

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(BUKOBA SUB- REGISTRY)**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 14 OF 2023**

*(Arising from Bukoba District Court at Bukoba in Criminal Appeal 2 of 2022 and original Criminal Case No. 498 of 2022 Bukoba Urban Primary Court)*

**EPHRAIM LUTAZAMBA ..... APPELLANT**

**VERSUS**

**MALINA ALICE ..... 1<sup>ST</sup> RESPONDENT**

**RUGEMALIRA FRANCIS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

5<sup>th</sup> March & 8<sup>th</sup> March 2024

**A.Y. Mwenda J.**

Before Bukoba Urban Primary Court, Ms. Malina Alice and Mr. Rugemalira Francis (the respondents), were arraigned for criminal trespass contrary to section 299(a) of the Penal Code [ CAP 16 R.E 2022]. It was alleged that on the 4<sup>th</sup> day of October, 2022 at Ijuganyondo area within Bukoba municipality District in Kagera Region, the respondents trespassed into the house of the one Ephraim Lutazamba. They pleaded not guilty as such, the trial commenced. The complainant paraded three witnesses and tendered seven (7) documentary exhibits whilst the respondents paraded five witnesses and tendered five documentary exhibits. Having considered the evidence on record and various laws, the trial court was satisfied that the complainant had proved his case beyond reasonable doubt. As such the respondents were convicted and sentenced to serve a term of six months (6) jail imprisonment.

Aggrieved with such a decision, the respondents filed an appeal before Bukoba District Court at Bukoba. At the end of the hearing of the said appeal, the appellate court ruled out that the evidence before the trial court was not sufficient to support conviction on criminal trespass and as such the conviction and sentence meted against the appellants (now the respondents) were quashed and set aside.

Aggrieved by the said decision of the first appellate court, Mr. Ephraim Lutazamba, the appellant, filed the present appeal with three (3) grounds which read as follows;

- 1) That, the appellate resident magistrate court grossly erred in law and fact to set aside a lucid finding of judgment with conviction and sentence of the trial primary court which found the appellant to have proved the charge (s) against both of the respondent
- 2) That the appellate district court grossly erred in law and fact to rule out that the respondents have a prima facie of a claim of right of ownership of land and the primary court had no jurisdiction to try a suit in criminal court.

3) That the appellate district court grossly erred in law to nullify the competent trial court findings which was competently held

On the date of appeal hearing, the appellant was represented by Mr. Mathias Rweyemamu, learned counsel while the respondents hired the legal services from Mr. Gildon Mambo, learned counsel.

When he was invited to address the court in support of grounds of appeal Mr. Mathias Rweyemamu informed to argue the 1<sup>st</sup> and 3<sup>rd</sup> grounds together and the 2<sup>nd</sup> ground separately.

Regarding the 1<sup>st</sup> & 3<sup>rd</sup> grounds of appeal, Mr. Rweyemamu submitted that before the trial court, the respondents were arraigned for criminal trespass contrary to section 299 of the Penal Code. According to him the trial court (Primary Court) is vested with jurisdiction to hear and determine criminal trespass cases as per 1<sup>st</sup> schedule of the Magistrate Court Act [Cap 11 R.E 20219] and, he said, before the said Court, the appellant discharged his duty to prove the case beyond the reasonable doubt.

Further to that Mr. Mathias submitted that before the 1<sup>st</sup> appellate court, the trial court's findings were set aside on the ground that the respondents defence raised serious doubt regarding ownership of land which, according to him, was wrong approach because the issue of ownership was already determined by the probate court where the appellant was declared as the rightful owner. To

support this point, he cited the case of AHMED MOHAMED AL LAAMAR VS. FATUMA BAKARI & ANOTHER CIVIL APPEAL NO. 71 OF 2012.

To conclude, he submitted that the first appellate court erred when it declared that the trial court had no jurisdiction to determine criminal trespass while the issue of ownership was already determined by the probate court. He therefore prayed this appeal to be allowed.

Responding to the submissions by the learned counsel for the appellant, Mr. Mambo, learned counsel for the respondents submitted that the learned counsel for the appellant is conceding that, the Primary Court determined the issue of ownership between the parties. According to Mr. Mambo, was done by the trial court was not correct in the eyes of the law. He submitted that since the trial court sat as a criminal court it had no jurisdiction to adjudicate matters involving ownership of land between the parties.

Mr. Mambo further submitted that the first appellate court was correct in its findings that criminal trespass was not proved beyond reasonable doubt. To support the point, he cited the case of STILIAS KALYOGUSI VS ZUBAIRI MOHAMUDU (PC) CRIMINAL APPEAL NO. 10 OF 2022.

Further to that, Mr. Mambo submitted that the records shows that the respondents did not trespass onto the land in question because they believed the house to be theirs as they bequeathed it from their late mother one Alice Brasio. To support the point, Mr. Mambo cited the case of KUSEKWA NYANZA VS CHRISTOPHER MKANGALA CRIMINAL APPEAL NO. 233 OF 2016.

On top of that, Mr. Mambo submitted that even if the issue of ownership was determined which is not the case, still the appellant did not prove his case beyond reasonable doubt due to uncertainty regarding the location of the suit property. He opined that on the records, the inventory shows that the house is located at MAGOTI KIBETA while in the appellant's claim it is said to be located at IBURA- KABALE Ward and he added in that when the appellant was defending his case, he said it is located at IJUGANYONDO. According to Mr. Mambo, this led to uncertainty regarding the location of suit property and therefore the proper forum to clear this doubt is the land court/tribunal. He thus concluded his submissions praying this appeal to be dismissed and the judgment of the District Court to be upheld.

In rejoinder Mr. Mathias submitted that, the cited case by the learned counsel for respondents are distinguishable and the discrepancy on the location of the suit property is minor. He reiterated to his prayer during submission in chief in that this appeal should be allowed.

That being the summary of what was submitted by learned counsels from both sides, the issue for determination is whether the present appeal is meritorious. As hinted earlier, this appeal emanates from District Court's Criminal Appeal No. 2 of 2023, original Criminal Case No. 98 of 2022 at Bukoba Urban Primary Court where the respondents were arraigned for criminal trespass contrary to section 299(a) of the Penal Code [CAP 16 R.E 2022]. In deciding cases for criminal trespass, where the ownership of the suit property is at issue, one of the

condition precedents is to let the issue of ownership resolved first before the proper forum. This position was stated by the Court of Appeal in KUSEKWA NYANZA VS CHRISTOPHER MKANGALA CRIMINAL APPEAL NO. 233 OF 2016. In that case, the Court authority while citing with approval the case of SYLIVERY NKANGA VS. RAPHAEL ALBERTO [1992] TLR 110 held inter alia that;

“Disputed ownership of land is not resolved in criminal proceedings. The law on that issue is that where there is a dispute regarding boundaries of adjacent private land or ownership of a part or the whole of adjacent land, such dispute is resolved in civil court. From then onwards, encroachment onto the land of the other could be a trespass and a criminal charge be brought against the offending party.”

Back to the present appeal, it is apparent that there is a dispute regarding ownership of the suit property. Going through the trial court’s records, the first appellate court’s and even during the hearing of this appeal, each party claimed to have a tittle over the suit property. From their testimonies, the appellant (the then complaint) testified before the trial court that he inherited the said suit property from his late father one Brasion Lwezaura Kaiziro. On the other hand, the respondent claimed that they inherited the said land from their mother one Alice Brasio. With such evidence, one may note that the issue of ownership ought to be determine first as their dispute fall in the ambit of KUSEKWA NYANZA’S CASE (SUPRA)

In such scenario, the issue of ownership ought to be resolved first before a proper forum which is through a civil suit or land case. Mr. Rweyemamu tried to impress that the issue of ownership was resolved in Civil Suit No. 09 of 2021 in which, according to him, the appellant was declared to be a true owner of the suit property. With due respect to Mr. Rweyemamu's opinion, that never happened because Civil Case No 9 of 2021 was a probate matter which appointed Projestus Rwechungura to be the administrator of the estate of the late Brasio Lwezaura Kaiziro. That by itself cannot be taken to be a declaration of ownership of the property in dispute to anybody as the respondents were not even involved.

Even if the issue of ownership was resolved before Civil Case No. 9 of 2021, which is not the case, still, in criminal cases the onus of proof lies on the prosecution and the standard is beyond reasonable doubt. In the case at hand, the appellant did not prove his case to that standard. This is so because the location of property alleged to be trespassed is uncertain. As it was rightly pointed out by Mr. Mambo, three locations appear to be mentioned. While the inventory which was heavily relied on by the appellant show that the land is located at MAGOTI- KIBETA, the appellant alleged the same is at IBURA – KIBALE Ward and the respondents said it is located at IJUGANYONDO. With the said three locations, it is uncertain as to where exactly is the suit property is located. This by itself creates doubt which should be resolved in favour of the accused persons now the respondents. This position has been stated in the

case of ABUHI OMARY ABDALLAH & 3 OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 28 OF 2010 (CAT) where the Court held inter alia that;

“Where there is any doubt, the settled law is to the effect that in such a situation an accused is entitled as a matter of right to the benefit of doubts.”

That being said this court is of the view that Bukoba Urban Primary Court, sitting as criminal court had no jurisdiction to determine the issue of ownership of the suit property. The issue of ownership between the parties ought to be resolved first before delving into a charge of criminal trespass.

In the upshot, this appeal fails and is hereby dismissed for lack of merits. The decision of the District Court in Criminal Appeal Case No. 02 of 2022 is hereby upheld.

Right of appeal fully explained.

It is so ordered.

  
**A.Y. Mwenda**  
**Judge**

**08.03.2024**

Judgment delivered in chamber under the seal of this court in the presence of the Appellant Mr. Ephraim Lutazamba and in the presence of Mr. Gildon Mambo the learned counsel for the Respondents.



  
**A.Y. Mwenda**  
**Judge**

**08.03.2024**