

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

DC CRIMINAL APPEAL NO. 6 OF 2023

*(Arising from Igunga District Court in Criminal Case no. 6 of 2022,
Originating from Igunga Urban Primary Court in Criminal Case no. 13 of
2022)*

NGELELA MAIGE.....APPELLANT

VERSUS

ISANZILA NZILE.....RESPONDENT

JUDGMENT

Date of Last Order: 22/03/2024

Date of Delivery: 30/05/2024

MANGO, J.

The Appellant herein sued the Respondent for criminal trespass in Igunga Urban Primary Court via Criminal Case No. 06 of 2022. The trial court found the Respondent guilty of an offence, convicted him and sentenced him to serve a conditional discharge for six months with an order of not committing any criminal offences within that period. Dissatisfied with the decision the Respondent herein successfully appealed to Igunga District Court via Criminal Appeal No. 06 of 2022. The District Court quashed the Respondent's conviction and set aside orders meted against him.

Aggrieved with the findings of Igunga District Court, the Appellant preferred this appeal with two grounds of appeal that;

1. The trial Magistrate erred in law and fact by raising an issue *suo moto* and using the same as the reason for her decision.
2. The trial Magistrate erred in law and fact by delivering a judgment *suo moto* without affording the parties right to be heard.

During hearing of this appeal, the Appellant was represented by Advocate Thadeus Kavulunzi whereas the Respondent was represented by Advocate Edward Malando. By leave of the Court, the appeal was disposed by way of written submission. I am grateful to advocates for parties in this appeal for their compliance with the schedule of submissions.

Submitting on the two grounds of appeal collectively, Mr. Kavulunzi submitted that the first appellate Court disposed of the appeal basing on the second ground of appeal placed before it which stated that *the trial magistrate erred in law ad fact by treating the matter as criminal trespass while the same was the issue of ownership*, and that court went on to raise *suo moto* the issue on how the seller of the disputed land was not legally appointed as the administrator of the estate of the Respondent's deceased father.

It was his contention that the first appellate court misled itself by failure to observe that, the issue of ownership between the parties had already been settled two years back through Nyandekwa ward tribunal which declared the Appellant as the lawful owner of the land subject to this appeal. He pointed out that, the Respondent never appealed against the decision of

Nyandera Ward Tribunal and the decision was tendered before the trial court and admitted as exhibit K-1.

Mr. Kavulunzi concluded that the presiding magistrate raised suo moto the legal capacity of a seller without affording the parties right to be heard, the fact which was supposed to be raised in the ward tribunal. To cement his argument, he referred the Court to the case of **Gurmit Singh vs Meet Singh & Another, Civil Appeal No. 256/2018**, (unreported). He prayed that the decision of the first appellate court be quashed with costs.

In reply Mr. Malando learned advocate for the Respondent argued that the District Court made its decision based on the question of ownership of disputed land which both parties had the opportunity to submit in the trial court. Mr. Malando further stated that the first appellate court made its findings by analysing the Appellant's ownership of disputed land on the strength of him being appointed as administrator of the estate of the late Nzile Hamu Kinuka. It was his view that the 1st appellate court made its decision based on evidence on records.

He faulted the case of **Gurmit Singh *supra*** that its facts are not in *pari materia* to the case at hand because in that case the parties were before the trial court and not at appeal level while in the current case parties had the opportunity to submit before the trial court.

Having considered submissions by the parties and read court record pertaining to this matter, I can now determine the appeal at hand. The main issues in this appeal are whether the decision of District Court based on

issues raised suo motto without affording parties with the right to be heard and whether the appeal at hand is meritorious.

The first issue necessitates this Court to reproduce the grounds of appeal tabled before the District Court. The Respondent who was the Appellant before the District Land and Housing Tribunal raised the following grounds of appeal:-

1. That the trial Magistrate erred in law and fact for failure to consider that the Respondent did not prove his case beyond reasonable doubts
2. That, the trial Magistrate erred in law and in fact for treating the matter as a criminal trespass (criminal case)
3. That the trial Magistrate erred in law and in fact when deliberately evaluate and assess unfairly the evidence adduced by the Appellant and Appellant's witnesses.

In determining the appeal, the District Court addressed the issue of competence of Shemi Nzile, the person who sold the land to the Appellant to sell land belonging to the late Nzile Hamu Kinuka. In so doing Hon. Magistrate discussed intensively the manner and procedure of appointments of administrator of an administrator of the decease's estate. He pointed out the applicable law and practices in administration of deceased's estate. He concluded that, Shemi Nzile was not appointed to be the administrator of the estate of the Respondent's deceased father, the late Nzile Hamu Kinuka, thus, the sale of land to the Appellant was done illegally.

Hon. Magistrate proceeded to determine the second ground of appeal on the basis of his findings regarding Shemi Nzile's capacity to sell the land subject to this appeal to the Appellant. In this he found that, the matter was wrongly filed and determined as a criminal trespass while parties contests ownership over the land. He held that;

"Back to the grounds of appeal, I would like to discuss the second ground of appeal as it can dispose of the whole matter herein. Basing on the explanation herein above, it is my standing that, the matter is still under the dispute of ownership hence it was wrongly brought as a criminal trespass. This is due to the facts that, the Appellant herein and the Respondent claims over the issue of ownership

It is a legal position from courts of records that, criminal trespass cannot succeed where the matter involves land dispute whose ownership has not been finally determined by a civil suit in a court of law..."

From the above quoted paragraph, it is clear that the District Court determined the appeal based on the grounds of appeal. To be specific, the District Court's decision based on the second ground of appeal in which the Appellant, herein Respondent alleged that the matter was wrongly entertained by the primary Court as a criminal case while it was merely a land dispute. The Court ruled that, the matter did not qualify to be determined as a criminal trespass Court.

With such findings, I can now determine whether the appeal is meritorious or not. Court record establishes that the matter started as a land dispute which was preferred by the Respondent before Nyandekwa Ward

Tribunal. The matter was registered as Case No. 66 of 2016 and it was settled between parties. The settlement indicates that Nshemi Nzile agreed to pay Tshs. 194,000/and Isanzila, the Respondent herein and his sisters agreed to return the land to Ngelela, the Appellant. The law section 3(2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], establishes Courts which can hear and determine Land disputes. The Ward Land Tribunal were among the Courts established to deal with the land disputes. In that regard, recording of their agreement before the Ward Tribunal the same acquired marks the land dispute between parties to this appeal determined by settlement of parties. Given the fact that neither party challenged the decision of the Ward Tribunal, the decision remains to be binding and enforceable against parties to the case. Thus, it cannot be considered that the dispute between the Appellant and the Respondent over the said land has never been determined. The land dispute between the Appellant and the Respondent was determined by Nyandekwa Ward Tribunal via Case No. 66 of 2016. Thus, the matter was correctly preferred as Criminal trespass.

Having held so, I find the appeal to have merits and the decision of the District Court is hereby set aside. Given the fact that the District Court determined the appeal on a technical ground leaving two substantive grounds of appeal undetermined. The matter is returned before the District Court so that the appeal can be determined on merits.

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

Right of further Appeal explained