

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT TANGA

LAND CASE APPEAL NO 12 OF 2008

*(From the decision of the District Land and Housing Tribunal of TANGA District
at TANGA In Land Case no 83 of 2005)*

ERNEST HUME & 2 OTHERS.....APPELLANTS

VERSUS

JOSEPH RASHID MTUNGUJA.....RESPONDENT

JUDGMENT

Before: Bongole, J

The appellants, namely Ernest Hume, Sulemani Kassim and Mainda Athumani who featured 1st, 2nd and 3rd appellants respectively in the service of Mr. W. Mramba learned counsel presented 4 grounds of appeal. They are appealing against the Judgment and decree of Hon B.K. Kishenyi

Chairman in Tanga District Land and Housing Tribunal Application No 83 of 2005.

The ground of appeal are that:-

1. *That as the bone of contention between the parties in the Tribunal was whether the First and Second Appellants had encroached and constructed their houses in the Respondent's area the Tanga District Land and Housing Tribunal grossly misdirected itself in law and on the facts in entering judgment for the Respondent without and before taking any evidence from Land Surveyors and or Land Officers that there was in fact such encroachment.*
2. *The reliance by the Tribunal on the letters of the Land Officer for Muheza District as evidence of encroachment was wrongful and improper as neither of those letters show that the said Land Officer had physically gone to the area in dispute and proved the encroachment reported to him.*

3. *That as the evidence of the Land Officer and or Surveyor was crucial and decisive in the matter the Tribunal misdirected itself in not seeing and finding that the Respondent who was represented by learned counsel had deliberately abstained from calling such Land Officer and or Surveyor for fear that their evidence would be in his disfavour. The Tribunal should in the circumstances and in the interests of justice, have called these officers as court witnesses.*
4. *That has according to the evidence the area in dispute was also the someone in dispute in the former court cases which had been decided in favour of the Third Appellant. That the Tribunal erred in not according sufficient weight to those former court decisions.*

They therefore prayed that the appeal be granted with costs.

The respondent in this appeal and in the DLHT had the service of Mr. Sangawe learned counsel.

In arguing the appeal, Mr. Mramba learned counsel adopted three grounds of appeal and argued the same *seriatim*. In support of the 1st ground, he submitted that the respondent complained that the 1st and 2nd appellants had encroached into his area allegations which were denied by the appellants.

That the appellants area was unsurveyed while the respondents area was surveyed. That the issue was correctly framed/build on this back ground.

That the only evidence to resolve the dispute was the Land Surveyor who in the circumstances must have known the boundaries of the disputed land. That the third appellant in particular stated that the bacons had been removed and planted in part of his land. That the respondent was duty bound to call witnesses to prove his claim as required by the law S.42 of Cap 216 R.E 2002 No 2/2002.

On the 2nd ground, he argued that reliance on the letter of Land Officers for Muheza District could not have in any way shown that the appellants had encroached into the respondent's land.

On the 3rd ground he submitted that the abstinence from calling Land Officer or officer was deliberate move and draws adverse inference on the part of the respondent himself.

Finally that in the DLHT the appellants raised concern that the matter was resjudicata or was subject to other case previously determined long before the new system of solving land dispute. He therefore prayed that this appeal be allowed with costs.

In reply, Mr. Sangawe learned counsel for the respondent submitted that there was sufficient and cogent evidence in favour of the respondent even without calling the land officer. That the Title deed No 8012 accompanied with deed plan proved ownership of the disputed piece of land. That Exhibits "P4" which was a letter from the Land Officer was to the effect of stopping the appellants from developing the area and simply it corroborated the title deed.

That the accusation of abstinence of calling the Land Officer to testify is speculative and afterthought. That the issue of resjudicata was not proved as there was no any copy of the judgment to proof that the matter was for the same parties and conclusively determined.

I owe the learned counsels unlimited gratitude for their submissions. As was correctly framed before the district Land and Housing tribunal the subtle issue was whether the appellants encroached into the respondent area.

From the proceedings of the tribunal it is trite that the area in dispute is $\frac{1}{4}$ of an acre which is alleged to belonged to the 3rd appellant who in turn sold it to the 1st and 2nd appellants.

The respondent's area is surveyed which measured 2.252 HCC and whereas the appellants area is unsurveyed. It was alleged that the becons of the surveyed area had been removed and planted in part of the appellants area.

As I understand from the proceedings and pleadings the dispute is not of ownership of plot No 1 Block J Muheza Urban but it is centered on

whether the area built by the appellants falls part and parcel of the surveyed plot which belongs to the respondent.

As the becons which could show the boundaries between the appellants and the respondents were in controversy, it is difficult to point out finger to either of the parties from having encroached in to such area.

The bottomline is to have resolved the boundaries problem before stating who is the rightful owner. As has been correctly submitted by Mr. Mramba learned counsel, common sence demands that in determining as to whether there is an encroachment into or not, the boundaries must be marked, known and ascertained.

The title deed is a document/a proof of ownership. There was no dispute that the respondent is the right full owner of plot No 1 Block J Muheza Urban. The issue was whether the appellants encroached into the said plot and build a house on it.

Persons who would be in a position of resolving this problem would be the Land Officer /land surveyors. I could state differently had it been that the whole area was surveyed. Hence the trial Hon Chairman must

have misdirected himself in reaching a decision as to who was the rightful owner of Plot No 1 Block J Muheza Urban in steady of dealing with the issue which was before him i.e the issue of encroachment. I think more evidence was required to establish that the $\frac{1}{4}$ of acre which was in dispute was part and parcel of plot No 1 Block J which is owned by the Respondent.

With regard to res-judicata as raised by Mr. Mramba is that, from the proceedings there has been no saentilia of evidence which meets the test of res-judicata.

Res-judicata demands that a suit must have been decided conclusively by a court of competent jurisdiction; involving the same parties and the same subject matter.

There was no evidence on record to that respect. Hence this ground of appeal is unsustainable.

Safe for ground of appeal No 4 the rest i.e no 1,2, and 3 are sustainable.

I hereby order that the file be forwarded to the DLHT of Tanga District for additional evidence from the Land Officer/Surveyor Muheza district to establish as to whether there was an encroachment of the respondent's area or not. Then, the tribunal will proceed in pronouncing its judgment as it will find fit.

No order as to costs in this appeal.

Ordered accordingly.

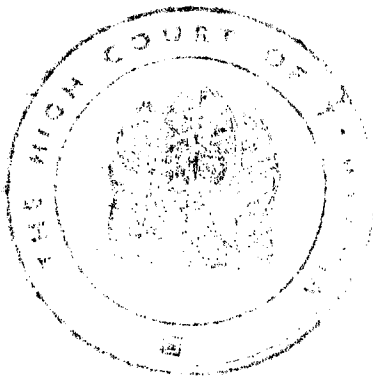


S.B. Bongole

JUDGE

13/7/2012

Order: The record be forwarded to the District Registrar Tanga who shall deliver this Judgment on a date that shall be communicated to the parties.



S.B. Bongole

JUDGE

13/7/2012

DATE: 14/9/2012


CORAM: P.C. MKEHA – DR

APPELLANTS – Present

RESPONDENT: Present

C/C MARIAM

Court: Ruling is read over to the parties' Counsel on this 14th day of September, 2012.


P.C. MKEHA – DR.
14/09/2012