

IN THE HIGH COURT OF TANZANIA`11`

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.272 OF 2020

(Arising from Land Application No.93 of 2016 of Ilala District Land and Housing Tribunal)

HAJI JUMA AMBARI APPELLANT

VERSUS

ADAM JUMA AMBARI RESPONDENT

JUDGMENT

Date of last Order: 07.01.2022

Date of Judgment: 18.01.2022

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal for Ilala in Land Application No. 93 of 2016. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and the respondent are disputing over a piece of land located at Gongolamboto. The appellant and the respondent are brothers. The appellant filed a suit against the

respondent, claiming that the respondent after obtaining his share from the estate of their late father Juma Mohamed Rashi Ambari threatened to demolish the appellant's structure and with a bad motive, he prepared a contract to justify his bad motive. The appellant prayed for a permanent injunction to restrain the respondent to claim ownership of the appellant's plot and a declaration order that the contract is void. The respondent, the administrator of the estate of the late Juma Ambari claimed that the appellant is his young brother and the disputed house belonged to their father. Both testified to the effect that after their father's death they agreed to subdivide the Plot No. 18 Block E located at Gongolamboto at Dar es Salaam. Their main dispute is on the road which is along with the appellant's house. The District Land and Housing Tribunal for Ilala determine the matter and decided in favour of the respondent.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Kinondoni and raised four grounds of grievance, namely:-

- 1. That the tribunal erred in law and facts to dismiss the Application and declare further that the exhibit D1 is invalid while the same*

containing a contradictory clause on the face of it, hence contravening the contents of the valid will left by the deceased.

- 2. The trial tribunal erred in law and in facts for dismissing the Application while the dispute was left unresolved as the judgment does not resolve the dispute.*
- 3. The trial tribunal erred in law and facts for not evaluating properly the evidence adduced by the parties herein, that the dispute arose between the parties herein resulted from the ill motive of the respondent to demolish frames/structure of the appellant claiming a right of way.*
- 4. That the trial tribunal erred in law and facts for determining the matter by framing issues that are not proper to resolve the dispute between the appellant and the respondent.*

When the matter came up for orders on 18th November, 2021 the appellant enjoyed the legal service of Mr. Said Ally Said, learned counsel and the respondent appeared in persona, unrepresented. The Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

In his written submission, the appellant's Advocate opted to combine the first and third. Likewise, the appellant combined the third and fourth grounds and argue them together.

Submitting in support of the first and third grounds, Mr. Said submitted that the deceased left a Will which could resolve the emerging ambiguities or challenge from the heirs. The appellant's Advocate referred this court to Clause 3 (ii) and (iii) of the said Will which states that:-

3 (ii) Namgawia mwanangu ADAM AMBARI sehemu ya nyuma iliyoko katika Plot Na. 18 Block 2 Gongolamboto Dar es Salaam yenye hati CT 41756 hususan sehemu ya nyuma iliyo ghala (Godown) yote na eneo lote lilolokuwa na sehemu anazotumia hadi wakati wa kifo change.

3 (iii) Namgawia mwanangu HAJI JUMA AMBARI sehemu ya nyumba iliyotajwa katika kifungu kidogo (ii) sehemu isiyogawiwa kwa ADAMU JUMA AMBARI hususani sehemu kuanzia ofisi namba (ii) stoo, chumba namba (2) na vitu vyote vilivyomo ndani chumba namba tatu (3) nne (4), tano (5), sita (6) na nane (8) yenye madula mbele.

Mr. Said continued to argue that the respondent had a bad motive hence on 15th August, 2014 he prepared a memorandum of understanding which the appellant signed without understanding the contents therein. The appellant discovered the bad motive of the respondent after he wanted to demolish some of the frames claiming that the piece of the suit land belongs to him. The learned counsel for the appellant complained that the memorandum of understating contravenes the valid Will which did not require division of the two areas by demolishing the appellant's frames. It was his view that as long as the frames were mentioned in the Will the same means they were lawful properties of the appellant thus the respondent cannot demolish to pave a way to his plot. He claimed that the respondent can use another way to pass by or to enter his land and the same were used since before their father's death. He urged this court to find that the memorandum of understanding is invalid since it contravenes the valid Will.

Arguing on the second and fourth grounds, Mr. Said argued that the center of the dispute between the parties is concerning pavement and the appellant's reliefs included permanent injunction to restrain the respondent to pass through his plot but the tribunal in its decision focus

on who is the lawful owner of the suit land. As a result, the tribunal declared that the appellant is not the lawful owner while the parties are not contesting the issue of ownership of the suit land. Insisting he claimed that the parties are not contesting on the ownership of the suit land but the right of way for the respondent to pass through to his plot.

On the strength of the above submission, Mr. Said beckoned upon this court to allow the appeal and quash the decision of the tribunal in its entirety with costs.

In his rebuttal submission, Mr. Kambamwene, the learned counsel for the respondent prepared and filed a reply. In his written submission, Mr. Kambamwene started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this application. The learned counsel for the appellant was brief and opted to argue the four grounds generally. He contended that the written agreement did not contravene the Will since at the trial tribunal there was no allegation of the agreement contravenes the Will.

The learned counsel for the respondent valiantly argued that it is not proper to raise this ground while the same was not raised at the trial

tribunal. He went on to submit that there was no any proof of ill motive. It was his view that the ill motive was required to be proved on a balance of probability thus the appellant's grounds are demerit. The learned counsel for the respondent contended that to argue that it is not true that the respondent fraudulently engineered the execution of the agreement which was voluntarily entered between the parties.

Mr. Kambamwene continued to argue that it is not correct to state that the trial tribunal framed issues and arrived at a wrong decision. He lamented that the appellant is unhappy because the Certificate of Title included an access path which he says is detrimental to his interests since he has some frames or structure in the suit area. It was his view that as long as the partition of the plots is concluded and titles are registered then it is too late to undo the said exercise taking to account that the appellant consented. He added that the suit plot was well portioned and certificated of titles were issued.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs and uphold the tribunal's judgment.

On his short rejoinder, the learned counsel for the appellant reiterated his submission in chief. He stressed that the Will in regard to Plot No. located at Gongolamboto did not cause any confusion, it distributed the properties of their late father to his heirs. It was his view that the administrator was required to administer accordingly to the Will. Mr. Said valiantly argued that the issue of memorandum of understanding contravening the Will was addressed in the Application thus it was his view that it justified the bad intention of the respondent and the same is not a new issue. The learned counsel for the appellant went on to argue that to subdivide the titles means to demarcate the two plots and not to demolish the appellant's frames.

In his conclusion, the learned counsel for the appellant urged this court to allow the appeal and quash the decision of the trial tribunal with costs.

I have revisited the evidence and submissions of both sides now, I am in a position to determine the appeal. I will consolidate the first and third grounds because they are intertwined. The second and fourth grounds will be determined separately. In order, they appear.

Addressing the first and third grounds, the appellant contended that the memorandum of understating and the Will was prepared by the appellant's father. Reading paragraph 3 (ii) and (iii) of the said Will as reproduced by the appellant, it states that Adam Juma was given a portion behind the Godown. I am in accord with the appellant that the Will did not state parties to create a pathway. However, the records reveal that the parties agreed to subdivide Plot No. 18 Block E located at Gongolamboto with Title No. 41786 which they inherited from their father, the late Juma Mohamed Rashid Ambari. The agreement clearly states that the plot will be divided as per the Will and show a road of the owner residing on the backward plot. Both parties signed the agreement and the same was witnessed by one R. Omary and a stamp duty was affixed thereto.

The appellant does not dispute that he signed the agreement but he claims that the agreement was made with ill motive and that he did not understand what was stated in the agreement. With due respect, I find that the appellant's Advocate claims are unfounded the evidence on record clearly shows that both parties agreed to divide the plot and path a pass-through to the respondent. The parties resurvey the plot and two

titles were issued therefore, it is my view that in case the appellant has any complaint regarding the pathway he had to discuss with his brother and find an amicable solution instead of blaming the trial tribunal's decision. Therefore, I am in accord with the respondent's Advocate that the appellant's claims are unsubstantiated.

On the second issue, the appellant faulted the trial tribunal for failure to resolve the dispute. The records show clearly that the suit Plot No. 18 Block E located at Gongolamboto was given to both parties and in accordance with their agreement they decided to divide the said plot therefore after subdivision the issue of ownership came, the appellant was given Plot No. 18/2 located at Gongolamboto. It is my considered view that according to the new division of plot No. 18 Block E the piece of land in dispute was not part of the appellant's plot since the parties entered into an agreement (exhibit D1) the plot was resurveyed and Plot No. 18 Block E was renamed. Thus, saying that the Will was silent in regard to the issue of the pathway is unfounded. This ground is demerit.

On the fourth ground, the battleground is concerning framed issues. Before I address the appellant contentions, I trace back the untyped proceedings of the District Land and Housing Tribunal for Ilala. This

takes me to the hearing date on 31st July, 2019, whereby the tribunal in the presence of the parties; framed three issues for determination the first issue was *whether the Plaintiff is the rightful owner of the suit premises*. The drawn issues were framed to lead the hearing of the case and assist the tribunal to conclude whether the appellant's claims held any semblance of weight.

Reading the judgment of the tribunal, I have noted that the Chairman considered the issues framed by the parties. The appellant did not raise this concern at the trial tribunal, all parties were comfortable with the issues framed and the tribunal determined all issues and arrived at a conclusion. Therefore, first of all, I do find that it is not proper for the appellant to raise his complaint at the first appellate court blaming the trial tribunal for determining the issue of ownership. Secondly, as rightly pointed out by the learned counsel for the respondent the issue of ownership part of the issues framed therefore it was correct for the trial tribunal to determine the issue of ownership.

The Chairman in his findings was guided by the framed issues and the first issue as required by the law. Order XX Rule 5 of the Civil Procedure Code Cap.33 [R.E 2019] provides as follows:-

"In suits in which issues have been framed, the court shall state its findings or decision, with the reason therefor, upon each separate issue"

The imperative requirement imposed on the trial courts under the cited provision was given an impetus in the case of **Sheikh Ahmed Said v The Registered Trustees of Manyema Masjid** [2005] TLR 61, wherein it was held that:-

*"It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. A trial court must make **a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect.**" [Emphasis added].*

The incisive reasoning in the cited decision was observed by the tribunal Chairman in his judgment. Therefore this ground is devoid of merit.

I am composed in my opinion that there is no any reason for this court to fault the District Land and Housing Tribunal decision. Consequently, given the foregoing, I find no merit in the appeal. Therefore, I proceed to dismiss the appeal in its entirety with costs.

Order accordingly.

Dated at Dar es Salaam this date 18th January, 2022.




A.Z.MGEYEKWA

JUDGE

18.01.2022

Judgment delivered on 18th January, 2022 in the presence of Mr. Said Ally said, learned counsel for the appellant and Mr. Kambamwene, learned counsel for the respondent.




A.Z.MGEYEKWA

JUDGE

18.01.2022

Right to appeal fully explained.