

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO.114 OF 2021

(Arising from the Judgment and Decree of the District Land and
Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No.
75 of 2020 originating from Bunju Ward Tribunal in Application No.95
of 2019)

SAMI EMMANUEL KILOGA APPELLANT

VERSUS

JUNIOR MUJUNI LUHINDA RESPONDENT

JUDGMENT

Date of last Order: 17.12.2021

Date of Judgment: 23.12.2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Bunju in Application No.95 of 2019 and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 75 of 2020. The material background facts to the dispute are briefly as follows; Junior Mujuni Luhinda, the respondent in this appeal lodged Application No. 95 of 2019 at the Ward Tribunal for Bunju claiming that

the appellant has encroached his piece of land. He claimed that the appellant denied to obey the beacons placed by the Government instead she built a wall on top of beacon No. DKK 581. The beacon which demarcates the plots of the two parties' plots.

On her part, the appellant denied the allegations. She avers that the respondent has hived off a part of the appellant's land as well as the public access road. The appellant said that the suit land is surveyed, however, the respondent has built near her plot without leaving a public access road and therefore, she had to build along the beacon. The Ward Tribunal decided the matter in favour of the respondent and ordered parties to obey the boundaries and the appellant to demolish her wall.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kinondoni at Mwananyamala vide Land Appeal No.75 of 2020 where she complained that the trial tribunal failed to evaluate and consider the appellant's evidence in respect to boundaries of the suit plot and that the locus in quo findings were wrongly recorded. The District Land and Housing Tribunal upheld the decision of the trial Tribunal and maintained that the appellant did not obey the boundaries. The first appeal irritated the appellant. She thus appealed to this court through Land Appeal No. 93 of 2020 on two grounds of grievance, namely:-

- 1. That the District Land and Housing Tribunal erred in law and fact in failing to evaluate and consider material evidence adduced by the appellant in respect of the boundaries of the disputed land.*
- 2. That the District Land and Housing Tribunal erred in law and fact in failing to consider the actual findings found at the locus in quo by the trial tribunal.*
- 3. That the District Land and Housing Tribunal erred in law and fact upholding the decision of the trial tribunal regarding the demolition of the appellant's wall for the reason that the same is built on top of the beacon No. DKK 581.*

When the appeal was called for hearing on 17th December, 2021, the appellant appeared in person, unrepresented and the respondent had the legal service of Mr. Rwiza, David, learned counsel.

Getting off the ground was the appellant. She started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal. In her submission, she combined the three grounds of appeal and argued them together. She was brief and straight to the point. The appellant at the trial tribunal she tendered a Sale Agreement and a Form No. 69 which was issued by the Commissioner of Land. She claimed that the respondent's house metal sheet was

watering in her plot therefore, she suggested the respondent to install a trench but he did not, thus, she decided to build a wall. The appellant went on to submit that beacon DKK 513 is a triangle pin, it is placed along the road boundary, and DKK 571 is along the wall of her house but they complained that the same is nowhere to be found.

The appellant continued to submit that the trial tribunal visited locus in quo and found that the said beacons but they did not record them properly. She urged this court to order retrial in order to allow the trial tribunal to record its findings properly and consider the documents which she tendered at the tribunal since the tribunal stated that she sold the respondent a piece of land while there is no any evidence to proof the same. She refuted that she build on top of the beacon No. DKK 581. She lamented that the trial tribunal decided to demolish the appellant's wall while the same is built within her plot. Stressing, the appellant submitted that the trial tribunal did not record her evidence at the *locus in quo*.

Rebuking the appellant's submission, Mr. Rwiza confutation was strenuous. He came out forcefully and defended both trial tribunals decision as sound and reasoned. On the first ground, the learned counsel for the respondent stated that the trial tribunal considered the evidence of both parties and visited locus in quo to assess the boundaries and the

beacons showed that the appellant build on top the beacon which was placed by the Government at Wazo Hill area and the parties were ordered to obey the boundaries. Mr. Rwiza claimed that at the trial tribunal the appellant was asked if she build on top of the beacon but she remained silent thus the Chairman and assessors were satisfied that the appellant build on top of the beacon.

With respect to the second and third grounds, the learned counsel for the respondent was forthright, he argued that the findings of the trial tribunal at locus in quo explained that the appellant build on top of the beacon thus, the appellant was ordered to demolish the wall. Mr. Rwiza valiantly argued that it is not allowed for a person to build on top of a beacon. It was his further submission that the District Land and Housing Tribunal considered the trial tribunal's findings and assessors' opinion and uphold the trial tribunal's orders in order to create harmony of all residents.

On the basis of the foregoing position, the learned counsel for the respondent has humbly implored this court to find no any scintilla of merit in the appeal by the appellant as a result it be pleased to dismiss it with the contempt it deserves with the usual consequences as to costs.

Rejoining, the applicant reiterates that she has not built on top of the beacon. She claimed that at the trial tribunal she answered all questions.

She urged this court to order the respondent to provide access to the public road along their boundaries.

I have taken into consideration the appellant and the learned counsel for the respondent submissions and gone through the appellate and trial Tribunals records. I am now in a position to confront the three grounds of appeal on which the parties locking horns. I have opted to combine the second and third grounds and argue them together because they are intertwined and the first ground will be argued separately.

The appellant's complaint is based on the boundaries of the suit land, she is faulting the trial tribunal findings found at the locus in quo and the trial tribunal order to demolish the appellant's wall. I have revisited the trial tribunal records and noted that on 28th October, 2019 the trial tribunal and parties visited *locus in quo* and the trial tribunal recorded that the appellant has built a wall on top of the beacon while she was required to keep a distance of approximately 18' from the beacon.

I understand that in the circumstances of this case, it was important for the trial tribunal to visit *locus in quo* in since there were some doubts and ambiguity, therefore, the tribunal had to assess the situation on the ground and to verify the evidence adduced by the parties during the trial.

In the cited case of **Avit Thadeus Massawe v Isidory Assenga**, Civil Appeal No.6 of 2017, the Court of Appeal of Tanzania held that:-

" Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it."

Applying the above holding of the case, it is vivid that the tribunal had to visit *locus in quo* since the evidence on record could not solve the parties' dispute. However, what I have noted is that during *locus in quo*, the tribunal proceeded to hear the evidence of the parties in exclusion of the expert evidence or opinion. The plots are within a surveyed area and beacons are in place therefore it was easier for a surveyor to clarify the alleged mess.

In other words, in the instant case, there is lack of involvement of the Land Surveyor. Thus, the unsanctioned variations and boundary adjustments of the parties were required to be accessed by a Land Surveyor. Taking to account that the respondent was not even sure about the size of his plot and the appellant is complaining that the respondent has blocked the shared access way and extended to the last beacon. The Land Surveyor was in better position to find out who exceeded the

boundaries and to find out whether the shared access way was blocked or not.

Additionally, during the visit of *locus in quo*, the appellate tribunal based its decision on the tribunal's members' opinion and it ruled that the trial tribunal in reaching its decision involved members of the tribunal in accordance to section 34 (1) of the Land Disputes Courts Act, Cap. 216. In my respectful view, this kind of dispute could have been easily and fairly been resolved by involving the Land Surveyor instead of depending on the parties' evidence and the members of the tribunal who were not professionals in matter related to land survey. Therefore, the appellate tribunal was in position to find that in the circumstance of the case at hand, the involvement of an expert was crucial.

The re-surveying exercise will reveal if the suit land was expanded, whether the parties have built within the beacons and whether the shared public way was blocked. I believe the Land Surveyor's findings and the report will settle the dispute on the boundaries. Therefore, it is my considered opinion that, failure to involve the Land Surveyor in matter of boundaries of this nature renders the whole proceedings of the trial tribunal null and void.

On the way forward, I invoke the power vested on me under section 43 (1), (b) of the Land Dispute Courts Act, Cap.216 [R.E 2019] and hereby quash the judgment, proceedings, and subsequent orders of the trial tribunal and appellate tribunal. I, therefore, remit the file to the Ward Tribunal of Bunju before another Chairman for retrial.

Order accordingly.

Dated at Dar es Salaam this date 23rd December, 2021.




A.Z.MGEYEKWA
JUDGE
23.12.2021

Judgment delivered on 23rd December, 2021 via audio teleconference whereas the appellant and the respondent were remotely present.




A.Z.MGEYEKWA
JUDGE
23.12.2021

Right of Appeal fully explained.