IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 11 OF 2023

(C/F Land Appeal No. 30 of 2022 in the District Land and Housing Tribunal of Arusha at Arusha, Originating from Sokoni II Ward Tribunal in Land Application No. 10 of 2014)

OLAIS OSUJAKI.....APPELLANT

VERSUS

WITNESS OSUJAKI.....RESPONDENT

JUDGMENT

24/08/2023 & 12/10/2023

GWAE, J

Before Sokoni II ward tribunal within Arusha District, the appellant, Olais Osujaki filed an application praying for an order restraining the respondent from using a road that crosses in front of his house so that the respondent, Witness Osujaki, could use the road that was erected for her to pass through.

On the other hand, it was the respondent's version that the road, which the appellant is restraining her from using, has been in use for a very long time even before the death of her mother who was the original owner. She also contended that, the appellant is her son (uncle) as he was born by her late sister who was in occupation of the house currently

used by the appellant, and that during her lifetime they have all been using the said road without any problem.

After hearing of the parties evidence together with their witnesses, the trial tribunal was of the finding that the appellant failed to prove his case as the evidence tendered sufficiently established that the road that the appellant restricts the respondent to use has been in use for a long time even before the death of the appellant's grandmother who actually is said to be the original owner of the premise. It was further the contention of the respondent that the appellant's assertion that, he has extracted another road for the respondent to use was unfounded as his own witnesses testified to the contrary.

Upon hearing the parties, the trial ward tribunal held that, the respondent had all the rights to use the road that is in dispute, in alternative, the appellant was directed to extract a new road/way for the respondent to pass.

Dissatisfied with the decision of the trial tribunal delivered on 27th January 2015, the appellant filed his appeal to the District Land and Housing Tribunal for Arusha at Arusha, to be refereed as the appellate tribunal. Unfortunately, he was also the losing party as the 1st appellate court upheld the findings of the trial tribunal.

Still aggrieved, the appellant is now before this court as second bite challenging the decision of the appellate tribunal with the following grounds;

1. That, the appellate tribunal erred in law and facts to uphold the decision of the trial tribunal compelling the appellant to extract another new road for the respondent or allow the respondent herein to pass through the appellant's herein private entrance gate without legal reasons.
2. That, the appellate tribunal erred in law and facts for failure to reanalyze and reconsider the evidence on record properly hence reached to the wrong decision of upholding the wrong decision of the trial tribunal.
3. That, the appellate tribunal erred in law and facts to uphold the trial tribunal orders, which are not capable of being executed.

Throughout the hearing of this appeal, the appellant and respondent enjoyed legal services from advocate Stephano James and Advocate John Mushi respectively. With leave of the court, the appeal was disposed of by way of written submissions.

Submitting on the 1st and 2nd grounds of appeal, the appellant's counsel argued that the dispute between parties herein is centered on the respondent's right to pass through the appellant's entrance gate. He went further to state that, for the respondent to enjoy the right of easement

she must be totally enclosed to the extent that there is no means she can have an access to her land. However, it was his contention that this is not the case as the there is a communal road extracted by the appellant, which she can use to have an access to her dwelling house and that the said road is also used by other families. Therefore, according to him, the orders compelling the appellant to allow the respondent to pass through his entrance gate and fence or extracting another private road just for the respondent will be unreasonable.

Submitting on the 3rd ground of appeal, Mr. Stephano, argued that the trial court's decision is not capable of being executed without causing unnecessary chaos to the parties' families. He went on submitting that, if the order of the trial tribunal is executed, it will involve the demolition of the appellant's dwelling house. He therefore prayed the appeal to be allowed.

Resisting the appellant's appeal, the counsel for the respondent maintained that this appeal lacks merit and is bound to fail as the decision of the trial tribunal based on the evidence on record together with what was observed by the tribunal at the locus in quo. He added that there will be no chaos in execution of the trial tribunal as alluded by the appellant's counsel and according to him it is the appellant who is actually creating

chaos. In concluding, Mr. Mushi argued that the appellant herein has no any right to block the respondent from accessing her house because she found her living there. In rejoinder, the appellant reiterated his submission in chief.

I have carefully gone through the records of this appeal; the issue for determination by this court is whether the 1st appellant tribunal was justified to up hold the decision of the trial tribunal.

Seemingly, the records of both tribunals reveal that, the center of the dispute between the parties is whether the respondent has a right to use the road in dispute. It was the evidence of the appellant that the respondent is using the road that crosses in front of his house while there was another road that he extracted for the respondent as her easement. His evidence was corroborated with that of his witnesses, however on cross examination by the tribunal the first witness, Langidare Meyeuni stated that there was no road that was extracted by the appellant for the respondent to pass.

Equally, the appellant's second witness George Kayan also when cross examined by the tribunal stated that the road that the appellant alleges that he extracted for the respondent to pass does not pass through the respondent's household, instead the said road end to the respondent's

cow shed and the toilet pit. Therefore, according to him that was not a suitable path for the respondent to use.

On the other hand, the respondent together with her witnesses namely; Simon Sungare and Jeremia Longidare established that the road that the appellant denies the respondent to use was a road that has been in existence for a very long time ago when the appellant was still young. The respondent stated that she was born in the disputed area and that her late mother, the original owner was also using the said road together with other family members including her witnesses. On 16/10/2014 the tribunal visited the locus and the following was observed; that, on the north side the disputed road is bordered with the respondent, on the south side it was bordered with the appellant, on the east side it was bordered with the road and on the west side it was bordered with the main road (Idara ya maji road).

It is elementary principle of law that the law places a burden of proof upon a person who desires a court to give judgment in his or her favour and such a person who asserts the existence of facts has to prove that, those facts exist. A fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (See the decision of the Court of Appeal of Tanzania in **Ernest Sebastian Mbele**

vs. Sebastian Sebastian Mbele & 2 others, Civil Appeal No. 66 of 2019 (Reported Tanzlii). Similarly, with that scant evidence on the part of the appellant, this court as the second appellate court is not persuaded if it warranted to interfere with the concurrent decisions of the tribunals below. It is always not easier for the 2nd appellate court or tribunal to fault the concurrent decisions of the courts below or tribunals unless there is good cause of doing so such misapprehension of evidence adduced by the parties or violation of principles of natural justice, law of procedure. I subscribe to the decision of the Court of Appeal of Tanzania in **Julius Josephat vs. Republic,** Criminal Appeal No. 03 of 2017 (unreported)-[2020] TZCA cited with approval in the case of **Mzee Ally Mwinyimkuu @ Babu Seya vs. The Republic,** Criminal Appeal No. 499 of 2017 (Unreported); Where the Court stated that;

> "*Perhaps we should now revert to the question we earlier on posed on what this Court is supposed to do given that the appellant's defence was not considered. We think we should consider first the supposed duty of the second appellate court. As may be recalled, it is the practice that in a second appeal, the Court should very sparingly depart from concurrent findings of fact by the trial court and the 1st appellate court. In exceptional circumstances, it may nevertheless interfere as such only when it is clearly shown that there has been a misapprehension of the*

evidence, a miscarriage of justice or violation of some principles of law or procedure by the courts below. This has been expressed in several cases, including those of ***Pascal Christopher & 6 Others v. The DPP, Joseph Safari Massay v. Republic,*** *Criminal Appeal No. 125 of 2012, and* ***Felix s/o Kichele & Another v. Republic,*** *Criminal Appeal No 159 of 2005 (all unreported). In the case of* ***Felix s/o Kichele & Another v. Republic*** *the Court said: "this Court may, however, interfere with such finding if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirection or non-directions on the evidence...."*

From the above principle of case law, the question that follows is, whether the appellant managed to prove his case on the required standards and whether the tribunals below appropriately determined the parties' dispute. Deducing from the evidence of both the appellant and the respondent it is obvious that the evidence of the appellant and his witnesses leaves a lot to be desired by this court as to whether the respondent should not pass in the road in dispute. Even the allegation that, the appellant herein has already extracted a road for the respondent to use is not sufficiently proved considering the evidence of the appellant's witnesses who testified on the contrary to the appellant's assertion that,

there is another way for the respondent. More so, even when the tribunal visited the locus in quo the records do not support the appellant's avowal that there is another road created by the appellant.

With such improbable evidence adduced by the appellant and his witnesses as demonstrated above, it is the decided view of the court as the 2nd appellant court, that the appellate tribunal was legally justified to withstand the trial tribunal's decision as the appellant is found to have failed to prove his case on a preponderance of probabilities.

In view of the above, I find no merit in the appellant's appeal. Consequently, I dismiss the appeal with costs.

It is so ordered.

DELIVERED at **ARUSHA** this 17th October 2023

MOHAMED R. GWAE

JUDGE

Court: Right of Appeal and its pre-requisite fully explained

MOHAMED R. GWAE

JUDGE