IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 127 OF 2021

(Originating from the Ilala District Land and Housing Tribunal vide Land Appeal No. 372 of 2019 delivered on 25th May, 2021)

MOHAMED S. FUNGAFUNGA.....APPELLANT

VERSUS

AMBIANA MZAVA .....RESPONDENT

J U D G M E N T

Date of Order: 06/12/2021
Date of Judgment: 28/02/2022

T. N. MWENEGOHA, J.

The appellant herein being aggrieved with the decision of Hon A. R. Kirumbi from the District Land and Housing Tribunal, Land Application No. 372 of 2019 is hereby appealing to this Court against the whole decision on the grounds:

1. **That, the Chairman erred in law and facts by entering judgment in favour of the respondent herein without considering that the appellant is the lawful owner of the disputed land.**
2. **That, the Chairman erred in law and facts by entering judgement in favour of respondent without considering**

the strong evidence adduced by the appellant and his witnesses concerning the disputed land.

It is the prayers of the appellant that this appeal be allowed, that the decision of Trial Tribunal be quashed and set aside and the appellant be declared a lawful owner of the disputed land.

It was the appellant's contention that he owned and occupied the disputed land which was allocated to him by the Village Council since 1983 and erected a house to which he has been living with his family without any disturbance. That in 1999 the respondent purchased land near the appellant's land. That, in 2005 the respondent encroached 16 feet in the appellant's land whereby in 2016 appellant instituted a case in the Ward Tribunal, which was dismissed, hence the appellant instituted a fresh case resulting to this Appeal.

He then proceeded by arguing his first ground of appeal that the Chairman erred in law and facts by entering judgment in favour of the respondent herein by referring to the case of **Ombeni Kimaro vs. Joseph Mishili t/a Catholic Charismatic Renewal, Civil Appeal No. 33 of 2017** which discussed on the Priority Principle that he who is prior in lime is the stronger in right. That in the said case it was held that

> *"The priority is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have titled over it, a party who acquired it earlier in point of time will he deemed to have a better or superior interest over the other".*

He contended that the evidence provided by the parties in the Trial Tribunal revealed that the appellant herein was the first one to acquire land since 1983 and that the respondent purchased land near the appellant land in 1999.That, it was in 2005 when the respondent encroached 16 feet to the disputed land.

In addressing the second ground of appeal, that the chairman erred in law and facts by entering judgment in favour of respondent without considering the strong evidence adduced by the appellant it was the argument of the appellant that he had proved his case. That, the disputed land belongs to him and he tendered evidence in the Trial Tribunal which proved his ownership. That, the respondent in the Trial Tribunal never proved or tendered any evidence to prove her ownership of the land.

That the appellant in the Trial Tribunal proved that the land is surveyed, whereby beacons of the appellant were found in the area of the respondent.

It was the appellant's argument therefore that, the Trial Tribunal did not consider that the appellant's tendered evidence proving his facts beyond probability.

He prayed for this Court quash and set aside the decision of the Land Tribunal, appeal be allowed and for him to be declare a lawful owner of the disputed land.

In his reply, through the writes submissions, the respondent informed this Court that he owned and occupied the land after buying it from one Mama Seleman in 1999. That he constructed a charcoal selling store (Banda la Mkaa) and later on he gave a piece of the said land to his daughter one Amina Ambiani who demolished the store and built a house in which she has been living there since 2004 with her family peacefully, undisturbed until 2016

when she successful sued the appellant for cutting her tree (Mti wa Mfunde) before the Kimanga Ward Tribunal where ruling was delivered in her favor.

That being aggrieved, the appellant herein instituted a fresh case before the Ilala District Land and Housing Tribunal which again ended in favor of the respondent herein, hence this Appeal.

In responding to the first ground of appeal it was the respondent's submission that the Tribunal did not error in law and facts and the chairman was very correct in entering the judgment in favor of the respondent herein after considering the evidence and defense adduced by both parties before the Tribunal.

As for the second ground of appeal that the Chairman erred in the law and fact by entering judgment in favor of the respondent, it was the respondent's contention that the Chairman was correct in entering the Judgment in his favor because there was no evidential proof submitted before the Tribunal showing that there was any encroachment to the appellant's land by the respondent. That, therefore after the Tribunal had considered the evidence adduce, it concluded that the appellant failed to prove the encroachment by the respondent as he claims.

It was the respondent prayers that the whole decision of The Ilala District Land and Housing Tribunal to be sustained and for this appeal to be dismissed with cost.

Having considered the submission of the parties and the records before me I will proceed by addressing grounds of the appeal as both grounds carry the same point on analyzing evidence.

The appellant had brought document letter of offer, and PW2 had informed the court that there are beacons which have been encroached in the respondent's land.

The respondent had denied all the points of appeal and added that the appellant hadn't proved encroachment.

This court has gone through the records of appeal brought before it and is of view that the law places burden of proof to the one who alleges. See **Evidence Act, Cap 6 R. E. 2019.**

The question is whether the appellant managed to prove his case on balance of probalities. What he alleged in his case in the Tribunal is that the respondent encroached his land and built a house without justification Therefore, his first duty was to prove that the area in dispute belonged to him. The proceedings reveals that the appellant had presented two witnesses to prove that the whole area is his. They also brought in proof of ownership, exhibit P1 and proof of payment of land rent. He also expressed the presence of beacon in the encroached area.

The records further reveal that the defence presented two witnessed who showed that the area was brought in 1999 and had finished the construction of the same in 2004.

It is observed further that the records reveal that no parties's evidence was able to reveal the size of their plots. In their findings the Tribunal was of the view that the appellant did not prove his case because he did not bring in the surveyors to are witness that his beacons were found in the respondent's house. Moreover, the Tribunal did not say anything regarding the respondent's evidence on the matter.

It is expected that the Tribunal should have weighed the evidence between the appellant and the respondent to establish ownership. Rather the Tribunal's analysis has revealed that the respondent has not proved his allegations. However, this leaves the issue of who is the lawful owner undetermined. The Tribunal has not specified who is the rightful owner.

The tribunal should have visited the locus in quo so as to ascertain the area as such visit would have showed the demarcation, which is the center of this dispute.

Moreover, the mention of presence of beacon shows that the matter could easily be addressed by land surveyors. Consequently, the Tribunal could have used this evidence to determine who is the rightful owner.

Therefore, the Tribunal failed to analyse evidence by failing to weigh the heavier evidence from the two parties.

This Court further finds that, the Tribunal would have been vested with the truth had they decided to visit the locus in quo as the evidence of beacons was testified in Court.

I therefore exercise my revision power and order the same to be tried before new chairman and new sets of assessors.

Each part to bare their own costs.

It is so ordered

T. N. MWENEGOHA
JUDGE
28/02/2022

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LAND DIVISION