

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB - REGISTRY

AT MWANZA

PC CRIMINAL APPEAL No. 9 OF 2022

*(Originating from Criminal case No. 11B of 2021 of the Primary Court of Mbarika
arising from Criminal Appel No. 01 of 2022 the District Court of Misungwi at Misungwi)*

GAGI S/O JEREMIAH-----APPELLANT

VERSUS

BAHATI S/O MANOGU-----RESPONDENT

JUDGMENT

Last Order: 9.02.2023

Judgment: 27.2.2023

M.MNYUKWA, J.

The appellant, GAGI S/O JEREMIAH was charged and arraigned before the primary court of Mbarika whereas, on behalf of the Republic, BAHATI MANOGU accused the appellant of criminal trespass c/s 299 of the Penal Code Cap. 16 RE. 2019. It was alleged that, the appellant one GAGI S/O JEREMIAH, on the 10th September 2021 at about 05.00hrs at Ilalambogo Village within Misungwi District at Mwanza region unlawfully entered into the piece of land allegedly to be in possession of Bahati Manogu and commit an offence.



At the trial court, the matter was heard and determined whereas the appellant was found not guilty and therefore discharged. Dissatisfied, the respondent Bahati Manogu appealed to the District Court of Misungwi whereas the 1st appellate court revised the decision of the trial court and convicted the appellant and imposed a conditional discharge sentence for 6 months. The appellant did not see justice and filed an appeal before this court with three grounds of appeal.

- 1. That, the first Appellate court Magistrate erred in law and fact as she fail to take note that the subject matter of these criminal proceedings, is a bonafide claim of right and not a criminal charge of trespass.*
- 2. That, the first appellate court Magistrate was erred in law to convict the respondent into conditional discharge for six months while the ownership or the property alleged to have been trespassed upon is in dispute between the complainant and the accused.*
- 3. That, the first appellate court Magistrate erred in law and fact as she fail to take note that in a case of criminal trespass a dispute arises as to the ownership of land the court should not proceed with a criminal charge and should advise the complainant to bring a civil action to determine the question of ownership as decided and advised by the trial court.*



By the order of this court, the matter proceeded orally whereas both parties appeared in person, unrepresented. The appellant was the first to submit on the grounds of appeal where he submitted as follows;

On the first ground of appeal, he submitted that the 1st appellate court erred in law for failure to appreciate the bonafide claim of right and not the criminal charge of trespass in which at the trial court the respondent claimed that he trespassed the piece of land.

On the 2nd and 3rd grounds of appeal, he avers that the 1st appellate court erred in convicting the appellant while there is a dispute on a trespassed alleged land. He insisted that where there is a dispute of ownership the offence of trespass can not stand and the respondent was to institute a civil case as ordered by the trial court. He refers to this court the case of **Ismail Bushaija vs R** 1991 TLR 100 that it is not proper for the person to be convicted when there is a dispute on land.

Responding to the appellant's submissions, the respondent prays his reply to the petition of appeal to be adopted and form part of his submissions. Replying on the 1st ground of appeal, he avers that there was no bonafide claim of right as alleged by the appellant and the 1st appellate court was right to convict the appellant.



On the 2nd and 3rd grounds of appeal, he avers that there is no land dispute between the respondent and the appellant and the appellant was rightly convicted.

He insisted that the appellant failed to prove ownership and therefore prays this court to uphold the decision of the 1st appellate court and dismiss the case. After the brief submissions by parties in person, I am now placed on the position to determine *whether the appeal has merit.*

I will start determining the 2nd and 3rd grounds of appeal together for they establish a point of law as the appellant claims that since the offence was of criminal trespass under section 299 of the Penal Code, Cap 16 R.E 2019 the 1st appellate court erred in convicting the appellant while the issue of ownership was not proved as required.

In records, both the appellant and the respondent does not have direct possession of the disputed land which was subject to the criminal trespass. The records of the trial court show that the appellant GAGI JEREMIAH claim ownership of the disputed area through his father, the deceased whereas Mayunga Shituguru was appointed as the administrator of the estate of Jeremiah Shituguru. On his evidence as SU3, testified that he was appointed as administrator (Exhibit K3 and K4) and



distributed the estate of the deceased (exhibit K5) as it reads on page 33 of the trial court proceedings: -

"Nimegawa kwa wake watatu wa marehemu wa kwanza ekari 80, mke wa pili hekari 75 na mke wa tatu hekari 65"

On the part of respondent one BAHATI MANOGU, the records reveal that he claims the ownership of the disputed land which was the property of Nyanda Malunga who died in 1982 and the land was further passed to his grandparent who also died in 1994 and in 1995 he was allocated 4.5 acres by the relatives.

It is further observed in the records that the respondent once had a land dispute No. 01/2019 which was between the respondent Bahati Manogu vs Mayunga Shitungulu (the administrator of the estate of the late Jeremiah Shitungulu) whereas on the decision (Exhibit K1) it reads on the 5th paragraph: -

"Baada ya kufanya uchambuzi wa kina wa maelezo ya mlalamikaji, baraza liliweza kubaini kuwa, mlalamikaji hana miguu ya kisheria katika mgogoro huu. Hii ni kwa sababu ardhi inayogombaniwa ni ardhi ambayo ilipatikana kwa njia ya urithi. Kwa kuwa mlalamikaji sio msimamizi wa mirathi ya marehemu Lwakwaja Nyanda hana miguu ya kisheria mbele ya baraza hili"



As it appears above, it is my findings that neither party, the appellant nor the respondent has a right of title on the disputed land for the reason that the ownership of the land or proof of possession is not settled. As the records reveal, one Gagi Jeremaya, the appellant claims his title which is derived from the estate of his late father administered by Mayunga Shitungu who based on his evidence did not mention that the appellant was demarcated land rather his testimony was as it reads on page 33 of the trial court proceedings: -

*"Nimegawa kwa wake watatu wa marehemu wa kwanza
ekari 80, mke wa pili hekari 75 na mke wa tatu hekari 65"*

That means neither of the three wives testified in court to prove that the area of the dispute was the exact piece of land allocated to the appellant.

To the part of the respondent, Bahati Manogu he claims to derive his right of title from his late uncle who died in late 1982 and the land was further passed to his grandmother who also died in 1994 and in 1995 he was allocated 4.5 acres by the relatives. No administration of the deceased estate was done and therefore no person who bears the locus to claim over the deceased title as the respondent did. Also land dispute No. 01/2019 which was between the respondent Bahati Manogu vs



Mayunga Shitungulu (the administrator of the estate of the late Jeremiah Shitungulu)whereas on the decision (Exhibit K2) it reads on the 5th paragraph: -

"Baada ya kufanya uchambuzi wa kina wa maelezo ya mlalamikaji, baraza liliweza kubaini kuwa, mlalamikaji hana miguu ya kisheria katika mgogoro huu. Hii ni kwa sababu ardhi inayogombaniwa ni ardhi ambayo ilipatikana kwa njia ya uridhi. Kwa kuwa mlalamikaji sio msimamizi wa mirathi ya marehemu Lwakwaja Nyanda hana miguu ya kisheria mbele ya baraza hili"

It is an early observation that the respondent also as on the part of the appellant had no right of title over the disputed land.

From the observations on record, not only the parties had no right of title on possession of the land in dispute, but also no party has a locus against another in commencing a matter over land in dispute. This brings me back to the decision of the trial court which properly held that the issue of ownership was not certain and therefore was to be determined first. As right held in the referred case of **Ismail Bushaija vs R** 1991 TLR 100 the offence of Criminal trespass cannot be proved without proving first undisputed ownership of the land in question. It is trite law that a charge of Criminal trespass cannot succeed where the matter involves land in a dispute whose ownership has not been finally



determined by a Civil suit in a Court of law. (See **S. Mkanga vs. Alberto** [1992] TRL 110). Therefore it was wrong for the 1st appellate court to hold that the respondent proved that the land in dispute belongs to him

In the upshot, I allow the appeal. I proceed to quash and set aside the judgment and orders of the 1st appellate court and consequently, I uphold the decision of the trial court.

It is so ordered.




M.MNYUKWA

JUDGE

24/02/2023


The right of appeal is explained to the parties.


M.MNYUKWA

JUDGE

24/02/2023

Court: Judgement delivered on 24th February 2023 in the presence of the appellant in person.


M.MNYUKWA

JUDGE

24/02/2023