

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MOSHI
AT MOSHI**

LAND APPEAL NO. 58 OF 2023

*(Appeal from the decision of District Land and Housing Tribunal for Same at Same in Land
Application no. 02 of 2021 dated 26th July, 2023)*

BAHATI JONATHAN MBWAMBO..... APPELLANT

VERSUS

JUMA SAIDI MMASA.....1ST RESPONDENT

HALIMA SAIDI MMASA2ND RESPONDENT

JUDGMENT

18th March & 12th April, 2024

A.P.KILIMI, J.:

The appellant hereinabove filed an application at the District Land and Housing Tribunal of Same at Same praying to be declared lawful owner of the suit property located at Hamlet/Kitongoji 'C', Makanya Village , Makanya ward District in Kilimanjaro Region under Customary Right of Occupancy No. 116, also prayed a declaratory order that respondents hereinabove are trespassers to the said land in dispute, next prayed for an order be issued to the Respondents to demolish erected wall trespassed in

a suit land , general damage to the tune of Tzs. 20,000,000/=for the loss he incurred and costs of the suit.

At the tribunal the appellant claimed that he is a lawful owner of the said land measuring 23 x 98 feet since 1980 and on the year 2013, she got a customary title registered as stated above. The respondents who are neighbors were separated by an easement between them measuring 15 feet which was created by agreement between them for each to reserve 7.5 feet to that effect. The appellant further alleged later between year 2012 and 2015 The respondents trespassed and built a wall on that easement hence causing the said right to way be shifted to her land to the extent of 7.5 feet.

The respondents on their part refuted the allegations and averred is the appellant who trespassed to the said way and erected a kitchen building.

The trial tribunal upon heard on merit, all parties to this matter and their tendered evidence, the tribunal was of the view, since in respect to the land in dispute parties proved is a way which belong to the village government. Then the first issue agreed upon which is who is the lawful owner of disputed land, the same cannot be answered because no

evidence proved where the size of the said way started to be measured so as to prove the extent of trespassing by the respondents to the appellant land. Consequently, the tribunal declared the respondents are not trespassers to the appellant's land.

Having dissatisfied by the above decision, the appellant has stepped into the realm of this court being equipped with the following six grounds:

1. That, the Tribunal Chairperson erred in law and in fact for failure to determine the issues framed during trial.
2. That, the Tribunal Chairperson erred in law and fact for failure to evaluate evidences of both parties.
3. That, the Tribunal Chairperson erred in law and in fact by raising and analyzing extraneous matters.
4. That, the Tribunal Chairperson erred in law and in fact, for abdicating liabilities of the Respondents to other person(s) who were not part of the suit.
5. That, the Tribunal Chairperson erred in law and in fact by circumventing and faulting the procedures of conducting locus in quo.
6. That, the Tribunal Chairperson erred in law and in fact for being bias.

When the appeal was placed before me for hearing, the appellant was represented by Mr. Julius Mndeme learned advocate, whereas all Respondents enjoyed the service of Mr. Julius Caesar Sabuni learned Advocate. Both proposed the appeal be argued by way of written submission, the court acceded to their prayers and they duly submitted as

per schedule ordered. I applaud them for their researched submissions and I will refer to them in due course of this judgment whenever necessary.

Now, having considered the evidence on record and the above counsel's submissions, I start by acknowledging that this being the first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject to critical scrutiny may arrive at its own independent decision. (See **Yustus Aidan vs. Republic** [2022] TZCA 622 (TANZLII)).

In disposing the first ground, I find convenient to be backed by the law, in terms of Order XIV rule 1(5) and 3 of the Civil Procedure Code, [Cap 33 R.E.2019], the trial court is required after ascertaining matters of facts and law to which the parties are at variance, frame issues which are to be recorded, on which the decision of the case concerned would be based. In that regard, I find it pertinent to reproduce the provision of the said order in rule 1 (1) (2) and (3) as hereunder;

"1.-(1) Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.

(2) Material propositions are those propositions of law or fact which plaintiff must allege in

*order to show a right to sue or a defendant must allege in order to constitute his defence.
(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.”*

The rationale of doing the above, is to narrow down the controversy and enable the parties confine themselves on adducing evidence on such respect, thus, the above, guide the court in reaching proper decision which answers their dispute in issue. Therefore, the issues framed must aim to answer the contests stipulated in the pleadings and prayers advanced therein.

However, this first ground will be dealt simultaneously with the second ground which portrays on whether the trial tribunal did not analyze evidence, because the answer to the first ground depend also to the evidence but this time in connection to the pleadings filed by the parties at the tribunal.

The appellant's counsel in his submission has claimed that the trial Tribunal erroneously did not determine the first and the second issue as reflected in page 5 and 6 of the judgment. These issues depict in the language of the tribunal as follows;

- "a) Ni nani mmiliki halali wa ardhi yenye mgogoro.*
- b) Je wajibu maombi wamevamia ardhi yenye mgogoro."*

In English means, first who is the legal owner of disputed land and second, whether the respondents trespassed disputed land.

As stated by the guidance of the law above, the area of controversy or cause of action is stipulated in the plaint which in fact-initiated claims; according to application (form. No.1) filed at the trial tribunal on 8/03/2021, at paragraph 6 shows cause of action by a sub heading stating brief statement of facts constituting the claim; and for ease of reference, I reproduce hereunder;

"i). That the Applicant is a lawful owner of the landed property located at Hamlet/Kitongoji 'C', Makanya Village, Makanya Ward, District in Kilimanjaro Region measuring 23 x 98 feet since 1980s and in 2013 she was issued with Certificate of Customary Right of Occupancy No. 116 and therefore protected under the Constitution of United Republic of Tanzania.

ii). That, the Applicant, the 1st and the 2nd Respondents are neighbors who respected boundaries and/or easement between them and there has been no disputes between the parties herein or their grandparents who lived in harmony and peacefully enjoyed their properties for times. More so, since then it was agreed that each neighbor should leave 7 .5 feet area to create 15 feet in total for purposes of easement for smooth movements in the area.

iii). That, surprisingly sometimes between 2012 and 2015 the 1st and 2nd Respondent without any colour of right erected a wall in the whole area of easement/way of Fifteen (15) feet and forced to shift the way on part of the Applicant's landed property measuring 7 .5 Feet."

[Emphasis added]

According to the pleading at the tribunal, there is no dispute that the appellant acquired a customary certificate of title with measuring as stated above, but has stated the cause of action at paragraph 6 (a) (iii) that the respondents have erected a wall in the whole area of easement/way of

Fifteen (15) feet and forced to shift the way on part of the Applicant's landed property measuring 7 5 Feet.

In my view of this cause of action, there are two limbs of controversy, first, the appellant at the trial was claiming that the respondent has invaded the existed easement and second the said invasion has caused his land to be taken as a way for 7.5 feet. These are areas of controversy stipulated in the pleading. I have scanned the trial tribunal record I found nowhere it was amended. Thus, these are critical parts of the pleading in which the trial tribunal needed to consider and bound. I would like to support my observation by the decision of the court in the case of **Simba Papers Converters Limited vs. Packaging & Stationery Manufacturers Limited & Another** [2023] TZCA 254 (TANZLII) when the court observed that;

*"The Court should not raise or entertain anything not forming part of the parties' pleadings. As doing so will be offending the settled rule against departure from the pleadings set out under Order VI rule 7 of the Civil Procedure Code [CAP 33 R.E. 2019]. Further, **Court's finding must be based on what was pleaded by the parties in view of the settled principle that the parties as***

well as the court are bound by what is pleaded in the pleadings in order to avert consideration of extraneous matters.”

[Emphasis is mine]

Now, in view of the above legal observations, the next point to be considered is whether the said issues raised at the trial tribunal were possible to solve the area of contest stated above.

There is no dispute that the appellant owned legally customary title as she tendered at the trial tribunal and marked A1 and I concede with her the same need to be protected since it has equal status with any other title, but according to the pleading explained above, the land in dispute claimed includes also an easement. For instance, at page 12 of the typed proceeding of the tribunal, when the appellant was asked by the respondent counsel replied as follows; -

"Uchochoro ulitolewa mwaka 1980 wakati huo mmiliki ni mama yangu. 7.5 futi zao na 7.5 futi upande wangu. Uchochoro ni wa ukubwa wa futi 15. Uchochoro ulitolewa unakuwa wa wote. Futi 15 ni za wote Wadaawa wamevamia futi 7.5 za upande wangu. Amemaliza futi 15 na

kuchukua futi 7.5 kwangu. Amechukua futi 22 zote. Ameingia katika eneo langu”

Her witness Juma Jumanne Mfaume (PW2) who declared that he was the member of village land allocating committee and visited the land in dispute, in my view did not prove the extent of trespass to appellant land but proved trespass of an easement, when he testified at page 18 and 20 respectively on the typed proceeding as hereunder;

*"Uchochoro huo kwa sasa haujaheshimiwa umebanwa upande mmoja na upande mwingine umefungwa. Uchochoro umefungwa eneo ambalo tulilipima. Uchochoro wa futi 15. Eneo la 23 kwa 98 futi nayo imeingiliwa na ukuta. **Sijapima eneo hili limeingiliwa kwa kiasi gani. Ila najua kuwa kumeingiliwa. Kamati nzima iiifika pale na kukuta ukuta umejengwa katika uchochoro Upana wa futi 23 na urefu wa futi 98 haujumuishi futi 7.5. Bikoni zipo mpaka leo hii.**"*

[Emphasis added]

From the above, despite the fact the appellant did not evidence as he pleaded, still his no evidence proved the extent her land was trespassed. Moreover, as rightly argued by the respondents' counsel, the first issue which aim to determine who is the lawful owner of the suit land was answered by the trial tribunal at page 5 of the trial tribunal Judgement when observed as follows;

"Kwa kuwa eneo linalodaiwa ni uchochoro na wadaawa wameeleza uchochoro ni wa serikali baraza halitajibu kiini cha kwanza kwa upande wowote ule maana hakuna ushahidi madhubuti ulioeleza uchochoro unaanzia eneo lipo ili kutambua kama hatua 7.5 zaidi zimevamiwa na wajibu maombi. Kwa mazingira hayo baraza pia haliwezi kutambua ni nani mvamizi wa ardhi ya mgogoro."

Having considered the evidence at the trial tribunal and the area of contest according to the pleading as highlighted above, and the pleading initiated appellant claim at the tribunal. In my view despite the fact that she gave the descriptions of the suit land in the pleading, the cause of action stipulated therein extended the land in dispute to the other land not belong to her. For instance, in her pleading shows that the act of building a wall forced to shift the way on part of the Applicant's landed property

measuring 7 .5 Feet. This means she also claim the respondents to vacate the said easement, but also no her part did not settle in evidence as shown above that the said wall trespassed to her land.

In the premises, I am settled according to the pleading the land in dispute included the easement which in itself demarcated the boundaries between the parties. Therefore, even if the tribunal could have declared the ownership of the land in dispute to be of the appellant, this could have meant the appellant to be declared to be the owner of part of easement, while apparently it was evidenced the same belong to nobody except the village council. Thus, in my view it was impossible for the tribunal to declare the said suit land belong to the appellant alone. In that regard I am settled the trial tribunal was right to decide the first issue as above.

Equally, in respect to the second issue raised at the tribunal which in fact depended the answer of the first issue, in my view after regarding the analyses above and the answer of the first issue hereinabove, I am settled the same was rightly answered by the tribunal at page 6 of the trial decision that the respondents cannot be held liable as trespassers to a land in dispute which both parties said is an easement which belong to the Village Council.

Nonetheless, at this juncture, briefly I find convenient to deliberate the issue raised by the appellant's counsel that the tribunal relied on extraneous matters and raised a new ground without affording parties right to be heard, I have considered the way the tribunal posed, apparently as stated by respondents' counsel the same was an obiter, since it stated the village council could have a better position to show what were the boundaries of the easement. In my view I see this added nothing to the said decision. Be it as it may, it was the concern of the appellant that the issue of joining village council was *functus officio* since it was rejected at the tribunal upon hearing preliminary objection.

I had an ample time to pass through application no. 2 of 2021 of the trial tribunal, it is true two objections were raised in that application, however, both were struck out for not qualifying to be point of law, this means the concern raised was not heard on merit. But at page 6 of the said ruling, the tribunal directed itself properly again by an obiter, when stated that although she had power to join the village council as a necessary party, under the auspice of section 7 of The Government Proceedings Act (CAP 5 R.E 2019) and section 25 (a) of the written Laws (Mics. Amendments) Act No. 1 of 2020 it was impossible since by joining

the village council as a party it becomes suit against the government which the said tribunal did not have such jurisdiction.

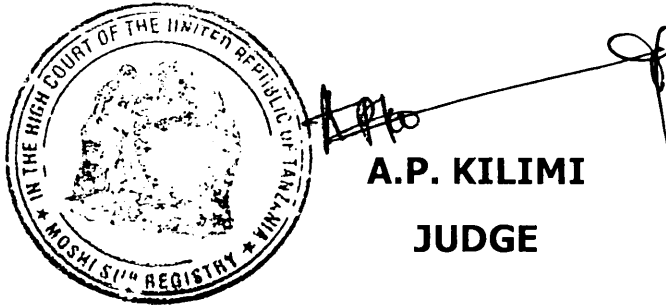
Therefore, since the duty of the court is to resolve the disputes between the parties to the court, I have taken on board the above issues which aimed to enable that duty were not organized to takes its course intended, thus, it is my considered opinion the variance between the pleadings, set up of issues and the evidence tendered has geared to the said course. In the above regard, I am settled the trial court did evaluate the evidence and hence correctly determined the two issues claimed as above, thus, the cases referred by appellant's did not suit the circumstances of this matter. Consequently, I hold the two grounds of appeal discussed have no merit thus dismissed.

Moreover, I am mindful issues being the key components in solving dispute, in considering the findings above, I have asked myself if I need to go further to resolve other remained grounds registered in this appeal. In my view, it is obvious that doing so will be an academic exercise, since whatever extent will be dealt to them, they cannot change the answers of the two issues above which are determinant of the parties' dispute agreed upon at the tribunal.

In the premises, I hold that the decision of the trial tribunal was justified for dismissal of the application entered and cannot be faulted by this court. In the final event and foregoing said, this appeal fails in its entirety. Costs to follow the event.

It is so ordered.

DATED at MOSHI this 12th day of April, 2024



A.P. KILIMI
JUDGE

Court: - Judgment delivered today on 12th day of April, 2024 in the presence of Mr. Jonathan Mndeme, Advocate for the appellant and Mr. Julius Caesar Sabuni, Advocate for all respondents. Also, only first respondent present.

Sgd: A. P. KILIMI

JUDGE

12/4/2024

Court: - Right of Appeal explained.

Sgd: A. P. KILIMI

JUDGE

12/4/2024