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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLENEOUS LAND CASE APPEAL NO. 47 OF 2019

(From Appeal Judgment of District Land and Housing Tribunal for Kinondoni, at Mwananyamala, Land Case Appeal No.54 of 2017, originating from the Ward Tribunal of Saranga Ward in Application No.21 of 2017)

SETH G. MBUYA.....APPELLANT

VERSUS

RUACHI A MATEMBA.....RESPONDENT

JUDGMENT

OPIYO J.

It has always been the position of law in contentions in court that, parties to the suit cannot tie but a person whose evidence is heavier than the other is the one who must win **{see Hemed Said versus Mohamed Mbilu (1984), TLR 113}.** This appeal is all about how the two lower tribunals (the District Land and Housing Tribunal for Kinondoni, referred as the 1st appellate court) and the trial tribunal (Saranga Ward Tribunal), complied with the above stated rule as far as the dispute between the appellant, Seth G. Mbuya and the respondent Ruaichi A. Matemba is concerned.

The background of this dispute dates back to 2001. The appellant had bought a piece of land from one Joseph Kessy. The respondent also bought a piece of land from the same seller, Joseph Kessy in same year, 2001, therefore they became neighbors as their plots were adjacent to each other,

but with known demarcations as stated by the one who sold the said plots to them. However, according to the appellant, when the respondent was developing her land, she trespassed into the appellant land, resulting to this dispute. The appellant approached the trial tribunal vide Application No. 21 of 2017, complaining about the trespass act by the respondent by erecting a fence wall, toilet and septic tank on the his land. The decision of the trial tribunal was in his favour. The respondent successfully appealed against the decision of the trial tribunal before the 1st appellate tribunal. Dissatisfied with the decision of the 1st appellate tribunal, the appellant has now preferred the instant appeal with four grounds, mainly faulting the improper evaluation of evidence by the first appellate court leading to overturning the decision of the trial tribunal who saw the respondent as a trespasser.

The appeal was heard by written way of submissions. Advocate Lusajo Willy appeared for the appellant while the respondent enjoyed the legal services of Amin M. Mshana, learned counsel.

Advocate Lusajo submitting for the appellant, consolidated grounds 1,2 and 4 and argued them together that, the 1st appellate tribunal failed to confine itself on the relevant issues of the dispute between the parties. The main issue at the trial tribunal was trespass by the respondent into the appellant's land by 1½ meters. He stated that, as long as the testimony of the seller proved that, the testimonies of other witnesses were worthless compared to that of the seller.

On the 3rd ground of appeal, the appellant's counsel maintained that, the 1st appellate tribunal was wrong when it disregarded the evidence of the seller

in its decision without giving any reasons for so doing. He contended that, since, he is the one who sold the land to both parties, his evidence was the most valuable as far as the demarcations of the two plots was concerned. That, the testimony of the seller went unchallenged at the trial tribunal and that amounts to admission as stated in **Kanisius Peter Marwa versus Republic, Criminal Appeal No. 306 of 2013, TLSR, page 374,** he argues.

Mr. Mshana for the respondent replying to the submissions by the appellant's counsel was of the view that, the 1st appellate tribunal was right to overrule the decision of the trial tribunal. He argued that, the evidence of the seller one, Joseph Kessy was unreliable, since, it did not even mention the size of the land he sold to the respondent. Above all, the 1st appellate tribunal visited the *locus in quo* and satisfied itself that, there was no trespass by the respondent into the appellant's land.

After considering the submission by both parties through their respective counsels as well as going through the records of the two tribunals, I have come to the conclusion that, this appeal has merits. I have only one reason which in my view is sufficient to prove that, the 1st appellate tribunal was wrong to overturn the decision of the trial tribunal. That is the evidence of the seller, Joseph Kessy.

The records of the trial tribunal are very clear that the seller gave his testimony and all of his testimony favored the appellant. Either the records further show that, the trial tribunal visited the *locus in quo* and the seller was present on the material date and showed the demarcations of the land

he sold to both parties. Unfortunately, this crucial evidence was disregarded by the 1st appellate court. The court went on to collect new evidence thereby taking a different course and arriving to a wrong destination which resulted into the instant appeal.

I understand that, the 1st appellate tribunal did that by virtue of it being a 1st appellate court. However, it is well settled that, the duty of the of court or tribunal in the first appeal is not to conduct a fresh trial, rather to re-hear the same case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion **(see a Ugandan Case of FATHER NANENSIO BEGUMISA AND 3 OTHERS v. ERIC TIBAREGA SCCA 17of 2000; [2004] KALR 236).** Therefore, it was not the duty of District Land and Housing Tribunal of Kinondoni District, being the appellate tribunal, to collect new evidence including visiting the *locus in quo*. That task had long been completed by the trial court. The act of the 1st tribunal in my settled opinion constituted an error apparent on face of its records. It is a mischief that cannot go uncorrected by this court as far as the conduct of hearing appeals is concerned. As said here in earlier, the evidence of the seller as given at the trial tribunal was heavier in favor of the appellant. In that case, the appellant deserved the award given by the trial tribunal as stated in **Hemed Said versus Mohamed Mbilu (1984), TLR 113, supra.** Therefore, the decision of the first appellate court is quashed and set aside.

By quashing the decision of the first appellate tribunal would naturally mean upholding the decision of the trial tribunal, but this is not the case here for

the reasons I am going to state shortly. The testimony at trial was that, the appellant herein had already, before the seller, forgiven the respondent for the original trespass of the one and half meters to his piece of land, by constructing a toilet. That means this problem was settled between them when they were mediated by the seller long ago. It is a new construction of a septic tank and wall obstructing a road that re-candled the dispute between them. In my considered view, since, in appellants own words, the issue over one and half meter's trespass was already amicably settled between the two, the trial court ought to have confined itself only on the unsettled matters between the parties. By ordering compensation for the already forgiven 1.5 meters trespass, the tribunal had gone beyond what was before it for determination, as the applicant was precluded from praying for what he had already forgiven. For the reasons the appeal is only partly allowed to the extent that the one and half meters piece of land originally trespassed is not included in the bargain as it was already bargained for in amicable settlement.

Eventually, I allow this to the extent explained. The decision of the 1st appellate tribunal is hereby quashed and its orders set aside and the decision of the trial tribunal and its orders are partly upheld to the extent explained.

No order as to costs.

THE HIGH COURT OF TANZANIA ★ LAND DIVISION ★

M. P. OPIYO,

JUDGE

5/3/2021