IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 72 OF 2022

(Originating from Land Application No. 19 of 2020 of the District Land and Housing Tribunal for Moshi at Moshi).

FAUSTIN MINJA..... APPELLANT

VERSUS

JONES LELU KALALU..... RESPONDENT

JUDGMENT

11/05/2023 & 09/06/2023

SIMFUKWE, J.

This appeal emanates from Application No. 19 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 on allegation that he had encroached his land measuring 8 feet width X 15 feet long. The respondent claimed that he bought the said land since 1983 from one Restiely K. Materu. That, in 2017, the appellant herein trespassed into his land by erecting a wall. On the other hand, the appellant herein disputed the claims and argued 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.

The trial tribunal visited the *locus in quo* and after considering evidence of both parties, decided in favour of the respondent herein. Hence, this appeal in which the appellant 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 ordered to be heard by way of written submissions. Both parties were unrepresented.

On the first ground of appeal which concerns failure to properly evaluate evidence of the parties; the appellant explained that the trial Tribunal did not resolve the dispute herein satisfactorily. That, 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 stated that:

> *" .... alinunua eneo hilo kutoka kwa mtu aitwaye Lahaeli Mshiu Mwaka 1980. Akasema kwamba eneo analomiliki yeye lina ukubwa wa futi 72 X 68 upana. ..... Akaendelea kusema kwamba baada ya kununua eneo hilo alijenga ukuta wa futi moja kuzunguka eneo hilo ambapo alijenga kipindi hicho alichonunua."*

Also, the appellant quoted the words of the respondent as recorded at page page 1 and 2 of the judgment of the trial tribunal where the respondent stated that: *" kwamba mleta maombi alinunua eneo hilo kutoka kwa mtu aitwaye Restiely K. Materu na kwamba amekuwa akilitumia kwa kupanda mazao ya msimu na baadae kujenga nyumba ya kuishi. Kwamba amekua katika eneo hilo tangu mwaka 1988."*

From the above quotations, the appellant submitted 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.

It was submitted further that even Kiboriloni Ward Tribunal saw 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 trial tribunal where **SU1 Jonathan Jeremia Matei** stated that:

> *"Akaendelea kusema kwamba mwaka 2019 ulifanyika urasimishaji wa eneo hilo na kiwanja cha Minja kikawekwa Beacon."*

On the second ground of appeal, the appellant lamented that the trial tribunal ignored his evidence which he believed that was credible and sufficient to prove ownership of the disputed land. Elaborating his evidence before the trial tribunal, the appellant submitted that he bought the suit land in 1980, from a person called 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 argued that he did not give credible evidence during the trial to move the trial Tribunal and to prove that the disputed land belong 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**, 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 strength of the above authority, the appellant argued 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) Regulation 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.

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

The appellant prayed that the decision of the trial tribunal be quashed and set aside. Also, 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.

In reply to the first ground of appeal which concerns evaluation of evidence, the respondent told this court that the dispute is not about ownership of land but rather the boundaries between the two plots of the parties herein. Also, it is not a dispute over whom bought the plot first as submitted by the appellant. He elaborated that; the parties are neighbours. That, the appellant bought his plot in 1980 from Lahaeli Mshiu and the respondent bought his plot in 1982 from Restiely K. Materu. The respondent explained to this court that the dispute started in 2016 when the appellant encroached/trespassed to 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.

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 witnessed by both parties that, the two plots were demarcated by 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 15 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, the dispute was over the boundaries, whereby the appellant constructed his wall in 2016 by encroaching about 8 feet X 15 feet of the respondent. Thereafter, 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 created 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.

Responding to the cited 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.

Countering the third ground of appeal, the respondent submitted to the effect that the judgment was proper, and it contains reasons for the decision. That the same was fair to all parties since during the trial, each party was given enough time and chances to bring 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.

Having summarized submissions of both parties, the issue for determination is **whether this appeal has merit.**

In determining the raised issue, this being the first appellate court, I will be guided with the decision in the case of **Standard Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another, Civil Appeal No. 98 of 2008**, (unreported) in which the Court of Appeal held that:

> *"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand* ***(Peters v. Sunday Post, 1958 EA 424; William Diamonds Limited and Another v. Rf 1970 EA 1; Okeno v. R, 1972 EA 32."***

I will determine the first and second grounds of appeal jointly as both grounds 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 these grounds, the appellant was of the view that the trial tribunal failed to resolve the dispute because even the respondent

does not know the exact size of his land. He believed that his evidence was strong because the same shows that he was the first one to buy the land and that he did not trespass the respondent's land.

These grounds were vehemently disputed by the respondent who argued that the dispute is not in respect of ownership, but it is in respect of boundaries. That, the dispute does not concern who first bought the land. The respondent alleged further that his evidence was credible and that of the appellant contradicts with what was found at the locus in quo.

I am aware with the provision of **section 110 Law of Evidence Act** (supra) as cited by the respondent which provides that the burden of proof lies on the person who alleges. That, this court will decide in favour of the party whose evidence is more credible than the other as far as the issue of disputed piece of land is concerned. In the case of **Said vs Mohamed Mbilu [1984] T.L.R 113** it was held that:

> *"According to the law, the person whose evidence is heavier than the other is the one who must win. In considering the weight of evidence things necessary to be considered is quality of evidence."*

It is on record that the dispute is over boundaries whereas the respondent argued before the trial tribunal that in 2016 the appellant herein encroached his land measuring 8 feet width X 15 feet long by erecting the wall. The respondent testified that the appellant herein uprooted the former boundaries of *'michongoma'* thorn trees and erected the said wall.

To substantiate his case, the respondent called the following witnesses: SM2 who alleged that the respondent bought the said land from his father in 1988 measuring 70 feet X 110 feet. SM3 stated that he was the assistant Chairman since 2015 to 2019 and testified that in 2017 the respondent brought the claim of trespass against the appellant herein. That, he called the appellant, but he did not respond. While answering the assessor's question SM2 explained that by that time the area was unsurveyed and there were no beacons.

On part of the appellant herein, he testified that 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 wall of bricks. He averred that if he had trespassed the suit land, then the respondent could have claimed from the time the wall was constructed. During cross examination, the appellant herein said that at the time of uprooting thorn trees *'michongoma'* he consulted the respondent. He said that the respondent went there when he was constructing the said wall.

Before the trial tribunal, the appellant herein called two witnesses, DW2, the Ward Executive Officer whose evidence was to the effect that he received this dispute in his office in 2017 and heard it. By that time the wall was already constructed. DW2 stated further that at the beginning there was thorn trees 'michongoma'.

Another witness was SM1 who testified that during the dispute he was a village executive Officer, who resolved the dispute. That, the land was

surveyed in 2019 and the beacons were put. Thus, the land of the appellant has beacons.

The trial Chairperson while deciding the issue of ownership had this to say:

> *"Nikianza na hoja ya kwanza bishaniwa na kwa mujibu wa ushahidi uliopo kwenye kumbukumbu, na baada ya kutembelea eneo la mgogoro ninakubaliana na maoni ya wajumbe kwamba mjibu maombi alivamia eneo la mleta maombi kwa kusogeza eneo lenye ukubwa wa futi 8 na kisha kujenga ukuta. Mjibu maombi katika ushahidi wake alisema kwamba baada ya kununua eneo lake mwaka huo wa 1980 alijenga ukuta wa futi moja kuzunguka eneo hilo lakini baadaye alibomoa ukuta huo na kujenga ukuta uliopo sasa. Hata hivyo mjibu maombi wakati anaulizwa maswali ya dodoso na mleta maombi alisema kwamba palikuwepo na miti ya michongoma awali ambayo baadaye aliiiondoa na kuweka ukuta. Hivyo baada ya kuondoa miti hiyo ya michongoma ndipo alipojenga ukuta huo ambao unaonekana kuingia kwa upande wa mleta maombi…"*

From the above findings and summary of evidence, guided by the principle that the onus is to the one who alleges, I strongly support the findings of the trial tribunal. It is trite law that the trial court is in a better position on matters of credibility of witnesses. In the case of **Elias Mwangoka @ Kingoli versus The Republic, Criminal Appeal No. 96 of 2019,** at page 10 last paragraph, Court of Appeal at Mbeya, held that:

"It is trite that credibility is the domain of a trial court which has the opportunity of observing and hearing a witness in a witness box."

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. In the case of **Kimonidimitri Mantheakis vs Ally Azim Dewji and 7 Others, Civil Appeal No. 4 of 2018,** at page 8 the Court of Appeal referred to the Nigerian case of **AKOSILE VS ADEYE (2011) 17 NNWLR (Pt 1276) p.263** which held that:

"The essence of a visit in locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbour and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects."

Before the tribunal, the appellant supported the evidence of the respondent that the dispute arose in 2016. Thus, the assertion by the appellant herein that he constructed the said wall long time ago and that the respondent should had claimed for trespass since then is unfounded. 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 said land from one Lahaeli Mshiu in 1980 measuring 72 feet X 68 feet as alleged.

Weighing 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. Thus, I find no basis of faulting the trial tribunal's findings. In the circumstances, 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.

The format of the judgment in so far as the District Land and Housing Tribunal is concerned is covered under **Regulation 20 (1) (a) to (d) of Land Disputes Courts (the District Land and Housing Tribunal) Regulations,** (supra) which provides that:

> *"The judgment of the Tribunal shall always be short, written is simple language and shall consist of:*
>
> *a. A brief statement of facts*
>
> *b. Findings on the issues*
>
> *c. A decision and*
>
> *d. Reasons for the decision."*

My thorough scrutiny 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 at page 2 to 3 of the typed judgment. Thereafter, he made findings of the issues as seen at page 4 to 5. The findings contain reasons for the decision. Thus, the contention that the judgment of the trial tribunal lacks legal reasoning, is baseless.

In the upshot, I am convinced that the three grounds of appeal have no merit. Consequently, I hereby dismiss the appeal in its entirety with costs.

It is so ordered.

Dated and delivered at Moshi this 9th day of June 2023.

X

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

09/6/2023