THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 104 OF 2021
(Originating from Application No. 123 of 2016 of the District Land and Housing Tribunal for Mbeya at Mbeya)

FORDINA VIJEVANIA SANGA.....APPELLANT

VERSUS

JOSEPH LAISON MWAZYELE.....RESPONDENT

JUDGMENT

Dated: 27th October, & 22nd December, 2022

KARAYEMAHA, J

This appeal arises from the decision of the District Land and Housing Tribunal (DLHT) for Mbeya at Mbeya, in respect of Application No. 123 of 2016, which was disposed of in favour of the respondent. In the impugned decision, the DLHT granted the respondents application on account that the appellant had strong evidence indicating that 1.3 meters were his property. The DLHT ordered further that the appellant was to demolish the fence, the toilet and kitchen built within 1.3 meters. The respondent was also awarded TZS. 5,000,000/= as general damages and costs of the suit.

The DLHT's decision has not amused the appellant. Believing that the DLHT took a wrong path, legally and factually, the appellant has moved to this Court, through a ten-ground memorandum of appeal contents of which are reproduced as hereunder:

1. *The tribunal erred in law and fact to rely on the evidence of SM 3 that the correct measurement was 13:630m and not (15.030m as in exhibit D-1) while no any exhibit which was tendered by SM1, SM2 or SM3 that justified the measurement of 13.630m.*
2. *The Tribunal erred in law and fact to rely on the evidence adduced by SM 3 as expert witness while no any expert report was tendered in Court which could have given the Appellant fair group to challenge the evidence of Sm3.*
3. *That the Tribunal erred in law and facts for failure to analyze the evidence on record of SM 1, SU 2 and SU 3 and the exhibit D – 1 tendered by SU 1 hence delivered decision which was not reasoned.*
4. *The tribunal erred in law and fact to decide in favour of the respondent basing only on corroborative evidence of SM 3.*
5. *The tribunal erred in law to decide in favour of respondent while the respondent failed to prove on the balance of probabilities.*

6. *The tribunal failed to analyze the evidence of SM 2, SM 3, and SU 3 before the building permit was issued verification of the site dimensions was done.*
7. *The tribunal erred in law to consider the evidence of SM 3 which was not given under oath at the locus quo.*
8. *The tribunal erred to consider the evidence of SM 3 at the locus quo while showing dimension of the Plot 968 and 970 he did not refer any document.*
9. *The tribunal erred in law and fact to admit exhibit P – 6 as secondary evidence which was objected for not being certified.*
10. *The tribunal erred in law and fact to award five million as general damages.*

For a better and quick appreciation of the matter that is before this Court, it is apposite that facts of the case be stated, albeit briefly. Vide a surveyed plan No. 24607 registered on 1st April, 1993, Andrea Georges Chikao acquired Plot No. 968 Block Y, Mwakibete area which was later purchased by the respondent. Having acquired it, the respondent developed part of it by constructing an unfinished house on the side free from any dispute and left another side subject of the dispute undeveloped. Surprisingly, the appellant without colour of right encroached 1.3 meters and

built a wall, Lavatory and kitchen. Considering this act as an encroachment, the respondent attempts to consult the appellant to settle the matter failed. The Mbeya City Director intervention also failed as all struggles to have her appear in his office were neglected by the appellant. All these triggered proceedings which were instituted in the DLHT, vide Application No. 123 of 2016. The following reliefs were claimed:

i. *Declaration that the respondent is the lawful owner of the suit land.*
ii. *Declaration that the appellant is the trespasser.*
iii. *A demolition order against the appellant of the fence and toilet built by the appellant in the suit land of 1.3 meters.*
iv. *Award of general damages.*
v. *Costs of the suit.*
vi. *Any other reliefs this court deems to grant*

The DLHT was convinced by respondent's side of the story. In its decision handed down on 13/10/2021, it granted the respondent's application with costs.

Hearing of the appeal took the form of written submissions, pursuant to the Court's order made on 07/08/2022, on which date a schedule for filing was set. This schedule was duly complied with. The appellant enjoyed the

legal services of Mr. Daniel Muya learned counsel whereas the respondent enlisted the legal services of Mr. Victor Mkumbe, learned Counsel.

Kicking the first ball was the learned counsel for the appellant who began with a prayer for consolidating grounds 1, 2, 4, 5 and 9 for being inextricably intertwined. The major complaint raised by the appellant is that PW2 (planning officer) and PW3 (the surveyor) did not tender any document to support their expert opinions on the proper measurements. Mr. Muya argued that if documents were tendered it would have made it easier for the tribunal to render justice. Commenting on exhibit P6, the learned counsel submitted that although it was used as a source of the correct measurement had nothing to do with this case because it was a photocopy, not certified, had no author or title. He lamented that apart from these shortcomings and being subjected to objection it served as the foundation for the expert evidence.

Submitting with regard to ground 7, Mr. Muya contended that PW3's testimony recorded at the *locus in quo* was not given under oath. As I understood him, he was convinced that he did not tell the truth. He argued further that if he took oath particulars such as age, religion, residence, etc. would be seen in the court record. He supported his views relying on the decision in the case of **Barnabas Ludori vs. Registered Trustees of the**

Arch Diocese of Mwanza, Land Appeal No. 67 of 2021 HC-Mwanza (unreported). On the effect, Mr. Muya submitted that the anomaly destroys the root of the evidence taken at the *locus in quo* hence should suffer the consequence of being declared void. To cement his position, he cited the case of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & 7 others,** Civil Appeal No. 4 of 2018 CAT-DSM (unreported).

Submitting in respect of ground 8, Mr. Muya took a serious exception to the trial Tribunal's decision holding that the evidence of PW3 recorded at the *locus in quo* had no document on which the dimensions of Plot No. 968 and 970 were referred. In his view, the expert evidence without documents equals to lack of impartiality and should be disregarded. He argued that the documents would support their 13.630meter measurement. He then faulted the DLHT for relying on the measurements without stating the reliable source. The learned Counsel, nevertheless, acknowledged exhibit P6 as one of the sources of the dimensions. To bolster his argument, he cited the case of **Romeshi Chandra Aggrawal vs. Regency Hospital Ltd** (2006) 9 SCC 709, **Samwel Japhet Kahaya vs. Republic,** Criminal Appeal No. 40 of 2017, CAT-**Arusha and Gulf Concrete & Cement Products Co. Ltd vs. D.B. Shaprya & Co. Ltd,** Civil Appeal No. 88 of 2019 (both unreported) in which the holding is that:

"Mere assertion without mentioning the date or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value."

The learned Counsel also consolidated Grounds 3, 4 and 6. The main complaint is that the dispute was decided in favour of the respondent apart from the fact that no single reliable document was tendered by the respondent, witnesses or expert witnesses either at the hearing or in actual situation entailing that the readings of 13.630 were accurate. He argued that no any respondent witness contradicted the testimonies of DW2 and DW3 who established the legal ownership of the entire suit land designated as Plot No. 970 Block Y, Mwakibete area, Mbeya City and that she had a title deed exhibit D1. By the fact that the respondent produced exhibit P 6 which had some shortcomings, the learned counsel argued that the appellant failed to meet the natural principle enshrined under section 110 (1) and (2) evidence Act, Cap. 6 R.E. 2022 which requires the one who alleges must prove.

Arguing ground 10, Mr. Mkumbe contended that the quantum awarded as general damages was manifestly excessive and it is without justification. Believing that the appellant proved the case on the balance of probabilities, the learned counsel conceived it to be an error to condemn her pay a general

damage of TZS. 5,000,000/= for encroaching by 1.3 meters and causing psychological torture on the plot that has correct measurements. Having submitted as such, the learned counsel implored this Court to set aside the judgment and decree of the DLHT and allow the appeal with costs.

Replying, Mr. Mkumbe implored on this court to dismiss the consolidated grounds 1, 2, 4, 5 and 9 because complaints have no legs to stand. Responding to the contention that PW3 failed to tender any document when they visited the *locus in quo*, the learned counsel submitted that PW3 tendered exhibit P5 (pictures) of the suit land which showed the encroached area measuring 1.3 meters. He went on submitting that the contention by Mr. Muya that PW3 did not support his testimony was surprising because he tendered exhibit P6 (land survey report). On the argument that exhibit P6 was uncertified copy, Mr. Mkumbe found nothing faulty in the DLHT's decision to admit it and added that PW2 was the author hence had authority to tender it and was the one to say whether it was genuine or not.

Responding on the 7th ground, Mr. Mkumbe had a different interpretation of the proceedings. Referring page 25 of the proceedings, the learned counsel contended that PW3 took oath before testifying and was reminded that he was under oath while at the *locus in quo* as reflected at page 47 of the proceedings.

Replying on ground 8, Mr. Mkumbe termed the complaint that the DLHT erred to consider the evidence of PW3 at the *locus in quo* as an insinuation because apart from this witness testifying that the appellant encroached on the respondent's land by 1.3 meters, PW3 re-measured the two plots, that is, 970 and 968 in the presence of both parties including the appellant's advocate. He argued that it was, therefore, unfair to name PW2 and PW3 not being impartial on the reason that they gave evidence against the appellant because what matters is the truth.

Submitting in respect of grounds 3, 4 and 6, Mr. Mkumbe contended that PW2 and PW3 tendered photos or pictures to exhibit the encroachment, measured the suit land in the presence of the appellant and her advocate and finally told the appellant and her advocate and the presiding chairman that the appellant indeed invaded 1.3 meters of the respondent's plot. The learned counsel shifted the blame to the appellant for her failure to consult the relevant authority for the purpose of showing her the correct demarcation of her plot.

Arguing ground 10, Mr. Mkumbe contended that the appellant's counsel failed to say why the amount of TZS 5,000,000/= assessed as general damages was excessive and what amount in their view could not be excessive. He cited the case of **Edwin Shetfo vs. Managing Director,**

A.I.C.C. (1999) TLR 130 to illustrate the position of law that general damages are assessed by the court not pleaded. He wound up by praying this court to dismiss the appeal with costs.

From these rival submissions the question that arises for this Court's determination is whether this appeal carries any merit to justify reversal of the decision of the DLHT.

Grounds 1, 2, 4, 5 and 9 of the appeal touch on the adequacy or sufficiency of the evidence of experts (PW2 and PW3) to prove the proper measurements. It is contended that these witnesses did not produce any documentary evidence. Submission in respect of these grounds decries the DLHT's decision to entertain documentary evidence which was tendered as a copy of the original document (exhibit P6) by PW3. The tendering of this document caused unhappiness on the appellant's side who claimed that it was a photocopy unauthentic and disclosing no source of it.

Ostensibly, Mr. Muya agrees that expert witnesses tendered exhibit P6 which exposed the proper measurements. What discouraged him was the failure to produce the original document, that is, producing a photocopy, a document that was not certified, had no author or title. I have gone through the judgment and discovered that apart from these shortcomings and being

subjected to objection, exhibit P 6 served as the foundation for the expert evidence.

Adduction of evidence in proceedings conducted by the DLHT is regulated by the Evidence Act [R.E. 2022]. With respect to documentary evidence, the governing provision is section 66 which lays a general rule that where the evidence adduced is in the form of a document, then the same must always be in its original form. This law has set several exceptions which fall under section 67(1) which are quoted in verbatim as follows:

> *67.-(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases-*
>
> *(a) when the original is shown or appears to be in the possession or power of-*
>
> *(i) the person against whom the document is sought to be proved;*
>
> *(ii) a person out of reach of, or not subject to, the process of the court; or*
>
> *(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 83;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

This provision envisions adduction of a copy of the document in evidence if either of the conditions set in the quoted section, meaning that a document that fails the test put by the law is inadmissible. This, then, brings out the question on whether, in this case, documents adduced in evidence were copies of the original documents and, if so, whether the same were admissible. The respondents' counsel has not assailed this contention. He only argued that PW2 was the author of the document hence had authority to tender it and was the one to say whether it was genuine or not.

As I tackle this issue, let me start by stating that issues touching on evidence and quality of the said evidence are mere technical issues that can be dispensed with in the guide of substantial justice as stated in Article 107A of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). My brother Hon. Ismail J, stated in the case of **Embassy Security & Domestic Duties LTD vs. Agness Aloyce & 3 others,** (PC) Civil Appeal No. 53 of 2019

> *"It is a bedrock of justice that is intended to ensure that cases are won or lost on authentic evidence produced in its primary form unless circumstances do not permit production of such evidence."*

Substantial justice is panacea to disputes resolution as compared to technical oriented decisions. Therefore, when a Court of law has an opportunity to do substantial justice it must do so with a sole intention of resolving disputes. Courts are enjoined to be guided by Article 107A (1) (2) (e) of the Constitution to dispense justice without being tied up with undue technicality that may obstruct dispensation of justice.

Glancing at the DLHT's judgment, it is clear that the trial Chairman based his decision on exhibits P 6, tendered by PW3 and admitted by the DLHT. This exhibit was tendered and admitted through PW3, Makoye Masalu. Exhibit P6 was tendered and admitted in its secondary form and that such

admission was done despite the objections from the appellant. The trial Chairman based his decision on Regulation 10 of G.N No. 174 of 2003 which allows the DLHT to admit and rely on secondary exhibits. He was further satisfied that the document was authentic and sure that the appellant had full knowledge about it.

In this case requirements of Regulation 10 of G.N No. 174 of 2003 were substantially complied with. Assuming that there were anomalies in admitting exhibit P6, I would still uphold the DLHT decision. While the anomaly would constitute an irregularity of no mean degree, I am guided by the provisions of section 45 of Cap. 216 which states as hereunder:

> *"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."*

From the quoted provision, the test for reversal of the decision of the DLHT is if an error, omission or irregularity has occasioned an injustice. In my considered view, the answer in our case is no. Having complied with

basic requirements as stated earlier on, it cannot be said that the tendering of a photocopy which shown the measurements and was tendered by a competent witness prejudiced either or both of the parties. In my view, the best thermometer of what justice is has been well served. I have taken into consideration, as well, that the parties have been at the thick of the dispute on this land since 2016. During this time, they have gone through numerous turbulences which have drained their energy and resources. Bringing them back to the drawing board would not be in any party's best interest. Consequently, I choose to dismiss this complaint.

The appellant's complaint in the 7th ground that PW3's testimony recorded at the *locus in quo* was not given under oath. I have carefully read the proceedings both typed and hand written. Apparently, PW3 testified during the trial. When the *locus in quo* was visited, the Chairman warned him that he was still under oath. In my considered opinion, I don't think that was wrong. The law requires every witness to take oath. The law does not make it imperative that a witness who has taken oath during the trial should again take oath when testifying in the same case. I am destined, in my view, to think that since the witness was not released from oath and was summoned to testify at the *locus in quo* where his evidence was to be ocularly

established, there was no any flaw to remind him of the oath he took earlier instead of making a fresh one.

The rationale behind oath taking in my understanding is, in legal terms, to make the witness to confine him/herself to telling the truth and not lie. In as much as no any law was offended and the appellant was not prejudiced, I find and hold that this ground has no merit and it is dismissed.

The court is tasked in the 8th ground to decide whether the DLHT was correct to rely on the evidence of PW3 given at the *locus in quo* without a document indicating the dimensions of Plot No. 968 and 970. He harboured the feelings that the expert evidence without documents equals to lack impartiality and should be disregarded. Mr. Mkumbe was unhappy with this contention and argued that giving truthful evidence cannot be equated to biasness. My unfleeting review of the whole evidence adduced at the *locus in quo* reveals that both plots were physically measured in the presence of parties and their advocates. It was found out that the appellant bite off a piece of 1.3 meters from the respondent's plot. This was supported by exhibit P6 which both parties acknowledge except that it is said to be a photocopy. Therefore, in view of the whole evidence, it is not true that PW3 failed to tender documentary evidence to indicate the measures of the suit land. Similarly, given the experts efforts to re-measure the two plots, that is,

970 and 968 in the presence of parties including the appellant's advocate it is indeed unfair to brand them partial witnesses.

Let me now turn to ground 10. Mr. Mkumbe's contension was that the quantum awarded as general damages was manifestly excessive and it was without justification. Undisputedly, the appellant's complaint on the 10th ground rests on the award of general damages. Mr. Muya submitted that the quantum awarded as general damages was manifestly excessive and it was without justification. Mr. Mkumbe was fully satisfied that the general damages were awarded on justifiable ground.

I wish to state from the wake that the law is settled that general damages are awarded after consideration and deliberation on evidence on record able to justify the award. The Chairman has discretion in the award of general damages. See the case of **Edwin Shetfo** (supra). However, the Chairman must assign a reason, when awarding the general damages. In this case he was to assign the reason why he awarded TZS. 5,000,000/= to the respondent. Unfortunately, there was no reason assigned.

It is a common knowledge that general damages are those the law presumes to follow from the type of wrong complained of. They need not to be specifically claimed or proved to have been sustained. Although that is the position of the law, general damages are not damages at large. See

Anthony Ngoo and Davis Anthony Ngoo vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014. It is the elementary principle that the aim of awarding damages is not to punish the defendant but to redress the plaintiff the injuries he sustained. But in the course of appeasing the plaintiff the court must assign the known principle to such effect. It is very unfortunate in this case the trial Chairman did not assign the principle used to reach to the amount of TZS. 5,000,000/= general damages.

In this case, apart from the fact that the appellant encroached and built in 1.3 meters of the suit land, there is nothing in the record indicating that the respondent suffered any inconvenience from the appellant. Therefore, wrong in my view to condemn the appellant to pay general damages on unestablished inconvenience.

In view of the foregoing, I partly dismiss this appeal and partly allow the appeal to the extent of quashing the order of general damages. The respondent is to have his costs.

It is so ordered.

Dated at **MBEYA** this **22nd** day of **December, 2022**

J.M. KARAYEMAHA
JUDGE