

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND APPEAL NO.49 of 2017**

**EGIN M. MUJWAHUZI.....APPELLANT**

***Versus***

**PRAYGOD K. PETRO.....RESPONDENT**

***Date of Last Order: 26.07.2018***

***Date of Judgment: 31.08.2018***

**JUDGMENT**

**S.A.N WAMBURA, J:**

The appellant **Egina M. Mujwahuzi** has filed this appeal on the following grounds:-

- 1. The learned Chairperson erred in fact and law by directing the Applicant to re-survey the plot through the Kinondoni Municipal Council so as to establish the boundaries while the survey process has already taken place by a licenced private surveyor who identified the boundaries and such evidence was not challenged through pleadings or by evidence.*
- 2. The learned chairperson erred on facts by stating that the respondent was not involved in the surveying process while there was testimony by the appellant then applicant that the respondent refused to participate in the process.*

3. *The learned chairperson erred in law and on evidence by not awarding appellant the prayers prayed for upon receiving evidence.*

He thus prayed for the appeal to be allowed, judgment and Orders of the District Land and Housing Tribunal quashed and set aside as well costs. He wanted the matter to be referred back to the Tribunal so that it can compose the judgment.

These grounds were challenged by the respondent one **Praygod K. Petro** though he did not adduce evidence at the District Land and Housing Tribunal.

With leave of this Court the appeal was argued by way of written submissions. I thank both parties for adhering to the schedule and for their interesting submissions.

Having gone through the submissions and record I have noted that parties are neighbours. Whereas the appellant is the owner of Plot No.866 Block 'C' Mbezi Beach, the respondent is the owner of Plot No.867 Block 'C' Mbezi Beach. It has been alleged that the respondent encroached into the appellants

land by 4.1 meters at the right side to 6.0 meters on the left. This was reckoned after a survey conducted by a private surveyor Pw2 one Mr. Kijonali Andrea Msango who was engaged by the appellant.

The appellant issued a demand notice which was not honoured by the respondent. He thus sued him at the District Land and Housing Tribunal. The District Land and Housing Tribunal ordered that another survey be conducted by a Surveyor from the Kinondoni Municipal Council so as to restore the said boundaries. It further ordered demolition of any structures to be found within the alleged encroached land. Dissatisfied the appellant has now filed this appeal.

It has been submitted that the District Land and Housing Tribunal erred in directing a re-survey of the plots by a surveyor from Kinondoni Municipal Council as the same had been conducted by a licenced private surveyor. This was after allegedly being adviced by the Municipal Council to do so. That

the surveyor's report was not challenged and was admitted as Exhibit P 3.

That it was not true that the respondent was not involved in the surveying process because the appellant had testified that the respondent refused to participate in the process and was notified by the appellant on the encroachment. When he refused, it was when the appellant engaged a private Surveyor.

It was further submitted that the learned Chairperson erred in not awarding damages to the appellant due to the disturbances encountered and loss he had suffered as he could not construct a toilet and a kitchen due to the encroachment.

He thus prayed for the appeal to be allowed with costs as well as the reliefs prayed for.

The respondent challenged all the grounds for the reason that there was no evidence to prove that the respondent encroached on the suit property as the surveyors report was void *ab initio* for being prepared by an unlicensed surveyor contrary to Section 4 (1) (a) (d) of the Land Surveyors Act, apart from being

one sided. This is because the respondent was never involved in the preparation of the same.

That since the appellant had not proved that the respondent encroached on his landed property then he was not entitled to any damages.

He thus prayed for the dismissal of the appeal with costs.

Now could the respondent respond to the grounds of appeal issued in an exparte judgment?

The record of the trial tribunal reveals that the respondent did not defend his case. Now since he did not defend the same, I believe he cannot respond to the grounds of appeal herein raised.

The only remedy which was available to him was to file an application to set aside the exparte judgment if he had any issues against the decision of the District Land and Housing Tribunal but not respond to the appeal filed in this Court.

In the case of **Maruna Tumbo Tumbo and Another Vs Medard Girion** Civil Revision No. 89 of 2002 HC at DSM Registry the Court held that;

*"The **legal remedy** for the applicants was not an application for revision **but was to set aside such order and to restore the suit**".*

[Emphasis is mine].

Though the ruling in the above case was in respect of a revision the same applies to a matter which proceeded ex parte if he wishes to be heard.

Now the provision of **Section 110 (1) and (2) of the Civil Procedure Code** provides that;

*"Section 110 (1) **Whoever desires any court to give judgment** as to any legal right or liability dependent on the existence of facts which he asserts **must prove that those facts exist**.*

*Section 110 (2) When a person is bound to prove the existence of any fact, it is said that **the burden of proof lies on that person**".*

[Emphasis is mine].

This burden has to be discharged even if the matter proceeds ex parte as it was held in the case of **Roseleen Kombe VS. Attorney General (2003) TLR 347**. The Court insisted that even if the matter is heard ex parte the said burden is not discharged. The Court held:

***"Even where the defendant files no Written Statement of Defence at all or does not appear, let alone where he files "an evasive or general denial", the plaintiff still has to prove his case for the relief sought, even if ex-parte".***

*[Emphasis is mine].*

It is worth noting that under Section 29(1) (2) of the Land Surveyors Act No.2 of 2017 provides that:-

*"Section 29(1) A licensed Surveyor must lodge a copy of each survey plan prepared by the Surveyor with the Survey-General.*

*(2) The Surveyor- General may approve the plan, subject to any corrections he or she considers necessary."*

Thus the survey plan has to be prepared by a licensed Surveyor and approved by the Surveyor General as stated under Section 29 and Section 31 of the Surveyor's Act (Supra).

Section 30 of the Surveyors Act states that;

*"Section 30 Only a Survey Plan prepared by a licensed surveyor and approved by the Surveyor-General under section 29 may be recognized by a Courts or the Government."*

According to the matter at hand this was not proved and so the said report though admitted as exhibit lacks legal effectiveness as was held by the District Land and Housing Tribunal.

Under the circumstances, I do find that it was proper for him to order for a re-survey by the Municipal Surveyor.


I note that the appellant has tried to sneak in evidence which is not on record that the Municipal authorities were the ones who advised the appellant to engage a private Surveyor.



This cannot be accepted in prosecution of ones case because we are bound by the pleadings and evidence which is on record. But even if was so advised the provisions of Section 29 (2) of the Surveyors Act have to be complied with.

Now as the appellant failed to prove his allegations, it goes without saying that he is not entitled to any damages.

In the circumstances, I herein dismiss the appeal with costs.

  
**S.A.N. WAMBURA**  
**JUDGE**  
**31.08.2018**