

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

LAND APPEAL NO. 29 OF 2020

(Originating from Land Application No. 233 of 2013 in the District Land and Housing Tribunal for Ilala)

THOBIAS MUSHI.....APPELLANT

VERSUS

MARO GEOFREY MWITA..... 1ST RESPONDENT

DIANA GEOFREY JOSEPH..... 2ND RESPONDENT

J U D G M E N T

Date of last Order:25/11/2021

Date of Judgment:28/02/2022

T. N. MWENEGOHA, J.

This is the first appeal whereby the Appellant herein was the Applicant in the District Land and Housing Tribunal at Mwananyamala (The Trial Tribunal) in Application No. 233 of 2013, whereby he was complaining against the respondent's act of demolishing his fence wall as a result of execution of application No. 2 of 2011. The trial Tribunal held that the demolition was proper as the wall was exactly the one subject in Application No. 2 of 2011. Dissatisfied with the said decision the appellant knocked the door of this Court with the following grounds: -

- 1. That the Trial Chairperson erred both in law and procedure by ruling that the fence wall demolished by the 3rd**

Respondents, was exactly the same which was ordered in the judgment in application No. 2 of 2011 as ordered by the same Tribunal in 2011(before Hon. R.H David, chairperson, as he then was) while the order was different.

- 2. That the chairperson erred in law by confirming that the decision of Land Application No. 2 of 2011 was correct while the parties and subject matter as well as the decision is different from application No. 233 of 2013.**
- 3. That, the chairperson erred in law and procedure by basing on the opinions of the assessors who visited the locus in quo in application No. 2 of 2011, before execution and who were not there during the time of effecting execution.**
- 4. That the chairperson grossly erred in law by deciding that the demolition was proper while the whole procedure before, during and after demolition were improper procedure and is tainted with irregularities.**

WHEREFORE, the respondent prays for the following orders;

- a. that this Honorable Court nullify the decision Land Application No. 233 of 2013, delivered on 11/11/2013 of the Trial Tribunal and uphold the judgment and decree in application no. 2 of 2011.**
- b. that, this Appeal be allowed with costs.**
- c. Any other relief(s) as this Court may deem just and fit to grant.**

The appeal was disposed of by way of written submissions which were filed as schedule. The Appellant was represented by Sylvester Fredrick Aligawesa, Advocate while the respondent was represented by Freddy Saileni Sanga, Advocate.

In his submission Mr. Aligawesa contended that in the Trial Tribunal the appellant was challenging on the execution done at a wrong place contrary to what was ordered in Application No. 2 of 2011 whereby the judgment ordered the erected wall constructed by one Grey Lucian Best be demolished. He submitted that during execution the court broker one Farb Associates Limited and Court Broker wrongly demolished the wall of the appellant instead of the one decreed. He added that apart from resisting, the execution was done.

On the merits of the appeal the counsel for the appellant did not submit much, he only stated that that the decision was tainted with illegality, irregularity as well as impropriety as shown in the memorandum of appeal.

The Counsel combined all grounds of appeal and submitted that the Trial Chairman had clearly stated that the judgment debtor is Grey Lucian Best however, he still confirmed the execution of appellant's wall. He also submitted that there was misspelling of the case number and parties whereas to him it implies that the Chairman was not kin with the case that is why he wrongly decided it the way he did. He therefore prayed for the appeal be allowed with costs.

In reply Mr. Sanga invited this Court to go through the record of the trial Tribunal especially in application no. 2 of 2011. That in application no 2 of 2011, the Tribunal visited locus in quo on 17th June, 2011 and found

that a fence wall was erected by the 1st respondent, one Grey Lucien Best and not appellant in this appeal. He added that in the said application no. 2 of 2011 the Tribunal itself found that there is no evidence against Tobias Mushi, the appellant herein.

He added further that the record also reveals that on 5th November 2013 the broker Farb Associates Limited and Court Broker wrote a letter to Grey Lucian Best informing him that there is a Tribunal order to demolish a fence wall of two meters at Tabata Kimanga. Furthermore, the broker, on 9th September, 2014 wrote a letter to the Chairman of the Trial Tribunal with reference number FAL/DLHT/72 informing the Trial Tribunal that the execution was successful done in front of the applicant and the respondent.

He submitted that the appellant is misleading this Court by saying that on execution day, the broker had wrongly demolished a gated wall belonging to the appellant. He insisted that this is totally false and abuse of the Court process.

He submitted that the appellant has failed to argue his appeal instead he prayed for his memorandum to be adopted to form part of his submission of which will not enable this Court to reach the judgment. The counsel further addressed on the issue of wrong name issued in the judgment and misspelling of the parties and proceeded to clarify what the Chairman intended to write. He then invited the Court to apply overriding objective principle as these were typing errors and misspelling.

In rejoinder Mr. Aligawesa reiterated his submission in chief, and added that what he did in his submission in chief is adhering to procedures governing hearing of cases because without praying to adopting any

document will be wrong as the Court cannot give what is not prayed for. He further added regarding the mistakes pointed out that they identified those mistakes to show negligence surrounding the judgment to point out that even the decision was reached negligently.

Having gone through submissions of both parties the issue for determination is whether the appeal has merit. In determining this, I will address all grounds of appeal together just as they were submitted.

As stated above the appellant did not submit much on the grounds of appeal, he only gave brief background and adopted his memorandum of appeal to form part of his submission. Similarly, the respondent just replied to what was submitted. This Court note that counsel for the appellant did not carry his part exhaustively and did not make effort in assisting this Court with regard to the appeal.

The main complain here is that the trial Tribunal was not correct to state that the demolished fence wall was the same as the one ordered in Application No. 2 of 2011.

My determination will be governed by the series of events extracted from the record as analyzed hereunder.

From the facts, the decision complained of is Land Application no. 233 of 2013. However, the said application cannot be read without Application no. 2 of 2011. Application no. 2 of 2011 involved Marro Geoffrey Mwita and Diana Geoffrey Joseph as applicants and the respondents were Grey Lucien Best (1st Respondent) and Thobias Mushi (2nd Respondent and current appellant).

The proceedings in application no. 2 of 2011 reveal that applicant's complaint was that the 1st respondent erected a wall fence thus she had no way/passage to her house apart from depending on the 2nd respondent's mercy to pass by the side of his house.

The chairman in his wisdom in the judgment in application no. 2 of 2011 stated that,

*"But I have not seen how **the second respondent** has been involved in this case. There is no any single evidence that touches the second respondent in relation to the applicant's claim. It is not **the second respondent** who closed that area.... the first respondent to shift his wall fence by two meters towards the open space and leave that area permanent easement for applicants and he should not close it again...." (Emphasis supplied)*

Contrary to the decision above the fence wall of the appellant herein (who was the 2nd Respondent in application No. 2 of 2011) was demolished. Consequently, he filed the Land Application No. 233 of 2013 at the Trial Tribunal. The Tribunal having heard both parties held that,

*"I have noted that dispute in Application No. 2 of 2011 where the applicant in this case was the **2nd respondent**, was the fence wall which was prohibiting the 1st respondent who was the applicant in that case to get access to her residential premises...." (Emphasis supplied)*

It went further to state that

*"... I consider this matter the same way as my honorable assessors do that **the fence wall demolished by the 3^d Respondent (sic) was exactly the one which was subject matter in Application No. 2 of 2011** before this tribunal. For that matter I find this matter with no substance at all before this tribunal and I therefore dismiss it with costs." (Emphasis supplied)*

Now, having narrated the above from the series of event it is clear that the appellant herein was not supposed to be affected by the decision in application no. 2 of 2011 in any way as there was no evidence tendered against him as cleared declared by the Chairman in the judgment. The decision was to demolish a fence wall belonging to the 1st respondent Grey Lucien Best and not the fence wall belonging to the 2nd respondent (appellant herein) as the same was not decreed to be executed. Whereas it is a trite law that you cannot execute what was not decreed.

The problem is how this Court can determine that the demolished wall was of appellant or of Mr. Grey Lucian Best. The records on the two decisions contradict each other. For instance where the Court in application No 2 of 2011 ruled that the appellant's wall was not to be demolished, the Chairman in application 233 of 2013 seemed confused with the facts and regarded the case before him to be similar to the prior decided case. It is further expected for the Chairman to give details on whether there were two walls or only one and in case of two, their differences and similarities or how they differ or can be identified to differentiate the two.

The statement that the wall is the same made the decision to be vague for lack of description. The description was necessary to this case as

stated above for this appeal. It is hard to tell what exactly had transpired from what is found on the record.

From the points highlighted above, this Court allows this appeal to the extent that the decision is vague. I therefore use my discretionary power of revision and quash the Trial Tribunal Decision in Application No. 233 of 2013 with no order as to costs. Any interested party has a room to file a fresh application.

It so ordered.

Dated at Dar es Salaam this 28th day of February, 2022.




T. N. MWENEGOHA
JUDGE