

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 56 OF 2022

(Originating from the Judgment of Hai District Court at Hai dated 15th September, 2022 in Criminal Case No. 15 of 2022)

PETERSON KABULULE LEMAAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

11th July & 15th August, 2023

A.P.KILIMI, J.:

The appellant initially was charged with four counts namely, first; criminal trespass contrary to section 299(a) of the Penal Code (Cap. 16 R.E 2019); Second; malicious damage to property contrary to section 326(1) of the Penal; Third; disobedience of lawful order contrary to section 124 of the Penal Code (Cap.16 R.E 2019) and an alternative fourth count of contempt of court contrary to section 114(1) of the Penal Code.

The particulars are to the effect that on the 1st day of November 2021 at Masama-Boreni Village within Hai District in the Kilimanjaro region, the accused unlawfully entered the farm of Sariaeli s/o Kabulule and cut

masale plants and by doing so disobeyed the lawful order issued on the 18th day of May 2017 by Hon. T. J Wagine chairman of the District Land and Housing Tribunal for Moshi, in Land Application No. 09 of 2014 and retake possession of the land property which was declared in above case to belong to Sariaeli s/o Kabulule.

The background, albeit in brief, as can be discerned from the adduced evidence at the trial court, were to the effect that, accused and the complainant are blood brothers. Their late father distributed his farms to all of his children and the farm of the complainant (PW2) is about one acre, later the appellant attempted to take the farm of PW2, the dispute arose between them and was referred to land tribunals and thereat PW2 won the case and declared the owner of the said land, that was in Land Application No. 09 of 2014 said above. Later on, the appellant invaded the said land and planted banana trees but also cut down masale plants. The same was reiterated by PW1 the elder brother of the two disputants, all this was reported to Adolf Munisi (PW3) the Village Chairman who visited the scene and saw the said destruction, and later WP 9428 D/CPL Elizabeth (PW4) Police investigator visited the scene and found as stated by earlier two witnesses above.

In investigating to prove the ownership in order to establish the offence of trespass, the said police officer was handed over decisions from the District Land and Housing Tribunal of Moshi in Land Application No. 09/2014 between **Peterson Kabulule Lema vs. Sariaeli Kabulule Lema and Another** and its appeal to The High Court Land Division Moshi registry No. 13 of 2017, and the same were tendered and admitted collectively as exhibit P1.

In his defence at the trial, the appellant said he was appointed as an administrator of the estate of his late father Kabulule Lema at Masama Primary Court in Probate Cause No. 03/2006. Later his brother Daniel Lema rushed to appeal to the District Court and the matter was ordered to start afresh. He was aggrieved and went to the High Court and the decision of the District Court was set aside and that of the Primary Court was restored on the ground that he was not a party to the lower court. Appellant tendered the decision of Shauri la Mirathi No.03 / 2006 of Masama Primary Court and Civil Appeal No. 11/2006 of High Court at Moshi which was admitted collectively as "D1".

The trial court relied on the above decisions and found the appellant did not own the above said land but entered on it to retake it hence disobeyed the lawful order issued in that decision of the District Land and Housing tribunal. Thereafter found the appellant guilty and convicted only for two counts, first count of criminal trespass contrary to section 299(a) of the Penal Code and third count of disobedience of lawful orders contrary to section 124 of the Penal Code. Subsequently for the first count he was discharged under condition not to commit any offence for one year, and for second account sentenced to pay fine of Tshs. 50,000/= or in default he should serve six months in prison.

Appellant aggrieved by the trial court decision and orders thereto has knocked the door of this court basing on two grounds as follows: -

1. That, the trial magistrate grossly erred in law and in fact for treating the land case as criminal case.
2. That, the trial magistrate grossly erred in law and in fact for convicting the appellant basing on unjustifiable evidence adduced by the respondent.

At the hearing of this appeal, the appellant appeared in person, being representing himself submitted orally to this court that, being at his home, he pruned trees on his fence, later during night he was arrested and remanded at Bomang'ombe Police Station, later he was sent to the court,

wherein he was convicted and sentenced to pay fine Tshs. 50,000/= or 6 months imprisonment. Also said the Magistrate wrongly convicted him because the said fence belongs to him, he being the last born was appointed to be administrator of the estate of his late father, and that said land belong to him, but if he touches it, they say he has made an offence.

The Republic was represented by Ms. Edith Msenga, Learned State Attorney, she contended that, the Republic proved that the appellant entered the land area owned Sariaeli Kabulule with intention to threaten him, but also wanted to take the ownership of the said land which the tribunal was already decided by the tribunal that the said land is owned by Sariaeli and appellant knew that ruling. She further said at the trial was proved by PW1, PW2, PW3 and PW4, but also, the Appellant did not object that he entered the said land, the fact there is an order already issued in respect to ownership, anybody entering the said land, need to be charged for the offence of Criminal trespass. To buttress, her stance learned state Attorney referred the cases of **DPP vs. Esha Abdalah Kombo and another** Criminal Appeal No. 32 of 2021 and **Kusekwa Nyanza vs. Christopher Mkangala** Criminal Appeal No. 233 of 2016 (Both unreported).

Ms. Msenga moreover contended that, in respect to the offence disobedient of lawful order of the decision of District Land and Housing Tribunal of Moshi in Land Application No. 09/2014, therein the tribunal declared that Sariaeli is the valid owner. Therefore, prosecution proved that appellant entered the land which is contrary to the order of the court, thus disobedient of lawful order, taking regard the said order needed to be abided unless is quashed by the High Court. To bolster her assertion referred the case of this was held in the case of **Kusekwa Nyanza vs. Christopher Mkangala** Criminal Appeal no. 233 of 2016 CAT at Mwanza and **Tanzania Breweries Limited vs. Edson Dhobe and 19 others**, Misc. Civil Application on 96 of 2000.

In brief rejoinder the appellant contended that Judgment of the tribunal can't overrule the Judgment of the High Court of **Peterson Kabulile Lema vs. Daniel Kabulile Lema** PC Civil Appeal No. 11 of 2008 decided by Mugasha J. as she then was. The appellant further said that, he has a letter of Administration of the estate which shows that he is responsible to the land in dispute.

In the determination of this appeal, having gone through the record of appeal, and heard the oral submissions by the appellant and the learned State Attorney, I wish to start with the first ground of appeal and the question I must ask is whether the trial court was wrong to treat this court as a criminal case instead of land case.

In finding the answer to above, I wish lay foundation by back up of law, In the case of **Sylivery Nkangaa vs. Raphael Albertho**, [1992] TLR 110, the respondent therein was charged with criminal trespass in the District Court of Singida. He was acquitted by the trial court and declared the rightful owner of a disputed piece of land. The losing party appealed to the High Court. The High Court held *inter alia* as follows:-

*"..... The charge of criminal trespass is not maintainable as the ownership of the land in dispute **has not been resolved by a court of law in a civil suit.** A criminal Court is not the proper forum for determining the rights of those claiming ownership of land. Only a **civil court via a civil suit** can determine **matters of land ownership.**"*

[Emphasis added]

(See also cases of **Ismail Bushaija vs. Republic**, [1991] TLR 100 and **Director of Public Prosecutions vs. Esha Abdallah Kombo and Another** Criminal Appeal 32 of 2021 (unreported).

In this matter at hand as rightly observed by the trial court, there is a decision of the court which resolved the dispute of the said land, the appellant was found therein. This is the case of the District Land and Housing Tribunal for Moshi, in Land Application No. 09 of 2014, the same was tendered at the trial and admitted as exhibit "P1". I have entirely perused it, is the appellant who filed it at the tribunal claiming for the said land against the victim herein PW2, on 8th May 2017 the said tribunal declared PW2 the owner of the said land and ordered boundaries destructed should be re-established between appellant and PW2. This decision to-date has never rescinded or quashed by any court. Thus, means it hold the realm about the said land.

The case cited by the appellant of **Peterson Kabulile Lema vs. Daniel Kabulile Lema** PC Civil Appeal No. 11 of 2008, this emanated from Probate cause from Masama Primary court wherein, it is true the appellant was granted letters of administration of estate of Kaburure

Tarawia Lema, and it is true this High Court decision nullified the decision of District Court in Civil Appeal no. 13 of 2007 and not the decision of the District Land and Housing Tribunal for Moshi, in Land Application No. 09 of 2014, first of all the said High Court was not resolving dispute of the ownership and second since the matter in dispute was different, thus it cannot be said that the tribunal came to overrule the decision of the High Court which is very impossible. Therefore, the defence of the appellant by using this case as a shield has no merit and ought to be strict ignored. In the premises, the fact that there is a standing civil decision declaring ownership of the said land to PW2, I am settled that, the trial court was right to treat the matter in criminal case, therefore, I am bold to find that this ground has no merit hence dismissed forthwith.

In respect to the second ground, I think this ground will not detain me much, after what I have already deliberated above concerning the evidence on ownership of the said land. The appellant's evidence did not object to enter the said land, indeed said, he entered and did his activities assuming that he was the administrator of his father's estate and also, he had inherited the land in dispute from his late father. The issue of probate as said above did not give him ownership. In the first convicted count, the

elements to be proved the offence criminal trespass is provided under section 299 which provides that;

"299. Any person who-
*(a) unlawfully enters into or upon **property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property; or***
(b) N/A

[Emphasis added]

In the premises of the law above, the prosecution paraded four witnesses and exhibit of copy of judgment which declared PW2 owner of the said land as shown above. I have read and considered the prosecution witnesses, and analysis done by trial court, I am in agreement with the trial magistrate since he had an ample time to test their credibility, thus in my view, actually what witnesses said on the conduct of appellant amounted to the offence charged. (See **Goodluck Kyando vs. The Republic**, Criminal Appeal No. 118 of 2003 CAT at Mbeya (Unreported). The trial court at page 6 of the typed judgment had this to say;

*"it is the complainant's evidence that on a material day, **the accused entered his farm cultivated, dig holes** and planted banana trees and when he asked him he told him **to get away as he is a Maasai**. The holes were also seen by PW1, PW3 and PW4. The accused maintained that the complainant has no land with in his land. In my view, I find the prosecution **witnesses were credible** taking into account that the accused even after the tribunal decision maintains that he is still the owner of the land. **There is enough evidence that the accused trespassed on the land of the complainant and intimidated him by telling him to get away because he is Maasai** and is not entitled to inherit the land of his late father. On the last ingredient, the conduct of the accused person after entering the suit premise and annoying the complainant and wanting to retake possession of the land falls squarely with in the offence of criminal trespass while knowingly that the complainant is the lawful owner as per the land tribunal decision."*

[Emphasis added]

Having observed above, and taking regard the issue of ownership was settled, that the land did not belong to him, for the above act he did assuming ownership, indeed offended the law above. In this regard, I am of the considered opinion that the trial magistrate rightly decided the first count basing on the evidence adduced which justifies the decision.

Therefore, the offence of criminal trespass was proved beyond reasonable doubt.

In respect to the appellant's conviction on the offence of disobedient of unlawful order. Section 124 of the Penal Code clearly states as follows:

*"A person who **disobeys any order:** warrant or command duly made, **issued or given by a court,** an officer or person acting in any public capacity and duly authorized in that behalf commits an offence and is liable, unless any other penalty or mode or proceeding is expressly prescribed in respect of that disobedience, to imprisonment for two years"*

[Emphasis added]

As rightly observed by the trial court. Court order is lawful unless it is invalidated by another superior order, and therefore it must be obeyed. Being so, it is undisputed that court order is binding, thus be implemented, and obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will be nugatory, hence everyone will decide to do only which is conversant to do like the appellant in this matter was doing. (See **Madaha Milingwa vs. Republic** Criminal Appeal 47 of 2017 (unreported))

In this matter as said above on the first ground in respect to ownership, the said order is found in the judgment of the District Land and Housing Tribunal for Moshi dated 8th May 2017 in Land Application No. 09 of 2014, (the exhibit "P1"), the order to be obeyed stated that;

"The lawful owner of the disputed land is the 1st respondent (herein PW2 Sariael K. Lema), the boundaries destructed should be re-established by planting masala as demarcation between the applicant (herein appellant) land and 1st respondent's land."

[Emphasis added]

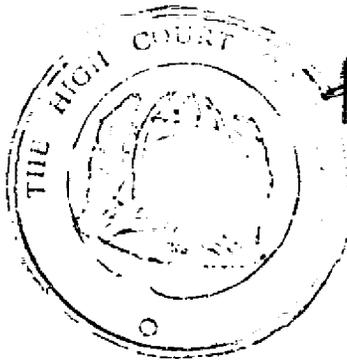
The import of the above order of the court, suffice me to connote that is an order as per law above, therefore the evidence adduced proved for the offence of criminal trespass above, this is because it stipulates that the act of the appellant to entering the said land while above order is in existence, I am settled amount to commission of the offence charged abundantly.

In conclusion thereof, I cannot fault the trial court decision, because, the trial magistrate rightly directed himself by interpreting the provisions of

law which provide for the offences charged in relation to the evidence adduced before him, and I am satisfied that the prosecution proved the 1st and 3rd counts as per standard required by the law. Consequently. I proceed to dismiss this appeal in its entirety.

It is so ordered.

DATED at **MOSHI** this 15th day of August, 2023.



A. P. KILIMI
JUDGE
15/8/2023