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

LAND APPEAL NO. 16I OF 2020
(Arising from the decision of Kinondoni District Land and Housing Tribunal at Mwananyamala in Land Application No.316 of 2018)

DIDAS MLYAUKI.....APPELLANT

VERSUS

PENINA CHRISTOPHER MGENI (suing under Special Power of Attorney).....**RESPONDENT**

Date of Last Order: 13.07.2021
Date of Judgment: 16.08.2021

JUDGEMENT

V.L. MAKANI, J.

This appeal is by DIDAS MLYAUKI. He is appealing against the decision of Kinondoni District Land and Housing Tribunal (the Tribunal) in Land Application No. 316 of 2018 (Hon. R.L. Chenya, Chairman).

At the Tribunal the respondent's complaint was that the appellant had constructed a wall on an open space which was used as a pathway to the respondent's house and neighbouring houses located at Makoka-Makuburu Street area, within Ubungo Municipality, Dar es Salaam

(the **suit land**). The respondent alleged that the appellant's continued blockage of the pathway resulted to the suffering and difficulties of the respondent and the neighbours to their houses. The respondent prayed for the wall blocking the pathway to be demolished and the pathway be maintained as it were before. In its decision the Tribunal partly allowed the application in that it declared that the respondent illegally blocked the applicant's/access to his/her house. The Tribunal also ordered the appellant to demolish the illegally built fence wall at his own costs; and that the pathway to the appellant's house should remain open and the same remain as it was in the previous state.

The appellant was dissatisfied with the decision of the Tribunal hence this appeal with the following grounds:

1. *That the trial tribunal erred in law and fact, to declare the appellant's suit land as an open space and used as a pathway to the respondent's house despite of strong documentary evidence which was self-sufficient proving the appellant's ownership.*

2. *That the trial tribunal erred in law and fact, to declare that, the appellant has trespassed to the open space, hence ordering demolition of his wall fence, while the same was not open area as it belonged to the appellant.*

The appellant also filed supplementary grounds of appeal as follows:

3. *That the District Land and Housing Tribunal erred to pronounce judgment and decree which resulted in a conflicting decision to Application No. 41/2015 on the same suit land from the same court despite of being admitted as Judicial Notice 1. Hence bad precedent in administration of justice.*

4. *The District Land and Housing Tribunal erred in law to declare the appellant trespass into open space without considering the "locus" of the respondent in question/demanding and/or claim over the open space.*

5. *The District Land and Housing Tribunal misdirected itself from the main issue before it, after declaring that the appellant had no building permit in the absence of claims from the relevant authority.*

The appellant prayed for the appeal to be allowed, the judgment and decree in Land Application No. 316 of 2018 be quashed and set aside, the appellant be declared the owner of the suit land, and that there is no open space or trespass committed by the appellant in his own land. The appellant also prayed for costs and any other relief(s) this court may deem fit and just to grant.

With leave of the court the appeal was argued by way of written submissions. The appellants submissions were drawn and filed by Mr. Gabriel M. Maros, Advocate; while Ms. Ester Shedrack, Advocate drew and filed submissions on behalf of the respondent.

In arguing the appeal Mr. Maros consolidated the first, second and third grounds and argued the remaining grounds separately. He said the appellant filed Land Application No. 41/2015 in the same Tribunal where the matter was resolved amicably, and a Deed of Settlement was filed, and a decree was extracted out of the settlement. He said the Tribunal acknowledged that the appellant was the lawful owner of the suit land with Residential Permit No. KND/MBR/MKO 20/37 in the appellant's name which was admitted as (**Exhibit D1**). He went on to say that section 110 (1)(2) of the Evidence Act CAP 6 imposes the burden of proof to the one who alleges that he/she must prove. He said the evidence by the respondent is not supported by documentary evidence to attest that the disputed area was an open space or pathway. He said the evidence by the appellant was very strong and ought to win the case as per the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113**. Mr. Maros pointed out that the Chairman confused a place being open (i.e. not yet with a structure/building) with an open space. He said the evidence of **PW1** and **PW2** in Land Application No. 41/2015 and the evidence by the appellant reveal that the area was open not an open space. He said the appellant had not built on the alleged open space because of

economic reasons, but there was no pathway. The respondent and the neighbours were passing through the appellants land for a long time without his consent or permission and this does not make the ownership be taken away from him as he had documentary evidence to prove the said ownership (**Exhibit D1**). He said the respondent did not tender anything to show that the suit land was an open space. He also said **DW2** testified to the effect that the appellant bought the suit land from one Pancras George one of the appellant's neighbour. Mr. Maros emphasized that it was wrong for the Chairperson to declare the suit land an open space while there was a decision in Land Application No. 41/2015 declaring that the appellant was the owner of the suit land and further that the Residential Licence (**Exhibit D1**) showed that the appellant was the owner of the suit land and there was no open space; and he insisted that he could not be a trespasser in his own land. He said Land Application No. 41/2015 declaring the suit land not an open space was tendered in Land Application No. 316/2018 and this sets bad precedent in the Tribunal having two distinctive judgments on the same suit land; one recognizing it as the appellant's suit land and the other as an open space.

As regards the issue of *"locus standi"*, Mr. Maros said an open space is anything which is not developed and is accessible to the public. He said in Dar es Salaam and for this matter Ubungo Municipality, open spaces are owned by the Local Authority, that is, the Ubungo Municipal Council. And since this is the case according to the Urban Planning Act No. 8 of 2007 and the Local Government (Urban Authorities) Act, 1982, the best party to sue ought to have been Ubungo Municipal Council vide its Director who is the custodian and not the respondent who does not have *locus standi* to claim either ownership or trespass of an open space as he is not the Authority. He concluded that the respondent had no right to bring action against an open area. He went on saying that the respondent is neither a spokesperson of the neighbours. He pointed out that it was improper and incompetent for the Tribunal to bring an action against an open space.

As for the fifth ground on the issue of building permit and absence of claims from the relevant authority, Mr. Maros said these were not the issues that were drawn for determination by the Tribunal. This were only assumed by the Chairman. He said if there were supposed to be there then the relevant Authority would have initiated the action and

not the respondent. With the above submissions and reasoning, Mr. Maros prayed for the appeal to be allowed with costs.

As regards to the three grounds of appeal as consolidated, Ms. Ester Shedrack submitted in reply that the argument that the applicant is the owner of the disputed premises is faulty understanding because going through the judgment of the Tribunal, the case was instituted for seeking a pathway to the respondent's house by demolishing a wall built by the appellant. She said according to the submissions by the appellant he obtained the suit land in 1987 and the said suit land was used by the respondents and neighbours until 2016 when he came to claim it. She said that meant that the pathway was used for 29 years and when the court visited the site the appellant failed to show an alternative pathway. She further said the cases referred as Land Application No. 41/2015 and Land Application No. 316/2018 are not similar in terms of the parties or the issues involved. She said the Tribunal properly made its judgment in consideration of the evidence on record and the arguments by the appellant are based on misconception and deserves nothing but dismissal.

Ms. Shedrack further submitted that the appellant himself in the proceedings declared that the suit land was an open space and was used as a pathway by the respondent and the neighbours though he further stated that the suit land belonged to him. He said the pathway had been used by the respondent and the neighbours for a long time that is, 29 years. He said the case of **Hemedi Said vs Mohamed Mbili** (supra) is distinguishable as the evidence was adduced at the Tribunal and the Tribunal visited the locus in quo to satisfy itself on the issues raised in court and that the findings were heavier and in favour of the respondent. Ms. Shedrack went on saying that the issue of open space was dealt with correctly at the Tribunal, the appellant failed to adduce evidence to corroborate or rather to supplement his residential licence as required by law in absence of which the Tribunal failed to demarcate the appellant's land.

On the ground of conflicting decisions, she submitted that these are two different cases. In Land Application No. 41/2015 the parties and issues framed are not similar and if such was the case, then the most recent decision prevails. She relied in the case of **Arcopar (O.M) S.A vs. Herbert Mavura & Family & 30 Others, Civil Application**

No. 94 of 2013 quoted in the case of **Zahara Kitindi & Dominic B. Francis vs Puma Swalehe & 9 Others** (unreported).

As for *locus standi,* Ms. Shedrack said that the appellant had an interest in the land because she had been using the pathway for a long time (29 years) and during these years the pathway was accessible to the public.

As regards the third ground Ms. Shedrack submitted that the contention that the Tribunal misdirected itself from the main issue after declaring the appellant had no building permit is illogical because the disputed area is not the respondent's premises but a pathway to her house. The respondent was therefore not obliged to show a building permit. She said the main issue before the Tribunal was the wall built in the pathway; and the Tribunal directed itself on this issue as it was the subject matter of the case.

On the issue of boundaries Ms. Shedrack said that the area was left open for 29 years and all that time the same was used as a pathway. She prayed for the court to dismiss the appeal for lack of merit so that the appellant can demolish the wall and leave the pathway open

to allow the respondent to access her right of way to and from her house as was before.

Mr. Maros reiterated the submissions in chief and further emphasized that the learned Counsel for the respondent is confusing between open space, open and/or ownership as far as the disputed suit land stand. He insisted that the suit land had neither been an open space nor pathway area by the respondent and her neighbours. He said the judgment (**Judicial Notice 1**) and **Exhibit D1** are conclusive evidence that the suit land belonged to the appellant. He said according to the judgment there is no open space, and the appellant cannot trespass in his own land. He said there is an issue of *"locus standi"* of the respondent to question on the open space which does not belong her. He insisted that the issues framed were not on boundaries but rather on the open space. He clarified that the conflicting decisions that is in Land Application no. 41/2015 and Land Application No. 316/2018 is that the suit land that was declared to be owned by the appellant in the former case is the same that has been declared an open space by the Tribunal in the latter case. He said the Chairman disregarded the former decision, and he pointed out that having the two contradictory decisions would cause chaos in

execution of these decisions hence bad precedent in administration of justice. He prayed for the appeal to be allowed and the court to set aside the judgment and decree in Land Application No. 316/2018.

I have gone through the submissions by Counsel for the parties and the records of the Tribunal. In so doing, I have been guided by the principle that this being a first appellate court, it has a duty to reconsider and evaluate the evidence on the record and come to its own conclusion bearing in mind that it never saw the witnesses as they testified. See the cases of **Audiface Kibala vs. Adili Elipenda & others, Civil Appeal No. 107 of 2012, (CAT-Tabora)** and **Maramo Slaa Hofu & others v. Republic, Criminal Appeal No. 246 of 2011 (CAT-Arusha**) (both unreported).

In arguing the appeal both Counsel consolidated the three grounds of appeal and argued the fourth and fifth grounds separately. I will follow the same pattern. Looking at the three grounds as consolidated they all revolve on whether the Tribunal properly evaluated the evidence before it.

There is no dispute that the appellant and respondent are neighbours, and that the respondent was the first to build a house in the area. Unfortunately, it took time for the appellant to build on his allocated land and so the respondent and neighbours passed through the appellant's land to their houses. The respondent in his evidence at the Tribunal and even in the submissions in this court does not deny that the land in dispute belongs to the appellant, her main claim is that the appellant was not on the suit land for 29 years and so a pathway was created therefore the appellant cannot build a wall on the said pathway. In ordering the demolition of the wall, the Chairman stated that the Residential Permit No. KND/MBR/MKO 20/37 is not conclusive proof that the suit land belonged to the appellant it had to be supplemented by an agreement. But without prejudice to the honourable Chairman, a Residential Permit as is the case with Certificate of Title or Offer Letter is conclusive proof of ownership of property. According to Section 2 of the Land Registration Act CAP 334 RE 2019 the word "owner" means:

> *"in relation to any estate or interests the person for the time being in whose name that estate or interest is registered."*

This position was replicated in the case of **Salum Mateyo Vs. Mohamed Mateyo (1987) TLR 111.** This means, any presentation of a registered interest in land is a prima facie evidence that the person so registered is the lawful owner of the said land. The position was reiterated in the case cited of **Amina Maulid Ambali & 2 Others vs Ramadhani Juma Civil appeal No. 35 of 2019 (CAT-Mwanza)** where the Court of Appeal stated:

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

In the present case the Residential Permit (**Exhibit D1**) was proof that the appellant was the owner of the suit land. And this has also been confirmed by the decision of the Tribunal in Land Application No. 41/2015 (**Judicial Notice 1**) where there was a Deed of Settlement between the appellant, Kinondoni Municipal Council and one Alen Frank Mrema.

Now, looking at the map which is part of **Exhibit D1** there is nothing like an open space. The land allocated to the appellant as per the said **Exhibit D1** covers the whole area and there is no indication whatsoever that there is an open space. Regrettably, the Tribunal on

its visit to the *locus in quo* did not make any observations as to what was found on site. There is a flimsy diagram on record, that is not titled or dated, presumably it was a draft and therefore not of assistance to the court. In my considered view, and as was opined by one of the assessors, Mr. Mbakileki, there is no open space and I hold as such. If at all there was an open space then **Exhibit D1** would have clearly indicated so. As explained by Mr. Maros, which explanation I subscribe, an open space is land for public use but the land that was open for 29 years was land that was not developed by the owner and in this case the appellant. Since it is the court's finding that there is no open space at the suit land, then the suit land belongs to the appellant and the use of the pathway by the respondent on the suit land without the consent of the appellant is illegal.

Having established that there is no open space, it is apparent that the appellant is not a trespasser. The Chairman pointed out the appellant had not obtained a permit to erect the wall. However, this was not one of the framed issues by the Tribunal and in any case, none of the parties had an opportunity of addressing the court on this issue. This is a fatal error which cannot be cured at this stage. In all, the Chairman failed to critically analyse the evidence. If he had done so I

am quite sure he would have come to a different position. These grounds of appeal therefore have merit.

Having established that there is no open space I do not find it necessary to deal and determine the ground on *locus standi.*

Before I conclude I would wish to point out that this is one among the cases which portrays unrelenting hearts. As neighbours, the parties herein ought to have amicably resolved the matter for the benefit of them all and to save the court's time. The present case in my view was an issue for the parties to discuss and agree on the way forward; it was not even supposed to reach this stage of appeal.

In the result the appeal is allowed with costs. The decision of the Tribunal in Land Application No. 316 of 2018 is quashed and set aside. It is hereby declared that, the suit land is not an open space, and the appellant herein is the owner of the said suit land hence not a trespasser. It is so ordered.

V.L. MAKANI
JUDGE
16/08/2021