

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 10 OF 2016

*(Originating from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala in Land Application No. 127 of 2010)*

PATRICK WALLACE KIONDO (as legal personal

representative of the late **WALLACE KIONDO**) **APPELLANT**

VERSUS

SHOMARI NYAGONGO **RESPONDENT**

JUDGMENT

Date of Last Order: 20.05.2022

Date of Ruling: 26.05.2022

A.Z.MGEYEKWA, J

At the centre of controversy between the parties to this appeal is a parcel of land. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 127 of 2010 in which Wallace Kiondo, the appellant lodged a case against Shomari Nyagongo, the respondent.

The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant alleged that the respondent has trespassed. The appellant testified that the respondent is his neighbour and the boundary between them was a tree. He testified that on 9th September, 2009 the respondent constructed a new boundary of bricks thus he cut down the trees. Thus he claimed that the respondent destroyed trees and thus he urged the tribunal to order him to vacate the suit land and pay for the damages caused. The respondent denied the allegations, he claimed that he is the lawful owner of the suit land. The District Land and Housing Tribunal decided the matter and decided in favour of the respondent.

Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal on six grounds of grievance; namely:-

- 1. That, the trial Chairman failed to identify and specify the disputed land as it was mentioned and discussed in the court proceedings.*
- 2. That, the trial Chairman erred in law and fact in holding that the disputed land is Land No. 21/45 and 21/66*

3. *That, the trial Chairman erred in law and facts that the appellant's land and respondent's land are not neighbours*
4. *That, the trial Chairman erred in law and fact in holding that the respondent did not trespass into the appellant's land.*
5. *That, the trial Chairman erred in law and fact in holding that the respondent is the lawful owner of the disputed land.*
6. *That, the trial Chairman erred in law and fact in failing to analyse the evidence hence arriving at wrong findings.*

When the matter was called for hearing before this court on 22nd April, 2022, the court granted the respondent's request to argue the appeal by way of written submissions whereas, the appellant's Advocate filed his submission in chief as scheduled. The respondent has defaulted to the court order. This court has held time without number that failure to file written submissions as ordered by the court is akin to a failure to appear when the case is called on for hearing and consequent orders for such non-appearance are inevitable.

There is an unbroken chain of decisions of this court that so hold. These include **Hidaya Zuberi v Bongwe Mbwana** PC Civil Appeal No. 98 of 2003 DSM (unreported), **Tanzania Harbours Authority v Mohamed R. Mohamed** [2002] TLR 76; **Patson Matonya v Registrar Industrial**

CourtofTanzania & Another, Civil Application No. 90 of 2011 and **Geoffrey Kimbe v Peter Ngonyani**, Civil Appeal No. 41 of 2014 (both unreported). In consequence of the foregoing, it is ordered that the matters be determined *ex-parte* against the respondent, by considering the appeal based on the submission filed by the appellant.

The appellant's counsel began narrating a brief background of the facts which led to this appeal which I am not going to reproduce in this appeal. The learned counsel for the appellant opted to combine the first and second grounds, fourth and fifth ground as well as the third and sixth grounds together.

On the first and second grounds, the appellant's counsel contended that the Chairman in his judgment failed to identify and specify exactly the suit land. The learned counsel submitted that in the record it is very clear that the appellant in his testimony informed the tribunal that the respondent invaded his land measuring 4 feet from the respondent's land. He also testified that their border was built with bricks.

She went on to submit that the Chairman in her decision on page 5 referred to the suit land as Plot No. 21/45 and 21/66 while it was not true since the two plots are separate pieces of land with different sizes. The

learned counsel added that the Plot No. 21/45 is measuring 1623 sqm and the respondent's Plot No. 21/66 is measuring 526 sqm. The applicant's counsel went on to state that the appellant urged the tribunal to order the respondent to remove the bricks in the suit land as he trespassed 4 feet.

Ms. Juliana contended that failure for the Chairman to specify and identify the suit land is fatal since the respondent is trying to take advantage to claim the whole appellant's land measuring 1623 sqm instead of taking 4 feet area which he won at the tribunal. To support her submission Ms. Juliana referred this court to Execution No. 431 where the respondent prays for the tribunal to appoint a broker to evict the appellant from his land.

As to the 3rd and 6th ground, the learned counsel for the appellant contended that the tribunal failed to analyse the evidence on record. He argued that the parties are neighbours. She added that the respondent testified to the effect that Mwanaisha Ndugumbi introduced him to the late Wallace Kiondo when he was showing him the area and DW2 testified to the effect that the appellant is his neighbour. Ms. Juliana insisted that the tribunal failed to evaluate the evidence on record.

She continued to argue that in the proceedings there were some contradictions; Fatuma the respondent's witness during cross-examination stated that the planted trees were not within the respondent's area instead the same were planted in the road reserve. Ms. Juliana urged this court to determine the matter on merit and if possible to visit *locus in quo*.

On the strength of the above submission, the appellant's counsel beckoned upon this court to quash the decision of judgment and decree of the District Land and Housing Tribunal for Kinondoni for being unjust and inappropriate and allow the appeal with costs.

Having heard the submissions of both parties simultaneous with carrying out a thorough review of the original record, I wish to state from the outset that I wish to begin with the first and fourth grounds which in my view, if decided in the positive, are sufficient to dispose of the entire appeal for reasons which will unfold in the course. The grounds relate to ownership of the suit land and the order issued by the tribunal. I have gone through the original proceedings and found that the application shows that the appellant's main claim was against the respondent who was alleged to trespass the appellant's land measuring 4 feet.

The evidence on record reveals that the appellant in his testimony claimed that the respondent invaded his land measuring 4 feet. The respondent in his testimony also testified to the effect that he was the lawful owner of the suit land and in accordance to the record the disputed area was measuring 4 feet. The respondent in his testimony was clear that he constructed a brick wall which was a boundary and the appellant claimed ownership over the said boundary. Therefore, examining closely the tribunal proceedings it is vivid shown each party had his own plot and they were able to prove their testimonies by tendering a sale agreement.

What was in dispute was the area where the respondent constructed a brick wall. In the record, the suit land was the 4 feet area as brought forward by the appellant in his claims and the respondent in his testimony admitted that the boundary area contained *mtikiti* and *michikichi* tress and the said area was within his land. The tribunal was required to declare the respondent as a lawful owner of the suit land measuring 4 feet not otherwise. I fully subscribe to Ms. Juliana's submission that failure for the Chairman to specify and identify the suit land was fatal since the respondent is taking advantage to acquire the plot of the appellant which was not in dispute. Therefore, in execution, the respondent is required to acquire the disputed land measuring 4 feet only.

In the upshot, I proceed to quash and set aside the District Land and Housing for Kinondoni at Mwananyamala Order dated 18th November, 2015 which did not specify the measurements of the dispute land. Appeal is allowed without costs.

Order accordingly.

Dated at Dar es Salaam this date 26th May, 2022.




A.Z.MGEYEKWA
JUDGE
26.05.2022

Judgment delivered on 26th May, 2022 in the presence of Ms. Sanga, learned counsel holding brief for Ms. Juliana, learned counsel for the appellant in the absence of the respondent.




A.Z.MGEYEKWA
JUDGE
26.05.2022

Right of Appeal fully explained.