

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 78 OF 2020

(Arising from the decision of District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 56 of 2019 originated from Wazo Ward Tribunal in Land Case No. 15 of 2019)

IMAMU SALEHE HAMISI APPELLANT

VERSUS

LAZARO NICHORA RESPONDENT

JUDGMENT ON APPEAL

Date of Last Order: 25/08/2021

Date of Judgment: 07/9/2021

A.MSAFIRI , J

This appeal traces its origin from the decision of the Wazo Ward Tribunal in Land Case No. 15 of 2019 wherein the appellant sued the respondent for encroaching his piece of landed property. However, the Ward Tribunal decision was not in his favour on the reason that the piece of land claimed to be encroached does not belong to the appellant nor the respondent but rather one Passiani Isidory Kavishe who testified as witness of the respondent who gave it away as pathway to other neighbours. He then appealed to the District Land and Housing Tribunal for Kinondoni at Mwananyamala so that to overturn the Ward Tribunal decision via Land Appeal No. 56 of 2019, even so the odds were against him as the District Tribunal ended up blessing the Ward Tribunal decision by dismissing his appeal on the reasons that the evidence of Passiani Isidory was never challenged.

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The appellant being aggrieved by the District Land and Housing Tribunal decision he has now filed the second appeal to this Court. By way of the petition of appeal on this matter the appellant raised three grounds of appeal, that is;

- 1. That, the Trial Tribunal erred in law and fact, by reaching into the decision in favour of the Respondent without taking into consideration of the witness statements and evidence adduced by the Appellant.*
- 2. That, the Trial Tribunal erred in law and in fact by denying a request of making a status in quo since the appellant is blind and to satisfy itself the exceeded of 10 meters by Respondent.(sic)*
- 3. That, the Trial Tribunal failed to consider that the appellant stayed to the land since 2006.*

Therefore, the appellant prayed for the appeal be allowed, an order of setting aside the decision of ward and district Tribunals, being declared as the lawful owner of the disputed land and any other relief(s) this court deemed fit. In the conduct of this appeal, the matter was argued by way of written submissions. The appellant enjoyed the legal aid service of Legal and Human Right Centre (LHRC), while the respondent appeared in person.

According to the appellant's submissions, beginning with the first ground of appeal, he submitted that, despite being blind, he had produced strong evidence that he has occupied the suit land without any disturbance even when the respondent was purchasing his plot, the appellant was a witness. That before the ward tribunal, the appellant was able to see unlike now and he showed the disputed area of which the

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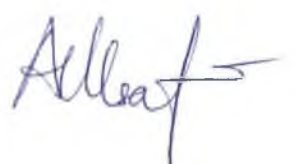
respondent exceeded 10 meters from the original boundary and constructed a wall. He is of opinion that he has proved his case on standard provided for under Section 110(1) of the Evidence Act, Cap. 6 R.E 2002.

On the second ground of appeal, he contested that, he made a request before the trial Tribunal to conduct locus in quo so that to satisfy itself that the respondent exceeded 10 meters, and the tribunal did not focus on factors for conducting locus in quo as it came up with new factors which were not requested by the parties. He cited the case of Avit Thadeus Massawe vs. Isidory Assenga, Civil Appeal No. 6 of 2017 to strengthen his argument.

Lastly on the third ground of appeal the appellant simply insisted that the trial tribunal failed to consider that the appellant enjoyed the piece of land for 15 years way before the respondent become his neighbour.

In response to the appellant's submission, the respondent strongly contested that the appeal lacks merit and it should be dismissed with costs.

For the first ground of appeal, he submitted that the appellant evidence was never backed up with any witness who can prove his ownership nor documentary evidence to support the same while on the other hand the respondent proved his case by bringing witness one Passian Isidory Kavishe who gave out the said piece of land as a path. He further argued that being in disputed land can be good in law if one wants to establish the point of adverse possession or limitation of time to sue but not knowing the boundaries of the suit plot.



For the second and third grounds of appeal, he replied that, the Appellant is misleading the Court, according to him the trial tribunal granted his application to visit locus in quo and they made discovery that the appellant was totally wrong. He further argued that the sale agreement proves the respondent to have purchased the suit land in the year 2006. There was no rejoinder from the appellant.

I have taken time to read the submission of both parties and summarized them briefly in above, and, I have carefully examined the court records. Before I endeavor upon determining the merit of this Appeal, it came across my attention that in capacity of second appellate Court I can either deal with the issue raised at trial tribunal which have not been dealt with at the 1st appellate Court or address the grounds of appeal as they are. In the case of **Melita Naikiminjal & Loishilaari Naikiminjal vs. Sailevo Loibanguti (1998) TLR 120** at page 130 Hon. Nyalali CJ. (as he then was) said;

"We are however, of the considered opinion that an appellate court so long as it grasps the essence of the case before it, has discretion to summarize the case and the grounds of appeal for purposes of conciseness and clarity".

Based on the wisdom of the above decision, I will simply deal with the grounds of appeal generally. It is my considered opinion that the main challenge on this appeal is on the weight of evidence between documentary evidence and oral evidence. In civil cases, the burden of proof is laid down under sections 110(1) and 111 of the Law of Evidence Act, Cap 6 RE 2009 which provides inter alia:-



S. 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"*.

S.111; *"The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side"*.

It is from this point that I feel the need to re- evaluate the evidences of the two decisions of lower courts basing on the evidence on records. I am of the view that the main issue for determination in this appeal is a dispute on boundaries and not ownership. The appellant sued the respondent for encroaching piece of land, the evidence presented before the ward tribunal is his own testimony, there is no witness or any documentary evidence to corroborate the appellant evidence. On the other hand the respondent presented sale agreement marked as exhibit " 5" and one witness who appeared to have been the neighbor to both parties. It further it was shown on records that, the Ward Tribunal visited the land in dispute on 27/02/2019 and this is shown clearly at page 2 of the Ward tribunal proceedings.

It is a settled law that a party with heavier evidence must win. This was elucidated in the case of **Hemedi Said vs. Mohamedi Mbilu** (1984) TLR 113 where it was stated that;

"according to the law both parties to law suit cannot tie, but the person whose evidence is heavier than the other is the one who must win"



In this case the respondent does not object that the purported encroached land in dispute initially was not his but the land belongs to his neighbour one Passiani Isidory Kavishe, who gave it away as a path to his neighbours including the respondent and appellant. In his own word Mr. Kavishe stated in his testimony that;

"mimi ni jirani wa wote wawili..... Tumeuziwa na mtu mmoja.... Wakati tunanunua kulikuwa na barabara moja baadae kuna mtu aliuziwa akaziba.... Mimi nikajitolea eneo langu ili mdai/mdaiwa wapate njia ya kuingia kwao ambayo inatokea barabara ya nyuma upande mwingine. nikaachacha nafasi kwa kurudisha eneo langu nyuma na kuacha mita 4....."

From this testimony it is clear that Passian Kavishe raised a concern as the owner of the land in dispute in which the respondent do not object to the said testimony, on the other hand the appellant failed to bring any witness to support his claim neither documents to prove his claim. The respondent has provide the Court with a heavier evidence which has not been rebutted by the appellant.

That means at all times during trial, the appellant's claims were not backed by any evidence that would have proved them. For instance, the appellant complained that his part of land was encroached by the respondent. Neither could he prove that he owned the encroached piece of land nor did he bring any witness to discredit the evidence of the respondent and his witness who claimed to be the lawful owner of the piece of land which he gave away as path way to his neighbors including the appellant himself. The appellant did not discredit the respondent's evidence that his properties have direct connection to the land in dispute.



Furthermore, the Ward Tribunal visited the land in dispute and its finding was in the line with the respondent's witness. On those findings, I have no reason to interfere with the findings and decisions of the trial Tribunal and the District Land and Housing Tribunal exercising appellate jurisdiction. I thus find that this appeal lacks merits and is hereby dismissed in its entirety with costs.

Appeal dismissed. Right of appeal explained.



A handwritten signature in blue ink, appearing to read "A. Msafiri", is written over a horizontal dotted line.

A. MSAFIRI
JUDGE
07/9/2021.