IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.137 OF 2021

(Arising from the District Land and Housing Tribunal for Ilala in Land Application No.17 of 2021. Arising from Chanika Ward Tribunal in Land Application No.75 of 2021)

REHEMA SHABANI ALLY NOTI ..... APPELLANT

VERSUS

ATHUMANI AWADHI ..... RESPONDENT

JUDGMENT

Date of last Order: 01.03.2022

Date of Judgment: 07.03.2022

A.Z.MGEYEKWA, J

The matter of controversy between the parties to this appeal is on the landed property. Brief facts related to the instant appeal is that the Rehema Shabani filed a case at the Ward Tribunal of Chanika in Land Dispute No. 75 of 2021. She sued the Athumani Awadhi for trespass alleging that the respondent herein had trespassed into her piece of land

and claimed for a declaration that she is the lawful owner of the disputed land located at Nguvu Mpya street.

During the hearing of the matter, the tribunal heard two witnesses, one the vendor and the other one the builder. Salumu Mtini, the vendor testified to the effect that he sold the plots to both the parties, and in between their plots there was a pathway which was the boundary and the said boundary do exist. Abdallah Omary, the builder also testified that when he constructed the house he left behind 3 meters and there was a pathway. The trial tribunal decided in the favour of the respondent and dismissed the matter for lack of merit for the reason that the allegation of trespass into the appellant's piece of land was not established. The trial tribunal ordered each party to obey the boundaries.

The appellant was undeterred by the Ward Tribunal decision in Case No. 38 of 2019. Hence she challenged the trial tribunal decision at the District Land and Housing Tribunal for Ilala at Ilala complaining that, the trial tribunal was wrongly constituted and failed to determine the appellant's rights.

In determining the appeal, the appellate tribunal was of the view that there was no cogent evidence adduced by the appellant as to the size and

boundaries of her alleged piece of land which was, allegedly, trespassed by the respondent. The appellate tribunal noted that the appellant did not state the size of the allegedly trespassed portion of land. The District Land and Housing Tribunal uphold the decision of the trial tribunal and dismissed the appeal.

Still undaunted, Rehema Shabani lodged a second appeal, seeking to impugn the appellate tribunal decision through a petition of appeal premised on three grounds of grievance, namely:-

1. *That, the trial tribunal erred in law and fact not to consider that the Chairman of ward tribunal was acting as the secretary during hearing at Chanika ward tribunal.*

2. *That, the learned Chairperson erred in law and fact by reaching its decision founded on wrong facts about the size of the disputable land.*

3. *That, the learned Chairperson erred in law and fact for failure to evaluate the weight of the evidence adduced by the Appellant in the tribunal.*

When the appeal was called on for hearing on 1st March, 2022, the appellant and respondent appeared in person. Hearing of the appeal took the form of oral submissions.

In his submission, the appellant opted to abandon the first ground of appeal. On the second ground, the appellant contended that the trial Chairman misdirected himself by stating that the appellant did not adduce cogent evidence. She claimed that she tendered a Sale Agreement which shows the size of the suit land. She added that the trial tribunal visited *locus in quo*, measured the suit land, and noted that the respondent has trespassed the appellant's piece of land by exceeding 1. 60 meters and there was a pathway that divided the two plots.

On the third ground, the appellant was brief and straight to the point. She contended that the Chairman erred in law and facts to evaluate the weight of her evidence. She lamented that the Chairman did not consider the fact that the respondent exceeded or invaded her plot contrary to the Sale of Agreement. She forcefully argued that the respondent was not supposed to win the case since his submission did not correlate with his Sale of Agreement.

In conclusion, the appellant urged this court to allow the appeal with costs.

In reply, the respondent's refutation was persistent. He opted to argue the second and third grounds together because they are intertwined. The

respondents came out forcefully and defended both trial tribunals' decisions as sound and reasoned. He submitted that the Ward Tribunal visited *locus in quo* and measured the suit land. He added that after the visit, the trial tribunal ordered the parties to show their Sale of Agreements whereas, in his Sale of Agreement the measurement of Eastside was wrongly recorded, it was written Northside. He went on to submit that the Ward Tribunal in trying to mediate the parties; decided to give the appellant additional 3 meters of a piece of land.

The respondent went on to submit that the appellant denied the proposal, hence both of them called their contractors and the vendor to testify at the tribunal. He stated that the vendor admitted that there were some mix-ups on naming the boundaries whereby the Northside was marked as Eastside. The respondent, insisted that the tribunals' decisions are sound and reasoned since he did not trespassed the appellant's piece of land.

On the strength of the above submission, 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 costs.

In her brief rejoinder, the appellant reiterated her submission in chief. She added that the findings of the trial tribunal were to the extent that the respondent's Sale of Agreement did not contain a clear description of measurement and location. Stressing, she submitted that her evidence was heavier compared to the respondent's evidence. She argued that she was not ready to take the plot which was in front of her plot because she has already constructed a house. She claimed that both tribunals confirmed that the respondent exceeded 1.6 meters.

In conclusion, she urged this court to allow her appeal with costs.

After going through the grounds of appeal on which the parties have bandying words the same made me peruse the records of both tribunals to determine *whether the appeal is meritorious*.

I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, see **Salum Mhando v Republic** [1993] TLR 170. See also the decision of the Court of Appeal of Tanzania in **Nurdin Mohamed**

@ Mkula v Republic, Criminal Appeal No. 112 of 2013, Court of Appeal of Tanzania at Iringa (unreported).

However, this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> *" An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."*

In my determination, I will consolidate the two grounds because they are intertwined. The second and third grounds are centered on evidence on record. The appellant is faulting the Chairperson for reaching a decision founded on wrong facts about the size of the disputed land. She is also complaining that both tribunals did not evaluate the weight of evidence adduced by the appellant.

I have gone through the trial tribunal record and scrutinized the sale agreement, I noted that the appellant brought to the attention of the trial tribunal the issue of measurement. It is borne in the record that at the trial tribunal, Rehema Shabani witness one Abdallah Omary testified to

effect that in the construction process, he left behind 3 meters and there was a pathway measuring 1.60 cm behind the electric pillar and in front, a beacon was taken away. The appellant's prayer before the trial tribunal was to sort out the division of the said piece of suit land. The trial tribunal in its decision based on the vendor and constructor testimonies and decided that both parties should own the piece of land as it was before the dispute. However, the trial tribunal did not determine the claims of the appellant's witnesses specifically one Abdallah Omary who testified to the effect that there was a missing beacon in the suit land and the disputed with a size of 60 cm be divided among the parties.

It is trite laws that a court of law or tribunal in conducting trial proceedings has a duty of evaluating and analyzing evidence adduced by the parties and making a finding on the basis of the evaluation and analysis. This mandatory requirement was accentuated in **James Bulolo & another v Republic** [1981] TRL 283 (HC). This Court made the following observation:

> *"It is the duty of the court first to analyse and assess the evidence and see how far if at all, it touches upon every accused as an individual. The court is not to lump the accused persons together*

and wrap them up generally in the blanket of the prosecution evidence. Appeal allowed."

A cursory glance at the judgment from which this appeal arises and the trial tribunal convinces me that the trial tribunal did not evaluate and analysed well the testimony of the appellant's side. The evidence at the trial tribunal is clear that the appellant raised her concern of measurement and size of the piece of land and the same was not done in a manner that identified the actual size and measurement of the suit land. Although the trial tribunal visited *locus in quo*, however, in my view, it was not easy to reach a fair decision without noting the proper demarcations of the suit land. The issue of size of a plot cannot be determined to its finality without determining the demarcations by tracing and allocating all beacons. I am saying because there was a missing beacon as confirmed by one Abdallah Omary.

In my unflappable view, it was not proper for the trial tribunal to consider the evidence of the respondent's witnesses in exclusion of the appellant and her witnesses. The trial tribunal was in a better place to hand victory to either of the parties after evaluating and analysing the evidence on record. It was in a position to involve people who placed the

said. Considering the fact that one beacon was missing. Therefore, I fully subscribe to the appellant's submission that her evidence was not well evaluated and analysed by the trial tribunal. For that reason, I find that the first and second grounds have merit.

In the upshot, I quash the decisions of both tribunals, I order the retrial at the District Land and Housing Tribunal since the Ward Tribunal is no longer dealing with litigations matter. Appeal is allowed without costs.

Order accordingly.

Dated at Dar es Salaam this 7th March, 2022.

A.Z.MGEYEKWA

JUDGE

07.03.2022

Judgment delivered on 7th March, 2022 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

07.03.2022

Right to appeal fully explained.