

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

MISC. LAND APPEAL NO. 123 OF 2021

(Arising from Ilala District Land & Housing Tribunal at Mwalimu House in Land Appeal No. No. 6 of 2021;
Originating from Majohe Ward Tribunal in Land Application No. BR/AR/MJ/MSP/AL/78/2020)

FIDELIS NGOWI.....APPELLANT

VERSUS

REGINA KAPINGA.....RESPONDENT

Date of Last Order: 26.05.2022
Date of Judgment: 30.06.2022

JUDGMENT

V.L. MAKANI, J.

The appellant in this second appeal is FIDELIS NGOWI. The matter originated from Majohe Ward Tribunal (**Ward Tribunal**) where the appellant lost. He then appealed to Ilala District Land and Housing Tribunal (**District Tribunal**) and he lost again. Being dissatisfied with the decision of the District Tribunal, he has preferred this appeal basing on seven grounds of appeal on the basis of the following grounds:

- 1. That the honourable Chairperson erred in both law and fact to hold that appellant is a trespasser.*
- 2. That the honourable chairperson erred in both law and fact to hold that the evidence of then respondent was stronger compared to that of the appellant.*

3. *That the appellant bought the disputed property from the person who was the first to acquire it was ignored.*
4. *That the appellant written submission in chief was not adequately dealt with and properly considered by the chairperson of the district tribunal rendering severe miscarriage of justice.*
5. *That failure of the district tribunal to visit the locus in quo has occasioned miscarriage of justice to the appellant.*
6. *That what actually is found on record plus documents of Sale Agreements of both parties is quite different from what actually transpired during the hearing of the matter from ward to the district tribunals.*
7. *That generally the evidence on records do not match with the findings of the chairperson of the district tribunal.*

The appellant prayed for the appeal to be allowed and the decisions of the District Tribunal be quashed and set aside.

The appeal was argued by way of written submissions. Mr. Said M. Seif, Advocate drew and filed submissions on behalf of the appellant, while Ms. Suzan Peter Mwansele, Advocate drew and filed submissions in reply on behalf of the respondent.

Mr. Seif dropped the first ground of appeal and argued the rest. On the second ground of appeal, he said the documents to be relied upon

in this case were the Sale Agreement between (a) **Keneth Honda Madale** and **Amina Abeid** dated 26/04/2006 which shows that the land sold was measured at 23 x 30, (b) Sale Agreement between **Keneth Honda Madale** and **Rejina Alois Kapinga** dated 12/11/2006 which shows the land sold was measured 38 x 27, and (c) Sale Agreement between **Amina Abeid** and **Fidelis Ngowi** dated 25/06/2015 which shows that the land sold was measured at 23 x 30. He said that the lower Tribunals considered only oral testimonies but not the Sale Agreement between **Keneth Honda Madale** and **Rejina Arois Kapinga** dated 12/11/2006 which shows that the land sold was measured at 38 x 27 which is totally wrong as all the Sale Agreements should have been considered. That the rest of the Sale Agreements were not mentioned or considered. He said that in this case, the strength of the appellants case depended on the Sale Agreement between **Keneth Honda Madale** and **Amina Abeid** dated 26/04/2006 which shows the land sold measuring 23 x 30 and the Sale Agreement between **Amina Abeid** and **Fidelis Ngowi** dated 25/06/2015 which shows the land sold measuring 23 x 30 which were not denied by the respondent. He said the lower Tribunals did not consider the relevance of those Sale Agreements. In that regard

Mr. Seif said, the appellants evidence was heavier than that of the respondent.

On the third ground of appeal, Mr. Seif said that appellant bought the suit land from **Amina Abeid** who was the first in the land through the Sale Agreement dated 26/04/2006. That from this we get the third Sale Agreement between **Amina Abedi** and **Fidelis Ngowi** dated 25/06/2015 measuring 23 x 30 which means that the same land was sold. He said this was not disputed by the respondent in the Tribunals. He insisted that the Tribunals should have gone to the locus to ascertain those pieces of land. That the decision of the Ward Tribunal relied only on oral testimony and the Sale Agreement of **Keneth Honda** and **Rejina Arois Kapinga** dated 12/11/ 2006 which shows that the land sold measured at 38 x 27 and the decision of the District Tribunal relied only on the decision of the Ward Tribunal.

On the fourth ground of appeal, he submitted that the District Tribunal failed to take into consideration the submissions by appellant in the second and third grounds of appeal. That there is neither analysis nor consideration of the appellant's second and third grounds of appeal.

On the fifth ground of appeal, Mr. Seif said the lower Tribunals did not visit locus in quo as land claimed by both the appellant and the respondent was measured at 23 x 38 and 4 metres was left for water drainage. That before the transactions all the land was owned by **Keneth Honda Madale**. That his land was measured at 23 x 38 with 4 metres left for drainage system. That after several transactions on the said land, the piece of land sold to the respondent by **Keneth Honda Madale** through the Sale Agreement dated 12/11/2006 was measured at 23 x 23 by taking 15 metres from appellant's land. On the 2nd, 3rd, 4th and 5th grounds of appeal Mr. Seif further said these supported the 6th and 7th grounds of appeal and therefore there was no need of repetition. He prayed for this appeal to be allowed with costs.

In reply, Ms. Mwansele followed the sequence of Mr. Seif and submitted on on the 2nd, 3rd, 4th and 5th grounds of appeal only. As for the second ground of appeal, she said the appellant's wife was a witness at the Ward Tribunal, but she did not tender any document to show ownership of the land that she was claiming. She said under Order XXXIX Rule 27 (1) of the Civil Procedure Code, Cap 33 RE 2019

(the **CPC**) parties are not allowed to produce additional evidence on appeal save by leave of the court. She prayed for the annexures attached to the written submissions, **Annexures LG-1, LG-2** and the sketch map by the appellant be disregarded as they offend Order XXXIX of the CPC. She said even if it is to consider those documents, still they change nothing on ownership by the respondent as they only tell the history of ownership.

On the third ground of appeal, Ms. Mwansele submitted that, the lower Tribunals did consider the sequence of ownership in which Mr. **Keneth Honda** divided and sold his land to **Regina Kapinga, Badi** and **Amina Abeid** who then sold her land to the appellant. She said this information is found on page 3 and 4 of the Ward Tribunal's decision. That there is doubt as to whether the appellant was aware of his boundaries prior to the purchase of the same. That appellant's evidence at trial insisted that he became owner by default after **Amina Abeid** who was the previous owner failed to pay their debt. She said the appellant did not conduct any due diligence before lending the money to the owner. She said on measurements, the Ward Tribunal took the trouble to measure the area in dispute versus

the Sale Agreement as reflected in page 5 paragraph 3 of the judgment.

On the fourth ground she said the appellant's written submissions regarding the third and fourth grounds of appeal were connected to the main issue of trespass to the respondent's land in which the Ward Tribunal well scrutinized it and considered submissions of both parties. That the Tribunal discovered that the main issue was boundaries and that appellant had trespassed on the respondent's land.

On the fifth ground of appeal, she submitted that the appellant assumed the facts submitted in the fifth ground of appeal since they are nowhere to be found in the Tribunals. She insisted that it is not the duty of the court to divide the land rather the appellant should have made inquiry prior to gaining possession of the land. She prayed for this appeal to be dismissed with costs.

In rejoinder, Mr. Seif reiterated his submission in chief and added that the lower Tribunals relied on the forged Sale Agreement by respondent and failed to discover the truth as they did not pay a visit

to the site thus reaching the decision basing on the Sale Agreement by the respondent.

Having gone through the submissions by Counsel for the parties the main issue for determination is whether this appeal has merit. I will consider the grounds of appeal generally.

The appellant complained that the Tribunals did not consider the sale agreements that were tendered by the parties. However, according to the evidence on record, the Sale Agreements were not at issue as both the appellant and respondent admit that the **Keneth Honda** sold land to **Amina Abeid** who later sold her land to the appellant. The same **Keneth Honda** sold another piece of land to the respondent. The piece of land to **Amina Abeid** and the respondent are adjacent so the plots share a boundary. Indeed, **Amina Abeid** was the first to buy her land, but it is on record of the Ward Tribunal that Flora Ngowi, who is the wife and attorney of the appellant visited the site in the presence of the respondent and **Keneth Honda** the seller of the plots. The seller showed the boundaries and confirmed the boundaries to be where the beacons are located, but the said Flora Ngowi did not agree to the findings. When the seller was queried

by the members of the Ward Tribunal as to who has trespassed into the others land, he said it was the appellant who trespassed into the respondent's piece of land (*"Amina ndio kaingia kwa Regina..."*). It is common knowledge that the seller is the one who is conversant with the land and the boundaries. His confirmation according to the record of the Ward Tribunal is evident that it is the appellant who has encroached in the land of the respondent. It was therefore correct in my view for the Tribunals to rely on the oral evidence because it was **Kenneth Honda** who was the seller, and it was also the same person who was present when the Ward Tribunal visited the site to assess and investigate on the boundaries. Ms. Flora Ngowi was not present on the signing of the Sale Agreement and even the agreement does not bear her name as a witness, meaning that at the time of the sale transaction she was not present so it would not been very easy for her to know the exact boundaries of the plot of land. In any case, the Ward Tribunal established when measuring the pieces of land in comparison with the Sale Agreement that the appellant had trespassed into the respondent's land. The Ward Tribunal's analysis in its judgment said thus:

"Katika kufanya uchambuzi, baraza limebaini yafuatayo katika shauri hili:

1.N/A....
2.N/A....
3. *Bw. Fidelis Ngowi ameingia ndani ya eneo la Bi. Regina Kapinga na kujenga ukuta wa uzio katika eneo hilo lisilo lake. Baraza limethibitisha hilo kwa kupima eneo lile na kulinganisha vipimo vilivyoko kwenye hati."*

In view thereof, the appellant's claim that the Sale Agreements were not analysed vis a viz the measurements that were reflected in the said agreements cannot hold water as set out hereinabove.

On the fifth ground the appellant is complaining that the lower Tribunals never made a visit to the site. However, it is apparent from the explanation above and the records that the Ward Tribunal visited the suit property, and they gave their analysis according to the evidence by the witnesses. The complaint that there was no visit to the locus in quo is therefore incorrect as it is quite apparent from the record that the seller **Kenneth Honda** sold pieces of land to the respondent and **Amina Abeid** who later sold to the appellant and the pieces of land are adjacent. The matter at issue was the boundary and the wall which was built by the appellant of which the lower Tribunals, correctly in my view, decided in favour of the respondent herein.

I have noted that the appellant has annexed to the submissions the photographs and a sketchmap and has asked the court for its reliance. In her submissions Ms. Mwansele pointed out that the annexures should not be considered as they offend the law. Indeed, it is trite law that appending annexures to submissions is improper and cannot be considered as part of the evidence. In other words, submissions are not evidence but rather elaboration of evidence already in court records and are not intended to be a substitute of evidence. In the case of **Modestus Rogasian Kiwango vs Hellen Gabriel Minja, CivilAppeal No.72 of 2019 (HC-DSM)** (unreported) my sister Hon. Masabo, J had this to say:

"As stated earlier, the appellant has appended several documents to the submission including a copy of a danmeeting and copy of marriage certificate between him and the said Agnes Onael. It is trite law that annexures should not be appended to submissions save where the said annexure is an extract of a judicial decision or text book.."

(see also the case of **Mbeya Cement Company Ltd v. Mbeya Cement Company Limited & National Insurance Corporation (T) Limited [2005] TLR 41.**)

Considering the cited cases, the photographs and sketch map do not belong to the category of extract of judicial notice or that of a textbook. As such they are not properly before the court. Further, the annexures have been introduced for the first time at the appeal stage which is legally improper. The law states that nothing can be taken on board at the appeal stage that which was not addressed at the trial court/tribunal (see **Hotel Travertine & 2 Others vs. NBC [2006] TLR 133**). For these reasons the annexures to the submissions are hereby disregarded and expunged from the record.

For the reasons explained above, I don't find any fault in the decision of the District Tribunal. Subsequently, the appeal is dismissed with costs.

It is so ordered.



V.L. MAKANI
JUDGE
30/06/2022