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

# LAND APPEAL NO. 244 OF 2021

(Arising from Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 29 of 2021; Originating from Mbezi Ward Tribunal in Land Application No. 25 of 2021)

**LUJUNA BALONZI JUNIOR.....APPELLANT**

**VERSUS**

**GERALD NZALALILA.....RESPONDENT**

Date of Last Order: 04.04.2022
Date of Ruling: 09.05.2022

## JUDGMENT

**V.L. MAKANI, J**

The appellant is LUJUNA BALONZI JUNIOR. He is appealing against the decision of Kinondoni District Land and Housing Tribunal at Mwananyamala (the **District Tribunal**) in Land Appeal No. 29 of 2021 (Hon. Rugarabamu, Chairman). The matter originated from Mbezi Ward Tribunal (the **Ward Tribunal)** in Land Application No. 25 of 2021.

In the Tribunals the appellant herein lost. Being dissatisfied with the decision of the District Tribunal he filed this appeal with the following grounds:

1. *That the District Land and Housing Tribunal erred in law and fact for not considering heavy evidence and*

*testimonies of appellant case during the trial which the appellant had right of way.*

2. *That the District Land and Housing Tribunal erred in law and fact for making a finding the area of 3 meters given to appellant was party to respondent land contrary to evidence tendered to the trial court.*

3. *That District Land and Housing Tribunal erred in law and fact for not properly invoking principles of Easement (Right of Way) whereby appellant has been used the land (sic) since 2009 without disturbance from neighbours.*

The appellant prayed for the appeal to be allowed and the judgment and decree of the District Tribunal be quashed and set aside. He also prayed for judgment to be entered in his favour, costs of the appeal and any other reliefs that the court may deem fit and just to grant.

The brief background of this matter is that both the appellant and the respondent bought pieces of land from one Amon Moses Moshi (the **Original Owner**). The appellant was the first one to purchase a plot of land on 28/04/2009 while the respondent bought his plot of land on 01/03/2011. It is on record that the appellant was given access road to his plot by the Original Owner which is still in use to this date. But on 09/02/2013 the appellant requested the Original Owner to use part of the respondent's land as way leave without the consent of the

respondent. The Ward Tribunal ruled out that the appellant failed to demonstrate and that he received consent from the respondent before that he was using the land in dispute before 09/02/2013. The Tribubal thus decided in favour of the respondent. The District Tribunal confirmed the decision of the Ward Tribunal.

With leave of the court the appeal was argued by way of written submissions. The appellant personally drew and filed his submissions. He said the use of a right of way was in 2009 but the respondent started to make disturbances in the year 2020. The appellant said the respondent among other things blocked the entrance so that he could not reach his home because he constructed a wall. He said the blocked way made the appellant suffer irreparable loss as he could not enjoy the right to way to enable him reach his home. The appellant said he has a right of way due to an easement created since 2009 to the dominant land of the respondent and this is according to section 144 1(a)(b)(c) and 144 (2)(a)(b) of the Land Act CAP 113 RE 2019 where it provides for the right of easement. The appellant also gave a definition of easement as per section 145(1) of the Land Act and the case of **Hewlins vs. Shippam 5B & C 229** to mean a privilege of right to cross or otherwise use someone's land for a

specific purpose and he said that was also provided in section 31(2) of the Law of Limitation Act CAP 89 RE 2019.

The appellant combined the second and third grounds. He said the dispute is not on ownership but rather on easement and if the District Tribunal had followed the evidence which was to this effect it would have reached a fair conclusion on easement. He said the Tribunals ought to have made findings of the existence of the implied easement whereby the appellant had a way since 2009 when he purchased the plot from the Original Owner. He prayed for the court to declare the existence of the implied easement and to vary the orders of the lower Tribunals according to section 157 of the Land Act. He concluded by further praying for the appeal to be allowed with costs and the judgment and decree of the District Tribunal be quashed and set aside.

Ms. Subira Mushi, Advocate drew and filed submissions in reply on behalf of the respondent. As for the first ground, Ms. Mushi said the appellant's submissions have failed to prove the passing of title from the respondent to the appellant. She said the Tribunals had confirmed that it was wrong for the Original Owner to have granted way to the

appellant without the consent of the respondent as the land for which the way was sought was already sold to the respondent by the Original Owner. She said any transaction therefore between the Original Owner and the appellant in respect of the land sold to the respondent was null and void because the respondent was not part of the transaction.

Ms. Mushi acknowledged that the provisions sections 144, 145, and 146 of the Land Act basically grant easement under express, prescriptive, implied and necessary terms. She said easement is granted to help keep peace between neighbours especially reaching an area without trespassing. But such easement cannot be where the said way leave happens to be in a residence of another. She said the Original Owner gave the appellant a private road without the approval of the respondent because the appellant refused to use the alternative road provided earlier on by the Original Owner. She said this alternative road is currently being used by the appellant after the respondent constructed a fence.

Ms. Mushi further said the appellant has failed to prove easement to both Tribunals, and further that he has not demonstrated the

purported easement in land from 2009 as required by section 31 of the Limitation Act which requires easement to be absolute and indefeasible. She said the appellant is therefore a trespasser in the respondent's land and cannot benefit from the illegal claim. She said he does not deserve relief at the hands of the law as per the Latin Maxim *pari delicto portior est conditio defendetis and dolo malo non oritur action* which basically means **"courts will refuse to enforce an illegal agreement at the instance of the person who is himself a party to the illegality or fraud"**.

As for the other grounds Ms. Mushi said the respondent bought the land with clear geographical boundaries without a provision of 3 meters way leave to the appellant's residence. She said the respondent secured building permits from relevant authorities and commenced constructions works. She said at all times the appellant has a private road to his residence and demands an alternative route within the respondent's land. She said the appellant ought to be aware that he is a trespasser to the respondent's land and cannot benefit from an illegal contract with the Original Owner regarding the provision of 3 meters private road. He said the principles of an easement are immaterial because the title passed from the Original

Owner to the respondent in 2011 who commenced construction works in January, 2013. She prayed for the appeal to be dismissed with costs.

The main issue for consideration is whether this appeal has merit. And I will be guided by the settled principle of law that this being a second appeal, the court rarely interferes with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. (See **Director of Public Prosecutions vs. Jaffari Mfaume Kawawa, [1981] TLR 149**; **Mussa Mwaikunda vs. The Republic [2006] TLR 387** and **Wankuru Mwita vs. Republic, Criminal Appeal No. 219 of 2012** (unreported). In **Wankuru Mwita** (supra) the Court stated that: -

> *"...The law is well-settled that on second appeal the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

(see also **Jacob Mayani vs. Republic, Criminal Appeal No.558 of 2016 (CAT-Shinyanga)** (unreported).

I have gone through the records of the Tribunals and the submissions filed herein. It is not in dispute that the Original Owner one Amon Moshi sold plots of land to the appellant and respondent in 2009 and 2011 respectively. That in 2013 the Original Owner got into an agreement with the appellant for way leave within the plot sold to the respondent. It is also not in dispute that the respondent was not involved when the Original Owner and the appellant entered in the agreement of way leave.

Indeed, as correctly said by the Tribunals below the appellant could not have been granted way leave by the Original Owner because title had already passed to the respondent who had bought the said plot. It is quite obvious that if at all way leave was before the sale then when the respondent was negotiating sale the issue of the way leave would have been discussed. But since the agreement for way leave between the Original Owner and the appellant was after the sale of the plot and did not involve the respondent then it is null and void because title had passed to the respondent and he was the only one who had the power and mandate over the said plot. In fact, one of the sons of the Original Owner while testifying at the Tribunal said that it was a mistake for the grant of way leave to the appellant

without the consent of the respondent and this makes it clear that the claim by the appellant has no merit.

The appellant also relied on sections 144, 145, and 146 of the Land Act on easement and way leave. But the application of these provisions of the law, in my view, are where one is in possession and or owner of land. In other words, easement or way leave will be applicable where the claim is against a person owning the property in question. For instance, easement shall be capable of existing only during the subsistence of the right of occupancy or lease out of which it was created (section 144(4) of the Land Act.

In this present case and according to the appellant himself, the agreement to easement/way leave was with the Original Owner who as established hereinabove was not in possession or owner of the plot at the time the agreement was signed as the plot was already sold to the respondent. So, doing anything without the consent of the respondent meant that the appellant was a trespassing on the respondent's land. According to section 144(4) of the Land Act, easement could not have been created because the appellant and the

Original Owner were not in possession/ownership of the plot where the appellant intends the access road to be located.

In the result and in view of what I have endeavoured to explain above, I don't find any fault in the decisions of both the Ward and District Tribunals. Consequently, the appeal is hereby dismissed with costs.

It is so ordered.

**V.L. MAKANI**
**JUDGE**
**09/05/2022**