IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 73 OF 2022

(Originating from Land Application No. 18 of 2020 of the District Land and Housing Tribunal for Moshi at Moshi).

FAUSTIN MINJA..... APPELLANT

VERSUS

HAPPINESS AISEN LYATUU..... RESPONDENT

JUDGMENT

11/05/2023 & 13/06/2023

SIMFUKWE, J

This appeal originates from Application No. 18 of 2020 of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal). Before the trial tribunal, the respondent herein sued the appellant herein claiming that he had trespassed into his land measuring 8 feet width X 26 feet long, located at Kitahie area, Kiboriloni Ward within Moshi Municipality in Kilimanjaro Region. The respondent alleged before the trial tribunal that she bought the said land in 1982 from one Ndenengo J. Mshiu. That, in 2016, the appellant herein trespassed into her land by erecting a wall. In his defence, the appellant herein contested the claims and alleged that he bought the disputed land from one Lahaeli Mshiu in 1980 measuring 72 feet X 68 feet. That, the alleged wall was constructed soon after he had bought the said land.

After considering evidence of both parties, the trial tribunal decided in favour of the respondent herein. Dissatisfied, the appellant filed the instant appeal in which he has raised three (3) grounds of appeal:

1. *That, the trial tribunal erred in law and in facts for failure to properly evaluate and make critical analyze the evidence of the parties thus reaching at an unjust decision. (sic)*

2. *That, the trial tribunal erred in law and in facts for ignoring the appellant (sic) evidence while the Appellant had given credible and sufficient evidence to prove the land belong to him.*

3. *That, the judgment and order lack legal reasoning.*

The appeal was argued by way of written submissions as both parties were unrepresented.

On the first ground of appeal which concerns failure to properly evaluate evidence of the parties; the appellant submitted that the trial Tribunal did not resolve the dispute herein satisfactorily, because even the respondent does not know the exact size of the land, he was declared to be the lawful owner. He referred to page 4 of the judgment of the trial tribunal where the appellant was quoted to have said that:

> *"Akasema kwamba eneo analomiliki yeye lina ukubwa wa futi 72 urefu wa futi 68 upana. Akasema Kwamba yeye alinunua eneo hilo kutoka kwa mtu aitwaye Lahaeli Mshiu Mwaka 1980."*

In addition, the appellant referred to the evidence of the respondent as recorded at page 1 and 2 of the judgment of the trial tribunal where the trial tribunal noted that:

> *"kwamba malalamiko ya mwombaji yanahusu kipande cha ardhi chenye ukubwa wa upana wa futi 8 na urefu wa futi 26 zilizovamiwa na mjibu maombi alipata eneo hilo kwa kulinunua Mwaka 1982 kutoka kwa mtu aitwaye Ndenengo J. Mshiu."*

On that basis, the appellant pointed out that he was the first one to buy the land and used it without disturbance. He opined that the first person to be allocated that piece of land was the one to be given first priority in case of double allocation.

The appellant averred further that even Kiboriloni Ward Tribunal found that the appellant did not trespass the suit land. Also, Moshi Municipal, the surveyors and other authorities measured the suit land and put the beacons. That, measurements show that the suit land belongs to the appellant. The appellant referred to page 3 of the judgment of the trial tribunal where he stated that:

> *"Mwaka 2019 Mkurugenzi wa Manispaa alitangaza kupima viwanja katika eneo hilo na wataalamu wa upimaji walipofika na kuweka beacons ndipo Happiness alipokuja katika baraza hili na kulalamika kwamba amevuka na kusogea kwake."*

The Appellant referred to the case of **Stanslaus R. Kasusura and A.G vs Phares Kabuye [1982] TLR 33** in which it was held that the trial

judge should have evaluated the evidence of each of the witness, assessed their credibility and made a finding on the contested fact in issue.

On the second ground of appeal, the appellant faulted the trial tribunal on allegation that it ignored his evidence which he believed that was credible and sufficient to prove ownership of the disputed land. He stated that he bought the suit land in 1980, from one Lahaeli Mshiu and continued using the suit property for cultivation purposes. That, he possessed the disputed land for more than 12 years peacefully. On part of the respondent, the appellant was of the view that he did not give credible evidence during the trial to move the trial Tribunal and to prove that the disputed land belonged to him. The appellant referred this court to the case of **Shaban Nasoro V. Rajabu Simba (1967) HCD 233** which held that:

> *"The court has been reluctant to disturb persons who have occupied land and developed it over a long period. The respondent and his father have been in occupation of suit land for a minimum of 18 years, which is quite a long time. it would be unfair to disturb their occupation."*

The appellant continued to submit that his evidence before the trial tribunal was worth, reliable and not fabricated. He referred to **section 110(1)(2) of the Evidence Act, Cap 6 R.E 2019** which imposes the burden of proof to the one who alleges. That, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

Supporting the third ground of appeal, the appellant challenged the judgment and order of the trial tribunal on the reason that the same lacks legal reasoning. He referred to the case of **Amiral Ismail Vs Regina 1**

TLR 370, (sic) which held that every judgment should state the facts of the case and should give sufficient and plainly reasons which justify the findings.

On the basis of the above cited authority, the appellant was of the opinion that the decision of the trial tribunal lacks reasons for the decision and material points of law. That, the trial tribunal failed to state reasons for its decision. Thus, the said judgment should be quashed by this court. The appellant cited **Regulation 20(1) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations G.N No. 174 of 2003** which provides that a judgment should contain a brief statement of facts, findings on the issues, a decision and reasons for the decision.

It was stressed that, the respondent alleged to be the owner of the suit land, but he did not have any documentary proof of the alleged ownership or strong evidence of alleged ownership contrary to **section 110 of the Evidence Act**, **Cap 6 R.E 2019.**

The appellant urged this court that the decision of the trial tribunal be quashed and set aside. Moreover, he prayed the court to declare that the disputed land belongs to him. Lastly, he prayed for the costs and any other relief this court may deem fit to grant.

Responding to the first ground of appeal which concerns evaluation of evidence, the respondent submitted that the dispute is not about ownership of land but rather the boundaries between the two plots of the parties herein. That, it is not a dispute over whom bought the plot first as submitted by the appellant. It was explained that the parties are neighbours whereas the appellant bought his plot in 1980 from Lahaeli Mshiu while the respondent bought his plot in 1982 from Ndenengo J.

Mshiu. The respondent contended that the dispute arose in 2016 when the appellant encroached into his land measuring 8 feet X 26 feet by erecting the wall which demarcate the two plots while the former boundary was an old wall of about one meter, bougainvillea fence and mango tree of which were now found on the appellant's plot.

The respondent stated further that during the trial at the tribunal, the appellant herein stated that soon after he became the owner, his plot and that of the respondent were demarcated by the wall fence of about one meter, bougainvillaea fence and mango tree. That, the appellant said the wall which caused the dispute was erected at the point of continuation of the old wall hence, developed side by side with the bougainvillea fence which was opposed by the respondent in his testimony. That, it was testified by both parties that, the two plots were demarcated by a mango tree which exists to date.

The respondent contended further that during the visit to the *locus in quo*, the appellant's testimony at the trial contradicted what was found at the *locus in quo*. That, at the *locus in quo* it was found that the new wall was constructed ahead of the old one and encroached to the respondent's plot of about 8 feet x 26 feet and the old wall of about one meter and bougainvillea fence was now on the appellant's plot. Also, the mango tree which was alleged by both parties that it was at the boundary, was found to be on the appellant's plot. Meaning that, the new wall encroached to the respondent's plot. That, when the appellant was asked why his testimony contradicts from the actual evidence, he did not reply. The respondent was of the opinion that, the testimony of the appellant was unreliable.

Responding to the 2nd ground of appeal that the appellant's evidence was ignored, the respondent submitted that the dispute before the trial tribunal was not whether the appellant was the owner of the disputed land, but rather the dispute was over the boundaries, whereby the appellant constructed his wall in 2016 by encroaching about 8 feet X 26 feet of the respondent. That, the respondent reported the matter to the local/ten cell leader. However, the Appellant ignored the summons which required him to attend. The respondent was then issued with a letter to refer his dispute to the village authorities. After mediation had failed, the matter was referred to the ward authorities.

The respondent distinguished the cited case of **Shaban Nasoro vs Rajabu Simba** (supra) and argued that the wall which caused this dispute was erected in 2016 and since that time the dispute has been reported to the authorities and there is no peaceful settlement in that area to date as stated by the appellant.

In reply to the section of the **Law of Evidence Act** (supra) which was cited by the appellant, the respondent argued that the burden of proof was upon the appellant, to prove why the original fixture which before the dispute was demarcation of the two plots, was not found in his side during the visit. That, since the appellant testified that the new wall was the continuation of the old wall, he was supposed to prove during the tribunal visit to the *locus in quo*, but he failed to do so.

Contesting the third ground of appeal; the respondent submitted that the judgment was proper and it contains all the credible reasons to reach a fair decision. That, the same was fair to all parties because during the trial, each party was given enough time and chances to adduce his

evidence. That, the judgment of the trial tribunal has all the standard features which any judgment must contain.

In his conclusion, the respondent prayed the appeal to be dismissed with costs.

I have considered submissions of both parties, the grounds of appeal and the records of the trial tribunal. The issue for determination is **whether this appeal has merit.**

In determining the raised issue, this being the first appellate court, the court is obliged to re-evaluate the entire evidence of the trial tribunal and come up with its own findings in case the trial tribunal did not evaluate the evidence properly. See the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal No. 45 of 2017) [2019] TZCA 453.**

The first and second grounds of appeal concern evaluation of evidence. On the first ground, the appellant condemned the trial Chairman for failure to evaluate the evidence while on the second ground of appeal he alleged that the trial tribunal did not consider his evidence. In support of these grounds, the appellant was of the view that the trial tribunal failed to resolve the dispute satisfactorily because even the respondent does not know the exact size of his land. He believed that his evidence was strong as the same shows that he was the first one to buy the land and that he did not trespass the respondent's land.

The respondent disputed the submission of the appellant and asserted that the dispute is not in respect of ownership, but it is in respect of boundaries. That, the dispute is not about who bought the land first. The

respondent contended further that his evidence was credible and that of the appellant contradicted with what was found at the *locus in quo*.

I subscribe to **section 110 Law of Evidence Act** (supra) as cited by the appellant which provides that the burden of proof lies on the person who alleges. The Court of Appeal in the case of **Paulina Samson Ndawavya** (supra) at page 14 had this to say in respect of the above section:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."*

In this case, it is on record that the dispute is over boundaries whereas the respondent argued before the trial tribunal that in 1995 the appellant herein trespassed into his land by erecting the wall. That, she reported the matter to the Village Executive Officer who settled the dispute by measuring the area and rectified the boundaries. However, in 2016 the appellant trespassed into her land again by 8 feet.

Before the trial tribunal, the respondent called the following witnesses: **SM2 Elibariki Jonas Mshiu** who alleged that the respondent bought the said land from his father in 1982 measuring 70 feet X 50 feet. That, the appellant encroached the land of the respondent by 8 feet. SM2 identified the sale agreement which was tendered before the tribunal (exhibit P1). **SM3 Fredrick Moses Temu** stated that he was the member of local government from 2005 to 2019. SM3 told the trial tribunal that the

respondent reported the claim of trespass against the appellant herein to him (SM3). That, SM3 called the appellant, but he did not respond. In short, SM3 testified against the appellant.

On part of the appellant herein, he testified that in 1980 he bought the suit land from one Lahaeli Mshiu measuring 72 X 68 feet. That, after he had bought the said land, he built the short wall of about one foot. He averred that in 1995 the respondent complained to the village government which visited the locus in quo and saw that he had not trespassed. That, in 2017 the appellant developed his wall up to 10 feet, then the respondent complained that he had trespassed in the suit land. The ward Tribunal visited there and found that he had not trespass. That, in 2019 the area was surveyed and inserted with beacons that's when the respondent started to complain.

Before the trial tribunal, the appellant herein called two witnesses, **SU2, Jonathan Jeremiah Matei,** whose evidence was to the effect that in 1995 the dispute was reported to village office. They visited the place and they measured the area and found that the area was not trespassed.

Another witness was **SU3 Usiwajali Khamis Kidaya** who testified that during the dispute he was a village executive Officer, who resolved the dispute. He testified to the effect that they could not order the demolition of the wall because the parties didn't present exhibits. SU3 explained that they considered the statement of the previous Village Executive Officer and found that there was no trespass. They advised the parties to pursue their rights in other institutions.

The trial Chairperson at page 6 of the typed judgment while deciding the issue of ownership had this to say:

"Nikianza na hoja ya kwanza bishaniwa na kwa kuzingatia ushahidi uliopo kwenye kumbukumbu, na baada ya Baraza hili kupata fursa ya kutembelea eneo la mgogoro na kwa kuzingatia pia maoni ya wajumbe wa baraza hili, Mdaiwa ni mvamizi wa eneo la mgogoro. Baada ya Baraza hili kutembelea eneo la mgogoro mleta maombi alionesha mti wa muembe ambao alisema kwamba ndiyo uliokuwa mpaka. Hata hivyo mjibu maombi alionesha sehemu aliyosema kwamba ilikuwa na ukuta wa urefu wa futi moja ambao baadae aliongeza na kuwa futi 10. Niseme tu kwamba wakati mjibu maombi anatoa ushahidi wake alisema kwamba aliongezea ukuta uliokuwepo wa futi 1 na kufikia futi 10. Maelezo haya ya mjibu maombi siyo ya ukweli kwani Baraza hili lilipofika eneo la mgogoro ***mjibu maombi alionesha sehemu iliyokuwepo ukuta wa futi moja ambao alivunja na ndipo akajenga ukuta wa sasa wa futi kumi, ukuta huo wa futi moja ulikuwa kabla ya ulipo ukuta wa sasa****.*

Kwa mujibu wa ushahidi uliopo kwenye kumbukumbu na kama mjumbe Sarah Mchau alivyosema kwenye maoni yake ni kwamba mgogoro ulianza baada tu mjibu maombi kujenga ukuta wa sasa. Kwa mujibu wa shahidi uliopo kwenye kumbukumbu mnamo Mwaka 1995 uliibuka mgogoro kati ya wadaawa. Mgogoro huo ulisuluhishwa na mipaka kurejeshwa lakini baada ya michongoma hiyo kuondolewa, na ukuta wa futi moja kuondolewa, ndipo mgogoro ulipoibuka baada ya kujenga ukuta huu uliojengwa Mwaka 2016. Hivyo basi hii

inadhihirisha kuwa ukuta huu wa sasa ndiyo uliosababisha mgogoro baada ya kujengwa na kuingia kwenye eneo la mleta maombi. Lakini pia Baraza hili lilipotembelea eneo lenye mgogoro liliridhika kwamba mti wa mwembe ndio mpaka maana mjibu maombi alishindwa hata kutoa maelezo ni kwa namna gani mti huo wa mwembe ulikuwa pale."
Emphasis added

From the above findings and summary of evidence of the trial tribunal, I am convinced to conclude that the trial Chairperson said it all. First of all, the trial Chairperson evaluated the evidence of each party and made his findings thereto.

Guided by the principle that the onus of proof lies to the one who alleges, I strongly support the above findings of the trial tribunal. This is because, the trial tribunal was in a better position to assess the evidence of the parties and their witnesses and their credibility. It is trite law that the trial court is in a better position on matters of credibility of witnesses. In the case of **Maramo Slaa Hofu vs Republic, Criminal Appeal No. 246 of 2011,** the Court of Appeal at Arusha, held that:

"We are aware of the rule that usually the trial court is best placed to determine the credibility of witnesses (See ***AUGUSTINO KAGANYA ETHANAS NYAMOGA AND WILLIAM MWANYENJE v R [1994] TLR 16 (CA)."***

In the case at hand, I am of considered opinion that the trial tribunal was in a better position to observe what transpired at the *locus in quo* in respect of the parties' boundaries.

Before the trial tribunal, the appellant supported the evidence of the respondent that the dispute arose in 2016. As rightly decided by the trial Chairperson, the evidence is clear on the fact that the dispute arose when the appellant constructed the new wall. When the trial Tribunal visited the *locus in quo* observed that the new wall was constructed in the area of the respondent. The respondent called the witness (SM2) who sold the land to her. Thus, the appellant's allegation that the respondent started to complain in 2019 when the area was surveyed and inserted with beacons is unfounded.

On part of the appellant, apart from the witnesses who claimed to know the dispute, the appellant did not call other witnesses to prove that the suit land belonged to him or that he bought the land measuring 72 feet X 68 feet from one Lahaeli Mshiu as alleged. In addition, the appellant's witness SU3 supported the evidence that the dispute arose in 2016.

On the basis of the above evidence, I am of considered opinion that the respondent herein presented before the trial tribunal evidence which was heavier than that of the appellant herein. In the event, I find no basis of faulting the trial tribunal's findings. Thus, the first and second grounds of appeal has no merit.

On the last ground of appeal, the appellant challenged the trial tribunal's judgment on the reason that the same lacks legal reasoning. This ground was disputed by the respondent who argued that the judgment contains all the ingredients of judgment.

Regulation 20 (1) (a) to (d) of Land Disputes Courts (the District Land and Housing Tribunal) Regulations, (supra) which provides that the format of the judgment of the District Land and Housing Tribunal

should contain brief statement of facts, findings on the issues, decision and reasons for the decision.

My critical examination of the impugned judgment of the trial tribunal revealed that the same contains all the ingredients of judgment. The trial Chairperson summarized the facts of the case as seen at page 2 to 5 of the typed judgment. Also, he summarized the opinions of assessors at page 5 last paragraph. Thereafter, he made findings of each issue as seen from page 6 to 7. The findings contain reasons for the decision. In the circumstances, I am of considered opinion that the contention that the judgment of the trial tribunal lacks legal reasoning, is misplaced.

It is on the basis of the above reasons that I hereby dismiss this appeal with costs.

Order accordingly.

DATED and DELIVERED at Moshi this 13th day of June 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

13/6/2023