THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 6 OF 2022

(*Originating from Land Application No. 3 of 2015 in the District Land and Housing Tribunal for Mbeya at Mbeya*)

ZUMBA K. ZUMBA ..... APPELLANT

VERSUS

JOEL NKWELELE ..... RESPONDENT

JUDGMENT

Date of last order: 28/10/2022

Date of judgment: 30/11/2022

NGUNYALE, J.

The parties to this appeal are contesting on ownership of the parcel of land located at Inshara hamlet Iwindi Village within Mbeya District where by the appellant complained that the respondent had trespassed to his land by exceeding the boundary between them. The tribunal heard the parties in a full trial which ended in favour of the respondent. The appellant preferred Land Appeal No. 06 of 2019 before this Court. The appeal was transferred to the Resident Magistrate Court of Mbeya at Mbeya where by the court (P. R. Kahyoza - SRM with Extended

Jurisdiction) ordered trial de novo because the assessors did not actively participate in the trial. After trial *de novo* the tribunal was satisfied that the appellant failed to prove that the respondent encroached his parcel of land, the application was dismissed with costs.

Aggrieved with the decision of the tribunal in favour of the respondent, he filed the present Land Appeal No. 6 of 2022 relying on five grounds of appeal that;

1. *That the trial tribunal grossly erred in law and facts by not considering the best evidence adduced by the appellant and hi witnesses during trial.*
2. *That the trial tribunal erred in law and in facts as its judgment based on what was seen in the locus in quo while it was visited after lapse of eight years.*
3. *That the trial tribunal erred in law and facts by considering the respondent's evidence while it was fabricated in many aspects.*
4. *That the trial tribunal erred both in law and in facts by misdirecting itself as it ruled that the appellant herein did not cross examine the respondent in some issues, meanwhile the record on the proceedings shows the appellant herein did cross examine all the witnesses. This made the trial tribunal to make unfair decision.*
5. *That, the trial tribunal grossly erred in law and facts by not explaining the reasons of its decision.*

On the date of hearing the parties by consent agreed to dispose the appeal by written submission. The appellant was represented by Jenifa Joely Silomba from Jesjly Attorneys while the respondent was fending by himself.

On the first ground of appeal the appellant submitted that he testified the best evidence that he is the lawful owner of the suit land in which he lived since 2005 and in 2011 he obtained a customary right of occupancy. His evidence was supported by Anuwila Mwansansha who was the chairperson of the land allocating committee in the Iwindi Village Council who knew the boundary very well. The visit *locus in quo* found that the respondent had built the *karo* (the structure used to grind coffee) to the appellant's side. It was the view of the appellant that he had strong evidence to convince the tribunal to decide in his favour, he referred the court to section 110 of the Evidence Act Cap 6 R. E 2019. He stated further that he proved that the respondent trespassed to his land.

Submitting on the second ground, he stated that the visit *locus in quo* was done on 04/10/2021 while the respondent had trespassed the appellant land since 25/12/2014. The visit was done after lapse of eight years, it was not proper for the trial tribunal to rely on such visit locus in quo. He referred to the case of **Nizar M. H vs. Gulamali Fazal JOhnmohamed** [1980] TLR 29 where it was stressed that; -

> *"it was only in exceptional circumstances that the court should inspect a locus in quo, or else the court unconsciously will take a role of the witness that adjudicator."*

Such long time between the date of trespass and the date of *locus in quo* makes difficult for the tribunal to ascertain to the truth, thus it ended with unjust decision.

In the third ground of appeal, they submitted that the trial tribunal considered the fabricated evidence of the respondent which was not even properly analysed by the tribunal. The respondent testified that the *karo* was built in 2018 before the appellant bought the said land while he was there since 2005 and he acquired the customary certificate of occupancy since 2011.

The appellant Counsel went on to submit on the fourth ground that the appellant accordingly cross examined the respondent as noted in the proceedings, the tribunal erred to state that the appellant did not cross examine important aspects. The appellant discharged well his duty to cross examine the witnesses. In the fifth ground the appellant submitted that the judgment of the trial tribunal is defective in form and substance by violating Regulation 20 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations GN No. 174 of 2003 which provide for content of the tribunal judgment. He referred to the case of **Amirafi Ismail vs. Reginac**, T. L. R which made some observations on the requirements of judgment:

"A good judgment is clear, systematic and straight forward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a court of appeal to know what fats are found and how."

It was the view of the appellant Counsel that the trial Chairman arrived at the decision without giving reasons as required by Regulation 20 (1) (d) of GN No. 174 of 2003.

The respondent after having read the submission of the appellant he submitted generally on all the grounds of appeal that the testimony of the appellant was very weak because he alleged that he has customary right of occupancy but the said certificate was never tendered before the trial tribunal. Generally, the appellant did not prove his allegations as the person who filed the application. It was proper and just for the tribunal to side and rule in favour of the respondent. The visit to *locus in quo* was very relevant to help the tribunal, he cited the case of **Avit THadeus Massawe vs. Isidori Assenga** Civil Appeal No. 6 of 2017 (unreported) where the Court of Appeal sitting at Arusha stated above visit to locus in quo; -

"... a visit to locus in quo will definitely help the court determine the appeal/case with clarity and certainly..."

It was the view of the respondent that visit to locus in quo was conducted in accordance with the law and the reasons for the same are as noted in case law above.

It was their further submission that the appellant failed to prove his case to the required standard as required under section 110 of the Evidence Act Cap 6 R. E 2019 and further stated in the case of **Ziad Mohamed Rasool General Trading Co L.L.C versus Anneth Joachim Mushi**, Civil Case No. 21 of 2020.

In a brief rejoinder the appellant reiterated his submission in chief and invited the court to do justice according to the constitution because the case was not proved on the balance of probability by the appellant.

After hearing both parties, the court has noted that the first to fourth grounds of appeal are about analysis of evidence, the court will attempt to re-evaluate evidence to determine whether the appellant proved his case on the balance of probability or not and on the last part it will determine about the competency of the judgment itself in answering the fifth ground of appeal.

According to the evidence in the records of the trial tribunal the appellant testified as PW1, in his testimony he testified that he is owning land legally and he was issued with Customary Right of Occupancy in 2011. The said

land he was owning since 25/01/2005 when he bought from the late George Mwashiwawa. At the time of buying the said land from the late George Mwashiwawa they reduced the agreement into writing, in his own words during cross examination he said '*tuliandikishiana*'. PW2 told the tribunal that he found the respondent digging the area of the appellant, he immediately informed the appellant who went to the scene to prove. During cross examination PW2 said that he did not know the size of the land of the appellant. PW3 Anuwila Mwansansha testified that he was the member of the Village Government and a chairman of the village land survey team. He participated during survey of the land of the appellant by putting beacon. He did not know how the appellant got the land.

In his side the respondent testified as DW1. He testified before the tribunal that he is living at Iwindi village in his area measured one acre. He is living there since 1972. In his area he has a residential house and he planted coffee, banana and trees. He also built a *karo* for grinding coffee in 2018. He never invaded or exceeded his boundary to the area of the appellant. The appellant when he bought the area from the late George Mwashiwa he found him there. During cross examination he said that he never saw the beacon on the area and he did not participate when the appellant survey the land to get the allelged Customary Right of Occupancy. The boundary was the road to the area known as Itimu. DW2

Andrea Mbwiga Sinemawiga Sinema testified that the parties are neighbours whereby they share the boundaries of their respective land and nobody among them has encroached the land of another.

In analysing the evidence abovec, I wish to be guided by section 110 (1) and (2) of the Evidence Act which provides; -

> *(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Guided by the above provision it is was the duty of the appellant to prove that the respondent encroached his land by exceeding his boundaries to the appellant land. In his testimony he testified that he bought the land around 2005 and he was issued with Customary Right of Occupancy in 2011. In his testimony he neither tender the said certificate of occupancy nor the document proving that he bought the said land. The testimony of PW3 was to the effect that he inserted beacon to mark the area of the appellant but during visit of *locus in quo* even those beacons were not seen. The respondent testified that he was living there since 1972 and this fact what not disputed by the appellant. He did not cross examine on this fact during cross examination. The appellant evidence is silent about the status of the boundaries at the time he bought the suit land, there is

no evidence which proves that the suit portion was the property of the appellant. DW2 testified that nobody entered to the land of another. Considering the evidence on record I agree with the trial tribunal that the respondent who was there since 1972 have stronger evidence that the appellant. The appellant has failed to prove his boundary marks. I take the position in the case of **Hemed Said dhidi ya Mohamed Mbilu** (1984) TRL 113 that in civil cases the one with heavier and strong evidence must win. In this case the appellant failed to prove on the balance of probability that his land was invaded by the respondent, therefore, he had week evidence.

On the second issue about the judgment of the trial tribunal the appellant complained that the said judgment had no reasons. I think this is not the issue to detain long because the learned Chairman narrated the material facts of the case at page 2 of the judgment where he established that the parties are neighbours and the dispute is based on the boundary between their land. He went further to establish two issues to be determined by the tribunal **one**, whether the respondent had invaded the land of the appellant and **two**, to what reliefs are the parties entitled to. In the other part he summarised the evidence of both parties and proceeded to analyse it thorough. In his analysis he ended up with the informed decision that the appellant failed to prove the boundaries of his land thus

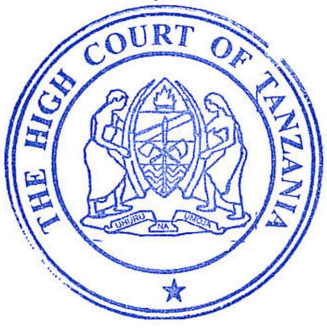
he dismissed the application. Regulation 20 (1) (d) of GN No. 174 of 2003 of Land Disputes (The District Land and Housing Tribunal) Regulations provides; -

> *The judgement of the Tribunal shall always be short, written in simple language and shall consist of;*
>
> *(a) a brief statement of facts*
> *(b) findings on the issues*
> *(c) a decision; and*
> *(d)* ***reasons for the decision****.*

The judgment of the tribunal as briefly stated above, the learned chairman considered all the contents of the judgment provided under the above law. Therefore, the argument of the appellant is an afterthought and without merit.

Consequently, the appellants appeal is bound to fail for having no legal legs upon which to stand. It is hereby dismissed with costs. Order accordingly.

Dated at Mbeya this 30th day of November 2022.



D. P. Ngunyale
Judge