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

LAND APPEAL NO. 100 OF 2018

(From the Decision of the District Land and Housing Tribunal of Temeke District at Temeke in Land Case No. 48 of 2016)

AZIZI ISMAIL.....APPELLANT

VERSUS

SHAIBU JUMA.....RESPONDENT

JUDGMENT

OPIYO, J

On 25th January 1997, the appellant, Aziz Ismail purchased a piece of land, located at Tungi Kigamboni, from the respondent, Shaibu Juma and his sister Fatuma Juma Mzee. The parties involved in the said transaction did not describe the boundaries of the land in question. At that material time when the sale was concluded, the respondent being the seller had a house adjacent to the land which he sold to the appellant.

Almost five years later, the appellant appeared to construct a wall around his land. It is alleged that, he found part of the respondent's house built within his land as per his claim. He had to divert his wall surrounding applicant's structure after appellant refused to demolish part of his structure

alleged to have trespassed appellants land. That, after construction of a wall, the appellant again extended his building attaching it to the appellant's wall for support, thus blocking the boundary between the two pieces of land. That, irrespective of constant demand by the appellant for the respondent to demolish that part of the his house which to the appellant, it had trespassed into his land, the respondent did not heed to the appellant's demands and part of his house remained standing on the suit land suppoted by the appellants wall. The respondent insisted that, it is the appellant who has trespassed into his land, the said house was built long before the wall of the appellant that is to say since 1975. Dissatisfied with the respondent's resistance, the appellant rushed into the District Land and Housing Tribunal for Temeke and sued the respondent for trespass on his piece of land. His application was unsuccessful. Against this background, the appellant lodged the present appeal based on the following grounds.

1. That, the Honourable Chairman erred in framing the issues contrary to the statement of facts constituting the claim.

2. That, the Honourable Chairman failed to properly analyse the testimony and evidence of the appellant.

3. That, as a result of ground 1 and 2 hereinabove, the Honourable Chairman erred in law and in facts in dismissing the Land Application No. 48 of 2016 with costs and in ordering the demolition of the appellant's wall thereof.

The appeal was heard by written submissions, Advocate Stella Simkoko, appeared for the appellant while the respondent appeared in person.

Submitting on the 1st ground of appeal, the Counsel for the appellant argued that, the appellant's claim at the trial tribunal was that, the respondent had built his rooms learning on the appellant's wall and not ownership of the suit land. Therefore the trial chairman erred to frame the issue touching ownership, the proper issue in dispute should have been *"whether the respondent had built his rooms on the appellant's wall."* Therefore the issue framed was contrary to the statement of facts constituting the claim.

On the 2nd ground of appeal, the counsel for the appellant maintained that Honourable trial Chairman failed to comprehend that the act of the appellant to build the wall fencing his land was justifiable and further that, it was a short of sight on part of the respondent to expect that the appellant would prefer the guava and palm trees to mark the boundary forever. Therefore the respondent had no justification whatsoever to build his other rooms on the wall of the appellant.

On the 3rd ground of appeal, Advocate Stella insisted that, it is the respondent who has trespassed into the appellant's land therefore he is the one to be ordered to demolish his rooms leaning to the appellant's wall. She based her arguments on the case of **Hajji Bunbakali versus Peter Muhairwe and 11 others, Civil Suit No. 36 of 1999 (Uganda) at page**

3 and also the case of Justice E. M.N Lutaaya versus Stirling Civil Eng, Civ. Appeal No. 11 of 2002, where it was held that, trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of land.

In his reply to the submissions by the Counsel for the appellant, Mr Shaibu Juma Mzee, the respondent maintained that, the issues were framed according to the statement of facts constituting the claim.

On the 2nd ground, the respondent contended that the trial Chairman properly analysed the evidence and testimony of the appellant and other witnesses including DW2 and DW3 in reaching the decision. The respondent's house was built since 1975 and that was not disputed during the trial and therefore the cause of action of the suit exceeded 12 years which is beyond the statutory limit as far as claims of land are concerned.

On the 3rd ground of appeal, it was argued by the respondent that, the trial Chairman was right to dismiss the suit (Application No. 48 of 2016) with costs and further, the Honourable Chairman was right to order the demolition of the appellant's wall. The respondent was of the view that, the present appeal should be dismissed and the decision and orders of the trial tribunal should be upheld.

In her rejoinder, Advocate Stella, for the appellant insisted that, the reply submissions by the respondent on the three grounds of appeal contain

nothing other than evasive denials from the respondent. She went further to state that, the appellant's claim is not on the respondent's house which was built in 1975, but a side of his house(some rooms) which has trespassed into the appellant's land and has blocked the passage between the boundaries of the two plots. The said rooms were built after the appellant has built his fence. Advocate Stella insisted that there is a need of this court to take additional evidence as far as the dispute between the parties is concerned subject to Order XXXIX rules 27(1) (b), (2), rule 28 and 29 of the Civil Procedure Code, Cap 33 R.E 2002. The same position was adopted in the case of **Ismail Rashid versus Mariam Msati, Civil Appeal No. of 2015**. Also the decisions of **Evelyne Even Gardens NIC and the Hon. Minister, Federal Capital Territory and Two Other Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 and Akosile Versus Adeye (2011) 17 NWLR (pt 1276) p.263**, which were quoted in the case of Avit Thadeus Masawe (supra) where it was decided that:-

> *"Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence."*

I have gone through the records of the trial tribunal and considered the grounds of appeal together with the submissions of the parties in this appeal. Being a first appellate Court, I'm entitled to review the evidence on record to satisfy myself on the correctness of the findings by the trial District Land

and Housing Tribunal of Temeke as was stated in the case of **Standard Chartered Bank Tanzania Limited versus National oil Tanzania Limited and Another, Civil Appeal No. 98 of 2008 (unreported).**

I shall start with the first ground of appeal, where the appellant faulted the Honourable Chairman of the trial tribunal for framing the issues contrary to the statement of facts constituting the claim. With regard to this ground I find it appropriate to reproduce Order VIIIB rule 3 (4) of the Civil Procedure Code, Cap 33 R.E 2019 which provides guidance on how issues are framed in our courts of law:-

> *"Where an amicable settlement of the case is not reached pursuant to the provisions of sub-rule (1) of this rule, the judge or magistrate presiding at such conference, shall, after consultation with the parties or their recognised agents or advocates, make a final pre-trial conference order therein framing the issues according to provisions of Order XVII of this Code, and fixing the trial date or dates and generally providing for matters necessary for the expeditious trial of the case according to the relevant Speed Track".*

The records at hand from the trial tribunal show that the above provision was complied with as far as the framing of issues is concerned. The issues so complained by the appellant were framed on 20th February 2018, which was the first day of hearing of the suit at the trial tribunal. The same were framed in presence of the parties including the appellant who was the

applicant at the trial tribunal. He did not dispute the same and proceeded the same day to testify in favour of his case as PW1. Meaning thereby, the parties were consulted and agreed on the framed issues to form part of the issues in dispute.

The framed issues were:-

1. Who is the lawful owner of the disputed land,
2. Whether the respondent has trespassed into applicants land.
3. Reliefs

In essence, if that was the case, the appellant would be estopped from bringing this claims at this stage with regard to the framed issues. But the parties being unrepresented, though consulted, but may have not been in the position to understand the implication of framing proper issues. Thus the task falls on the court to ensure that the issues framed, if answered really disposes the dispute between the parties. This invites the court to determine the correctness/sufficiency of the issues framed.

The claim as per the plaint was "*the respondent has trespassed to the applicants plot by erecting his house depending the support of applicant's wall. As the result the respondent's building (house) has blocked the boundary of the two parties.*" So the dispute concerned the trespass by getting support on applicant's land and blockage of the boundary between the two properties. Examining the same with the issues framed, I find the 1st ground of appeal to be baseless. It is my view that, whenever an issue of

trespass is concerned, by necessary implication, the ownership of the trespassed land comes into question. Thus the trial court was right to frame the issue on ownership. Had it been that he ended his analysis on ownership alone, the claim that he did not determine the matter in dispute would stand. But in this case, the issue of ownership was not the only one framed as insinuated by appellant's counsel. There was also an issue whether the respondent had trespassed the appellant's land. And in my view, this second issue, that formed the core of dispute was well analysed by the trial court. At page six of the judgement, the trial court stated that:-

> *"The tribunal visited the suit land, and thereat, the respondent's house was found to have been attached by the fence wall ...constructed by the applicant. However, by mere looking on those structures, the applicant's fence wall looks to be more new than the respondents house which seemed to be more old; the fact which clearly shows that, it is respondent's house constructed recently than the respondent's house, as testified by the respondent, DW2, DW3 and the applicant himself..."*
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> *Due to that it is my firm view that the respondent has never trespassed into applicant's land and even it would have been found that the respondent indeed trespassed into the applicants land, yet for more that sixteen years which the respondent's house has been existed at the suit land bars the applicant to file this matter to claim the land*

which its cause of action has exceeded twelve years, which is statutory time limit to claim the land."

With the above passage in place in the trial courts record, it is my settled view that Ms. Stella's argument that the issue which was framed and determined by the court was wrong, is misconceive. The proposed issue by the appellant in his submissions in chief, to would have been a proper issue for determination at trial as to *"whether the respondent had built his rooms on the appellant's fencing wall"* is in essence the same with the issue whether the respondent had trespassed to the appellants, but in narrowed way. This is because, there was also a claim on a cross over appellant's land blocking the boundary, and thus the ownership of the alleged blocked boundary also came into question. Thus, the issue for determination before the trial tribunal was wider that just finding support on the wall of the appellant. The land subject of the dispute contained two structures as per the sketch map, a wall crossing over a building. It is obvious from the records therefore that, the dispute was also over the land that have the two structures mentioned herein above, and not on the two structures built over each other alone. Therefore, knowing who the rightful owner of the suit land was equally important in order to determine who trespassed on the said land among the two parties in dispute. So, focusing only on the trespass issue as done by the appellant is baseless. For that, the first ground of appeal is therefore devoid of merit it is dismissed.

Turning into the second ground. I have nothing much to say on this too as the same also lacks merit. I have read carefully the evidence on records from the parties and their witnesses. I have also studied the sketch map of the suit land. My findings are not different from those of the trial tribunal. It is unthinkable to believe that the respondent was the one who built his house into the appellant's wall, while the evidence on record including the testimony of the appellant himself (PW1 at the trial tribunal) show that the said house was there adjacent to the land which was sold to him by the respondent himself. The sketch map shows that the appellant's wall is joined on respondent's house from each side. The respondent's house as per the evidence has been there, on the suit land, since 1975. The evidence further show that, it is the appellant himself who is to be blamed for destroying the trees in place for marking the boundaries between the two lands (guava and palm trees). Had he constructed his wall leaving the guava and palm tree demarcation of the boundary intact, we would not be here fighting over a boundary. The issue of finding support in appellant's wall was well dealt with after being cross checked through site visit and finding that the respondents house was older that the appellant's wall, meaning that it is the wall that was joined in the respondent's house. Therefore, I see nothing wrong in the analysis of the evidence by the trial tribunal. The second ground is equally dismissed.

Lastly, the third ground of appeal that, based on outcome of ground one and two, the Honourable Chairman erred in law and in facts in dismissing the Land Application No. 48 of 2016 with costs and in ordering the demolition of

the appellant's wall thereof. Based on the way it was framed, it depended on the findings of the two grounds above. The above two grounds have been dismissed. Therefore, I will not waste much of my time to discuss the third ground of appeal in any detail. It will suffice noting that, this ground contains two parts, part on challenging dismissal of the suit with costs and another part challenging demolition order. For the first part given the outcome of the two grounds, it stands to be baseless as based on the findings in the above two grounds, it was right for the trial tribunal to decide the way it did, to dismiss the suit with costs. I therefore dismiss the first limb of this ground.

On the limb challenging the demolition order, I have a brief observation to make. In my view, there was no counter claim in the main suit, to warrant such order. The tribunal ordered on what was not prayed for in that suit. According to the trial court finding, the appellant is the one who joined his wall to the respondent's land and seem to be bothered by such joint at the same time. He then sued for demolition of the respondent's wall to clear the boundary he opted to close. This, to me, is a contradiction. The respondent seems not bothered by such closure, to the extent, he never claimed for any demolition. The prayer for demolition was from the appellant himself not the respondent. In such circumstance, in my view, the issue of clearing boundary should be left to the option of the one who closed it and at the same time demands its clearance, the appellant. There is no justification of forcing him to demolish part of his wall to clear the boundary while the opponent party is not bothered by the closure. Therefore, if he finds to be uncomfortable with joining of the two structures which is his own making,

he should detach the same by demolishing part of his wall, leaving the boundary free, otherwise he should get used to it, as it is a contradiction to dismiss his application, but ordering clearance of a boundary which the finding shows, he is the one who closed it. In the circumstances therefore, this decision of the trial tribunal is quashed and set aside. In the end, the holding is that the appeal lacks merits, save for the issue of demolition order as explained above.

Appeal partly allowed to the extent explained. No order as to costs.

M.P. OPIYO,

JUDGE

29/4/2020