

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 247 OF 2020

(Arising from Land Application No. 266 of 2019 from the District
Land and Housing Tribunal for Ilala at Ilala)

ROBERT B. MAPESI..... APPELLANT

VERSUS

MICHAEL NYARUBA RESPONDENT

JUDGMENT

Date of Last order: 16.06.2021

Date of Judgment: 16.07.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land located at Karakata Mji mpya Shina Na. 3 along Msimbazi River village within Kipawa Ward at Ilala

District. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal in Application No. 266 of 2019.

The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant claimed that in 1997, he bought the suit land from one Seleman Daudi and since then he has been enjoying the occupation until 2015 when the respondent purchased land adjacent to his land.

The appellant alleged that the respondent invaded and fenced his parcel of land and fenced, cut down trees, and demolished part of his fence. The appellant instituted a case at Kipawa Ward Tribunal where his case was dismissed for want of jurisdiction and thus lodged an application before the District Land and Housing Tribunal for Ilala seeking the tribunal to order the respondent to vacate possession of the appellant's piece of land and to pay him compensation in a tune of Tshs. 10,000,000/=. The District Land and Housing Tribunal for Ilala decided in favour of the respondent.

Believing the decision of the District Land and Housing Tribunal for Ilala was not correct, the appellant lodged an amended petition of appeal containing three grounds of appeal as follows:-

- 1. That, the Hon. Trial Chairman of the Tribunal erred in law and in fact by holding that, the disputed area is within the reserved Mismbazi River Bank thus it cannot be owned by any one.*
- 2. That, the Hon. Trial Chairman of the Tribunal erred in law and in fact by dismissing the appellant suit without considering the evidence in record as adduced by the appellant together with his witnesses that proved ownership of the disputed area by the appellant.*
- 3. That, the Hon. Trial Chairman of the Tribunal erred in law and in fact by dismissing the appellants suit based on contradictory and unauthenticated evidence by the respondent.*

When the matter was called for hearing before this court on 12th April, 2021, the appellant had the legal service of Mr. Andrew Miraa, learned counsel whereas the respondent enjoyed the legal service of Mr. Dustan Nyakambo, learned. Hearing of the appeal took the form of written

submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant's Advocate filed his submission in chief on 17th May, 2021 and the respondent's Advocate filed his reply on 31st May, 2021 and the appellant's Advocate filed a rejoinder on 7th June, 2021.

Mr. Miraa, learned counsel for the appellant in his written submission, on his first ground, complained that the trial Chairman erred in law and fact by holding that the disputed area is within the reserved Msimbazi River Bank thus it cannot be owned by anyone. The learned counsel for the appellant stated that the evidence on record shows that the disputed area is nearby Msimbazi River. He complained that the findings of the tribunal are contrary to what parties testified during the trial. To support his claims he referred this court to the appellant's testimony who testified that his premises is three hundred meters from the Msimbazi River and the Ward tribunal findings did not show that the disputed area was within the reserved Msimbazi river valley.

Mr. Miraa went on to testify that the respondent testified that the appellant's premises was approximately three hundred meters from the

Msimbazi River valley and DW2 and DW3 testified the same that the disputed plot was nearby Msimbazi river. He argued that the tribunal found that the disputed area is facing the Mzimbazi River and concluded that the same is within the reserved river. To support his submission he referred this court to page 9 of the tribunal's judgment. The learned counsel for the appellant went on to testify that the tribunal visited locus in quo and it did not show that the disputed area is within Msimbazi River Valley, instead, the disputed area is triangular measured 20 x 18 meters, no other details were made to prove that the disputed area was within the Reserved Msimbazi River Valley.

It was Mr. Miraa further submission that the judgment did not contain an evaluation of the entire evidence and it was not reasoned. To bolster his submission he cited the case of **D.B Shapiya and another v Mek One and General Trader and another**, Civil Appeal No. 197 of 2016 (unreported).

Submitting on the second ground, that the trial Chairman erred in law and fact by dismissing the appellants' suit without considering the

evidence on record that proved that the appellant was the owner of the disputed plot. Mr. Miraa contended that the appellant and his witnesses' adduced evidence to prove that he is the legal owner of the disputed property. He went on to argue that the evidence reveals that the appellant purchased the disputed plot located at Kipawa measuring 35 x 35 approximately one and a half acres from Selemani Daudi in 1997. He went on to argue that the respondent is the one who invaded the appellant's property. Mr. Miraa refers this court to the evidence of PW1, PW2, and PW3. He further argued that the former owner of the respondent's property stated that the current owner had extended the original borders which suffice to conclude that it was true that the disputed property belonged to the appellant.

Mr. Miraa urged this court to re-evaluate the evidence on record. To support his position he cited the case of **Demmay Daati and two others v Republic** [2005] TLR 133.

On the third ground, the appellant complained that the trial Chairman faulted himself by dismissing the appellant's suit based on contradictory

and unauthenticated evidence by the respondent. He argued that there is a variation of measurements on the size of the appellant's plot. He stated that the valuation report which was tendered by the respondent at the trial tribunal shows the respondent's property to be of different sizes from the one shown in annexure 4 (Exh.D3). He further argued that a person cannot own a property that has two sizes. In his view, he stated that contradiction is not minor and it goes to the root of the case. To support his submission he referred this court to the Book of Law of Evidence 21st Edition Reprint 2005 by Raataalal & Dhijardlala. Insisting, he argued that since the documents provided by the respondent are contradictory then the same is unreliable and thus the tribunal erred in making its decision based on the said documents.

As to the fourth ground, that the trial tribunal erred in dismissing the land application without considering the findings of the site visit. The learned counsel for the appellant contended that it was the tribunal's findings that the visit was not sufficient to warrant the tribunal to decide in favour of the appellant he lamented that many facts were not included

in the proceedings. The learned counsel for the appellant went to submit that the Ward tribunal report after the site visit concluded that the disputed plot was not within the reserved Msimbazi River Valley while the District Land and Housing Tribunal during the site visit had a different finding. He complained that the procedure during and after the site visit was not complied with. Fortifying his position he cited the cases of **Nizar M.H v Gulamali Fazal Janmohamed** [1980] TLR 29 and **Avit Thadeus Massawe v Isidory Assenga**, Civil Appeal No.6 of 2017.

With respect to the fifth ground, the appellant complained that the trial tribunal erred in law and fact by not awarding damages to the appellant to a tune of Tshs. 10,000/=. He lamented that the evidence on record reveals that the appellant's wall was demolished by the respondent when he was trespassing into his property. The learned counsel for the appellant stated the appellant's witnesses who testified that they saw the respondent and respondent's wife ordering the demolition of the appellant's wall. He claimed that the appellant suffered loss. He cited the case of **Razia Jaffar Ali v Ahmed Mohamed Sewji & Five Others**

[2006] TLR 433 and Order XX Rule 4 of the Civil Procedure Code Cap.33 [R.E 2019]. He blamed the tribunal Chairman for reaching such a decision without addressing each and every issue framed during the trial.

In conclusion, the learned counsel for the appellant urged this court to allow the appeal and quash the decision of the District Land and Housing Tribunal for Ilala with costs.

Opposing the appeal, the learned counsel for the respondent from the outset submitted that the appeal is demerit. He opted to combine the second and third grounds of appeal and argue them together because they are intertwined. He also opted to argue the first, fourth and fifth grounds separately.

On the first ground, he valiantly argued that the evidence on record at the trial tribunal was not only realistic but also reasoned. The learned counsel for the respondent went on to submit that the Chairman critically analysed the evidence on record. He referred this court to the four principles in deciding cases as it was held by the Court of Appeal of

Tanzania in the case of **Said S/O Salum v Republic**, Criminal Appeal No. 499 of 2016 (unreported). He went on arguing that the evidence adduced at the trial tribunal includes documentary evidence and exhibits and the same narrated clearly that the appellant's premises are three meters from Msimbazi River Valley and the respondent's house is closer to Msimbazi River Valley. He went on to state that the government authorities have the power to demarcate hazardous land and protecting it. He referred this court to section 7 of the Land Act, Cap. 113 [R.E 2019].

Submitting on the second and third grounds, he contended that the trial tribunal judgment is self-explanatory thus there was no any contradictory evidence. He claimed that the appellant's witnesses' testimonies were not strong enough to prove the location of the disputed triangular area which they claimed that the respondent invaded and trespassed it. He went on to state that the appellant's claims were untrue since PW2 narrated the story well thus the same was not hearsay evidence. He went on to state that PW4 testified to the effect that the disputed plot was on the respondent's side. He stated that the appellant

failed to establish that the disputed triangular portion of land is on his farm. Insisting, he stated that no one was able to testify clearly that the disputed area was located in the appellant's farm.

The learned counsel for the respondent went on to complain that the appellant's allegations that the respondent invaded his plot were not proved on the standard of probabilities since the applicant's witnesses' evidence was contradictory. He urged this court to disregard the appellant's appeal.

Submitting on the fourth ground, he urged this court not to consider the appellant's Advocate contentious that the procedure of site visit at the Ward Tribunal did not comply. He lamented that the learned counsel for the appellant was required to rely on the evidence on record and not the story of the appellant. To support his submission he referred this court to the trial Ward Tribunal proceedings dated 01st April, 2019.

On the fifth ground, the learned counsel for the respondent contended that the award of compensation is required to be substantiated by

evidence, short of that the same cannot justify being an award. He also claimed that everyone who wants to rely upon and the basis of which such party wants to obtain judgment must be proved. He referred this court to section 110 of the Evidence Act, Cap.6 [R.E 2019] and the case of **Anthony Ngoo & Davis Nathony Ngoo v Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported) and the case of **Michael Nyaruba v Shaibu Mawazo**, Civil Appeal No. 87 of 2014 (unreported).

On the strength of the above submission, the learned counsel for the respondent urged this court to dismiss the appeal for lack of merits.

Reiterating what he submitted in submission in chief, the learned counsel for the appellant argued that there is no evidence that supports the tribunal's findings that the disputed area is within 60 meters from the Mismbazi River Bank. Insisting he argued that the trial Chairman did not consider the evidence on record and his decision was based on contradictory evidence. He valiantly submitted that exhibits D1 and D2 were forged and unreliable and the sketch map of the land he sold was not part of the sales agreement made during a sale of his farm.

On the strength of the above submission, the appellant's Advocate beckoned upon this court to quash the decision of the appellate tribunal and allow the appeal.

Having summarized the submissions and arguments by both learned counsels, I am now in the position to determine the grounds of appeal before me. In my determination, I will consolidate the first, second, and third grounds because they are intertwined. Except for the fourth and fifth grounds which will be argued separately in the order they appear. I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in the case of **Hemedi Said v Mohamedi Mbilu (1984) TLR 113**, which requires, "*the person whose evidence is heavier than that of the other is the one who must win*". In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Ilala.

On the first, second, and third ground the appellant complained that the trial tribunal erred in law and fact by holding that the disputed area is

within the reserved Msimbazi river bank thus it cannot be owned by anyone. The appellant also complained that the District Land and Housing Tribunal erred in law and fact by dismissing the suit without considering the evidence on record and based its decision on contradictory and unauthenticated evidence.

I have perused the Tribunal proceedings and found that the appellant testified that he purchased a disputed area measuring half an acre and the same is located along Msimbazi River. The appellant went on to testify that the disputed area is triangular shape whereby the respondent encroached on his plot and constructed a fence wall on the Northwest side. PW2, a former ten cell leader testified to the effect that the appellant informed him that the respondent encroached the appellant's plot. PW2 testified to the effect that he witnessed the appellant's beacon were uprooted. PW3, the one who sold the plot to the respondent, the plot neighbouring the appellant's plot testified to the effect that the respondent constructed a fence wall extending to the applicant's part of his plot.

On his side, the respondent testified to the effect that the disputed area borders the Msimbazi river/ stream or is facing the reserved Msimbazi river 60 meter area which the appellant has no right to claim ownership. DW2 and DW3 had a similar testimony, they testified that the respondent constructed a fence facing Msimbazi river in order to avoid soil erosion and waterflood thus no one trespassed others plot.

I hesitate to subscribe to the appellant's Advocate and the respondent's Advocate contentions on this grounds since the evidence on record points out that on the appellant's side they are claiming that the area belongs to the appellant and the respondent's side they claim that the disputed area is no one lands. The appellant on his side banked on the sketch map which was tendered at the tribunal. However, the same shows the disputed area without pointing to the Msimbazi river border. In such a situation where the issue of border or demarcation is concerned the tribunal visited locus in quo to certify itself whether the disputed area is a reserved area or otherwise. The same will be addressed in the fourth and fifth grounds of appeal.

As to the fourth ground, that the tribunal faulted itself for dismissing the Land Application without considering the findings of the site visit. The records reveal that the Chairman in his judgment mentioned that the tribunal visited the locus in quo and both parties described the disputed area and the same is a triangular shape measuring 20 x 18 x 26 meters. I have read the original trial tribunal proceedings, the tribunal visited locus in quo on 11th September, 2020 and they drew a sketch map which shows that the appellant's and respondent's plots face the Msimbazi River and the disputed area is triangular in shape which is beside the respondent's plot side. According to the drawing made by the tribunal, I hesitate to believe that the disputed area belonged to the appellant. I am saying so because the area is along the Msimbazi river on the respondent's side.

Consequently, I am in accord with the tribunal findings and the respondent's Advocate submission that the triangular disputed area is hazardous land and it is beside the respondent's area, the same cannot declare someone's land. Therefore this ground is demerit. The Chairman evaluated the evidence and in his final analyses he found that the appellant did not prove on the standard of probability that he is a lawful

owner of the area of the dispute which faces the Msimbazi. Therefore I am not in accord with the appellant's Advocate that the judgment lacks the ingredients of a good judgment.

With respect to the fifth ground, the appellant is complaining that the tribunal erred in law and fact by not awarding damage in a tune of Tshs. 10,000,0000/= while there was evidence on record that the property was damaged by the respondent in the course of trespassing into his property. I fully subscribe with the learned counsel for the respondent's contentions that the award of compensation is required to be substantiated by evidence, short of that the same cannot justify being an award. The appellant's complaints were not supported by any cogent documentary evidence. The appellant testified to the effect that the respondent trespassed the appellant's plot and uprooted the beacon. The sketch map (Exh. P2) did not show the area where the beacons were uprooted.

The appellant's witness PW2 during cross examination stated that he does not the exactly boundaries of the parties and when PW3 was cross examined he also testified that the sale agreement did not indicate the

boundaries of the plot. Therefore if the borders were not identified or clearly explained by the appellant how could the tribunal decide in his favour? The cited case of **Michael Nyaruba** (supra) is similar to the findings of this court. In Nyaruba's case like the case at hand the issue for discussion is general damage whereas the same is awarded after proof of the claimed amount. The Court of Appeal of Tanzania in the case of **Anthony Ngoo** (supra) stated that the general damages are awarded by the trial judge after considering and deliberating on the evidence on record able to justify the award. In the instant appeal, the tribunal analysed the evidence on record and reached its decision that the appellant did not prove his case.

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evidence on record and reached its decision that the appellant did not prove his case.

For the reasons given above and as stated earlier, one of the canon principles of civil justice is for the person who alleges to prove his allegation. That is in accordance with the elementary principle of he who alleges must prove as embodied in the provisions of section 110 (1) of the Evidence Act [Cap. 6 R.E. 2002] and in the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Applying the above authority of the law, I have to say that I do not think the appellant proved this allegation to the required standard; a standard higher than the balance of probabilities - not even on the balance of probabilities. Thus, I find no iota of truth in the appellant's complaint.

In consequence, I find that there is no merit in these grounds of grievance. That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the tribunal findings. Therefore, I proceed to dismiss the appeal without cost.

Order accordingly.

Dated at Dar es Salaam this date 20th July, 2021.



A.Z.MGEYEKWA
JUDGE
20.07.2021

Judgment delivered on 20th July, 2021 via audio teleconference whereas Mr. Andrew Milla, learned counsel for the appellant and Mr. Nyakambo, learned counsel for the respondent were remotely present.



A.Z.MGEYEKWA
JUDGE
20.07.2021

Right of Appeal fully explained.