is distinct from other ordinary cases on the subject and distinguished the precedents in **Sylivery Nkanga v. Raphael Albertho** [1992] TLR No. 110 and **Ismail Bushaija v. Republic** [1991] TLR 100.

Finally, Mr. Tawabu submitted that Mr. Chacha Mwita Mseti (DW2), who was summoned by the appellant (DW1) to testify in his favour, he narrated several land disputes between DW2 and PW1, but did not tender any documents to substantiate his allegation as per requirement of the evidence law and declined to mention location, size and demarcations of the disputed lands whereas PW1 had described very well his land and that is what

he is executing as he won in this court at Mwanza and that even if there is any dispute at the tribunal, it cannot overrule the previous decision of the superior court, the High Court at Mwanza.

Rejoining the submission of Mr. Tawabu, Mr. Tuthuru contended that the evidence tendered in the district court substantiate the land dispute between PW1 and DW2, hence DW1 could not dispute its admission during the hearing of the case and in any case it was a **judgment in personam**, which binds the parties to it, and not the whole world in the **judgment in rem**. According to Mr. Tuthuru, the standard practice require land disputes be resolved first before criminal case could take its course, even if it concerns different or several parties. In his opinion, the appellant is not party to any land dispute, but could not be criminally responsible in criminal trespass whereas there is a pending land dispute in the tribunal.

I have consulted the record of the present appeal. The record shows on 9th November, 2020, the Republic initiated a charge of criminal trespass against the appellant and cited section 299 (a) of the Penal Code. In the particulars of offence, the Republic alleged that on diverse dates between 1st and 27th day of October 2020 at Nkende Village within Tarime District in

Mara Region, the appellant unlawfully entered into the land owned by Thobias Rajah (PW1) with intent to intimidate him.

During the hearing of the case, the prosecution, brought PW1, PW4 and exhibits P.1, P.3, P.4, P.5 to establish the land trespassed by DW1 belongs to PW1 and DW1 had trespassed the same without any permission of PW1. In the record, it is further displayed at page 30 and 31 of the proceedings that both DW1 and DW2 admit that DW1 had no any land in dispute with PW1.

Following the registration of the materials, the district court convicted and sentenced the appellant to serve conditional discharge with two (2) conditions to be completed in three (3) months. The district court reasoned at page 10 of the judgment that:

> *I am satisfied that the prosecution side has successfully proved that PW1 is the owner of the land which was trespassed by the accused person.*

In order to show the present case in distinguishable from the established practice of courts in our jurisdiction on the offence of criminal trespass in land disputes, the district court stated at page 7 of the judgment that:

> *In the case of* ***Sylivery Nkangaa V. Raphael Albetho*** *[1992] TLR No. 110, Mwakasaya J, (as he then was)*

stated, inter alia that a charge if criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined ..... and in ***Ismail Bushaija v. Republic*** *[1991] TLR 100, it was held that it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused person and when the case of criminal trespass a dispute arises as to ownership of the land, the court should not proceed with criminal charge and should advice the complainant to bring a civil action to determine the question of ownership.*

Finally, the district court distinguished the cited precedents and the present case at page 9 of the judgment in the following words:

...the evidence of both parties show the issue of ownership has been established by the prosecution side ... DW1 stated to have trespassed on the land of PW1 as the same belongs to his brother DW2. But from this evidence we see that the accused is not denying the fact that he entered into the same land but stating to

have entered the farm of his brother, DW2. The accused was quiet aware that the land belongs to PW1 when he entered and cultivated the land.

From the record, it is vivid that the appellant entered into the land of the complainant (PW1), but claimed the land belongs to DW2, as reflected at page 30 of the proceedings of the district court. The evidence is further corroborated by DW2 at page 31 of the proceedings of the district court. Similarly, the appellant acknowledged a land dispute registered in the tribunal between PW1 and DW2, and not party to it, but declined to wait for final determination of the matter.

In the present case, neither evidence of objection proceedings between PW1 and DW2 was admitted in court nor protest of **Land Appeal No. 33 of 2010** between **Alex Chacha (PW2)** and **Thobias Rayah** (PW1) decided by this court on 11th August 2011 at Mwanza. From the record, the dispute in **Land Appeal No. 33 of 2010** originated from the tribunal in **Land Application No. 48 of 2009** and remain intact to date without any intervention and had produced **Misc. Application No. 26 of 2019**, which also remain intact to date.

The only question therefore in this appeal is whether: *a charge of criminal trespass under section 299 (a) of the Penal*

Code involving land dispute between a complainant and accused can succeed in criminal court before resolving ownership in land to the finality in a civil court. The reply is obvious that: *the charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined between the complainant and accused by a civil court*. That is why Mwalusanya, J., (as he then was) on 26th May 1992, in the precedent of **Sylivery Nkanga v. Raphael Albertho** (supra) had resolved an appeal in two pages only stating that: *a criminal court is not the proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine matters of land ownership*. It was easy because there was already in place acceptable standard practice rendered down by Chipeta, J., (as he then was) on 14th August 1991 in the precedent of **Ismail Bushaija v. Republic** [1991] TLR 100. In this precedent, Chipeta J., at page 102 of the decision resolved that:

> *In my view, it is wrong to convict a person for criminal trespass* ***when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused***. *As was pointed out by this court in the case*

*of **Saidi Juma v. Republic [1968] H.C.D. 158** ... in a case of criminal trespass, a dispute arises as to the ownership of the land, the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership. That is exactly what the trial court should have done in the present matter.*

(Emphasis supplied).

Finally, as part of cherishing its constitutional mandate enacted under article 107A (1) and 108 of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] (the Constitution), this court advised that: *the complainant is advised to seek redress in a civil court*. The thinking and practice of this court on the subject has already received approval of the Court of Appeal in a bundle of precedents (see: **Kusekwa Nyanza v. Christopher Mkangala** (supra); **Director of Public Prosecutions v. Malimi Sendana & Three Others**, Criminal Appeal No. 92 of 2018; and **Simon Mapurisa v. Gaspar Mahuya**, Criminal Appeal No. 221 of 2006).

This court has been cherishing the position since the citation of the precedent in **Saidi Juma v. Republic [1968] H.C.D. 158** without any reservation and there is a bunch of decisions on the

move (see: **Mustapha Mustapha Juma v. Selemani Bakari** [2017] TLR 427; **Tryphone Jeremiah v. Ufoo Rogate Sawe** (PC) Criminal Appeal No. 13 of 2020; **Janken Asukile Mwalwega & Another v. Republic**, Criminal Application No. 141 of 2020; **Stilias Kalyongosi v. Zubairi Mahamudu**, (PC) Criminal Appeal No. 10 of 2022).

Understanding the indicated precedents of this court and Court of Appeal are settled and certain on the subject, on 23rd June last year, 2021, Mongela, J., sitting at Mbeya Registry of this court, resolved similar complaint in five (5) pages only without being detained on the subject (see: **Janken Asukile Mwalwega & Another v. Republic** (supra). However, when there is special circumstances or good reasons, this court is allowed to depart from its previous decisions (see: **NBC Limited & Another v. Bruno Vitus Swalo**, Civil Application No. 139 of 2019; **Richard Mbwana v. Joseph Mang'enya**, Misc. Land Case Application No. 2 of 2021; **Republic v. Ramadhani Mohamed Chambali**, Criminal Sessions Case No. 11 of 2020; **Tanga Cement Company Ltd v. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 and **Machota Maro Masese v. Birage Maro Birage**, Misc. Land Application No. 36 of 2022).

In the present dispute, there is special circumstance which distinguishes this case and the cited precedents and that is root of the matter decided in 1991 in this court. This court categorically stated that: *it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in* ***dispute between the complainant and the accused*** *(see:* **Ismail Bushaija v. Republic** (supra) (Emphasis supplied).

In the present case this crucial nexus between the complainant and accused in land dispute is missing. From the record of this appeal, there is no land dispute or connection between the complainant (PW1) and the accused (DW1). If this species of intrusion into other persons' lands without justifiable cause is blessed by our courts, it will be a peril to land owners cherishing their rights to land, like in the instant case.

At least, the appellant could have acted under genuine belief that the land belongs to him and has the right to enter and use the land, the result would have been different (see: **Mustapha Mustapha Juma v. Selemani Bakari** (supra). However, in the instant case, the appellant admitted that the land belongs to DW2, his brother.

In the end, it is my view and I hold that the offence of criminal trespass to land can be established without first resolving land dispute, if the accused is not party to a land proceedings and admit the land in dispute does not belong to him. I have therefore decided to dismiss this appeal and uphold the conviction and sentence of the district court imposed to the appellant as the appeal was brought in this court without good reasons of appeal.

Ordered accordingly.

Right of appeal explained to the parties.

F. H. Mtulya
Judge
04.11.2022

This judgment was pronounced in chambers under the seal of this court in the presence of the appellant's learned counsel, Mr. Cosmas Tuthuru and in the presence of respondent's learned State Attorney, Ms. Agma Haule.

F. H. Mtulya
Judge
04.11.2022