

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA  
(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**PC CRIMINAL APPEAL NO. 05 OF 2022**

*(Originating from the District Court of Sumbawanga at Sumbawanga in Criminal Appeal No. 06 of 2022 and Original Criminal Case No. 13 of 2022 of Muze Primary Court)*

**MODEST CLAUDIO.....APPELLANT**

**VERSUS**

**REMIGIUS RESPICIOUS ..... 1<sup>ST</sup> DEFENDANT**

**FREDRICK MARCO ..... 2<sup>ND</sup> DEFENDANT**

**JOHNAS KAKUSU ..... 3<sup>RD</sup> DEFENDANT**

**MASANJA MABUGA ..... 4<sup>TH</sup> DEFENDANT**

**EBIZEBOUS MSOMBA ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

*18/09/2023 & 19/10/2023*

**MWENEMPAZI, J.**

This is the appellant's second attempt as he was aggrieved by the decisions of both lower courts, meaning the Primary Court at Muze (trial

court) and the District Court of Sumbawanga at Sumbawanga (1<sup>st</sup> appellate court), where he had unsuccessfully filed a criminal case against all the defendants herein at the trial court for the offence of criminal trespass and, at the end of a full trial all the defendants were acquitted as they were found not guilty of the offence they were charged with. Thereafter, the appellant again unsuccessfully appealed to the first appellate court, but the decision of the trial court was upheld, and the 1<sup>st</sup> appellate court insisted that the appellant had not proved ownership of the land in question and thus he cannot charge the defendants for criminal trespass.

Attempting to prove wrong the two lower courts, the appellant arrived to this court with his petition of appeal which consists of two grounds of appeal which are as reconstructed hereunder;

1. That, the learned Resident Magistrate erred in law and fact to bless the judgement of the trial court by holding that the appellant did not attach a Certificate of Ownership of the Disputed land, forgetting that the allegation was presented as a Criminal issue since the appellant was declared the owner in the Judgment of the District Land and Housing Tribunal in Appeal No. 93 of 2019 which was

delivered on 16/07/2020. That, it proves the first appellate court's judgment is unfair.

2. That, the learned Resident Magistrate erred in law and fact on the ground which was not raised in the Petition of Appeal that the same cannot defeat the suit.

In which, the appellant prays for judgment a decree on his favour and that the appeal be allowed with costs, whereas the judgment and decree of the first appellate court be quashed and set aside, and any other relief this court deems fit, just and proper to grant.

Unfortunately, the respondents had refused to adhere to the summons served to them by the court process server and so there is no any reply to the grounds of appeal.

When this matter came for hearing on the 04<sup>th</sup> of September 2023, as expected only the appellant appeared and he had no legal representation, meanwhile the respondents were not present. It was this court's order that the case will proceed in the absence of the respondents, and leave was granted to the appellant to file his written submission supporting his grounds of appeal, as he prayed for this appeal to be heard by way of written submissions.

Submitting for his grounds of appeal, the appellant stated that the service of court summons to the respondent was done through the court broker known as Mark Xavier Msilu but the respondents dishonoured the order to appear deliberately and the appellant had attached the affidavit sworn by the process server in proving his argument.

He added further that, it is clearly that the act of the respondents to refuse to sign the court order shows that they intend to his life. And for the reasons he submitted, he prays for this court to take action against the respondents.

As the respondents never appeared in court, again there was neither any reply to the submission made by the appellant nor any rejoinder by the appellant himself.

The only issue to be determined in this appeal is ***whether the appellant has sufficiently convinced this court that the two lower courts were unjust in their respective decisions.***

In my consideration of this appeal, I shall keep in mind the fact that this is a second appeal as stated at the beginning. In that, my interference with concurrent findings of facts, if any, will therefore be

made only when justified. This was the principle in the case of **D.P.P vs Jaffari Mfaume Kawawa [1981] TLR 149** in which the holding thereof is all too common to repeat.

In the records before me, it is undisputed that the appellant was the complainant in the criminal case filed at the trial court, whereas he complained that the respondents have unlawfully trespass into the land that he legally possesses and they are conducting agricultural activities without his consent. The records also reveal that the learned trial magistrate was not convinced by charges against the respondents and he proceeded to acquit them, in similar vein the appellate learned magistrate upheld the decision of the trial court.

In the case of **Geita Gold Mining Limited vs Twalib Ismail & Others, Civil Appeal 103 of 2019** [unreported] at page 10, the Court of Appeal of Tanzania was of the view that: -

*"It is a truism that trespass is a tort of interference to possession, that is why even a tenant may sue his landlord for trespass if he encroaches upon his lawful possession."*

Again, the Court of Appeal in the case of **Frank Safari Mchuma vs Shaibu Ally Shemndolwa [1998] TLR 280** at page 288 held that:-

*"By definition trespass to land is unjustifiable intrusion by one person upon the land in the possession of another. It has therefore been stated with a light touch that: If the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile in it."*

In recognition from the above citations, it was vital for the appellant to first prove ownership of the disputed land and thereafter sue for trespass. In the records at hand, indeed the appellant did tender a decision from the DLHT of Rukwa at Sumbawanga which was **Land Appeal No. 93 of 2019** where the parties were **MODEST CRAUDIO KILENGA VS ANASTAZIA KAFUPI** in which the appellant was declared the lawful owner of the disputed land therein.

I am satisfied with the two courts below that there was no evidence to prove the appellant's case, since the decision he tendered as evidence was against another person who is not a party to this matter, neither were the respondents herein a party to the decision he tendered in the trial court as evidence of ownership. Shortage of which, this court and the

courts below failed to believe if the land in dispute herein was the land in dispute in Land Appeal No. 93/2019 as elaborated above.

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not disputed on account of the weakness of the opposite party's case. See **Paulina Samson Ndawavya vs Theresia Thomasi Madaha, Civil Appeal 45 of 2017** (unreported).

In relation to the two grounds of appeal filed by the appellant herein, I find no reason for disturbing the concurrent findings of fact of the two lower courts as the decisions of both were not unjust to the appellant as he suggested.

On the basis of my discussion above, I find this appeal with no legs to stand on and therefore I proceed to dismiss it with costs.

It is so ordered.

Dated at Sumbawanga this 19<sup>th</sup> day of October, 2023.



  
**T. M. MWENEMPAZI**  
**JUDGE**