

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

LAND APPEAL NO. 19 OF 2022

*(Arising from Kinondoni District Land and Housing Tribunal in Land Application
No.100 of 2011)*

LAURIAN RWEMBEMBELA APPELLANT

VERSUS

ALEX JASPER MAFURU RESPONDENT

JUDGMENT

Date of last Order: 16.08.2022

Date of Judgment: 19.08.2022

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land located at Plot No. 281, Block D at Tegeta area, Dar es Salaam containing 2840 square meters, whereas the respondent had instituted a suit against the appellant in the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Application No.

100 of 2011. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal in Application No. 100 of 2011. The material background facts of the dispute are not difficult to comprehend. They go thus: Alex Jasper Mafuru, the respondent instituted the application against Laurian Rwembembela. He claimed that the appellant invaded his piece of land. The respondent prayed for the District Land and Housing Tribunal for Kinondoni at Mwananyamala to order the appellant to demolish his fence.

On his side, the respondent denied all the allegations. The District Land and Housing Tribunal for Kinondoni determined the matter in favour of the respondent.

Believing the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala was not correct, the appellant lodged a Petition of Appeal containing four grounds of appeal as follows: -

1. *That the trial Chairman erred in law and fact in holding that the Respondent was the lawful owner of the suit property while on records the suit property is an open space and the Respondent lacked locus standi to sue over the same.*
2. *That the trial Chairman erred in law and fact in holding that the*

Kinondoni Municipal Council relocated the beacons on the suit property while the Appellant had never been given any notice for the said relocation and he was not involved in the thus he was not given a right to be heard.

3. *That the trial Chairman erred in law and facts by holding that the Appellant encroached into the suit property by 10.5 Meters while there was no any evidence to prove the same.*
4. *That the trial Chairman failed to analyse and evaluate the evidence on record, thereby reaching an erroneous decision.*

When the matter was called for hearing on 27th July, 2022, the appellant was enlisted the legal service of Mr. Richard Madibi, learned counsel while the respondent enjoyed the service of Mr. Simba Pius Kipengele, learned Advocate. The Court acceded to the appellant's proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

The appellant's counsel began by tracing the genesis of the matter which I am not going to reproduce in this appeal. The appellant in his written submission started by addressing the first ground of appeal Mr. Madibi

contended that the suit property was an open space and the same is owned by the Municipality or the Ministry of Lands Housing and Human Settlements. He went on to argue that during the trial the appellant had tendered exhibit D1 which reveals that Plot No. 281 Block D, Tegeta Area, Dar es Salaam is an open space. He added that the PW3 did not tender any Town Plan. Mr. Madibi contended that during the hearing, the respondent tendered a Letter of Offer while on record, he testified that he purchased the said suit property from Zakaria Daniel, but it is doubtful how he obtained the Letter of Offer. Mr. Madibi contended that the respondent was not the lawful owner of the suit property because the suit land is an open space.

The learned counsel for the appellant went on to submit that there was no any sale agreement tendered by the respondent to prove whether he bought the said suit property from Zakaria Daniel because the respondent had no Certificate of Title. It was his view that the respondent had no title over the said suit property. Fortifying his submission, he cited the cases of **Emmanuel Assenga v Mahamoud Mringo**, Misc. Land Appeal No. 52 of 2018, High Court of Tanzania, Land Division, Dar es Salaam (Unreported), **Registered Trustees of Khoja Shia Ithna Asheri**

Jamaat v The Attorney General & 3 others, Land Case No. 118 of 2019, High Court of Tanzania, Land Division, Dar es Salaam (unreported).

The learned counsel insisted that Plot No. 281 Block D, Tegeta Area an open space, and the same is owned by the Municipal Council or the Ministry of Lands, Housing and Human Settlement Development. Counsel for the Appellant further submitted that the respondent lacked *locus standi* to institute the suit claiming trespass into public land. Supporting his submission he cited the case of **Scolastica Investment Company Limited vs. Fredrick S. Kisamo**, Land Case No. 24 of 2017.

On the second ground, Mr. Madibi contended that the Kinondoni Municipal Council did not relocate the alleged beacons on Plot No. 281 Block D Tegeta Area, which is an open space. He claimed that the appellant did not receive any notice from the respondent notifying him the Officer re-allocation of beacons processes which was alleged to be in the appellant's fence. It was his view that had it been conducted by the Municipal Council, then they could have prepared a report. The learned counsel for the appellant contended that reading exhibit P2 shows clearly that the appellant was not involved in the re-allocation process thus he was not afforded the right to be heard.

The counsel for the appellant went on to state that the tribunal could have noted that the appellant has not encroached 10.75 meters on the suit land.

Submitting on the third ground, counsel for the appellant contended that the trial Chairman erred in holding that the appellant encroached into the suit property by 10.75 Meters while there was no evidence to prove the same. The counsel for the appellant contended that PW2 evidence is uncertain as he alleged that the suit Plot No. 48 Block D and Plot No. 281 Block D, have two different town planning maps, however, he failed to tender the same. He went on to submit that exhibit P2 does not show the surveyors who conducted the said allocations of beacons and the Report (Exh.P2) is just a letter addressed to Commissioner for Land.

Arguing for the fourth ground of appeal counsel for the appellant contended that the trial Chairman failed to analyse the evidence on record. He claimed that the Chairman did not analyse whether the respondent was a lawful owner of the suit property considering the fact that he had no Title Deed and the appellant asserted that the suit plot is an open space. He added that the trial Chairman fail to evaluate exhibit D1 and exhibit P1 and to order that the suit property is an open space.

Mr. Madibi did not end there he claimed that the trial Chairman failed to evaluate evidence as to whether the appellant was not given the right to be heard. He claimed that the trial Chairman did not analyse the appellant's testimony, the Chairman stated that the appellant encroached 10 meters and on page 3 the Chairman alleged that the appellant encroached 10.75 meters into the respondent's land.

On the strength of the above submission, Mr. Madibi beckoned upon this court to quash and set aside the District Land and Housing Tribunal's judgment and allow the appeal.

In response, Mr. Simba opted to submit generally. He contended that the suit plot was legally owned by the respondent and the same was proved by PW3, a Land Officer Office who testified to the effect that the respondent is the lawful owner of the suit plot and the same is not an open space. Mr. Simba contended that it is not true that the appellant encroached into the respondent Plot for 10.75 meters, as the appellant and respondent plots are surveyed and their measurement is recorded in their Certificate of Titles. He went on to submit that PW2, Ali Maulid Mgomi, a land surveyor from Kinondoni Municipal Council in his testimony testified to the effect that he received a letter from the respondent

concerning the survey process and the surveyors found out that the appellant encroached into the respondent land for 10.75 meters. The counsel for the respondent argued that PW3 had no chance to argue on the TP plan because the same was not yet to be tendered at the time she testified.

The learned counsel for the respondent went on to state that the appellant's allegation that the suit land is open space is contrary to the submission of PW3 who testified that Alex Jasper Mafuru is the lawful owner of the suit land.

The learned counsel went on to argue that the appellant argued that the verification of beacons was done by the Kinondoni Municipal surveyor. He went on to submit that PW2 testified that after the verification of the location of the said beacons, they discovered that the appellant encroached on the respondent's plot for 10.75 meters. He added that one beacon was removed and that after the surveyor's findings the appellant refused to demolish his wall, thus, the respondent decided to institute a land case in Kinondoni Land and Housing Tribunal.

The counsel for the respondent continued to argue that the appellant argued that the respondent failed to tender the Title Deed while there

was a witness from the Commissioner for Land testified that Alex Jasper Mafuru was the lawful owner of the suit plot, he had a Title Deed and was paying land rent. He claimed that it was clear that the appellant exceeded 10.75 meters into the respondent's land and the appellant did not tender his Title Deed nor justified that he did not encroach into the respondent's plot.

I have revisited the evidence and submissions of both sides now, I am in a position to determine the appeal.

In my determination, I will consolidate the first and second grounds together because they are interrelated. Equally related are the third and fourth grounds which I shall also determine together.

As to the first and second grounds of appeal, the appellant's counsel is claiming that the Chairman declared the respondent a lawful owner while the suit land was an open space he claimed that he was never given notice of reallocating the bacon. Records reveal that PW2, a witness of Kinondoni Municipality testified to the effect that Plot No. 281 Block D belongs to the respondent and the appellant encroached 10.75 meters into the respondent's land.

PW3 testified to the effect that the respondent is the lawful owner of the suit land and the said area is not an open space. I have examined the evidence on record and noted that the issue of open space was raised by the appellant in his testimony without tendering any cogent documentary evidence to prove his assertion. Reading the evidence on the record, it clearly shows that the appellant's claims are not strong enough to move this court to decide in his favour because PW2 in her testimony made it clear that the suit land was not an open space.

The appellant in his argument contended that he did not encroach on the respondent's land and he is relying on a Town Plan Map (Exh.D1). I have scrutinized exhibit D1, the same does not support the appellant's claims because there is no any indication that the respondent's land is an open space area. The issue whether or not the area is an open space does not concern the appellant. I am saying so because open space is a public Area, therefore, the appellant has no *locus* to claim that the suit land is an open space.

The appellant claimed that the respondent in his testimony did not tender a Title Deed to prove his ownership, this argument is misplaced I am saying so because in the matter before the District Land and Housing

Tribunal ownership was not among the issues for determination and the appellant had no *locus standi* to raise such complaints because in his testimony, the appellant admitted that he is not the owner of the suit land.

For the sake of clarity, I have read the cases of **Emmanuel Assenga** (supra) and **Registered Trustees of Khoja Shia** (supra), the issue for discussion was ownership of land. In my view, this cited case is distinguishable from the instant case. In the instant case, unlike the cited cases), the dispute was trespass whereas the respondent claimed that the appellant has trespassed into his land.

Regarding the issue of contradiction, the Chairman in his Judgment specifically page 3 the Chairman summarized the evidence on record and stated that the appellant was not required to construct his wall in the suit land measuring 10.75 meters. In the last paragraph, the Chairman stated that the appellant has constructed a wall and encroached 10.75 meters, however, on page 4 of his Judgment, the Chairman in his findings maintained his first observation that the appellant encroached 10.75 meters into the respondent's land. In my view, the contradiction was minor and the same does not go to the root of the case. Therefore this

ground is demerit. The issue of reallocation of the beacon from Plot No. 281 Block D at Tegeta, the evidence shows that the appellant was not involved in the reallocation exercise of the said plot, however, the issue of allocation did not concern the appellant. Had it been that the beacon was reallocated from Plot No. 48 Block D Tegeta then the appellant could have the right to be informed otherwise his claims are demerit.

The third and fourth grounds relate to analyses of evidence on record. The appellant's counsel is complaining that the Chairman faulted himself in holding that the appellant encroached into the suit property while there was no any evidence. I have perused the District Land and Housing Tribunal records and noted that PW1 testified to the effect that the Kinondoni Municipality surveyed Plot No. 281 and placed beacons that were removed. The respondent's testimony was supported by exhibit P2 collectively a letter dated 12th May, 2008. For ease of reference, I quote part of the words stated in the said letter as hereunder:-

"... mmiliki wa Kiwanja No. 48 Kitalu 'D' Tegeta amejenga ukuta na kuingia kwenye kiwanja 281 kitalu D kwa mita 10.7m kutoka katika jiwe la mpaka SA 398. "

From the above excerpt, it is clear that the appellant trespassed 10.75 meters into the respondent's land and the evidence on record supports DW1 evidence. The record reveals that the Chairman in his analysis summarized all the witnesses' testimonies and determined the issues framed whereas all the evidence on records revealed that the appellant was a trespasser.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the findings of the District Land and Housing Tribunal for Kinondoni. Therefore, I proceed to dismiss this appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 19th August, 2022.



A.Z.MGEYEKWA

JUDGE

19.08.2022

Judgment delivered on 19th August, 2022 via video conferencing whereas both counsels were remotely present.




A.Z.MGEYEKWA

JUDGE

19.08.2022

Right to appeal fully explained.