

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

LAND APPEAL NO. 42 OF 2022

*(Arising from the Decision of The District Land and Housing Tribunal for
Kilombero/Malinyi, at Ifakara, in Land Appeal No. 153 of 2020; Originating from Ifakara
Ward Tribunal in Land Case No. 06 of 2020)*

ADAM K. ALLY KASSAM.....APPELLANT

VERSUS

MUSA R. SHOMARY MYOWELA.....RESPONDENT

JUDGMENT

26th October, 2022

CHABA, J.

The present appeal traces its origin from the decision of Ifakara Ward Tribunal at Kilombero in Land Case No. 06 of 2020 where the respondent sued the appellant for trespassing on his Plot No. 15, Block "D" situated at Ifakara within Kilombero District. As gleaned from the record of the trial Ward Tribunal, the respondent alleged that the appellant herein unlawful crossed the beacons showing signs for demarcations between the two Plots, i.e., Plots Nos. 15 and 16 Block "D" owned by the respondent and the appellant respectively and constructed



a building therein. The trial Ward Tribunal record, however, doesn't disclose kind of construction purported to have been made by the appellant.

Aggrieved by the decision of the Ward Tribunal, the appellant filed an appeal before the District Land and Housing Tribunal for Kilombero/Malinyi (the DLHT) where he lost. Still dissatisfied, the appellant preferred an appeal before this court armed with the following two grounds of appeal: -

- 1. That, the District Land and Housing Tribunal for Kilombero/Malinyi being the first appellate tribunal erred in law and fact for failure to re-evaluate properly the evidence adduced before Ifakara Ward Tribunal henceforth came up with a wrong decision by upholding the decision of trial tribunal.*
- 2. That, the District Land and Housing Tribunal for Kilombero/Malinyi being the first appellate tribunal erred in law for upholding the Ifakara Ward tribunal which determined the matter without jurisdiction since the matter was time barred.*

Before embarking on the merits of the appeal, I find it apt to briefly narrate the material background which gave rise to this appeal. The appellant and respondent are neighbors for a longtime and have been staying in their respective Plots i.e., Plots Nos. 16 and 15, Block "D" situated at Ifakara township within Kilombero District since lifetime of their parents. According to the record at the Ward Tribunal, the dispute between parties is in respect of a boundary between their Plots. And

according to the respondent's complaint, the appellant had trespassed over his Plot No. 15, Block "D" and crossed the beacons planted as signs indicating demarcation between the two Plots by erecting a building.

As hinted above, the dispute arose during lifetime of their parents. Therefore, the parties are suing each other in the capacities of being administrators of the estates of their deceased's parents. The lower tribunals records reveal that, in the year 1998 the respondent instructed his younger brother Haruni R. Myowela to report the matter to the respective Land Department or Authority so that they could take the appropriate steps and measures to resolve the dispute. It was averred that, Haruni R. Myowela complied with his brother's instruction by informing the Land Department (Idara ya Ardhi) at Ifakara within the District of Kilombero who afterward visited the crime scene.

The lower tribunals records reveal further that on 29th June, 1998 the District Council through its Land Department issued a letter dated which officially informed the parties to respect their boundaries. According to the respondent, the appellant did not respect such instruction instead he continued to cross the boundary by erecting a building and occupying the whole passage between Plots Nos. 15 and 16. This act prompted the respondent to take legal action by suing the appellant before the trial Ward Tribunal for trespassing his Plot by crossing the beacons planted as signs showing demarcation. Upon hearing both sides, the trial Ward Tribunal decided the matter in favour of the respondent (applicant at the



trial Ward Tribunal). The appellant (respondent at the trial Ward Tribunal) however was unhappy and preferred an appeal before the DLHT where he lost, hence this second appeal.

When the appeal was called on for hearing, parties agreed to dispose of the appeal by way of written submissions. Hence, the appellant had to file his written submission in chief on or before 25/07/2022, the respondent had to file reply to the appellant's written submission in chief on or before 18/08/2022, and rejoinder (if any) had to be filed by the appellant on or before 16/08/2022. The appellant complied with the scheduled order. But the respondent through his learned advocate Mr. Sikujua Funuki did not file reply thereto, and instead he lodged the notice of default to file written submission in support of appeal claiming that the appellant failed to submit his written submission in support of the appeal on 25th July, 2022 without notice. He stated that failure to file the same is tantamount to failure to prosecute the case as it was underscored by the Court of Appeal of Tanzania in the case of **Godfrey Kimbe vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014, CAT - Dar Es Salaam (Unreported) at page 3 and thus prayed the Court to dismiss the appeal.


As noted above, the record is clear that the appellant filed his written submission in support of the appeal on 25/07/2022, and the respondent didn't comply with the scheduled orders. Since the respondent failed to file reply to the appellant's written submission, it is settled that failure to file submission(s) is

tantamount to a failure to prosecute one's case as it was underscored in the case of **National Insurance Corporation of (T) Ltd & Another vs. Shengena Limited**, Civil Application No. 20 of 2007 (Unreported). That being the position, I am now endorsed to proceed to determine the appeal without the advantage of the respondent's arguments.

As hinted above, the appellant has filed two grounds of appeal complaining that; **One**, the DLHT erred in Law and fact for failure to re-evaluate properly the evidence adduced before the trial tribunal henceforth came up with a wrong decision, and **Secondly**, the DLHT erred in law for upholding the Ifakara Ward Tribunal decision which determined the matter without jurisdiction since the matter was time barred.

To support his appeal, the appellant submitted at length. However, I will not reproduce the appellant submission, but I will be referring it in the course of determining the grounds of appeal.

I have keenly followed and considered the appellant's written submission in support of his appeal in the light of grounds of appeal. I have also spent time scrutinizing the records of the trial Ward Tribunal and First Appellate Tribunal (the DLHT) and the decisions thereof. Having so done, I now proceed to determine the merits of this appeal.



Starting with the first ground, the appellant submitted that the first appellate tribunal (the DLHT) erred in law and fact for failure to re-evaluate properly the evidence adduced before the trial Ward Tribunal henceforth confirmed the decision thereof.

It is worth noting that, in this appeal, the question of ownership is not an issue at all, and it is certain that the appellant and the respondent are the true owners of Plots No. 16 and 15, Block "D" situated at Ifakara within the District of Kilombero, respectively. However, the crux of the matter in my view, relates to the issue of trespassing a parcel of land by the appellant on Plot No. 15, Block "D" owned by the respondent.

On scrutiny of the trial tribunal's record, I have seen a letter with Ref. No. LD/2716/5/OOM dated 29th June, 1998 addressing the disputes between the parties. The Letter was issued by Kilombero District Council through the Office of District Executive Director, and it was directed the appellant. The contents of the letter are reproduced hereunder:

YAH: KIWANJA NA 16 NA 15 KITALU "D" IFAKARA MJINI

Barua ya Ndugu Rashid Shomari Myowera ya tarehe 4.10.1997 yahusika.

Mapema Oktoba, 1997 Ndugu R. S. Myowela alituma maombi Ofisi hii kutaka isaidie suala la kuonyesha mipaka halisi ya viwanja hivyo nilivyovitaja hapo juu kuwa ndiyo suluhu kwa mgogoro uliokuwa unajitokeza mara kwa mara wa kuingiliana mipaka.

Ofisi hii ilitekeleza kwa ombi hili kwa kujua lilikuwa na uzito wake.

Naamini mipaka ya viwanja hivyo sasa iko wazi na inaeleweka kwa kila mmoja wenu (mmiliki wa kiwanja Na. 16 na pia wa Na. 15).

Hivyo ni Imani ya Ofisi hii kuwa kila mmoja wenu ataheshimu na kulinda mipaka yake bila kuingilia eneo la mtu mwingine.

Nawatakia suluhu njema.

Imesainiwa na:

O. O. Mpombo

**Kny: AFISA MAENDELEO YA ARDHI (W)
KILOMBERO**

Nakala: Ndugu Rashid Shomari Myowela,

S. L. P 36,

IFAKARA Kwa taarifa.

Again, on 19/08/2005 the Office of the District Executive Director (DED), Land Department at Ifakara/Kilombero wrote a letter to Mr. Kassam Ally Kassam, appellant herein notifying him to attend the exercise of measuring the parcel of land in disputes. The letter read; I quote:

YAH: UJIO WA WAPIMA ARDHI

Tafadhali husika na kichwa hapo juu.

Ofisi imeazimia kubainisha mpaka kiwanja Na. 15 Kitalu "D" Ifakara Mjini.

Ukiwa kama Mkazi wa Kiwanja Na. 16, kwa barua hii tafadhali unaombwa uwepo katika eneo husika siku ya Jumatatu 22/08/2005 Saa 6.00 mchana ili ushuhudie kazi hii ambayo itabainisha mipaka ya viwanja vyenu na kuondoa mgogoro uliopo kati yako na Jirani yako Ndg. Rashid S. Myowela. Kazi hii itawezesha kila mtu kujua eneo lake halali kisheria.

Imesainiwa na:

M. S. Mdule

Kny: AFISA ARDHI (W)

KILOMBERO

Nakala:

1. Mkurugenzi Mtendaji (W),
2. Mkuu wa Wilaya, Kilombero,
3. Mkurugenzi Taasisi ya Kuzuia (sic) (PCB), Kilombero.

The records further reveal that on 2/09/2019 the appellant, Kassam Ally Kassam wrote a letter to the Suburb Chairperson at Ifakara notifying him about the respondent's complaints. The letter read; I quote: -

YAH: MALAMIKO YA NDUGU RASHID SHOMARI MYOWELA

Husika na somo hilo hapo juu.

Napenda kukujulisha kuwa matatizo ya mgogoro Ardhi kati yangu na mtajwa hapo juu yalishamilizwa na Ofisi ya Mkurugenzi wa Halmashauri ya Wilaya ya Kilombero kupitia Idara yake ya Ardhi kwa barua ya tarehe 29/06/1998 baada ya Idara hiyo kufanya upimaji na kuniarifu kwa barua yenye Kumb. Na. LD/2716/5/00M na nakala ya barua hiyo kupewa mtajwa hapo juu.

Hivyo, sina ugomvi wowote wa Kiwanja namba 16 na 15 Kitalu "D" pamoja. Pamoja na yote naambatanisha nakala ya barua Afisa Ardhi Wilaya Kilombero ya tarehe 29/06/1998 kama kumbukumbu.

Asante.

Wako,

Imesainiwa na,

KASSAM ALLY KASSAM

Nakala:



1. Mkurugenzi wa Halmashauri ya Wilaya ya Kilombero,
2. Rashidi Shomari Myowela.


Apart from the above documentary exhibits, there is also other documents (sketch maps) drawn by the members from the trial Ward Tribunal showing the disputed area. The trial tribunal record discloses further that, while at the disputed Plot No. 15, Block "D" one member asked the appellant to this effect; I quote: -

"Swali: Ulisema Muheshimu mipaka kwa kifungu gani?"

"Jibu: Tulitumia busara na siyo sheria".

From the foregoing, I have deliberately decided to demonstrate what actually transpired since 1990's in respect of the disputed small parcel of land and the measures that were taken by the relevant authority primarily entrusted by the Government to supervise, survey the respective areas and allocates Plots to citizens.

As hinted above, the evidence adduced at the trial Ward Tribunal reveals that the disputes between the parties traces its origin way back in 1990's. In 1998, the Kilombero District Council through the Land Department wrote a letter to both parties directing them to respect the boundaries. It appears however, that the boundaries were not clear to both parties as a result, the disputes between the parties persisted.



The evidence adduced before the trial Ward Tribunal divulges further that, in 2005 the Land Department wrote another letter to the appellant informing him that the Land Department has planned to indicate the actual boundaries between the disputed Plots on 22/08/2005 and therefore he had to be present to witness the said exercise. The Land Department in the said letter undertook to ascertain the real boundaries between the disputed Plots but going through the records, there is no any evidence which vindicates that the Land Department visited the disputed parcel of land and ascertained the boundaries with a view to resolve the disputes between them. As the records stands, the actual boundaries are still unknown to the parties.


From the above discussion, it is crystal clear that the dispute between the appellant and the respondent had never been dealt or resolved by the District Council of Kilombero through its Land Department to warrant the lower Tribunals to determine the dispute fairly. I say so because, in the record of the trial Ward Tribunal there is no any report from the Land Department in the District Council of Kilombero indicating that the dispute was properly handled as promised in the letter issued by the Land Department in 2005.

In my unfeigned opinion, the displayed negligence of the respective Land Department whom I believe that from the beginning they brushed away and failed to use their professional skills to resolve the genesis of the disputes which stemmed in 1990's have resulted to the endless disputes between the parties.



It is worth noting that, the trial Ward Tribunal erred in law and fact to conclude that the appellant trespassed the respondent's Plot in absence of the relevant reports exhibiting actual size of each plot and signs for demarcation of the two Plots. Indeed, the trial Ward Tribunal reached her final decision without considering the fact that the boundaries are unknown to both parties. The lower Tribunals Records reveals that, the two plots were not distinguished in terms of demarcations as per requirement of the law in Regulation 3 (2) (b) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 (the Regulations). In **Hassan Rashidi Kingazi & Another v. Halmashauri ya Kijiji cha Viti**, Land Appeal Case No. 12 of 2021 this Court held that any land in dispute must be sufficiently described with certainty in terms of size, location and demarcations.

It is apparent that in the instant case the size and boundaries of the two plots were not clearly identified. In that regard, it was hard to reach to a fair and just decision in absence of the concrete evidence from the Land Department indicating the actual size of each Plot and clear boundaries over the disputed parcel of land. Equally, the DLHT failed to re-evaluate and analyze the evidence adduced at the trial Ward Tribunal, as a result it reached to a wrong decision.



In my considered opinion, failure by the DLHT to call for additional evidence from the respective Land Department whom I believe that they brushed away by giving the mere statements on a crucial issue that needed clear answers to resolve the disputes between parties was an error on the part of the first appellate tribunal.

In view of the above, it is my holding that the DLHT erred both in law and fact to confirm the decision of the trial Ward Tribunal in absence of a concrete evidence from the Land Department showing clearly the sizes of two Plots in terms of actual measurements and boundaries.

Basing on the foregoing reasons, the first ground of appeal is answered in affirmative.

As regards to the second ground, the appellant complained that the trial Ward Tribunal determined the matter without jurisdiction on the ground that the matter was time barred.

In his written submission, the appellant averred that, the time limit to recover land is twelve years (12). He highlighted that the trial Ward Tribunal did not consider the fact that it received testimony from the appellant to the effect that his late father had been in occupation of the disputed parcel of land since 1945 and the respondent began to claim the same in 1998. He further underlined that, even the Land Office advised them to continue living (stay in the disputed land) as they used to live. Further, it thought that it was wise to take such a path,



instead of taking legal actions. He asserted that, the appellant was favored by the principle of adverse possession in respect of the disputed parcel of land at the time the respondent sued the appellant.

He further highlighted that since the respondent's father passed away some years back and still, he failed to produce any documentary exhibit(s) showing that he was an administrator of the deceased's estates so as to align himself with the provision of section 35 of the Law of Limitation Act [Cap. 89 R. E, 2019], in the circumstance had no locus to sue the appellant. For ease of reference, the law provides that: -

"For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration or, as the case may be, of the probate".

Explaining how the respondent was time barred, the appellant contended that, section 9 (1) of Law of Limitation Act (Supra) articulates that, where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, was the last



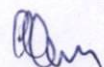
person in possession of the land, the right of action shall be deemed to have accrued on the date of death.

That being the legal position, he was of the view that, the time started to run against the respondent when his father passed away. He said, if the Ward Tribunal was smart to count and concentrate with the time limits, automatically would have ousted itself from entertaining the matter at hand. To buttress his argument, the appellant referred this court to the case of **Yusuf Same and Another v. Hadija Yusuf [1996] TLR 347** wherein this Court (Msumi, J., As he then was) held:

"(i). In terms of Section 3 (1) of the Law of Limitation Act it was immaterial whether limitation had been set up as a defence and the magistrate had accordingly erred in this respect.

(ii) The limitation period in respect of land, irrespective of when letters of administration had been granted, was 12 years and on this basis the respondent's claim was time-barred."

Based on the above precedent, the appellant stressed that it is illegal to bless and upheld the unjust decision of the trial Ward Tribunal since its power to determine the matter at hand was already ousted by the Law of Limitation Act (Supra) and similarly the first appellate tribunal was caught by the same web. He emphasized that, since the issue of jurisdiction is very fundamental and it goes to the very root



of the matter, both lower tribunals didn't take heed on the question of time limits to recover the disputed parcel of land as prescribed by the law. He therefore, prayed the court to allow the appellant's appeal, quash and set aside the whole decisions reached by the lower tribunals.

Having summarized the appellant's version in respect of the second ground, at the outset, I would like to state that, the issue or question of dispute on ownership does not exist and the respondent did not institute a suit at Ifakara Ward Tribunal seeking for recovery of the disputed land. I say so because, neither the appellant nor the respondent has exhibited from the beginning that he owns the two Plots Nos. 15 and 16, Block "D". The most important point at issue is trespass of a small parcel of land found in the respondent's Plot No. 15, Block "D". That being the case, this ground of jurisdictional issue is unfounded, baseless and has no merit.

Before concluding, I would like to advise both parties to ask the Land Department, within Kilombero District Council / Ifakara Township to resolve the disputes by showing the actual sizes and the boundaries of Plots No. 15 and 16, Block D. The Kilombero District Council being Government Institution primarily entrusted to allocate, supervise, measure or ascertain the size(s) of Plots should intervene the disputed parcel of land by visiting the crime scene and take the actual measurements of Plots No. 15 and 16, Block "D" situated at Ifakara Township in the presence of the parties and local leaders, fully identify the



boundaries, ascertain the sizes of the parties' Plots, demarcate the same by planting new beacons, and accordingly furnish them (parties to the case) with the respective report and necessary documents indicating clearly the size(s) of each Plot and its boundaries in accordance with the law.

In the final event, this appeal is partly allowed. However, for the interest of justice, I nullify and quash the whole proceedings generated from the trial Ward Tribunal and the District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara and set aside the judgment and decree thereof and any orders emanated therefrom. Each party to bear its own costs. **I so order.**

DATED at MOROGORO this 26th day of October, 2022.



M. J. CHABA

JUDGE

26/10/2022

