IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 41 OF 2022

(Arising from the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 478 of 2019)

KAMILI JOHN LEMA ..... APPELLANT

VERSUS

ANGELA KASSIM MWINUKA ..... RESPONDENT

JUDGMENT

Date of Last Order: 30/5/2022
Date of Ruling: 28/6/2022

A. MSAFIRI, J

The appellant has lodged this appeal after having been dissatisfied with the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala (herein as the trial Tribunal) in Land Application No. 478 of 2019, where the judgment was entered in favour of the respondent.

The appeal is based on five grounds of appeal as follows;

1. That, the trial Chairman erred in law and fact by disregarding the evidence and witness testimonies during the trial.
2. That, the trial Chairman erred in law and fact by holding that the appellant unlawful (sic) invaded respondent land.

3. That, the trial Chairman erred in law and fact by holding that the appellant in his written statement of defence agreed with the respondent claim that he trespassed into the land in dispute.
4. That, the trial Chairman erred in law and fact by deciding on the matter which was not pleaded in the respondent application.
5. That, the trial Chairman erred in law and fact by ordering the demolishment of appellant house by two blocks size without proof that the respondent actually own the disputed land.

The appellant prayed for the judgment and decree of the trial Tribunal to be set aside. He also prayed that the reliefs sought by the appellant at the trial stage to be awarded to the appellant. The respondent opposed the appeal and filed a reply to the memorandum of appeal in which she denied all claims raised in the grounds of appeal by the appellant.

The appeal was heard by way of written submissions. The appellant appeared in person and was unrepresented while the respondent was represented by Antony Kiyanga, learned advocate.

I have gone through the written submissions by rival parties and I am grateful for both parties' submissions for and against the appeal as they have assisted me in determination of the same. I need not recite all what the parties has submitted as the written submissions are part of the court records, however, I have considered them in my analysis and determination of the appeal.

The brief background of this appeal is that, the respondent instituted a land dispute against the appellant before the trial Tribunal in Land Application No. 478 of 2019. She claimed that the appellant has trespassed into her land and she sought for declaration that she is the lawful owner of the land in dispute located at Makangira Street, Msasani area, Kinondoni, Dar es Salaam.

According to the facts on application, the appellant and respondent are neighbours, and they bought their pieces of land from the same previous owner named Sevenday Kaunda. The pieces of land were adjacent so, they became neighbours. That in 2017, the respondent started to build the house in his piece of land but he trespassed into the respondent's land claiming that the same belongs to him. The dispute was referred to the local Government Office and later to the Ward Tribunal but without success. In addition, at the Ward Tribunal, the parties were informed that the same had no pecuniary jurisdiction to entertain the matter.

After the hearing, the trial Tribunal entered judgment in favour of the respondent and declared her the lawful owner of the land in dispute. Furthermore, the trial Tribunal ordered the appellant to demolish his house by the size of two bricks and hand over the land in dispute to the respondent.

I have gone through the five grounds of appeal. The appellant has argued them by consolidating grounds number one and two, and grounds number Alls.

four and five. He argued ground number three separately. The major issue here is whether the appeal has merit. For the reasons I will explain later, I will start determining ground number three which was argued separately.

In the said ground of appeal, the appellant stated that, the trial Chairman erred when he held that the appellant agreed with the respondent's claim that he trespassed into the land in dispute. The appellant stated that, the trial Chairman erred by relying on one mistaken word in the paragraph disregarding the rest of the contents of the paragraph, and the whole defense of the appellant in his written statement of defence during the trial.

The appellant quoted the disputed paragraph 10 of his written statement of defence which he claimed was partly quoted by the trial Chairman. The clause read thus;

> "*That, the contents of paragraphs 6(i) of the application are strongly disputed and the applicant is put to strict proof. Respondent states that the construction being alleged by the applicant is the respondent's renovation and or repairs of the two small houses he had purchased from Mr. Sevenday Kaunda as per sale agreements attached as "KJL1" to the Respondent's answer,* ***and the said renovation/ or repairs were carried out within the applicant's land purchased by the Respondent*** *from the said Sevenday Kaunda, and the alleged claims by the Applicant that had been ignored by the*

Respondent are false claims which are unjustified" (**Emphasis added).**

The appellant contended that, the statement which was quoted by the Chairman that *"And the said renovation/or repairs were carried out within the applicant's land,"* were just the slip of the pen by the mistake of the advocate of the appellant who drafted the defense. He added that, the words *"within the applicant's land"* was supposed to read *"within the Respondent's land"*. He said that, the allegations of trespass into the respondent's land was clearly disputed by the appellant in paragraph 7 of his Written Statement of Defence but the Hon. Chairman chose to ignore it.

In reply, Mr. Kiyanga for the respondent submitted on ground number three that, the trial Chairman was right to take into account the fact that the respondent had admitted in his own pleading that he had carried out the renovation or repairs within the applicant's land. He argued that the appellant's argument that his admission was a slip of the pen has to be disregarded.

I have read the judgment by the trial Tribunal. Indeed, the Hon. Chairman has based his decision on that part of the appellant's (then respondent) defence in his written statement of defence. The Hon. Chairman did not analyse the evidence adduced during the trial by both parties, but relied completely on what he concluded to be admission of the respondent

(appellant) in his written statement of defence, that he had trespassed into the land of the applicant.

From the beginning of his judgment, the trial Chairman seems to rely only on that part of the written statement of defence, disregarding the whole contents of the same.

At page 3 of the said judgment, the trial Chairman stated that,

> *"Mdaiwa aliwasilisha hati yake ya Utetezi kukana madai ya mdai. Amejitetea kama ifuatavyo; .....the construction being alleged by the applicant is the respondent's renovation and or repairs of the two small houses he had purchased from Mr. Sevenday Kaunda as per Annexure "A" to the respondent's answer, and the said renovation/or repairs were carried out within the applicant's land purchased by the respondent from the said Sevenday Kaunda...."*

According to this, the trial Chairman picked those words only from the whole contents of the written statement of defence of the respondent and used them to make a finding and reached to the decision in favour of the applicant. The trial Chairman did not even pause to analyse the available evidence by both parties. He did not even consider the opinion of the assessor, and although he was not bound by the opinion of the said assessor, he did not give reason why he is not agreeing with the said assessor's opinion.

At page 6 of the judgment, the trial Chairman found that, the respondent has no base of denying the claims by the applicant because he has admitted that he has made renovation in the applicant's land;

> *"kwa msingi wa mdaiwa kukubali kuwa amejenga katika eneo la mdai Baraza linaona hana utetezi wa msingi. Hii ni kutokana na kukiri kwake kujenga katika eneo la mwombaji katika hati yake ya utetezi".*

The trial Chairman relied on numerous authorities by the Court of Appeal which set the principle that parties are bound by their pleadings and no party should be allowed to part from his pleadings.

I have gone through the party's pleadings. On 08/11/2019, the applicant (now respondent) filed the amended Land Application. On 10/2/2020, the respondent filed the Reply to the amended application. It is paragraph 8 of the same which contains the words that the trial Chairman took to be admission of the respondent that he trespassed to the applicant's land.

I have read the whole contents of the said reply to the amended application and I am led to believe the appellant's claims that those words which were picked as admission, were written by mistake in what the appellant has called "slip of the pen".

Looking at paragraph 4 of the Reply, the respondent denied the claims by the applicant that the disputed land belonged to her. In his denial, the respondent added that, the parties to this land in dispute had each purchased a property from one Sevenday Kaunda. At paragraph 6, the respondent stated that the applicant is the one who has constructed a wall and blocked a pavement. From this, and the whole contents of written statement of defence, the respondent denied totally to have trespassed or made renovations/erected a building on the applicant's land.

I agree and believe the appellant's submissions that, by looking at the whole contents of the denial and statements by the respondent in his reply to the amended application, the words at paragraph 8 of the same were a mistake where instead of writing "*repair were carried out within the respondent's land.*" It was written "*repairs were carried out within the applicant's land*".

It is my finding that the trial Chairman erred when he relied on those few mistaken words to make his findings instead of looking at the whole contents of the written statement of defence and the evidence adduced during the trial. And this is the reason why I saw it wise to start with determination of the third ground of appeal. The trial Chairman did not bother to analyse the available evidence adduced during the trial.

In the circumstances, this court as the first appellate Court has mandate to step into shoes of the trial Tribunal and analyse the evidence.

In the case of **Deemay Daati & 2 others vs. the Republic,** Criminal Appeal No. 80 of 1994, it was held while relying on the authority in the case of **Peter vs. Sunday Post Ltd** (1958) E.A 424, the Court of Appeal for East Africa that;

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of facts".*

Guided by that principle, I will look and anayse the evidence adduced by parties to the suit during the trial. During the trial, the respondent who was then the applicant, testified as PW1 and stated that she bought the disputed area from Sevenday Kaunda measured 129 square meters on 13/4/2005. That the area had a house already built by the seller. She started living there. That, the respondent then came to live in other house of Sevenday Kaunda which the respondent also bought from the said Mzee Kaunda. She said that, the respondent had tenants in the house which he bought from Mzee Kaunda.

That Mzee Kaunda, in the presence of *Mjumbe* requested her to allow the respondent's tenants to use her toilet for two months while waiting for the respondent to build his own toilet for his tenants. She said that, however, the respondent built the toilet before the expiry of two months and the tenants started to use it.

That, the mark of the applicant's boundary was a built foundation, and a pawpaw tree, but when the respondent began building his toilet, he removed/uprooted the pawpaw three and demolished a pole (nguzo).

That, when the respondent began building, he demolished two bricks length size of her foundation and he merged/entered her side of land. The applicant stated further that the matter was reported at the Street Local Government Office and the Street Committee to check on the boundaries. That the respondent was ordered to demolish his building but he did not. That, he was stopped to continue building and he stayed for over one year without building. That later when she has travelled and came back, she found the respondent has erected his wall up to the top.

She reported the matter to the Street Chairman who after sometime, he ordered the applicant and respondent each to leave a space between their lands and fix a gate which will be used by both sides. That, when she went to work, the respondent fixed a gate in her area without her consent. That, the respondent then fixed his water pipe in her area.

She prayed for the trial Tribunal to visit the area in dispute to survey and see whether the area in dispute belonged to the respondent or the applicant.

In cross examination, PW1 stated that, the respondent has entered in her area for a size of two bricks. She argued that the dispute is for area not a Ardh.

way. But she averred that the respondent has closed a way for her to pass. She tendered the residential license and sale agreement dated 13/4/2005 which were admitted collectively as Exhibit P1.

PW2 one Sarah Sevenday Kaunda stated that she knew the boundaries of houses sold, that there was "*mpapai* and *"kizingiti".* In cross examination she said she did not know why the parties are fighting for boundaries.

The defendant testifying as DW1, stated that, the applicant is his neighbour, they all bought their places/area from one Sevenday Kaunda. That the applicant bought a four rooms bricks house while the respondent bought the small houses adjacent to the house bought by the applicant. That, there was one toilet which were used by all occupants i.e. the applicant and the respondent. That both parties agreed before "*Mjumbe"* and seller that the toilet will be used by both owners of the land. The respondent tendered the agreement which was purportedly entered by the applicant and respondent before "Mjumbe". It was admitted as Exhibit D1.

DW1 stated that after buying the small houses, he demolished one which was near the applicant's house and left an easement. That he built inside his area and left about 90 centimeters from the wall of the small house. That, later he received directives from the local Street Chairman to demolish the said wall, in order to make a way to pass through between his house and the applicant's. He tendered the agreement between the two parties of 19/10/2011 as exhibit D2.

He said that, the applicant built a wall which blocked the wall of the respondent's house and also blocked the passage way which they had agreed to leave for purpose of passing through. He also tendered the residential license which was admitted as Exhibit D3.

DW1 testified further that, during the survey, the applicant area was surveyed. That the said survey went further and merged into the house of the applicant, and the respondent was given a map "L".

He prayed that, since there was a mistake in survey, the residential licenses of the two parties should be amended to rectify the mistake done during the survey where a part of the respondent land was surveyed to belong to the applicant. He added that, the applicant should demolish her wall, and he, the respondent shall demolish and remove the gate so that parties in dispute can live peacefully.

After hearing of both parties, the trial Tribunal visited the locus in quo. At the locus in quo, the Tribunal made observations that, the applicant is claiming for area measured the length of two bricks from the area of the respondent. The trial Tribunal saw that the two bricks were part of the respondent house. The passage/alley which the parties agreed to make was seen, and the gate was seen and both were being used by both parties.

The Tribunal observed further that, between the house of the applicant and the respondent there is a passage. At the locus, the applicant stated that, the fence wall of the respondent on the sought side is part of her area. The respondent also stated that the applicant has erected a fence wall on the west side which blocks him from going around his area/house.

I have read the contents of Exhibit D1 which is the agreement between the parties about leaving the passage way between their plots, and putting a gate which will be used by both parties. By observation of the trial Tribunal which visited the locus in quo, the agreement was honoured by both parties. This is because the trial Tribunal saw the passage way between the parties' houses. The Tribunal also saw a gate which was used by both parties.

The dispute here is on the two bricks size wall which was allegedly demolished by the respondent which the applicant said it marked the boundary of her area. That, the respondent later built a wall which took part of her land. That the respondent has exceeded two bricks size into her area.

To my understanding after reading the whole proceedings, the applicant claims are based on that two bricks size wall built by the respondent which exceeded into her area.

However, the trial Tribunal at the locus in quo observed that the two bricks area which the applicant claimed it has exceeded into her area, it is actually part of the respondent's house (appellant). I will quote part of the hand written proceedings at the locus in quo;

"Mdai anadai Eneo la matofali mawili kutoka kwa Mdaiwa.

Tofali hizo mbili zimeunganishwa/ni sehemu ya nyumba ya Mdaiwa".

In conclusion, the observation by the trial Tribunal at the locus in quo was that, there was a passage way between the houses of the parties, there was a gate which was used by both parties, and the two bricks wall was part of the respondent's (appellant's) house.

The available evidence does not show whether the appellant has trespassed into the respondent's land and how he has trespassed. By this evidence, it is my view that the trial Tribunal erred in failing to analyse the evidence and hence reached to the wrong conclusion and decision. The trial Tribunal was wrong in its findings and decision that the bricks sized area was owned by the applicant (now respondent) without showing how it reached that conclusion.

It is my view that, the dispute between the two neighbours on the boundaries of their areas can be settled by each of the neighbours respecting the boundaries set and each one keep on her/his part of land as purchased from one Sevenday Kaunda.

From this analysis, I allow the appeal, quash and set aside the findings, judgment and decree by the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 478 of 2019. The parties are to respect the boundaries of their areas.

Appeal allowed with no order to costs. Right of appeal explained.

A. MSAFIRI,

JUDGE

28/6/2022