

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

**MISC. LAND APPEAL NO. 11 OF 2021**

(Arising from the decision of Kinondoni District Land & Housing Tribunal at Mwananyamala in Land Appeal No. 49 of 2020; Originating from Msigani Ward Tribunal in Application No. 10 of 2020)

**BILALI ATHUMANI.....APPELLANT**

**VERSUS**

**SYLIVESTER MGONJA.....RESPONDENT**

Date of Last Order: 12.09.2022

Date of Judgment: 17.10.2022

**JUDGMENT**

**V.L. MAKANI, J.**

This appeal is by BILALI ATHUMANI. It originated from Msigani Ward Tribunal (the **Ward Tribunal**) in Application No. 10 of 2020 where the respondent herein was the winner. The appellant decided to appeal to Kinondoni District Land and Housing Tribunal at Mwananyamala (the **District Tribunal**) in Land Appeal No. 49 at 2020 (Hon. R.B. Mbilinyi, Chairman) where he again lost.

Being dissatisfied with the decision of the District Tribunal the appellant appealed to this court based on the following grounds:

1. *That the honourable Chairman of the District Land and Housing Tribunal erred both in law and in fact having upheld the decision of Msigani Ward Tribunal and declare that the boundary demarcation between the appellant and respondent plots is Palm Oil Tree (Mchikichi) and not the road something which is not true.*
2. *That the honourable Chairman of the District Land and Housing Tribunal erred both in law and in fact to consider the evidence of the respondent without him submitting any documentary evidence to be relied upon to substantiate his claims.*
3. *That the honourable Chairman of the District Land and Housing Tribunal erred both in law and in fact having failed to observe that the appellant purchased his plot of land which between the appellant and respondent plots since from the inception and as of now is the road and the said palm oil tree is within appellant's plot.*
4. *That the honourable chairman of the District Land and Housing Tribunal erred both in law and in fact having failed to observe the minutes of local government of Msigani which clearly reveal that the Chairman of Serikali ya Mtaa and the members thereof visited plots is road and not palm oil tree (Mchikichi) as alleged or at all.*
5. *That the honourable Chairman misdirected herself for considering entirely the evidence of respondent only in reaching her decision without considering both oral and documentary evidence of the appellant tendered and admitted during trial hence arrived at a wrong decision by upholding the decision of Msigani Ward Tribunal.*
6. *That the honourable Chairman of the District Land and Housing Tribunal erred both in law and in fact having failed to observe that the appellant was the first person to purchase his plot of Land in 2004 measuring 13x20m and the respondent purchased late in 2006 and since the respondent without any cause of action and or*

*justification raised alarm regarding boundary demarcation for no apparent reasons.*

*7. The honourable chairman erred both in law and fact for delivering decision relying on non-existing evidence.*

The appellant prayed for the appeal to be allowed and the decision of the District Land and Housing Tribunal for Mwananyamala and that of the Ward Tribunal be quashed and set aside. He also prayed that the boundary demarcation between the appellant and respondent's plots is THE road and not palm oil tree (mchikichi) as alleged or at all. The appellant prayed for the respondent to pay costs of the appeal.

The appeal proceeded orally, and the appellant fended for himself while the respondent was represented by Ms. Mcharo, Advocate.

The appellant said in the District Tribunal erred to say that he was in the suit land from 2007 but he said he has been on the property from 2004 and he has a house with three rooms and the land is measured at 13 x 20m and the land is boarded by the respondent. He said he was not informed of the visit to the *locus in quo* and so he was not present hence his right to be heard was curtailed. He said in the Ward Tribunal he was the respondent, and the respondent had no

witnesses and there was no Sale Agreement, and the appellant did not show any boundaries by palm oil trees (Mchikichi). He said at the Ward Tribunal the respondent said the seller and their witnesses are now deceased and the District Tribunal agreed to this but they stated that Shani Mfuko and Peta Mfuko were sellers. He said when the respondent claimed before the Chairman of *Serikali za Mitaa* that he had trespassed to his land the Chairman called them, but the respondent did not have evidence/proof as to the boundaries and Peta Mfuko was present who showed the boundary to be the road and not the palm oil tree (mchikichi). He prayed for the appeal to be allowed and the decision of the District Tribunal be set aside and costs of the appeal.

In response, Ms. Mcharo submitted as an introduction that the record shows that the dispute is on boundaries, so the issue is not that the appellant was on the suit land from 2004, but when the cause of action accrued, that is when there was trespass as such the matter was within time. Ms. Mcharo said the issue of visit to the *locus in quo* is a new issue as it was not raised and discussed in the District Tribunal and therefore this court cannot consider it. Ms. Mcharo further said the appellant in the Ward Tribunal was the witness and

it is on record that other witnesses were present. She said the seller is very old and the Tribunal went to her home, and she told the Tribunal that she was the one who sold the land to the appellant and the respondent. She said Shani was a witness to the sale though she was called by the appellant, but she said the boundaries were the palm oil trees and other trees (mijohoro) which were cut to for the intention of the appellant to trespass to the respondent's land. She said Petta the son of the seller confirmed the sale and the boundaries, and these were the witnesses of the appellant, but they said the truth and supported the respondent's case. She said the process of the dispute starts with the Ward Tribunal and not *Serikali ya Mitaa* whose records are not before this court. She said the Ward Tribunal visited the *locus in quo* and the sketch is also before the court.

As for the first ground the issue of the road as a boundary was not raised in the Ward or District Tribunal so this matter cannot be considered at the level of the High Court. She said even the witnesses including the wife of the appellant did not talk of the road as the boundary, but electrical pole which was also not correct as the pole by the time of sale was not present.

As for the second, third, fourth and fifth grounds Ms. Mcharo said the same were covered in the introduction and she reiterated that they have no merit. As for the sixth ground she submitted that the issue that the appellant bought his plot before the respondent does not give the appellant the right to trespass into the respondent's plot, so she concurred with the decision of the District Tribunal. She also agreed with the District Tribunal that the cause of action commenced when he trespassed to the respondent's land and not when he bought the land.

As for the seventh ground the Ms. Mcharo stated that the argument that the District Tribunal relied on witnesses that were not present cannot be true because the District Tribunal deals with record and does not call for new evidence/witness. She said the Ward Tribunal listened to the witnesses and many of them were the appellant's witnesses who were truthful and showed the boundaries and under the strength of the evidence by the children of the seller, the Ward Tribunal decided in favour of the respondent. In conclusion, Ms. Mcharo prayed for the appeal to be dismissed with costs for lack of merit and she supported the decision of the Ward and District Tribunals.

In rejoinder the appellant stated that Shani and Peta were at the Ward Tribunal and there are no written documents that the respondent is the buyer and owner of the suit plot. He said he has never seen the sketch of the visit to the *locus in quo*. He said he could not say something which was not there and that there was a road even before he bought the suit plot and he was the first to buy the said plot.

I have listened to the submissions by the appellant and Counsel, and the main issue is whether this appeal has merit.

I will combine the first, second, third, fourth, fifth and seventh grounds of appeal which all revolve around the evidence at the trial Tribunal. It was stated and I agree with the Chairman of the District Tribunal that the evidence of the Ward Tribunal was properly analysed. The seller is very old and the Ward Tribunal visited her home, and she told the Ward Tribunal that she was the one who sold the land to the appellant and the respondent. The witnesses Shani and Petta the son of the seller said the boundary was tampered with and the appellant has trespassed into the respondent's land. Petta showed the boundaries of the suit land and told the Ward Tribunal

that there were new trees (which were small) planted and which were not there when the land was sold, and further that, the only known boundary which was still remaining was an old palm oil tree (mchikichi). The witnesses said the new planted trees clearly showed the appellant has shifted the boundaries hence trespass. In actual sense, I agree with the District Tribunal that the evidence to support the respondent had more weight and leaned in his favour. As for the road as the boundary, the trial Tribunal found that the road and the electric pole could not make a boundary because there came in later in time. The Ward Tribunal and the District Tribunal all relied on the evidence which was on record. In any case, as correctly said by Ms. Mcharo, the issue of the road as a boundary was not raised at the District Tribunal and therefore cannot be addressed at this stage. In the result, these grounds have no merit and are dismissed.

The appellant also complained in the sixth ground that he bought the land way back in 2004 so there is limitation of time. However, the cause of action cannot, as correctly argued by Ms. Mcharo, be counted from when the appellant bought the land but when there was trespass. And in the evidence of the Ward Tribunal the respondent started complaining to the appellant about the trespass in 2018 and later in 2020 he decided



to go to the Ward Tribunal which means the action is within the time according to the law. This ground therefore has no merit.

Then there is the issue of visit to the *locus in quo* which was complained of by the appellant. This has not been raised as a ground of appeal but in his submissions the appellant complained that he was not informed of the visit. This issue as correctly said by Ms. Mcharo was not addressed at the District Level and so cannot be entertained at this stage. In **Sadick Marwa Kisase vs. Republic, Criminal Appeal No. 83 of 2012 (CAT)** (unreported) the Court of Appeal stated:

*"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."*

(Also see the case of **Hotel Travertine & 2 Others vs. National Bank of Commerce Limited [2006] TLR 133**). Subsequently, the complaint has no merit.

In the result, I find no fault in the decision of the District Tribunal.

The appeal is therefore dismissed with costs. It is so ordered.



*V.L. Makani*  
**V.L. MAKANI**  
**JUDGE**  
**17/10/2022**