IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL CASE NO. 46 OF 2023

(Arising from Land Application no. 11 of 2021 of Same District Land and Housing Tribunal at Same)

GEORGE YESSE MRIKARIA (As Administrator of the Estates of the late Esrom Anael Mrikaria) **..... APPELLANT**

VERSUS

BODI YA WADHAMINI BARAZA KUU LA WAISLAM TANZANIA (BAKWATA) MSIKITI MKUU WA WILAYA YA MWANGA..... RESPONDENT

JUDGMENT

27/11/2023 & 30/01/2024

SIMFUKWE, J.

The appellant herein George Yesse Mrikaria the administrator of the estate of the deceased Esrom Anael Mrikaria, sued the respondent, **Bodi ya Wadhamini ya Baraza Kuu la Waislam Tanzania (BAKWATA) Msikiti Mkuu wa Wilaya ya Mwanga** for encroaching into 10 meters of his Plot

No. 141 Block A located at Reli Chini street at Mwanga Ward within Mwanga District in Kilimanjaro Region. The appellant alleged before the trial tribunal that the respondent built a madrasa at the disputed land. He prayed inter alia to be declared the lawful owner of the disputed land. The respondent denied the claims against them.

After considering evidence of both parties, the trial tribunal decided in favour of the respondent. Being aggrieved with the judgment and decree of the trial tribunal, the appellant appealed before this court on the following grounds:

1. *THAT, the learned Chairman of the District Land and Housing Tribunal grossly erred in law for failure to answer the 1st issue.*
2. *THAT, the learned Chairman of the District Land and Housing Tribunal grossly erred in law during the 1st and 2nd visit of the locus in quo as follows:*
    a) *That, during the 1st visit no measurement of the respondent's land was done to see if her land had the same measurement as stated by SU4 and no extension as claimed by appellant.*
    b) *That, the tribunal's witness who failed to clarify the disputed land during the hearing was the only Tribunal's witness who was further heard during the 2nd visit instead*

of the summoned Angelina Sampa now the land officer Same District, who formerly resolved the dispute in Mwanga District on 22/03/2011.

3. *THAT, the learned Chairman of the District Land and Housing Tribunal grossly erred in law for failure to consider the reality in the admitted Exhibit A1 the District Land Officer's letter dated 22/03/2021 (sic) which confirmed that the respondent had trespassed 10 meters as claimed.*
4. *THAT, the trial Tribunal erred in law when condemned the appellant relying on the failure to change the site plan, the task that was beyond appellant's power to do.*
5. *THAT, the statement by Tribunal's witness, the Land Surveyor that the appellant's land was taken by TANROADS by 22.5 meters according to the map drawn in 2008 and that Plot No. 141 Block A is no longer there, contradict with reality in Exhibit A1 of 22/03/2021 (sic).*

The appellant prayed that the appeal be heard by way of written submissions. His prayer was granted whereas, his written submission was drawn by Mr. Dickson Laurent, learned counsel. The respondent enjoyed the service of Mr. Rashid Shaban the learned counsel.

On the first ground of appeal, Mr. Dickson submitted that on 7th December, 2021 the trial tribunal framed 3 issues as seen at page 5 of the typed proceedings and the first issue was: **"Je, Mwombaji ni mmiliki kihalali wa kiwanja no. 141 Kitalu "A" kilichopo mtaa wa Reli Chini, Kata ya Mwanga wilaya ya Mwanga."** That, reading the entire judgment of the tribunal, nowhere the said issue above was discussed and resolved by the trial tribunal. Legally, failure to resolve/answer the framed issue is fatal and renders all the resultant order in that decision void worth of being quashed and set aside. Mr. Dickson cited the case of **Victor Raphael Luvena v. Magreth Ephraim Kawa and Others, Civil Appeal No. 25A/2021,** page 9-15, CAT at Dar es Salaam (unreported).

On the second ground, that the Tribunal erred in law during the 1st and 2nd visit to the locus in quo; it was asserted that no measurement of the respondent's land was done to see if her land had the same measure as stated by SU4 and there was no extension as claimed by the appellant. That, measuring the respondent's land was very important taking into account that the appellant claimed that his land was trespassed by 10 meters and recognized the respondent to be his neighbour on the Northern side. Considering also that SU4 stated that the respondent's land on the Northern side had 45 meters. It was

thus important to measure the respondent's 45 meters to see if they were still the same or there was additional size that might be those 10 meters claimed by the appellant. The learned counsel referred to page 6, 29,33 and 47 of the typed proceedings. He cited the case of **Nazir M. H v. Gulamali Tazal Janmahamud [1980] TLR 29** to cement his argument.

It was submitted further that the second visit was supposed to be done on 14/4/2023 and one Angelina Sampa the Land Surveyor and Town Planning officer was ordered to attend. The said witness had once resolved the matter on 22/03/2011 between the parties according to the admitted exhibit A1. However, the Tribunal proceeded with the visit in absence of the said important key witness Angelina Sampa.

Arguing the 3rd ground of appeal, Mr. Dickson submitted that the trial Tribunal never considered exhibit A1 to come to its conclusion of the dispute.

On the 4th ground of appeal, it was submitted that changing the site plan was beyond the appellant's powers.

Regarding the 5th ground of appeal, it was submitted that the Land Surveyor stated that the appellant's land was taken by TANROAD by 22.5 meters and that according to the map drawn on 2008 Plot No.

141 Block A was no longer there. It was alleged that the fact contradicts exhibit A1 of 22/03/2011 in which the land officer recognized existence of the appellant's land.

In his reply to the submission in chief, on the outset, Advocate Reshid Shaban submitted that this appeal is misconceived, misplaced and deserves to be dismissed with costs for lack of merits.

On the 1st ground of appeal; it was replied that the same lacks merit in the eyes of law and facts due to the fact that, the issue was clearly discussed and resolved by the trial Tribunal. He implored this court to go through page 5 of the judgment from paragraph 7 to 27 (sic) and at page 6 of the judgment starting from paragraph 8 to 16 (sic).

Concerning the case of **Victor Raphael Luvena** (supra) cited by the learned counsel of the appellant, Mr. Rashid was of the view that the said case is distinguishable to our case at hand as the said case concerned failure of court to frame the crucial issue as to whether the respondent's farm was part of the appellant's farm; while in our case issues were framed and the first issue was answered clearly at page 5 and 6 of the judgment of the tribunal.

On the second ground, it was replied that when the tribunal visited the locus in quo, it was revealed that Plot No. 141 Block A "Old Mwanga" was not there. That, the plot claimed by the appellant was

within TANROADS reserved area and it was clearly shown at page 5 paragraph 13, 14, 15, 16 and 17 (sic) of the tribunal judgment. It was submitted further that; a mere letter did not show the boundaries of the plot and the size of the plot as shown at page 5 of the judgment. Mr. Rashid went on to submit that, the position of the law is very clear that when it comes to the issue of ownership of land, the person with certificate of title thereof will be taken as the lawful owner unless it was proved that the certificate was not lawfully obtained. The same was clearly established in the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore and Another,** Civil Appeal 207 of 2019 [2022] TZCA 739, at page 18 and 19 where it was held that:

"Certificate of Title is a conclusive proof of ownership of land."

Mr. Rashid cited another case of **Amina Maulid Ambali & Others v. Ramadhani Juma**, Civil Appeal No. 173 of 2020 [2021] TZCA 186, at page 9 where the Court stated that:

> *"Where two persons have competing interests in a landed property, the person with the certificate thereof will be taken to be the lawful owner unless it is proved that the certificate was not lawfully obtained."*

In this case, Mr. Rashid contended that the respondent herein tendered before the tribunal an OFFER issued on 9/11/1994 by the

Commissioner for Land and it was admitted as exhibit B1, and the said OFFER showed the location and size of the plot. Thus, the second ground of appeal lacks merit and the same deserves to be dismissed with costs as the appellant failed to tender any deed or certificate of title to justify his claims.

It was contended further that, after the visit to the locus in quo, the District Land and Housing Tribunal re-assembled on 25/04/2023 and the Chairman read out all the notes taken at the locus in quo. Mr. Rashid subscribed to the case of **Nazir M. H. v. Gulamali Tazal Janmahamud** (supra) in which it was stated that:

> *"When a visit to a locus in quo is necessary or appropriate, and we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any……. And for instance, if the size of a room or width of a road is a matter in issue, have the room or road measured in the presence of parties, and note made thereof. When the court re-assembles in court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated……"*

The learned counsel was of the opinion that, the procedure enshrined herein above was adhered by the trial tribunal in cooperation with

Mwanga Land Surveyor/Officer as the whole area of conflict was measured in the presence of both parties. That, no party objected the whole procedure during the visiting of the locus in quo even after re-assembling in the tribunal room. That, raising the issue of measuring the respondent's land at the appeal stage is an afterthought which is not allowed in law. He cemented his point with the case of **Sospeter Kahindi v. Mbeshi Mashini,** Civil Appeal No. 56 of 2017 [2018] TZCA 223, in which the Court of Appeal held that:

> *"We are, as a result inclined to hold that the appellant's request for termination of proceedings came rather belatedly. For it was made on the day the tribunal visited the locus in quo……. We would therefore, support the learned appellate judge's holding that the appellant's belated request was an afterthought."*

Mr. Rashid reiterated that; the Land officer assisted the trial tribunal to discover that Plot No. 141 Block A had entered into TANROAD reserve area almost 22.5 meters. Therefore, after the demolition and execution done by TANROAD, the appellant is now forcing the respondent to go back 10 meters.

The learned counsel insisted that, it is trite law that he who alleges must prove as provided under **section 110 (1) and (2) of the Evidence Act, Cap 6 R.E 2022**. That, the appellant tries to mislead

this court by shifting the burden of proving his case to the tribunal which is contrary to the law.

In reply to the 3rd ground of appeal, Mr. Rashid submitted that, they were of the view that the tribunal considered exhibit A1 and adduced reason as to why it ignored that exhibit. He said that the same is revealed at page 6 of the judgment of the tribunal.

On the 4th ground of appeal, Mr. Rashid replied that the trial tribunal did not condemn the appellant for failure to change the site. Rather, the trial tribunal explained the institution which had authority to issue the site plan. He referred to page 6 of the judgment of the trial tribunal where the issue of site plan was discussed.

On the 5th ground of appeal which concerns contradiction of evidence, it was replied that, the duty of the trial tribunal was to hear the evidence adduced before it, evaluate the said evidence and to pronounce judgment. That, the law is clear that the tribunal or court cannot turn to be the witness so as to produce evidence, the said duty remains to the parties to the case.

In his rejoinder, the learned counsel for the appellant was of the view that, according to his submission the respondent does not dispute that during the visit of the locus in quo, no measurement of the respondent's land was done to see if her land had the same

measurements as states by SU4 and there was no extension as claimed by the appellant. That, during the second visit to the locus in quo, the tribunal proceeded with the hearing in absence of the land officer one Angelina Sampa and Town planning officer who were important tribunal witnesses. Hence, rendering the second visit useless. That, the respondent does not dispute that the purported map that is claimed to have taken off the appellant's land was not admitted to form part of the tribunal's records.

Mr. Dickson reiterated his submission in chief in respect of the grounds of appeal. He added that, how the same plot which was seen during the visit to the locus in quo, could disappear while composing judgment? That, the disputed plot had two houses the existence of which negates the allegation that the said plot is no longer there.

Moreover, Mr. Dickson submitted that, it should also be known that the appellant claimed trespass over Plot No. 141 Block A at Old Mwanga; and not ownership over the title held by the respondent. That, he claims encroachment done by the respondent over his plot named herein above.

I have considered the grounds of appeal, the submissions of both parties together with the trial tribunal's record. The issue is **whether this appeal has merit.**

The first ground of appeal concerns failure to resolve the first framed issue by the trial tribunal. It is trite law that each framed issue must be resolved in the course of composing judgment. In the case of **Sheik Ahmed Said versus The Registered Trustees of Manyema Masjid [2005] TLR 61** which was referred in a very recent decision in the case of **Victor Raphael Luvena** (supra) cited by the learned counsel for the appellant, the Court of Appeal of Tanzania at Dodoma while emphasizing this principle held that:

> *"It is necessary for a trial court to make a specific finding on each and every issue framed in a case even where some of the issues cover the same aspect."*

The learned counsel for the appellant complained that the issue whether the applicant (appellant) was a lawful owner of Plot No. 141 Block A located at Reli Chini street, Mwanga Ward in Mwanga district, was not resolved by the trial tribunal. On the other hand, the learned counsel for the respondent was of the view that the said issue was clearly discussed and resolved by the trial tribunal at page 5 of its judgment.

I have gone through the judgment of the trial tribunal. At page 7, third paragraph, last sentence, it was concluded that:

> *"Kwa hoja hizi mjibu maombi hajaingia eneo la mgogoro linalodaiwa kuwa la mwombaji na kujenga madrasa. Madrasa yamejengwa katika eneo la mjibu maombi."*

On the next paragraph of the same page, the trial tribunal continued to state that:

> *"Ili mwombaji kushinda kesi yake alipaswa kushibitisha (sic) madai yake katika baraza hili lakini kwa ushahidi aliotoa muombaji ameshindwa kuthibitisha madai yake."*

The above quoted findings were reached by the trial tribunal after evaluation of evidence of both parties. Therefore, it goes without saying that the first issue was resolved by the trial tribunal as correctly submitted by the learned counsel of the respondent.

On the second and fourth grounds of appeal, the appellant submitted that the trial tribunal misdirected itself by its failure to measure the land of the respondent and failure to testify by key witnesses. The respondent replied inter alia that the position of the law is very clear that when it comes to the issue of ownership of land, the person with certificate of title thereof will be regarded as the lawful owner unless it is proved that the certificate was not lawfully obtained.

I have thoroughly examined evidence of both parties on record. I have discovered that, the appellant had never indicated the size of his disputed plot. I am of considered view that for the complaints of the appellant in respect of the visit to the locus in quo to have substance, he had a duty to describe the size of his land. The appellant never indicated the size of

his purported land in his application and in his evidence. With due respect to the appellant, the complaint that the trial tribunal did not measure the land of the respondent in order to verify that the respondent had trespassed into his land is vague. In absence of the details of the size of the land of the appellant, measuring the size of land of the adverse party could serve no purpose. Otherwise, even if the matter was decided in favour of the appellant, it could be very difficult to execute it.

It has been over emphasized that in civil cases, the burden of proof lies on the person who alleges. The onus never shifts to the adverse party unless the one who alleges has discharged his/her onus. In the case of **Ernest Sebastian Mbele vs Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168** [TANZLII] at page 8, the Court of Appeal stated that:

> *"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6)."*

In the instant matter, the appellant herein being the applicant before the trial tribunal was required to prove on balance of probabilities inter alia the size of his suit land. I agree with the learned counsel for the respondent that the appellant could have tendered the site plan of his plot instead of attaching the site plan of the respondent only.

On the third and fifth grounds of appeal which concerns failure to consider exhibit A1 (a letter dated 22/03/2011); the respondent's counsel stated that the trial tribunal considered the said exhibit and the trial Chairman adduced reason as to why he did not rely on exhibit A1. He referred to page 6 of the judgment where it was stated that:

> *"Kielelezo A1 kimeambatanishwa na site plan ya BAKWATA ambayo inafanana na site plan ya Mjibu maombi aliyoambatanisha katika kielelezo B1. Site plan hiyo ilitolewa 1994 kwa mjibu maombi na mwaka 2011 idara ya ardhi Mwanga kwa barua yake kwa Mkurugenzi alitumia site plan hiyo hiyo na anaeleza kuwa msikiti umeongezewa au kuingilia eneo la muombaji kwa mita 10 YAPATA MIAKA 17 tangu BAKWATA kupata site plan hiyo……."*

In the circumstances, it is crystal clear that the learned trial Chairman considered exhibit A1, discredited it and decided in favour of the

respondent, the decision which I don't see any justification to interfere with.

Therefore, I find this appeal lacks merit and dismiss it in its entirety with costs.

It is so ordered.

Dated and delivered at Moshi this 30th day of January 2024.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

30/01/2024