IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 81 OF 2020
(Originating from the decision of District Land and Housing Tribunal of Kinondoni at Mwananyamala in Application No. 455 of 2007 dated 03/04/2020)

DR JOHN S. MBAGO.....APPELLANT

VERSUS

KITEKENI MWITA .....1st RESPONDENT

MR KOMBA.....2nd RESPONDENT

JUDGMENT

02/12/2021 & 14/12/2021

Masoud, J.

The appellant was the applicant in the District Land and Housing Tribunal for Kindondoni in Application No. 455 of 2007. The matter which was brought against the respondents herein above was for right of pathway and trespass into the appellant into the applicant's property. The main allegation was that the respondents blocked the pathway leading to the applicant's premises. In relation to allegation, the appellant contended that the respondent erected a building on the original pathway that led to the appellant's premises, and the second respondent dug for and erected a toilet in the middle of the pathway

leading to the appellant's premises, and demolished the appellant's foundation and trespassed into his property.

Having heard the parties in the trial in which the appellant brought a total of four witnesses, and the respondents a total of four witnesses, the trial tribunal dismissed the matter with costs. While dismissing the matter, the trial tribunal reasoned in the light of the nature of the complaint and the evidence adduced and was satisfied that the appellant did not lead any evidence establishing his right to the alleged pathway and that the suit land was indeed a pathway. The trial tribunal had it that the appellant did not discharge his duties pursuant to section 110 of the Evidence Act, cap. 6 R.E 2019. Accordingly, the matter was dismissed with costs for lack of merits.

Aggrieved by the above decision, the appellant filed the present appeal. The appeal was grounded on the following.

One, that the trial tribunal erred by failure to properly analyse and evaluate the evidence and hence arrived at unaffair and unjust decision. Two, the trial tribunal erred in upholding that the suit property was a pathway. Three, the trial tribunal erred in upholding that the

respondents did not block the pathway. Four, the trial tribunal erred in admitting the statement of defence of the respondent out of time without knowledge of the appellant. Five, the trial tribunal erred in admitting statement of defence of the respondent into court record while it was not properly filed and paid for. And sixth, the trial tribunal erred for recording respondent evidence in the absence of the appellant.

The appeal was argued by filing written submissions. The appellant was represented by Mr Adrian Mhina, learned counsel, while the respondents were represented by Mr Emmanuel Mbuga, learned counsel. I have considered the submissions in my judgment.

The first, second and third grounds were argued together. Insistence was made on the alleged failure by the trial tribunal to analyse and evaluate the evidence. Particular reference was drawn on the evidence of DW.2, and DW.3. It was contended that the evidence underlined the necessity of easement and hence right to easement to the appellant. And that such evidence was shown in the judgment.

It was shown that omission to analyse the evidence as in the present instance constitutes circumstances in respect of which an appellate court

like this one may interfere with the lower court or tribunal's finding. The case of **Materu Leison and G. Foya** [1988] TLR 102 was referred in respect to the principle. I read the appellant's counsel submissions as saying that the failure of the trial tribunal to analyse and evaluate the evidence denied the court opportunity to make sense out of the evidence of the witnesses as to necessity of easement.

In his reply, the appellant's counsel contended that the grounds of appeal and submissions therefore were misconceived. There was no admission as to path way as alleged. There was similarly no evidence established as to the existence of the alleged pathway since the premise is in unsurveyed area. He brought to the attention of the court the undisputed evidence that the appellant has an alternative path way. As to the issue of assessors, it was challenged as it was not raised beforehand as a ground of appeal. Nonetheless, it was addressed in the judgment at page 7.

On my part, I do not think that because the witnesses of the respondents in their evidence stated that the right to easement is necessary then such testimony should be analysed and evaluated in the favour of the appellant. As the appellant was the one who brought the

action against the respondent the burden of proof rested on him. My evaluation of the entire evidence as the first appellate court showed that there was no evidence from the appellant not only describing the pathway in the manner that disassociate it with pieces of land under the ownership of the respondents, but also providing for its dimensions. Regard is in this respect had on the fact that the evidence of the respondents was apparent that there was no such pathway as the area where their respective pieces of land are situated is a squarter and that the pathway alleged by the appellant is situated in their respective pieces of land. Further that it was clear in the record that if the pathway were to be ordered would lead to demolition of houses of residents who are not part to this case.

In the course of dealing with the first, second and third ground of appeal, the appellant unprocedurally introduced a new ground of appeal as if it were an aspect of the three grounds of appeal argued together. This was with regard to the absence of the assessors of opinion. It is indeed true that the ground was not part of the record although the argument by the respondent's counsel that as to why there was no assessors opinion to be considered was very well addressed by the trial

tribunal at page 7 of the typed judgment where the learned Chairman indicated that while one of the assessors had died, the other had retired.

The fourth and fifth grounds of appeal were combined and argued together. It was, in a nutshell, argued that the written statements of defence of the respondents were filed in the trial tribunal out of time on 6/3/2008 and 16/6/2008 for the first and second respondents respectively. I was told that there was no leave sought and granted to the respondents prior to filing the same bearing in mind that they were served with the application sometime in November 2007. The sixth ground was abandoned and hence not argued.

In reply to the submissions on the fourth and fifth grounds of appeal, the counsel for the respondents was quick in responding that the points should have been raised and argued and determined at the trial. Had the appellant raised the points, he would be justified in raising the point at the moment as grounds of appeal.

I have scrutinized the record and could not see any where in the proceedings of the lower tribunal that the appellant raised an objection in respect of the written statement of defence filed by the respondents.

Nonetheless, even if the written statement of defence of the respondents are expunged or discounted so is their evidence, the evidence led by the appellant would still remain below the balance of probability yardstick.

I am aware in the above respect that even if a case is heard ex-parte, the burden of proof is not discharged. In **Roseleen Kombe vs AG** [2003] TLR 347 referred to my by the counsel for the respondents, it was authoritatively held that and I hereby quote:

> *Even where the defendant files no written statement of defence at all or does not appear , let alone where he files "an evasive or general denial", the plaintiff still has to prove his case for the relief sought, even if ex-parte.*

From the evidence of the appellant on the record as is of his three witnesses (PW.2, PW.3 and PW.4), it is apparent that there were no proof shown that the disputed land was indeed a pathway. Reference to street leaders of the area by such witnesses did not see the appellant calling such leaders to testify in support of his case. The claim is thus unfounded.

On the contrary, they were (street leaders) or then leaders) part of the witnesses of the respondents, for example DW.3 and DW.4 who testified against the appellant. All such witnesses were certain that the area is a squatter and the very suit land claimed to be a pathway is part of pieces of land belonging to the respondents and other individuals in the locality who were not joined as parties to the case.

The question is whether the grounds or any of the grounds of appeal raised and argued can in the circumstances be upheld. In view of my respective findings herein above, I would answer the issue in the negative as the findings herein above are respectively to the effect that the grounds of appeal raised and argued are not meritorious.

In the upshot, the appeal is dismissed with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 14th day of December 2021.

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B. S. Masoud

Judge