IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND CASE APPEAL NO. 21 OF 2022

(From the decision of District Land and Housing Tribunal of Kibaha District at Kibaha in Application No. 69 of 2017 and Original Tribunal of Bunju Ward in Application No. 70 of 2019)

KIMANGARE ABDALLAH.....APPELLANT

Versus

JAMES VALENCE.....RESPONDENT
(*as the Attorney of Grace Mapande*)

JUDGMENT

14/07/2022 & 18/08/2022

Masoud J.

There is in this appeal concurrent findings of the lower tribunals in relation to a dispute between the parties herein concerning the right of easement as claimed by the appellant. The record is apparent that it is in the ward tribunal of Bunju where the appellant initiated his claim as to right of easement against the respondent. Having heard the evidence from the parties and their witnesses, the trial ward tribunal was satisfied that a decision could not be made in the favour of the appellant.

I am not in doubt that in arriving at such decision against the appellant, the trial tribunal had in mind the evidence adduced in the course of the trial and the duty of the appellant to prove his claim. As the appellant was aggrieved by the decision of the trial ward tribunal, he appealed to the District Land and Housing Tribunal of Kinondoni (herein the district tribunal).

At the district tribunal, the appellant sought to fault the trial tribunal on grounds of failure to consider that the appellant does not have any other way to access his premise; failure to take into account that the way/road in dispute was there, and had also been used by the respondent before she sold a piece of land which was accessed by the said way/road; and the trial tribunal was in error of considering evidence of the witnesses of the respondent which is contradictory, weak, false, planted, and fabricated.

Having heard the parties as a first appellate tribunal, the district tribunal was in the same findings as was the trial ward tribunal. In a nutshell, the district tribunal was satisfied that the alleged errors in the grounds of appeal were not reflected on the evidence on the record. The evidence, it

was stated, did not show that there was the way/road which was being used by the appellant, and further that there was no evidence that the appellant once purchased the area constituting the pathway/road. Rather, the area allegedly comprising the alleged pathway/road belonged to the respondent. On the contrary, it was evident that there was a *"Kwa Mgode"* pathway which the appellant was using.

Still aggrieved, the appellant preferred the second appeal in this court. He raised similar complaints as was in the district tribunal. The overarching complaint was that the district tribunal was in error for its failure to fault the trial ward tribunal's decision in his favour on the reasons advanced as grounds of his complaint.

As this is a second appeal, the court is precluded from interfering with or disturbing concurrent findings of fact of the two lower tribunals except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure, or have occasioned a serious miscarriage of justice.

There is indeed a considerable body of case law on the above principle. See, for instance, **Amratal Damodar Maltaser and Another t/a Zanzibar Silk Stores v A. H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31, **Neli Manase Foya v Damian Mlinga** [2005]TLR 167, **Martin Kikombe v Emmanuel Kunyumba,** Civil Appeal No. 201 of 2017 and **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006 (both unreported).

When hearing the appellant in respect of his grounds of complaints, the appellant spent much time traversing on matters which were not related to the grounds of complaint, and if they did they were presented in a manner that did not show a clear link with the grounds of complaints. Of significance, the appellant adopted the grounds as forming part of his submission and invited the court to consider visiting the locus in quo.

When replying to the submission by the appellant, Mr Karumbore Pasensia, Advocate for the respondent, attacked the submission for its lack of clarity and failure to clearly address the grounds of appeal. He maintained that the area constituting the pathway belong to the respondent, having bought it in 2009 as was apparent on the record. The

said piece of land is not related to the piece of land the appellant referred to. The sale transaction between the appellant and respondent did not materialise as it was envisioned. He insisted that the appellant has an alternative pathway to reach his residence.

Thus, the alleged entitlement to right of the pathway specified in the appellant's claim does not exist. In all, it was insisted that the district tribunal properly decided the appeal from the ward tribunal. The court was invited not to find merit in the appeal. In his brief rejoinder, the appellant maintained that there was no alternative way as alleged.

In the light of the above principle which precludes a second appellate court from interfering with the concurrent findings of lower tribunals, I considered the evidence on the record in relation to the rival submissions on the grounds of appeal, and the impugned decision of the district tribunal. I inquired into whether there was misapprehension of evidence, violation of law or procedure, or serious miscarriage of justice warranting this court's intervention which involved the complaints reflected in the grounds of appeal. In my determination, I only confined myself to the complaints reflected in the grounds of appeal.

In my scrutiny, the submission by the appellant was not clearly hinged on the situations in respect of which the court can interfere with the concurrent findings of the lower tribunals. As to the existence of alternative pathway which is alleged by the appellant not to exist and it is non-existence not having been considered, the submission by the appellant did not pinpoint the evidence showing that the alternative pathway does not exist as he alleged.

The failure by the appellant to pinpoint the evidence showing the non-existence of the alternative pathway is notwithstanding that the district tribunal and the ward tribunal were of the finding that the evidence on the record was clear that there was alternative pathway in the area. It is not without relevance to say that it is on the record that the trial ward tribunal visited the locus in quo, and its finding, which was upheld by the district tribunal was informed by the visit.

My further scrutiny of the evidence did not reveal anything worthwhile which would have entitled the court to disturb the concurrent findings on the reason of non - existence of alternative pathway. In as much as there is nothing suggesting misapprehension of the evidence on the point

shown to me and which is apparent on the record, I find that the complaint by the appellant in this respect are unfounded. Therefore, the finding of the district tribunal in relation to existence of alternative pathway was justified.

As to the allegation by the appellant that he purchased the area in dispute from the respondent and thus was entitled to the pathway, there was also no evidence that was brought to the attention of the court by the appellant as the basis of the complaint. There was only flat claims I would say, regard being had to the evidence given by the appellant and one witness who testified on his behalf in the trial tribunal. In respect of this complaint, the finding of the district tribunal which upheld the finding of the trial ward tribunal was to the effect that there was no evidence that the appellant purchased the area comprising the alleged pathway.

Considering the evidence of the witnesses who testified before the ward tribunal, as compared to the finding as to the absence of evidence that the appellant purchased the area comprising the pathway, I also on this point find that there is nothing amounting to misapprehension of evidence, or violation of law or procedure or resulting to miscarriage of

justice on the part of the appellant warranting interference with the findings. This complaint as was the earlier fails as well.

As to the allegation of considering and using the evidence of the witnesses of the respondent which was contradictory, false, planted and cooked, there was no account on this complaint given at the hearing by the appellant other than adopting the grounds of complaint as afore said. I did not have, therefore, advantage of having the appellant taking me through the evidence on the record whilst pinpointing respective pieces of evidence by the witnesses of the respondent evidencing the alleged contradiction, falsehood, and fabrication.

The alleged contradictory, false, planted and fabricated evidence is not seen on the record of the evidence from witnesses who testified for the respondent if I am to go by the record. The allegations partly touch on the demeanour of the witnesses which is within the mandate of the trial tribunal. On the record, there was nothing suggesting that the witnesses gave fabricated evidence and did not tell the truth.

Even if it were so, the appellant would still have the onus of proving his claim on the balance of probabilities and not through the weaknesses of

evidence of the respondent. The contradiction which might be seen are minor and do not go to the root of the matter as per the rule stated in **Mohamed Said Matula v Republic** [1995] TLR 3 (CA) as to dealing with inconsistence or contradiction in the evidence.

Again, looking at the evidence of each and every witness of the respondent's three witnesses in relation with the evidence of other witnesses including the appellant's witness, I find the complaints raised touching on the witnesses of the respondent and their testimonies misplaced. I am in this determination guided by the case of **Shabani Daudi v. R.**, Criminal Appeal No. 28 of 2000 (unreported), which ruled on how the second appellate court may determine matters relating to credibility of witnesses other than demeanour of the witnesses. Understandably, that letter is the monopoly of the trial court and in this case the trial tribunal.

Assuming that the said evidence was indeed of that nature as alleged by the appellant, I would still need to satisfy myself as to whether it led to miscarriage of justice to the appellant so that I may have room to disturb the concurrent findings of the lower tribunals. On reflection of the way

the district tribunal considered the evidence on the record, and arrived at its decision which upheld the findings of the trial tribunal, it is evident that the district tribunal in general terms did not find the evidence of the witnesses of the respondent contradictory, false, and fabricated. As already stated, I find nothing in that respect on the record amounting to misapprehension of the evidence and violation of law or procedure in relation to treatment of such evidence, regard also being had to substantive justice principle applicable to the ward tribunals.

It is in this respect to be recalled that the appellant's claim in the ward tribunal was founded on that, the appellant has a right of way, which he acquired having purchased a piece of land from the respondent of which the respondent accessed by the alleged pathway, and that he had been using the pathway all along. While the appellant brought one witness who had long relocated to Tunduru, and was thus no long living in the area of dispute, the respondent brought three witnesses who were her neighbours within the area of dispute. Evidence of proof of purchase of the piece of land and hence the area comprising the alleged pathway was not there.

From the evidence that ensued, there was no evidence which sufficiently established the elements of appellant's claim. On balance, the district tribunal as was the ward tribunal was no doubt satisfied that the appellant who was the claimant and appellant in the ward tribunal and district tribunal respectively did not establish his case on balance of probabilities.

In conclusion, I am of the finding that the grounds of the appeal are all without merit. The concurrent findings of the District Land and Housing Tribunal of Kinondoni and the Ward Tribunal of Bunju cannot, in the circumstances, be disturbed. The appeal fails and is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 18th day of August 2022.

B.S. Masoud

Judge