

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

LAND APPEAL NO. 173 OF 2017

*(From the Decision of the District Land and Housing Tribunal of
TEMEKE District at TEMEKE)*

ATHUMANI H. NGOVI 1ST APPELLANT

IDDI J. ALLY 2ND APPELLANT

VERSUS

ZAINAB SUED MKOMWA RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI, J:

At the District Land and Housing Tribunal for Temeke ("The Tribunal") the respondent herein successfully sued the appellants herein vide Land Application No. 118/2013 ("the Application"). The dispute was on the trespass to the respondents land situated at Mbagala Kizuiani ("the suit property"). Dissatisfied with the decision of the tribunal, the appellants have lodged this appeal on the following grounds:

1. That the Honorable Tribunal erred in law and in fact by failing to analyse the sale agreement adduced by the appellant herein and carefully scrutinize their evidence against that of the respondent.
2. That the Honorable Tribunal erred in law and in fact by only relying the evidence of the respondent in respect of residential licence No.

037050 and disregard Residential licence of the appellants as the due shows vividly demarcation of the disputed land premises.

3. That the Honorable Tribunal erred in law and in fact by entertaining a matter which was not of its jurisdiction.

The appellants prayed for the following orders:

1. The appeal be allowed with costs.
2. The decision of the Tribunal be quashed and set aside
3. The proceedings in Application No. 118/2013 at the tribunal be declared nullity.
4. Costs be borne by the respondents.
5. Any other relief(s) this Honorable Court may be pleased to grant.

All parties appeared in person and unrepresented. In due course of this appeal, the court was informed that the respondent passed away and on the 04/06/2020, one Shabani Bakari Ngunga, the appointed administrator of her estate presented letters of administration and his name was ordered to be impleaded in the pleadings. On the same day, this court ordered the hearing to proceed by way of written submission. Fortunately all parties filed their submissions accordingly hence this judgment which, before I proceed to determine the grounds of appeal herein, I find it prudent that the brief background of the dispute is narrated.

At the tribunal, the respondent sued the two appellants over a piece of land to with; house No. TMK/MBG/KZN33/593 located at Mbagala Kizuiani, Temeke District of Dar-es-salaam city. The respondent alleged that the appellants are her neighbors who had trespassed into her land and erected

a building therein. On their part, the appellants herein (then respondents) claimed that the land belonged to them having legally purchased from one Dominic Nyakarunga on the 10/12/2005, a transaction which the appellants alleged to have been witnessed by the respondent. The appellants further claimed that they possess a Residential License over the disputed land with No. TMK007558 and a house built therein with No. TMK/MBGK/KZN33/590. Upon a full trial, the tribunal decided in favor of the respondent herein declaring the respondents as trespassers and ordering them to demolish their structure built in the suitland within 45 days of the date of the decision. Aggrieved by the said decision, the appellants have lodged this appeal on the aforementioned grounds.

In their joint submissions to support the appeal, the appellants submitted that, the trial tribunal failed to analyse the sale agreement (exhibit RI) which showed the boundaries. They argued that had the honorable tribunal carefully scrutinized that the sale agreement and the evidence by the neighbors (DW3 and DW4) who categorically stated that the boundary between the applicant and respondents was a "footpath" it would have arrived at a different conclusion and declare that the respondents were not trespassers into the applicants land. Further that the appellants even tendered a residential license, which the tribunal appreciated in its judgment but did not give it some weight.

The appellants submitted further that the residential license shows the demarcation between neighbors and that had the tribunal considered it together with the sale agreement and the witnesses (DW3 and DW4) mentioned herein above, it would have arrived at right decision and

declared that the appellants who were respondents did not encroach into the applicants land.

The appellants submitted further that the fact that the respondent herein produced a residential licence, could have been considered together with those of the appellants herein to indicate the demarcation between them. They argued that the tribunal did not consider the appellants' residential licenses and it relied only the respondent's evidence that the boundary marks were "Orange Tree and Muarobaini" instead of relying on the licenses of both parties which could show the exact boundary between them. Therefore, it was wrong for the tribunal to hold that the appellants trespassers into the respondents land without considering what is shown on both parties residential licenses.

In reply, the respondents submitted that the trial Tribunal properly analyzed the sale agreement tendered by the Appellants; the Respondent was a witness of the sale agreement. Further that the sale agreement does not disclosed or states the boundary mark between the two disputing sides. He argued that the Section 110 and 111 of the Evidence Act, Cap 6 R.E 2002, and place the burden of proof upon to the one who alleges. That the standard of proof in Civil matters is the balance of probabilities and in the trial tribunal the Respondent paraded three witnesses the respondent herself (PW1), one Dominic Nyakarunga (PW2) and Isabela Dama Dominic (PW3). That PW2 was the one who sold land to the Appellants who also blamed the Appellants to uproot the boundaries mark. Therefore, the trial tribunal analyzes the sale agreement and came to the conclusion that the evidence of the Respondent hold water to prove ownership of the sit land.

He submitted further that it is undisputed that both parties tendered their residential license of which were admitted by the trial Tribunal arguing that the trial tribunal was correct to determine the matter without putting into consideration of the residential license because the Appellants tendered the sale agreement which was basic and essential document of which was strongly to prove the ownership but the same sale agreement does not states the boundaries mark.

The respondent further argued that since the residential license does not state the boundaries mark between the parties and that the vendor of the appellants testified against them that they removed out the boundaries mark. He submitted that the trial Tribunal properly analyzed and evaluate the evidence on records and reached a proper and just decision that the respondent is the lawful owner of the suit land. His conclusive submissions were that the instant appeal is devoid of merit and the same deserve to be dismissed entirely with costs.

Having gone through the records of this appeal, it is apparent that the issue of ownership of the properties is not disputed as each party had a residential licences. The issue was on the size of the property of the parties to which the appellants are alleged to have trespassed to the respondent's land. As correctly pointed out by the respondent, neither the sale agreement nor the residential licences mention anything of the boundaries. So the best evidence should have come to the person who sold the land to the appellants to which the respondent was a witness. This person by name of Dominic testified as PW2 and his wife was PW3 and they all testified that the appellants trespassed into the respondents land. In my

strong view, this is the best evidence to have proved the actual size that was sold to the appellants.

On the other hand, the defence witnesses were only witnesses to the sale but the owner is the one in the best position to have testified on what was actually sold to the appellants. Since the former owner who sold the land to the appellants corroborated the respondent's evidence that her land was trespassed, then the tribunal was right to have reached its verdict.

Having made the above findings, I see no need to interfere with the findings of the tribunal. The appeal before me lacks merits and it is hereby dismissed with costs.

Dated at Dar es Salaam this 27th day of August , 2020



S.M MAGHIMBI

JUDGE