IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

PC. CIVIL APPEAL NO. 12 OF 2023

(Arising from Civil Appeal No. 13 of 2023 Babati District Court, Original Civil Case No. 3 of 2023 Dareda Primary Court)

CONSTANTINO GIDANGANYI ..... APPELLANT

VERSUS

YONA ISRAEL.....RESPONDENT

Date of last order: 8/2/2024
Date of Judgment: 16/2/2024

JUDGEMENT

MAGOIGA, J.

Before Dareda Primary Court (hereinafter referred to as the trial court), the respondent sued the appellant for payment of Tshs 663,000/= for compensation of respondent's crops which were damaged by trees grown on the appellant's land.

As it could be gathered from the record, it is common ground that the appellant and respondent are neighbours. The appellant's land is located

adjacent to the respondent's land. The record shows that the appellant planted gravelia tress on his land since 1998. It was claimed that, the appellant's trees grew and their branches extended to the respondent's land causing crops which were planted under those branches not properly grown due to shade which prevented sunlight from reaching those crops.

It was claimed before the trial court that since 1998 the respondent saw poor harvest because of the shade of those trees. To this, he filed a matter in 2023 before the trial court claiming for Tshs 663,000/= being the value of various crops such as maize, beans and sunflower which were damaged.

After hearing the parties, the trial court dismissed the respondent's claim for lack of proof.

Being aggrieved with the trial court's decision, the respondent lodged Civil Appeal No. 13 of 2023 before Babati District Court (hereinafter referred to as the first appellate court).

After hearing the parties, the first appellate court reversed the trial court's decision and ordered the appellant to pay the respondent Tshs 663,000/=

being the value of the crops. The first appellate court also ordered the respondent to prone his trees.

The appellant was aggrieved with the decision by the first appellate court, as such preferred the instant appeal with four grounds of appeal which were couched in the following language as;

1. *That the first appellate court erred in law and in fact as it failed to properly evaluate and consider evidence adduced by the parties reaching a wrong decision in the face of law.*

2. *That as per ground No.1, the first appellate court erred in law and in fact for basing his decision upon documentary evidence (exhibit P1) tendered by the respondent which did not prove the case. In that way it arrived at a wrong decision in the face of law.*

3. *That the first appellate court erred in law and fact as it decided the appeal beyond its jurisdiction when it ordered and granted reliefs which the respondent did not claim. In*

so doing it issued decision contrary to the law.

4. *That the decision of the 1st appellate court is bad in law for failure to see to it that the trial court had no jurisdiction over Civil Case No. 03 of 2023, thus far, it arrived at a bad decision in the face of the law.*

When the appeal was called on for hearing, Mr. Kuwengwa Ndonjekwa learned advocate represented the appellant, while Mr. Abdallah Kilobwa learned advocate represented the respondent. The appeal was disposed of orally.

In his submission in support of the appeal, Mr. Ndonjekwa abandoned the 4th ground of appeal, and argued the remained three grounds by arguing grounds one and two jointly and ground number three separately.

In his submission in support of the first and second grounds of appeal, Mr. Ndonjekwa faulted the first appellate court for not properly evaluating the evidence on record. He submitted that the trees were planted since 1998 but nowhere the respondent complained of the said trees since then. He argued that the respondent claimed to have witnessed the damage of his crops with

his neighbors who he never mentioned.

He submitted that there was valuation report tendered before the trial court as exhibit P1 but the maker did not state where he derived such authority to conduct the valuation, which farm was valuated and no name of the valuer. According to Mr. Ndonjekwa, with the above shortcoming in the respondent's case, the trial court was right in its decision.

Submitting on the third ground of appeal, Mr. Ndonjekwa faulted the first appellate court for granting reliefs which were not prayed for by the parties. He pointed out that the order requiring the appellant to prune his trees was not prayed for before the trial court. To buttress his arguments, the learned advocate referred to the cases of **Hotel Travertine Ltd & 2 others v NBC Ltd** [2006] TLR 133 in which it was stated that the appellate court cannot allow matters not taken or pleaded at the trial court.

In reply, Mr. Kilobwa argued that the fact that the appellant's trees were planted in 1998 has nothing to do with the matter at hand since the claim before the trial court was for the year 2023. Equally the absence of neighbors has nothing to do with the matter hand. Regarding the valuation report

tendered before the trial court, the learned advocate for the respondent argued that the name of the maker was not important but the maker had authority to conduct such valuation.

In reply to the third ground of appeal, Mr. Kilobwa admitted that the order for pruning the trees was not asked for by the respondent, but was quick point out that it was consequential and not substantial relief, hence, it could be granted for the interest of justice.

In rejoinder Mr. Ndonjekwa essentially reiterated his submission in chief.

Having gone through the parties' rival submissions in respect of the first and second grounds of appeal, the issue for my determination is whether the grounds one and two have merits. I will equally determine them in the manner and order argued.

It is settled law that, the first appellate court is enjoined to reassess the evidence on record and where possible it can make its own findings. The court sitting on the second appeal like in the present matter, rarely interferes with findings of facts by the lower courts unless there is misdirection or non-

direction or misapprehension of the evidence on record.

The first appellate court is being reproached for not analyzing properly the evidence on record.

I have keenly gone through the record; it is not in dispute that the appellant's trees were planted since 1998. In his testimony the respondent admitted that since the year 1998 he has been experiencing poor harvest because of the trees that prevent sunlight from reaching the crops. If I allow the record to speak by itself the respondent before trial court testified that:

> **"Kila mwaka tangu 1998 nakuwa nalima shamba langu lakini imekuwa ikifanya uharibu shambani kwangu."**

But the record is silent if the respondent has ever complained anywhere regarding the appellant's trees causing the damage to the crops, he plants every year. It can be said that the first appellate court misapprehended the substance of evidence on record. What the respondent was telling the trial court was that he has acquiesced to the situation for more than 25 years down the road and hence he planted his crops knowing that there are trees planted

on the appellant's land which prevent sunlight from reaching his crops. Indeed, the respondent's claim was hopelessly time barred and ought to have been dismissed on its face value.

More importantly there is evidence by DW2 one Alex G. Basubizahe the Forestry Officer, he testified before the trial court that the type of trees planted by the appellant do not cause any damage to the respondent's crops because those trees are environmentally friendly as the preserved moisture. He told the trial court that leaves from those trees add fertility to the soil. According to the said witness, he inspected other parts of the respondent's farm which are not near the said trees and he discovered that crops in those parts were not in good condition. This piece of evidence was not at all considered by the first appellate court.

Also, it was not clearly stated as to what extent the appellant's trees extended to the respondent's farm as to cause the claimed damage. The learned first appellate magistrate truly failed to apprehend the evidence on record and formulated his own opinion not supported by the evidence adduced by the parties in his decision.

Another reason I fault the learned first appellate magistrate was that he formulated a new cause of action as vividly seen on page 10 of the typed judgment where he baptized the cause of action as nuisance to the respondent's land. With due respect to him, this was wrong and unacceptable. The claim of nuisance which is purely common law tort has its distinct elements which was not an issue in the instant matter.

On the above reasons, I find the first and second grounds merited and are allowed.

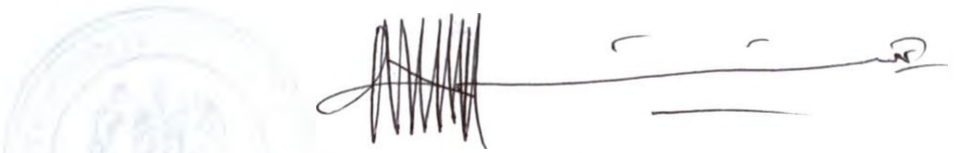
As to the complaint in ground three, without much ado and which ground was conceded by the Mr. Kilobwa, learned advocate for the respondent with respect, I don't share his view that was consequential. In the circumstances, I am, therefore, satisfied that the reliefs granted by the first appellate court were not prayed for by the respondent before the trial court and cannot be consequential. As such, granting them, the first appellate court grossly erred and it condemned the appellant unheard. Therefore, I find merits on the third ground of appeal.

In totality the appeal has merits. The decision of the first appellate court is

quashed and set aside. I hereby restore the trial court's decision. The appellant will have his costs in this court and in courts below.

It is so ordered.

Dated at Babati this 16th February 2024



S. M. MAGOIGA

JUDGE

16/2/2024