

**IN THE HIGH COURT OF TANZANIA
DODOMA SUB REGISTRY
AT DODOMA**

PC CRIMINAL APPEAL NO 10021 OF 2024

*(Arising from decision of the District Court of Iramba at Kiomboi in Criminal Appeal No 2
of 2024)*

RUKIA MOHAMED.....APPELLANT

VERSUS

FATUMA NJOKARESPONDENT

JUDGMENT

Date of Last Order: 19/06/2024

Date of Judgment: 03/07/2024

LONGOPA, J.:

This is a second appeal arising from the decision of the Mkalama Primary Court at Nduguti in Criminal Case No 153 of 2023 that convicted and sentenced the appellant for the offence of criminal trespass contrary to section 299 (a) of the Penal Code, Cap 16 R.E. 2022. The District Court of Iramba at Kiomboi in Criminal Appeal No. 2 of 2024 did confirm and upheld the decision of the Primary Court.

The appellant was further aggrieved by this decision of the District Court thus on 18th day of March 2024 preferred this appeal against the



whole of the decision of the District Court on the following grounds, namely:

- 1. That the appellate court erred in law and fact to enter judgment that the trial court has jurisdiction to entertain criminal land trespass case while it was a purely land dispute case of which a trial court had no jurisdiction.*
- 2. That the appellate court erred in law and fact to upheld the decision of the trial court allow translator without prior court's order that effect.*

Wherefore, the appellant prays from this Honourable Court to allow this appeal with costs.

On 19th June 2024, the parties were availed opportunity to address this Court on the grounds of appeal. The appellant enjoyed legal services of Mr. Bonaventura Njelu, learned advocate while the respondent enjoyed the legal services of Mr. Leonard Haule, learned advocate holding a brief for Mr. Kolo Emmanuel, advocate for the respondent.

The counsel for the appellant commenced his argument by restating that there were two grounds of appeal whereas the appellant opted to argue on the first ground alone thus the second one should be considered abandoned.

It was submitted that the offence for which the appellant was charged with in the Primary Court of Mkalama at Nduguti was criminal trespass as the appellant believed it to be his farm. The trial court ought to have stopped the proceedings of ownership of the land to be determined first by appropriate land courts. The Primary Court entertained the matter without any prerequisite jurisdiction. This was raised in the first appellate court, and it is reflected in page 2 of the appellate's court decision.

Both parties, accused and complainant were claiming ownership on the same piece of land thus the Primary Court ought to have referred the parties to the relevant authorities to determine the land dispute.

At page 4 of the judgment, the first appellate court erred to insist that the Primary Court had jurisdiction to entertain the matter as parties to the case raised the matter of ownership. It is our submission that the court ought to have reviewed the pleadings especially that of the defence. The appellant stated to have been clearing his land/ farm thus the question of ownership was raised.

The appellant's counsel cited the case of **Zabron Ngailo versus Felista Mwendakwijila Kalinga**, PC Criminal Appeal no 03/2022 at pages 6-7, where the High Court held that offence of criminal trespass cannot be determined in existence of the dispute of ownership, to cement



his argument that primary court lacks jurisdiction to determine the criminal case in circumstances where ownership comes into question.

It was reiterated that primary court was not the civil court to determine the ownership of the land in question that led to the criminal trespass. The appellant disputed the ownership of the land that he was charged for criminal trespass.

It was submitted that the two subordinate courts erred in law to entertain the matter as there was a question of ownership that was supposed to be determine first before the criminal trespass can definitively be determined.

The reasoning of the district court is that primary court was satisfied that the respondent was legal owner. This cements the argument that criminal trespass was not appropriate in the circumstances. It is submitted that primary and district courts erred in law to decide a criminal trespass against the appellant based on the defence raised on the ownership of the land.

It was appellant's prayer that the decision of the Primary and District Courts should be dismissed for being of violative of the law. It should be quashed and set aside as the Court entertained the matter without jurisdiction.



On the other hand, the respondent argued that the ground of appeal is misconceived. This is the sense that criminal trespass no 153 of 2023 before Primary Court was purely criminal case in nature. The Primary Court had jurisdiction to entertain criminal trespass. There was no issue of claiming of ownership as there was no dispute as to ownership of that land.

Further, it was argued that the reasoning of the District Court on page 4 of the judgment was correct. There is no ground whatsoever to revert that decision. Primary Court did not determine the issue of ownership. The reasoning was correct. It was reiterated that Counsel for appellant misled himself as the court did not delve into determination of ownership of land rather whether there was a criminal trespass or not.

It was submitted that the case cited by the counsel for the appellant is distinguishable as at page 7 the High Court stated that each case depends on the circumstances and facts of each case to find out whether the Primary Court had jurisdiction or otherwise. In the cited case, the primary court determined ownership of that land. The court in that court determined first the question of ownership and determined on the issue of criminal trespass. In the instant appeal, there was no such determination of the ownership of land by primary court. It only dealt with criminal trespass. It is respondent's submission that this court should disregard that case as it is clearly distinguishable.



The respondent concluded that this appeal lacks merits, and it should be dismissed for want of merits. The decision of the District Court should stand as it was correct exposition of the law.

In rejoinder, the appellant reiterated that primary court had no jurisdiction as the case was a criminal in nature, but the court went on to rule on the owner by referring to the Legal Dictionary regarding the ownership. Thus, the primary court traversed on civil matter that it had no jurisdiction to entertain.

According to the appellant, reference made to the Legal Dictionary on the meaning of owner as demonstrated in the page 4 of the judgment of the District Court is illustratively expression that both the trial and first appellate court addressed the question of ownership which was not within their jurisdictional mandate to delve into as the matter before the two subordinate Court was on criminal trespass only.

It is lucid that with determination of the ownership by the subordinate courts meant that they went beyond their jurisdiction. The same circumstances and facts exist in both this appeal and in the case of Zabron Ngailo. Thus, it was reiterated that decisions of the primary and district courts be set aside and allow this appeal.

Having heard the rival submissions by the parties, I have dispassionately perused the record of both the trial and first appellate Court on the matter to discern whether the appeal has merits or otherwise.

I shall commence addressing the appeal by reiterating the ingredients of the offence from the provision that creates it. It provides that:

299. Any person who-

(a) unlawfully enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property is guilty of criminal trespass and liable to imprisonment for three months; if the property upon which the offence is committed is any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property, the offender is liable to imprisonment for one year.

According to section 299 (a) of the Penal Code, ingredients of criminal trespass include: First, there must be unlawful entry into property under possession of another person. Second, there should be intent to commit an offence, or intimidate or annoy the person who possesses such property. The *actus reus* is the entry into land or remaining into land upon lawfully entry under possession of another. It is lucid also that *mens rea*

must be established. There should exist intent to commit an offence, intimidated, insult or annoy the other person.

For the offence to occur, it is the duty of the prosecution to establish that all the elements of the offence exist. It appears that complainant must have some form of lawful interest in the property either possession or ownership to warrant action complained of unlawful entry or unlawful remaining on the property to be an offence. In circumstances where there are claims of ownership between the complainant and the accused, it is crucial that determination of the ownership should precede the determination of criminal offence. There is a plethora of authorities from this Court on the aspect regarding determination of the civil dispute on who is the owner/possessor before the offence of criminal trespass can stand.

In the case of **Asha Ramadhani vs Salum Saidi** (PC Criminal Appeal No. 4 of 2013) [2014] TZHC 2394 (4 June 2014) (TANZLII), at pages 9 -10, the High Court (Shangwa, J.:.) stated that:

On ground six, I agree with Mr. Mwankenja that in order to establish an offence of criminal trespass on land in cases where there is a dispute between one person and another as to who is the owner of such land, civil litigation should be invoked first before criminal prosecution takes.

Invoking charge of criminal trespass in respect of property i.e. landed property where the parties claim ownership become unsafe to determine such a charge in absence of the decision by civil court on ownership of such land. In the case of **Asha Ramadhani vs Salum Saidi** (supra), it was observed that the appellant had been allowed to use the land. The Court stated that:

At any rate, it appears to me that Asha Ramadhani and two others were wrongly found guilty and convicted by the primary Court of disobeying a lawful order and criminal trespass because they had been allowed by one Mwandiko to cultivate the land in issue and according to what they knew the land dispute over that piece of land which existed between Mwandiko and Salum Saidi no longer existed and that the piece of land on which they were found cultivating belonged to Mwandiko and not to Salum Saidi. This means that they had no mens rea to commit both offences.

In the case of **Richard Laurent vs Meja Mafuru Maregesi** (PC Criminal Appeal 27 of 2022) [2023] TZHC 16625 (30 March 2023) (TANZLII), at page 6-7, the Court (Hon. Komba, J. :) noted that:

In the instant matter, the first appellate court while analysing the appeal perused documents tendered by

parties and was satisfied that land dispute between the parties was solved by District Land and Housing Tribunal for Mara in Misc. Application No. 361 of 2014 in the year 2014 where respondent was declared the lawful owner. The court was satisfied that there was no further orders that nullified or reversed the said decision and therefore the applicant had no good title. Upon that satisfaction it proceeds to pronounce that appellant trespassed to respondent land and uphold the finding of the trial court. This court find the same and that there is no need to fault the first appellate court.

It is lucid that, a civil court decision on who is the rightful owner/possessor of a particular property is fundamental to allow a criminal court to try a criminal trespass case. In existence of prior finding by competent land court would result in confirmation of the finding by the trial or first appellate court if the criminal trespass offence was established within the required standard.

In **Grace Olotu Martin vs Ami Ramadhani Mpungwe** (Civil Appeal 91 of 2020) [2023] TZCA 193 (20 April 2023) (TANZLII), at page 13, the Court of Appeal reiterated that:



*In law, the developments made by the appellant on the respondent's land caused discomfort or inconvenience on the part of the respondent. Trespass in civil law differs from that in criminal law on this point. The offence of criminal trespass consists in entering or remaining on the land of another person with an intent to commit an offence or intimidate, insult or annoy any person in possession of such property. (See section 299 of the Penal Code, Cap. 16). Thus, we agree with learned counsel for the respondent that the precedent set in **Frank S. Mchuma vs Shaibu A. Shemdolwa (supra)** is not in line with the settled law on the matter and, if allowed to be further propagated, will definitely occasion injustice in circumstances of the present case and the like. Above all, the law entitles to compensation a person who effects development on the land he legally owns or has authority to do so.*

In the case of **Honoratha d/o Alfred @ Mdichey vs Republic** (Criminal Appeal 72 of 2022) [2022] TZHC 14733 (18 November 2022) (TANZLII), at pages 7-8, the High Court (Hon Kakolaki, J.) stated that:

It is true and I embrace both parties' submission that, the charge for criminal trespass cannot stand when ownership of the land is in dispute. This principle was stated in the



case of **Sylivery Nkanga v. Raphael Albertho (supra)** where the court stated *inter alia* that: (i) A charge of Criminal trespass cannot succeed where the matter involved land in dispute whose ownership has not finally determined by a Civil Suit via Court of Law. (ii) A Criminal Court is not a proper forum for determining the rights of those claiming ownership of Land. Only a Civil Court via Civil Suit can determine matters of Land ownership. The same principle is enlightened in the case of Simon Mapurisa vs Gasper Mahuya, Criminal Appeal No. 221 of 2006 where the court after citing with approval the case of Sylivery Nkanga and Ismail- Bushaija (supra), had this to say: "...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 the ownership of a part or the whole of the adjacent land, such dispute is resolved in a 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. Going by the lower court records, the appellant was convicted for the charge of trespass to the land; contrary to section 299 of the Penal Code.



I fully subscribe to this position that in circumstances where ownership is disputed, it is unpalatable for the criminal court to determine the matter of criminal trespass in absence of certainty regarding the possession/ ownership. Reasoning is simple. Illegal possession cannot entitle a person to claim against another person on criminal trespass thus some legality on possession/ownership on part of the complainant cannot be ignored.

It is on record that the subordinates courts in this appeal did determine that the respondent is the one in possession of the land given she witnessed the sale agreement of the land in question. On page 4 of the District Court's judgment, it is stated that: *ukisoma ukurasa wa sita mstari wa tano unasema mwaka 2003 Saidi Nguli alinunua shamba hilo na mjibu rufaa (SM 1) alishuhudia makabidhiano hayo. Mahakama ikaenda mbali kwa kuangalia maana ya neno Mmiliki kwenye Kamusi (Legal Dictionary) na ikaona Mmiliki sio lazima awe mwenye mali, bali mtu yeyote mwenye mamlaka ya udhibiti juu ya eneo flani. Na kwa shauri mbele yetu, Mjibu rufaa ndiye mtu mwenye usimamizi wa mamlaka juu ya shamba hilo lenye ekari 50.*

Literally translated that part of the decision meant that "Perusal of page six in fifth line in 2003, one Saidi Nguli bought the land, and the respondent herein was a witness to the handing over of the land. The trial Court went further on Legal Dictionary to check the meaning of owner and



found that owner is not necessarily the rightful owner of the property but anyone in possession of the control over the land in question. In the instant case, the respondent is the possessor of the farm in question measuring 50 acres.

This finding has one major weakness that every person in possession of the property is regarded to be the owner/ possessor thus could institute a criminal trespass against any other person. Such holding appears to defeat the purpose of the law. It appears that a trespasser might be in possession of the land but is not entitled to institute a criminal trespass against any other person. At least, the possession must be lawful, valid and bonafide. The main issue should be whether there was material evidence that the respondent had lawful possession of the property in question.

In the case of **Shabani Ramadhani vs. Fatuma Cornel** (Criminal appeal No. 5 of 2023) [2023] TZHC 20690 (11 August 2023) (TANZLII), at page 6-7, the High Court (Hon. Ngwembe, J.[as he then was]) noted that:

However, possession and ownership are different in law. To possess, I comprehend is to have a property or something under control. Even a custodian may be a possessor. Possession which is not illegal must be either valid, legal or at least bonafide. However, ownership is a concept slightly higher than possession. Ownership goes with rightfulness



and does not necessarily imply possession for the purpose of criminal trespass. That in criminal trespass the elements above must be proved. Also, that if the complainant has proved possession of the property upon which criminal trespass is said to have been committed, he is not required to prove rightful ownership unless there is a pending dispute before a proper court of law regarding ownership of the same property.

It is true that the subordinates court were called upon to address the criminal trespass where the possession was an important element. Given the defence by the appellant that she was the owner of the land in question, it was improper for the trial court to determine the question of the rightful owner as it was not civil court with competent jurisdiction to determine that aspect.

I am of the settled view that primary court's decision as amplified by the district court was based on findings that the respondent was a lawful owner of the disputed land. As a result, it was concluded that the appellant had criminally trespassed to that land. Such decision went beyond the jurisdiction of the primary court as it had no powers to determine ownership of land.



It is further evident that perusal of resultant orders in the primary court decision were as follows: (1) Mshtakiwa anaadhibiwa na mahakama hii kwa kulipa faini ya shilingi laki moja (100,000/=) akishindwa kulipa faini aende Gereza kwa kipindi cha miezi mitatu; (2) Mshitakiwa anaamriwa na mahakama hii kuachia shamba SM1, naye kubaki katika eneo alilopewa. Literally, primary court ordered a fine of TZS 100,000/= or three months' imprisonment in case of failure to pay the fine and that the accused is ordered to give vacant possession of the land to first prosecution witness, and the convict should remain in the land that was allocated to her.

There is no doubt that the second order is an extension of the decision that determined ownership of land that was not within the mandate of primary court exercising land criminal trespass. That order had effect that primary court had established the question of ownership of land between the complainant and the accused. It was wrong to so determine and order by the primary court as it had no such jurisdiction.

It is therefore vivid that primary court committed a serious error to decide in favour of the respondent as it had prerequisite civil jurisdiction to determine the ownership of land in circumstances of the case at hand. Therefore, both the decision of the Primary Court of Mkalama at Nduguti in Criminal Case No 153 of 2023 and the Criminal Appeal No 2 of 2024 before the District Court of Iramba at Kiomboi were marred with illegality on



ground of lack of competent jurisdiction. Both decisions are hereby nullified for being illegal.

The appeal is allowed thus conviction and sentence imposed against the appellant is set aside. All the orders thereat are set aside as well. They originate from a nullity judgment.

It so ordered.

DATED at **DODOMA** this 3rd day of July 2024.



Longopa

E.E. LONGOPA

JUDGE

03/07/2024

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