

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

LAND APPEAL NO. 8 OF 2023

(Arising from the decision of the District Land and Housing Tribunal for Tabora In Land Appeal No. 18 of 2018, Original Land Case No. 51 of 2017 Tutuo Ward Tribunal)

PIUS MELEMENJI.....APPELLANT

VERSUS

JUMA BAKARI KIYENGWE.....RESPONDENT

JUDGEMENT

Date of last order:

Judgement date:30/05/2024

MANGO, J

The Appellant, Pius Melemeji instituted Land Case No. 51 of 2017 before Tutuo Ward Tribunal against the Respondent Juma Bakari Kiyengwe on the alleged trespass into his land located at Tutuo Village, Tutuo Ward within Sikonge District. He alleges that, the Respondent trespassed into part of the said land not the entire land. The trial tribunal dismissed the Application. The Appellant unsuccessfully appealed to the District Land and Housing Tribunal for Tabora via Land Appeal No. 18 of 2018. He has now approached this Court armed with three grounds of appeal which reads as follows: -

1. That the District Land and Housing Tribunal erred in law and in facts for upholding the decision of Tutuo Ward Tribunal which completely failed to analyse and consider evidence adduced by the Appellant and hence arrived at unjust decision

2. That the District Land and Housing Tribunal misdirected by itself in determining the dispute and upholding the decision of Ward Tribunal which indeed was tainted with irregularities
3. That the District Land and Housing Tribunal erred in law and in fact for dismissing the Appellants appeal and upholding the decision of the Tribunal which contained with irregularity as the Ward Tribunal decided the case basing on the visit to the land in dispute which did not involve the Appellant

During hearing the Appellant appeared in person while the Respondent was represented by advocate Akram Magoti.

On the first ground of appeal the Appellant submitted that the trial tribunal did not consider his evidence especially his sale agreement dated 28th September 1998. To his surprise the tribunal ruled in favour of the Respondent who had no any document that establishes his title over the land in dispute.

On the second and third grounds of appeal, he challenged the visit to the locus in quo without his involvement and the decision of the tribunal which solely based on the findings made during the visit to the disputed land. He argued that, the tribunal scheduled the visit to be conducted on 2nd October 2017 but the visit was conducted on 29th September 2017 without any notification to the Appellant. He also submitted on the findings of the tribunal to be incorrect since his land is not bordered by Juma Bakari Kinyengwe. According to him, Juma Bakari Kinyengwe does not own any land at the disputed place.

In his reply submission, advocate Magoti submitted that, the grounds of appeal raised by the appellant are meritless and they deserve to be dismissed. On the first ground of appeal, he argued that, the two tribunals evaluated and considered well evidence tendered by each party. He referred the Court to the second to third page of the decision of the Appellate Tribunal and the fourth page of the decision of the trial tribunal as pages in which evaluation and consideration of evidence of both sides was done by the two tribunals.

On the second ground of appeal, he submitted that, the Appellant did not mention any irregularity in the proceedings of the lower Court. He argued that, it is trite law that, irregularity in the judgement should be on face of record. To buttress his argument, he cited the case of **Elias Masija Nyang'oro & Others vs Mwanachi Insurance Company Limited** (Civil Appeal 278 of 2019) [2022] TZCA 648 (24 October 2022). He added that, this ground of appeal is new as it was not raised during the first appeal. Thus, this Court cannot determine the issue which was not raised before the District land and housing Tribunal.

On the third ground of appeal, he submitted that, the Appellant participated in the visit to the locus in quo as it appears in page 16 to 17 of the proceedings. Thus, he was informed of the date and participated in the visit to the land in dispute. The learned counsel submitted also on the alleged admission of trespass by the Respondent. In this, he argued that, the issue was considered by the tribunal and was found to be weightless since the Ward executed Officer is not a mediator of land disputes and the he did not appear to testify before the tribunal when he was required to do so.

In his rejoinder the Appellant reiterated his submission in chief. He also argued that, the Ward Executive Officer was not properly summoned.

I have considered submissions by both parties and Court record. The main dispute in this matter is boundaries of the Appellant's land and the land belonging to the Respondent. Court record establishes that, the dispute was once resolved by the Ward Executive Officer but parties did not honor their agreement, the act which made the Appellant to file a formal suit before the Ward Tribunal. Court record also establishes that, the trial tribunal made its decision based on its findings during visit to the disputed land and the testimony of the Appellant's vendor one Ally Mwami.

I find the first ground of appeal to be unmeritorious on the ground that the Appellant evidence was considered but, the tribunal found the same to weigh less compared to the findings of the tribunal during the site visit and the testimony of the Ally Mwami, the person who sold the land to the Appellant.

On the third ground of appeal, I find the manner the trial tribunal conducted the visit to the land in dispute to be improper. The Courts visit locus in quo not for collection of evidence but verifying what has been stated or indicated in documentary evidence produced before it. In the case of **Depson Balyagati vs Veronica J. Kibwana** (Civil Appeal No. 21 of 2021) [2023] TZCA 17772 (23 October 2023) the Court of Appeal of Tanzania observed that;

"It must be noted that, the purpose and manner of which the proceedings at the locus in quo should be conducted, is a question which has on several occasions been dealt with by the appellate courts in East Africa and other common law jurisdictions. Regarding the

purpose of the visit, as far back as in the 1960s, the law was settled that, it is to check on the evidence by the witnesses and not to fill gaps in their evidence or lest, the court may put itself at the risk of turning into a witness in the case”

In the matter at hand the tribunal did not observe the purpose of the visit to locus in quo as a result it reduced the procedure to a procedure employed for evidence collection. I hold so because, the seller Ally Mussa Mwami gave his first testimony during site visit conducted by the tribunal on 29th September 2017. Court record indicates that on that date, Ally Mussa Mwami was shown the sketchmap drawn during attempts to resolve the dispute by the Ward Executive Officer. The witness said he does not recognize the sketchmap because it does not reflect the correct boundaries of the land he sold to the Appellant.

The assertion might be correct since the sketch map was drawn by the Ward Executive Officer in the course of resolving the dispute and not determining the dispute. It should be noted that in negotiations parties may agree to loose part of their rights in order to resolve their dispute. Parties may successfully resolve their disputes via negotiations if they decide to respect what they agreed during their negotiations or where such negotiations are conducted by a competent and recognized negotiator and the agreement is filed in Court for adoption as decree of the Court. Unfortunately, parties to this appeal did not wish to respect what they agreed in their attempt to resolve their dispute and their negotiations were not done by the assistance of a competent negotiator. Thus, the agreement alleged to have been concluded during their negotiations cannot be enforced by Courts of law.

Aside of trying to verify the correctness of the sketchmap drawn during attempts to resolve the dispute between parties to this appeal, the Trial tribunal did not attempt to verify the boundaries of the land from the seller. This is evident from the fact that, the tribunal did not wish to be shown the location of any features that appear in the sale agreement produced by the Appellant. Such features include the mango trees and the house that was purchased by the Appellant. Court record indicates that, the seller stated that among the three mango trees which he sold to the Appellant two of them were cut down. Unfortunately, that he did not mention what was the boundaries between the Appellant's and Respondent's pieces of land. It is not clear what made a witness who had not yet testified before the tribunal, to visit the land in dispute in absence of the Appellant and be allowed to comment on the correctness of documentary evidence tendered by the Appellant.

Court record indicates further that, the seller did not take part in the second visit to the land in dispute made on 07th October 2017 in which the Appellant was present. The tribunal ordered the seller to attend in another visit to the suit land scheduled to be conducted on 23rd October 2017 in order to show boundaries of the land he sold to the Appellant. No record that such a visit was ever conducted by the tribunal, what is reflected in record is that the buyer appeared and testified before the tribunal on 15 January 2018. This time he merely reproduced the testimony he adduced during site visit on 29/09/2017 in which the Appellant did not participate.

All these establishes that, the visit to locus in quo was not conducted properly. In short, Court record establishes that, the tribunal visited the

locus in quo in order to collect evidence which was later adduced by the seller instead of verifying what has been stated by witnesses. Given the fact that the trial tribunal made its findings based on the visit to the land in dispute and testimony of the seller, I find the decision of the trial tribunal to be made without affording the Appellant with the right to be heard and based on evidence that was not properly obtained.

For that reason, I hereby quash the decision of the District Land and Housing Tribunal and employ revisionary powers vested in this Court to set aside the decision of the trial tribunal. It is further ordered that, the matter be tried afresh before a competent tribunal at the option of the parties. Given the fact that the appeal involves neighbours whose good relationship is necessary to prevent further disputes, I do not award costs.

Dated at Tabora this 30th day of May 2024



A handwritten signature in black ink, appearing to read "Z.D. Mango", written over a set of horizontal dashed lines.

**Z.D.MANGO
JUDGE**