IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND CASE APPEAL NO. 141 OF 2022

(Arising out of Land Application No. 30 of 2019 before the District Land & Housing Tribunal for Arusha at Arusha)

NAI MOLLEL _____ **APPELLANT**

VERSUS

EMMANUEL RAFAEL _____ **1ST RESPONDENT**

ASNATH JOEL _____ **2ND RESPONDENT**

SONGOYO MOLLEL _____ **3RD RESPONDENT**

JUDGMENT

25/07/2023 & 13/10/2023

BADE, J.

The Appellant appealed before this Court against the decision of the District Land and Housing Tribunal of Arusha at Arusha in Land Application No. 30 of 2019 delivered on the 17th day of June 2021. The appeal is based on the following 3 grounds:

i. That, the trial tribunal erred in law and fact by relying on the argument that the date of invasion written in the pleading is different from one adduced during trial.

ii. That, the trial tribunal erred in law and fact by deciding that the appellant failed to prove the ownership of the land in dispute.

iii. That, the trial tribunal erred in law and fact by not considering the unchallenged evidence adduced by the appellant.

The short background of this matter is that the appellant sued the respondents before the Land Tribunal claiming that they trespassed into her land measuring 20-meter width and 16-meter length, and for unlawful encroachment of 4x100 meters of the road heading to the appellant's home, obstructing the road and making it insufficient for use. The suit land is located at Lolovono Street, Sokon 1 Ward. It was alleged that in November 2017, the 1st respondent built a brick-fenced wall on the northern part of the road encroaching by almost 2.5 meters. In the same year 2nd respondent had expanded her farm coming into the road by planting "masale" grass, banana trees, and other grasses on the north side of the road. It was further alleged that in the same year of 2017, the 3rd respondent had trespassed into the applicant's land also encroaching on the road on the south part by planting "masale" grass, banana trees, and other grasses.

The suit was heard ex-parte, as the respondents failed to appear having been issued with summons. The appellant did not bring any witnesses at the trial. At the end of the day, the trial tribunal ruled out that there was not enough evidence to prove that there was a road on the suit land and that the road belonged to the appellant. The trial tribunal also held that the appellant failed to prove that the suit land she claimed to be invaded by the respondents belonged to her on one hand and that there was a variation on the dates of invasion between her oral testimony and what is stated in the application, so he dismissed the suit.

This appeal was disposed of by way of written submissions and the same was filed as scheduled. The appellant appeared in person unrepresented even though she enjoyed the services of Mr. Mayombo, a learned advocate who was engaged by the appellant to draft the submission.

Arguing the 1st ground of appeal, he submitted that the trial tribunal chairperson misled himself during the composition of the judgment as the appellant had precisely testified during the trial that the invasion of the suit land was done in 2017. He erroneously erroneously quoted the appellant as saying that the suit land was invaded in the year 2000. It is Mr. Mayombo's contention that in civil cases, parties are bound by their

own pleadings, which means that what has been pleaded in the plaint or application cannot be changed at the trial. To support his position, he cited the case of **Yara Tanzania vs Ikowu General Enterprises Limited,** Civil Appeal No. 309 of 2019 which quoted with approval the principle stated in the case of **Barclays Bank (T) Ltd vs Jacob Muro,** Civil Appeal No. 357 of 2019. He insisted that the trial tribunal was not supposed to deliver its judgment and decree based on the ground that the statement in the pleading was different from that adduced during the trial. In his view, he was supposed to be guided and bound by what has been averred in the filed pleadings where the year 2017 was in fact stated.

Amplifying on the 2nd ground of appeal, he submitted that the trial tribunal misdirected itself by deciding that the appellant failed to prove the ownership of the suit land. The appellant testified that the suit land was given to her by her father one Likingulani Lengido in 1993 and this fact was witnessed by family members. In his opinion, since her testimony was never questioned or opposed by any person, it was supposed to be taken as is, in the way it was testified, lamenting that the trial tribunal however decided to ignore the said testimony.

His further argument was that the magnitude of proof in civil cases is on the balance of probabilities, which he insists necessarily means the court is satisfied a fact or event occurred if it considers that the occurrence of the fact or event was more likely than not. In his view, the act of the trial chairperson to demand other evidence to support the already adduced evidence goes beyond the standard kept by the law.

On the 3rd ground, Mr. Mayombo submitted that the trial tribunal was duty-bound to consider the unchallenged evidence adduced by the appellant as there was no other evidence that challenged it.

After perusing the court's record and submission by the appellant, the issue for determination here is whether this appeal has merits and in determining so, I will tackle the grounds of appeal as they were raised seriatim.

On the first ground of appeal, the appellant's main argument is that the trial tribunal misdirected itself when composing judgment by stating that the appellant's testimony varies with what was stated in the application, as in her testimony she testified that the suit land was invaded in 2000 while in the application it was stated that the invasion took place on 2017. Going through the trial tribunal's judgment I found out that the tribunal did not base its decision solely on the variation of the date of

invasion, the chairperson's decision was based on the fact that there was not enough evidence to support the allegation by the appellant that the said easement belongs to her, and indeed it was encroached by the respondents to make it less useful. In my view, the chairperson cannot be faulted for holding the way he did because, on a claim for encroachment, the plaintiff has to prove not only the ownership of their own land but also of the land encroached which is the suit area/land. The claim of encroachment seeks to establish whether the defendant has in fact encroached onto the disputed land belonging to the Plaintiff. There should have been in evidence proof of the land area encroached. This court found that other than the Appellant establishing her own ownership of the land, there is no record in evidence of the proof of the encroachment to the specified land area in dispute.

Conversely, to determine whether there has been an encroachment, it is desirable to get the field/farm/plot measurement/borders be established by an expert/authority so as to find out the exact area that has been encroached upon. Oral evidence from only the Plaintiff, in my view, cannot conclusively prove such an issue. I join hands with the tribunal in its holding that the claim had no merit for want of sufficient evidence/proof.

Progressing to the second and third grounds of appeal, I shall determine the two grounds jointly as they are intertwined. The Appellant alleged that tribunal did not consider her unchallenged evidence which proved that she is the lawful owner of the suit land. I have taken time to go through the record of this appeal and it is my considered observation that the dispute was not based on ownership, but rather, on the alleged encroachment made by respondents to the appellant's suit land who are neighbors sharing borders of the said land.

In addition to showing an interest on the land and derive a locus standi by proving ownership, the appellant should have proved encroachment onto the disputed land area by the respondents as explained above. As it happened, the appellant did not tender such evidence before the trial tribunal to substantiate her claim.

On the issue of the tribunal not considering the unchallenged evidence by the appellant, it is implied from the above that since the appellant only dwelt on plain allegations without any supporting evidence on the encroachment claim, the said claim stood unproved.

It is a trite law that every judgment passed by a court of law has to be on merits, irrespective of the fact, whether or not, the defendant appears before the court of law and defends themselves. The fact that

the respondents in the present appeal did not appear at the trial tribunal or now, will not cause the court to give an automatic decree in favor of the Appellant. The court will, after due application of its mind, either decree or reject the claim of the Applicant/Plaintiff/Appellant.

In any case, true to its duty, this court as a first appellate court took time to re-examine the appeal case by subjecting the evidence presented to the trial court to fresh, exhaustive scrutiny and re-appraisal for it to come to its own conclusion.

As a matter of fact, it is correct to sum my opinion that the appellant has failed on the balance of probabilities to prove her claim; since the evidence before the tribunal was such that the tribunal could not say it is more probable than not that the burden by the Applicant then, who is now the Appellant was discharged. Contrary to what the Appellant's counsel alleges, the probabilities in my view were left to be equal, which means to say the burden was not discharged in the instant case as there was no material before the court over which the probability test could be applied to find the judicially needed balance.

With that being said, I find that these grounds have no merits and join hands with the trial tribunal's findings that the appellant did not adduce enough evidence to support her claim.

In conclusion, having made the above findings, I dismiss the entire appeal for want of merits.

Considering the nature of this appeal, I make no orders to costs.

It is so ordered.

DATED at **ARUSHA** this **13th** day of **October 2023**

A. Z. Bade
Judge
13/10/2023

Judgment delivered in the presence of the Appellant and absence of the Respondents in chambers on the **13th** day of **October 2023**

A. Z. BADE
JUDGE
13/10/2023