IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPEAL NO. 63 OF 2022

(Originating from the District Land and Housing Tribunal of Moshi, at Moshi, in Application No. 74 of 2017 dated 30/09/2022)

THE REGISTERED TRUSTEES KANISA LA PENTEKOSTE KILIMANJARO..... APPELLANT

VERSUS

RAYMOND MUSHI .....1ST RESPONDENT

GIDO RAPHAEL KAYANI .....2ND RESPONDENT

DAFA KIMELA MKILINDI .....3RD RESPONDENT

JUDGMENT

13th March & 17th May, 2023

A.P.KILIMI, J.:

The appellant mentioned hereinabove filed an application before the District Land and Housing Tribunal of Moshi at Moshi vide application no. 74 of 2017 claiming for the following reliefs, A declaration that the land in dispute is solely property of the appellant, A declaration that the respondents mentioned above are the trespassers to the land which belongs to the appellant. An Order to stop the respondents, their agents or any one acting

under their instructions from further meddling with the Suitland. An order that the respondents be ordered to demolish all structures and give vacant possession forthwith. Costs of the case and any other relief just to be granted.

The facts which cause the appellant to move the said tribunal gleaned from the pleading were that, the appellant alleges that, had been in peaceful occupation of the Suitland since 1970's which makes a total of 47 years till the filing of the dispute. In that disputed land, there are an exhaustive development effected by the appellant to wit a church which had been in operation to date. Thus, the appellant being lawful owner of the said land applied for the right of occupancy and after all mandatory procedures being followed obtained the Certificate of Title No. 41717 from Land authority.

Later in the year 2014 the appellant discovered that the first respondent removed beacon No. 507 and thereafter erected a toilet and block wall in which he took a total land area of 4.46 meters. The second respondent removed the beacon No. 482 and built a House and Mabanzi wall therein. Another was the third respondent, who entered the Suitland within beacon no. 483 whereby he removed it and erected a House over it hence took a total of 2.45 meters.

The appellant tried to resolve the dispute unsuccessful through local authority of Tarakea, later requested assistant of the District Executive Director office to clarify the demarcations of the Suitland something which proven failure as there was no experts in the DED's office. Further to that, the applicant was advised to seek assistance of Private registered land surveyors for clarification of their demarcation, from the said advice, the applicant got the assistance of Kill Surveyors who surveyed the land in dispute and discovered that some of the beacons had been removed.

Before commencement of the trial, the tribunal with the assistance of the parties agreed on the following issues:

> *"(1) Whether the Respondents* ***trespassed to the suit premises, a registered land with no. CT 41717.***
> *(2) To what reliefs are parties entitled to"*
>
> [Emphasis added].

Then the appellant paraded four witnesses, and further tendered the above-mentioned report and the title deed. After the application heard on merit, the trial tribunal held that respondents are not trespassers to the Suitland because the appellant failed to show beacons alleged to have been encroached by the respondents, thus dismissed the application with costs.

The appellant aggrieved by the trial tribunal and orders thereto, has moved this court basing on the following grounds: -

1. That the decision of the trial Tribunal was not based on the evidence given before it.
2. That the learned trial Chairperson erred in law and in fact in deciding that the Respondents had never encroached into the Appellant's piece of land and thereby deciding the case in favour of the Respondents whereas the evidence adduced was below the standard of proof required by law and the second and third respondent tendered no evidence at all as to how they came to own the suit land.
3. That the learned Tribunal Chairperson erred in law and in fact in failing to decide who is the legal owner of the piece of land in dispute.
4. That the learned Chairperson erred in law and in fact by holding that the Appellant was unable to show the same beacons that the Appellant had lamented that the Respondents had removed from the land in dispute.
5. That the learned Chairperson erred in law and in fact by not noting the fact that the respondents too were unable to show four beacons demarcating the boundaries of their purported land.
6. That the learned trial Chairperson erred in not reaching a conclusion as to the measurements of the land despite having visited the land in dispute with a surveyor as well as a Land officer especially after the matter of the land measurements contradiction of 944 square meters and 1939 square meters had already arisen.
7. That the learned trial Chairperson erred in law and in fact when he relied on traditional boundaries of logs (mabanzi) instead of beacons while the land in dispute was a measured and registered land which ought to have ordinary brick beacons; and the first respondent had tendered his title deed for a granted right of occupancy and not a customary right of occupancy.
8. That the learned trial Chairperson erred in law and in fact by ignoring the fact that the first person in time is the first in right despite both the first and second

respondent conceding to the fact that the Appellant was the first on the land in dispute.

9. That the learned trial Chairperson erred in law and in fact in deciding to ignore the evidence of all the Appellant's witnesses including that of PW2 Arobogasti Zakaria Muhumba- a Land Officer and PW4 Alphonce Solo Mwafinga- a Surveyor.
10. That the learned trial Chairperson erred in law and in fact by arriving at a decision despite him not determining the demarcations and boundaries of land of each party to the dispute.

From the above grounds the Appellant is praying this appeal be allowed with costs, then be declared the legal owner of the piece of land in dispute. While the Respondents be declared trespassers to the said land, Furthermore the appellant prays to this court to order for demolishing all structures on the said land in dispute, the Respondents be restrained from trespassing into it, and the boundaries of the land of each party to the dispute be re-determined and beacons reinstalled.

When this appeal came for hearing the appellant was represented by Ms. Lilian Justus learned advocate, The second respondent was represented by Ms. Jane James learned counsel while the first and third respondents stood themselves.

Starting with the first ground, Ms. Lilian argued that the evidence was not based on evidence tendered, because the learned chairperson did not consider testimony of PW4 who is the land officer and exhibits of the title dead, by not stating conclusively the demarcation of the land in dispute as per exhibits tendered. She further said the facts that no beacons were found is the impression that the said land was encroached by respondents and removed the beacons, thus failure to consider evidence of the party is as good as not hearing that party. To buttress this, she has referred the case of **Hussein Idd and Another v. R (1986) TLR 300** and **Kundai v. R (2008) TLR 352.**

In respect to the second ground, the counsel for appellant submitted that the one who alleges must proof, the Respondents alleged that they never encroached the said land but they tendered no evidence to prove the allegation especially for the second and third Respondents. Therefore, she is saying the appellant evidence was stronger than that of the Respondents. Thus, the tribunal was wrong to give them victory which was not justified by evidence, she then referred the case **Hemed Said v. Mohamed Mbilu (1984) TLR 113** to fortify her view.

Submitting to support the third ground of appeal, Ms. Lilian said according to the record of tribunal, the main issue was that the respondents had encroached the land in dispute but until determination, the Chairperson did not even determine how large of land was said to be encroached and at last he did not say to whom the said land belong to. She further argues that it was the duty of chairperson after visiting locus in quo to determined which land was encroached in terms of measurements, but the Chairman did not exercise that duty, the counsel then referred the case of **Wilfred Maro v. Sarah lotti Mbise and 3 others** Civil Appeal No. 64 of 2020 to support this argument.

Thereafter the counsel abandoned ground number four and six, whereas in regard to ground number five she merely submitted, neither of any of the respondents were able to show the beacons demarcating their land, while both testified that their land was registered. The counsel for appellant further in respect to ground number seven submitted that the chairperson relied on the demarcation of Mabanzi instead of beacons which was wrong because the title deed tendered before tribunal was for right of occupancy and not customary occupancy.

Lastly, Ms. Lilian while submitting in support of the eighth ground of appeal maintained that the trial tribunal did not observe on priority principle that, the first in time is the first in right. This is because it was testified that Appellant was there in the land since 1970, the facts which was not disputed by respondents. Furthermore, she abandoned ground number nine and ten.

Responding to the appellant's submissions above, the first respondent contended that, the tribunal considered the expert evidence which was tendered by the General Secretary of Appellant which shows the area encroached, then the next witness was Arobogast Zakaria who is land officer, both negated that the church did not possess the said land.

The first respondent further contended that witness from Kili Surveyors which is a private institution went to the locus in quo, after surveyed, did not saw 1939 square meters as alleged by the appellant, the same was observed and approved by the tribunal when visited locus in quo, thus it troubled to the demarcation of the alleged land in dispute.

Ms. Jane James learned counsel representing the second respondent submitted that the second respondent did no encroach the area of appellant, the tribunal did evaluate evidence including that of appellant, the disputed

land is registered and certificate of occupancy was tendered and admitted as exhibit P3 but the appellant did not come with clean hands, the exhibits P3 show size is 1039 square meters, while PW4 a surveyor from Kili Surveyors, tendered exhibit P6 which shows that the area in dispute is 944 sqm, so the two witnesses contracted each other, Also, PW2 who is the land officer also contradict the other, by saying that there is different between the size of the actual land and what is written in the title deed. Thus, the tribunal based on the evidence before it, and it is not true that all parties were having title deed, at the trial only the appellant and second respondent were having titled deeds.

Furthermore Ms. Jane added that at the tribunal, there were no issue of who is legal owner of the land, in essence the issue was about trespass, so the tribunal was correct to say about encroachment, but not the issue of ownership.

In respect to beacons, Ms. Jane submitted that it is not true that the second respondent did not show beacons, the contradiction is between the Appellant and his witnesses, this was that PW4 was given the work of resurveying and return a report exhibit P6, said he saw beacons 482 which did not affect appellant's land, therefore the second respondent has never

trespassed to the suit land. Therefore, due to contradictions no way the chairperson of the Tribunal could have done for the title which was detailed a size not available to actual land.

Ms. Jane said further submitted that the case cited of **Wilfred Maro** (supra) is distinguishable to this case, because that case as shown at page 10 dealt with ownership while this case at hand deals with trespass not the ownership. The counsel then concluded by arguing ground number six, and said the fact that the appellant specifically said that PW2 and PW4 was ignored, but she says it is not true all evidence were considered in the Judgment. The Chairman of tribunal admitted the contradiction, thus means he considered their evidence, and concluded that second respondent did not trespass the suit land.

The third respondent argued that his land is not surveyed, his land is situated behind the second respondent, and concluded that to his view the trial tribunal did justice.

In rejoinder, Ms. Lilian prayed to reiterate her submission in chief, and further rejoined that evidence tendered by PW4 is the area remained, so there is different of square meter 965, so the trial tribunal misconceived the

evidence on size. Therefore, the tribunal was required to base on what is tendered in the title deed, she further insisted that discrepancies was about 3 square meters which may be to the lapse of the memory.

In respect that the case that was solely on trespass and not ownership, Ms. lilian submitted that where there is trespass the issue of ownership cannot be escaped, so one cannot trespass to the land which is not owned.

Responding about beacons, Ms. Lilian argued that according to record, second respondent trespassed beacons 482 and 468, but also, she added that the second respondent did not show his area by means of beacons.

The counsel for appellant further argued that, the appellant proved the size of the land which was encroached, something which the chairman did not consider. On the issue that the certificate owned by the appellant was mistaken, it was not, but conclusive correct that is why the tribunal did not expunge from the court. Lastly the counsel added that the two cases referred are relevant, because you cannot determine trespass without knowing rightful owner.

Having considered the above submissions and the record of the trial tribunal, I wish to start with the duty of this court when hearing appeal. It is

trite law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive on its own findings of fact, if necessary. The same was observed by the Court of Appeal in **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009. (unreported) that;

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

According to the grounds of this appeal, the appellant's learned counsel abandoned grounds number four, six, nine and ten. I have revisited the remaining grounds of appeal, in my opinion ground number one and two deals with the same crux which is the evidence tendered at the tribunal, thus will be determined together.

I concede with the learned counsel for appellant when she said who alleges must prove. As a matter of principle, the burden of proving each allegation rests on the Plaintiff who also bears the evidential burden and must be discharged on the balance of probability. (See the cases of **Magambo J. Masato & 3 others verus Ester Amos Bulaya & 3 others**, Civil Appeal No. 199 of 2016, CAT – Dsm, and **Godfrey Sayi vs Anna**

Siame as Legal Representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2021 (both unreported).

In this appeal counsel for appellant alleges that the learned chairperson did not consider testimony of PW4 who is the land officer and exhibits of the title deed tendered, according to the typed proceeding at page 36 AW4 one Alphonce Solo Mwanshinga, a Surveyor from Kili Surveyors had this to say;

> *"We also after re affixing boundaries discovered that the size of the* ***plot is sq. meters 944****. I do not know the owners of the affected houses. The Applicant were satisfied with our job. I also know that the land belongs to the Applicant as per documents they possess.* ***I saw the certificate of Title which had a different size of land. In the previous sketch plan, the surveyor made error on the Deed plan where it shows that, the size of the plot is 1939 while the real size is 944 sq. meters."***
>
> [Emphasize supplied]

When cross examined by Ms. Jane James counsel for the second at page 37 of the tribunal record, respondent (AW4) had this to say;

> *"Such a title with a different size is not defective* ***but owner has to report at the relevant office to make changes***

on certificate of Title. He is the land officer who can tell whether the certificate of Title defective or not. *It is the certificate of Title which shown the size at 1939 sq. metre. The sketch plan is part of the report. It was not my job clarify the different size of the land."*

[Emphasize supplied]

According to the above evidence it is straight forward the above-named witness said what he evidenced in exhibit P6 which is Kili surveying report. However, the same shows that the size of the disputed land is 944 sq. metres while the title deed tendered and admitted as exhibit P3 shows the appellant's land size at 1939 sq. metres. In my view the testimony and exhibits tendered by PW4 being having above discrepancy cannot prove conclusively the demarcation of the land in dispute. Moreover, the facts that the appellant alleges that because no beacons were found is the impression that the said land was encroached by respondents who removed the beacons, in my opinion it is not correct unless the survey done by kill surveyors being professionals could have positioned so, but they did not. In such regard the two grounds are dismissed forthwith.

The above observation goes to the third ground effectively because, basing on the above evidence which does not show the demarcation of the appellant's land, consequently maintains that the appellant's evidence at the trial tribunal did not conclusively prove the land alleged to be in dispute which is owned exclusively by the appellant. With respect, I don't agree with the assertion of appellant's counsel argument that the chairperson of the tribunal after visiting locus in quo was having a duty to determine which land was encroached in terms of measurements, but he did not. The learned chairman did his duty by ascertaining the evidence of land profession and non-professional tendered, and reached the conclusion.

According to page 8 of the typed Judgment of the trial tribunal, the learned Chairman categorically observed that the appellant relied on Kili surveyors sketch map, but the said Chairman was of the view that the said sketch map authenticity was questionable, this is because it shows that the area belonging to the appellant is 944 square meters, while the appellant title deed (exhibit P3) shows the size is 1939 square meters.

In my view, though the two documents stated above was admitted, the tribunal took struggle to verify the contents in them by looking at its correctness as a matter of principle and reached the decision bravery. In

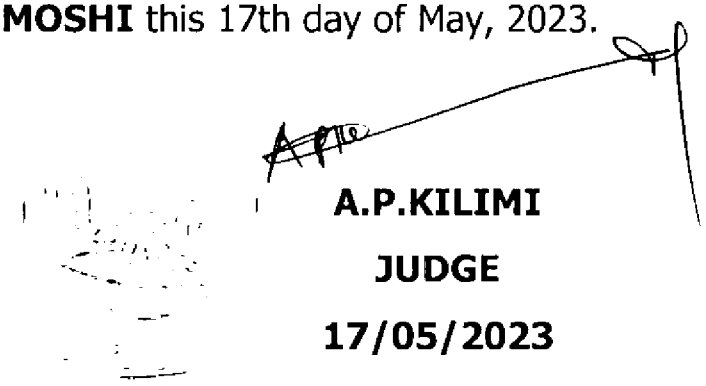
view thereof, it is my considered opinion, it was right for trial tribunal not to decide who is the legal owner of the piece of land in dispute under the said above circumstances. Thus, accordingly the third ground is hereby dismissed.

In respect to the fifth ground, it is trite law that, he who alleges has a burden of proving his allegation as per the provisions of **section 110 of the Tanzania Evidence Act, Cap 6, R. E. 2022.** It was therefore the duty of the appellant to prove the ownership of the suit land on a balance of probabilities. With respect to learned counsel for the appellant, the facts that she alleges that respondents were unable to show beacons demarcating the boundaries of their purported land cannot prove what the appellant alleges without evidence to do so. Furthermore, that was not an issue at the trial tribunal for the respondents to do so. This is fortified by the cardinal principle in our jurisdiction that the decision of the court must be based on the issues framed by the court and agreed upon by the parties, if done contrary may have the effect of miscarriage of justice. (See **Hood Transport Company Limited v. East African Development Bank,** Civil Appeal No.262 of 2019 (unreported). It is thus my finding this ground also must fail for want of merit.

In the circumstances discussed above, and having considered to the remaining two grounds which were not abandoned by counsel for the appellant, I find that the determination of grounds of appeal hereinabove is sufficient to dispose this appeal.

With the discussion above, I am convinced that this appeal is lacking merit and consequently I dismiss it with costs.

DATED at **MOSHI** this 17th day of May, 2023.



A.P.KILIMI

JUDGE

17/05/2023