IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC.LAND APPEAL No.185 OF 2021

(Appeal from the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Case No.61 of 2015.)

LEBBI CHENGULA.....APPELLANT

VERSUS

MARTIN SOLOMON.....RESPONDENT

JUDGMENT

21/04/2022 & 14/07/2022

Masoud, J.

The appellant was aggrieved by the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala (herein after "the trial tribunal") in Application No. 61 of 2015 delivered on 09/07/2021. He appealed before this court against the said decision. The appeal was hinged on the following grounds:

1. *The learned Chairperson erred in law and in facts by concluding that the piece of land in dispute is a public road while the same initially belonged to DW2 (Deodati Tarimo) who sold it to the appellant.*
2. *The learned chairperson erred in law and in facts by concluding that the piece of land in dispute is a public road while there was*

no any evidence from other neighbours of the respective place claiming the same to be a public road.

3. *That, the learned chairperson erred in law and in facts by failure to take into consideration the evidence of Obadia Kisamo who sold both plots in dispute to the Appellant and Respondent herein.*
4. *That, the learned Chairperson erred in law and in facts by failure to consider the evidence obtained at the locus in quo and thus ended to erroneously concluding that there is no alternative way and thus the piece of land in dispute is a public road.*
5. *That, the learned trial Chairperson erred in law and facts by considering and giving weight the opinions of the assessors (Balozi Celestine Liundi and Mzee A. Kinyondo) while the same were not amongst those who visited the locus in quo*
6. *That, the trial Chairperson erred in law and in facts by concluding that the piece of land in dispute is a public road while there is ample evidence before the Tribunal that the Respondent only asked from the owner of the respective plot to pass through his building material to his plot.*

The first, second and sixth grounds of appeal could conveniently be combined as one ground of complaint. The same involved the conclusion by the trial tribunal that there was a pathway in the area in dispute. The remaining three grounds of appeal could also conveniently be dealt with as presented in the memorandum of appeal.

The background of this appeal involved an action that was brought by Martin Solomon, the respondent in this appeal, against Lebbi Changula, the appellant in this appeal. In the said action, the respondent sought for a permanent injunction restraining the appellant from obstructing the public way, a declaration that the respondent and other residents in the area are lawfully entitled to use the public way, costs and any other reliefs.

The public way in dispute was described as covering the width of about four metres and serving as the only way from Mbezi_Ukonga Majumba Sita Road at Malambamawili area to the respondent's house. The said pathway was described as of 4 metres in width, and of about 200 metres away from Malambamawili Road and as the only means of access to the respondent's premise.

It was alleged that the public way originally passed through a plot which was later on sold to the appellant from the previous occupier. Having so purchased the said plot, the appellant constructed an underground rain water harvesting tank, and a wall across the disputed public way without considering the interests of the respondent. It was thus alleged that the public way was as a result blocked and its users inclusive of the respondent were denied access. The respondent complained of the appellants acts of no avail.

The appellant disputed the respondents allegations. He said that the deputed area is part of a parcel of land that he owns which has never been a public way. He accounted as to how he acquired the area in dispute in which he constructed his water tank, and a wall.

Having heard the parties, and their respective witnesses, the trial tribunal found in the favour of the respondent. The trial tribunal was satisfied that the respondent established in his evidence that he had been using the public way on his way to his premise before the same was blocked by the appellant. The trial tribunal was equally satisfied that with the blockage of the said public way, the respondent could no longer access his place using such way.

While the appellant was represented by Mr. Lupia Abraham Augusto, learned Advocate, the respondent was represented by Mr Mussa Roma, Advocate. The appeal was heard by filing written submissions pursuant to a filing schedule ordered by the court. The written submissions were drawn and filed by the learned counsel for the appellant and respondent respectively. The appellant submitted on all grounds of appeal seriatim, starting with the first ground of appeal.

As shown earlier, the first, second and sixth grounds of appeal in totality complained about the conclusion by the learned Chairperson that the disputed area is a public way. There was however no evidence to support such finding. I was shown the evidence on the record to the effect that the disputed area initially belonged to DW.2 (Deodati Tarimo) before it was sold to the appellant. Arguing in support, the appellant revisited the evidence of the respondent (DW.1), Deodat Tarimo (DW.2) and Kamir Samuel Kisambo (DW.3) which, according to the counsel for the appellant, complemented each other. It was to the effect that the area in dispute was acquired by the appellant from DW.2. The evidence had it that there was no public road on the disputed area. There was also no dispute that the appellant purchased the disputed area from DW.2.

The appellant referred the court to what he described as ample evidence that the respondent asked the owner of the respective plot to pass his buildings materials through such plot. I was thus referred to page 5 of the judgment of the trial tribunal where it was apparent as afore said and the testimony of DW.2 which was evident that the disputed area was not a public way. It was argued that with such evidence it was not open to the trial tribunal to believe the evidence of the respondent in total disregard of the evidence led by the appellant.

The court was in this appeal referred to section 31(1) of the Law of Limitation Act, cap. 89 R.E 2019, which provides requirements for entitlement to a right of a pathway. It reads thus:

> *" where any easement has been enjoyed peaceably and openly as of right, and without interruption for twenty years, the right to such easement shall be absolute and indefeasible."*

I was thus told that the erection of the wall by the appellant on the disputed area had interrupted the purported right of way which the respondent was previously allowed to use in order to take his building materials to his plot. As the respondent did not use the disputed area as

a pass way for twenty years uninterruptedly, he could not be entitled to the right of way which was non-existent.

The case of **Alex Senkoro and Others versus Eliambuya Lyimo (As Administrator of the Estate of Frederick Lyimo, deceased)**, Civil Appeal No. 16 of 2017 CAT, in which the Court of Appeal, among other stated that right of way can be acquired by way of prescription on account of long use of a minimum of twenty years as provided by section 31 of the Law of Limitation Act was invoked in support.

In respect of the third ground of appeal, the appellant's counsel submitted that it is on the record that both parties to the dispute purchased their respective plots from one Obadiah Kisamo. The record revealed that while the appellant purchased his parcel of land in 2013, the respondent purchased his parcel of land on 2014. It was thus reasoned that failure to consider the evidence of Obadiah Kisamo as the vendor prejudiced the rights of the parties.

It was argued that since Obadiah Kisamo was the vendor was in a better position of knowing the nature of the disputed piece of land in relation to the disputed area. According to the appellant, the failure to join Obadiah Kisamo in the case occasioned miscarriage of justice to the parties. On

this point, the appellant relied on the case of **Juma B. Kadala v Laurent Mkande** [1983]TLR 103 where it was held that the buyers must be sued along with their vendors.

Submitting in chief on the fourth ground of appeal, it was argued that when one reads the impugned judgment, it is obvious that the trial Chairperson reached at his decision by only considering what transpired during the trial, without taking into account the findings from the locus in quo. It was thus argued that the failure to consider the evidence from the visit of the locus in quo resulted to erroneous conclusion that there is no alternative way for the respondent to reach his place, hence declaring the disputed piece of land as a public road.

To support his argument as to failure to consider evidence from the locus in quo, he cited the case of **Abbas Abdallah Ishabailu vs Farida Funguo, Misc. Land Application No. 557 of 2021 high court (Land Division)** where it was held that;

> *"Failure of the chairman of the Tribunal to call witnesses to be examined in chief during the hearing and during the locus in quo contravened Section 147 of the Evidence Act Cap. 6 R.E 2019"*

On the fifth ground of appeal, it was submitted that it is a mandatory requirement of the law under section 23(2) of the Land Disputes Courts Act, Cap 216 R.E 2019 that the tribunal shall be properly constituted when held by a Chairman, and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment. Mr. August submitted further that despite the above general rule, in the case at hand the opinions of the assessors were not of great weight as they failed to visit the locus in quo. The nature of the matter in question required the opinion of people who visited the disputed piece of land. Therefore, the assessors were not fit persons to justify that the piece of the disputed land was a public road or whether there was no alternative way for the Respondent to reach his place.

In reply, the respondent submitted generally on the first and second ground of appeal. There was no specific reference to the evidence of the witnesses relied on by the appellant. It would seem however that in relation to the appellant's submission on the first ground, second, and sixth ground of appeal which relate to the complaint by the appellant on the conclusion of existence of pubic way on the disputed area, the respondent said that the disputed area was public way, which had been in use for such a long time. Thus, whether or not a portion of the disputed

area constituting the public way used by the respondent to access his place has no justification in the eyes of the law. The problem as to the use of the said public way started when the appellant encroached the disputed area, the respondent argued.

In so far as the evidence on the record is concerned, the only reference was made by the respondent on PW.2 who was alleged to be a former local government leader within the locality of the disputed area when the respondent purchased his parcel of land. The same was, it was alleged, done with the knowledge of the neighbours and the previous owner of the appellant's property.

Simple logic was invoked by the respondent, saying that it suggested and dictated the existence of the public way as alleged. In addition, the respondent described the disputed road way which in his argument has been in existence long before the parties herein came into the occupation of their respective premises. In so doing, however, the respondent made no reference to the evidence on the record.

In bringing his submission to rest on the above mentioned grounds of appeal which relate to a finding on the existence of a public way on the disputed land, the case of **Shadrack Balingo v Fikiri Mohamed**

Hamza and Others, Civil Appeal No. 223 of 2017 was relied on, which case was also invoked by the trial tribunal in support of its decision.

As to the claim that Obadiah Kisamo who sold respective pieces of land to the parties herein his evidence should have been considered, the respondent admitted that he indeed purchased a piece of land to the appellant. However, it was argued that the said Obadiah Kisamo was not a key witness having left the premise upon selling the same to the respondent and identified the relevant boundaries in the presence of PW.2, a local government leader.

On the ground relating locus in quo, the respondent's reply to the appellant's submission was brief. Without addressing matters raised, the respondent had it that the locus in quo was conducted twice by the trial tribunal. The first was at the initial stage of the construction of the structure that blocked the pathway while the second was after the completion of the structure. The appellant was thus of the view that the judgment of the trial tribunal was properly entered after the trial tribunal understood the dispute following the locus in quo visit.

With regard to the submission on the ground of appeal concerning assessors, it was submitted by the respondent that the ground is not meritorious. The assessors who were present during the trial were the same ones throughout the proceedings. The court was invited as such to have regard to the record which depicts consistence in the coram as the law requires.

My evaluation of the evidence in relation to the first, second, and sixth ground of appeal confirmed the view taken by the appellant that the evidence of DW.1, DW.2 and DW.3 was critical in the determination of the issue relating to the first ground of appeal. The issue is in particular on whether the disputed area was indeed a public way as concluded by the learned Chairman of the trial tribunal. This issue was incidental to the question whether the respondent was entitled to the right of way which was set by the trial tribunal for determination.

The evidence of DW.1, DW.2 and DW.3 was evident that the disputed area was not a public way although it was used as such by the respondent to take his building materials to his premise. The evidence of such witnesses has it that the disputed area was part of the land that was under the ownership of DW.2, which was eventually sold by DW.2 to the

appellant (i.e DW.1). Although there is no public way through the said plot which was sold to DW.1, the respondent had once asked DW.2 to be allowed to pass his building materials through the plot when he was building his house.

The above evidence is consistent with what was stated in the appellant's written statement of defence. It was therein stated that the disputed area was acquired by the appellant from one, Deodat Tarimo, who testified for the appellant's case as DW.2, and whose evidence was that the disputed area originally belonged to him before he sold it to the appellant, and that the disputed area was not a public road as alleged. It is in the evidence of DW.1 and DW.3 that the respondent was only allowed to pass across the disputed area to ferry his building materials when he was building his house.

According to DW.1 when the disputed area was acquired from DW.2 in 2014, he was already in the ownership of another parcel of land which he purchased from one, Obadiah Kisamo in 2013 and on which there were two houses. It is in the evidence of DW.1 that there was a pathway led to his premises from the main road and not beyond the plot which he acquired from DW.2, and on which the respondent used to pass through

as he carried his building materials across the plot which originally belonged to DW.2.

On the contrary, the evidence of PW.1, PW.2, and PW.3 by and large centred on the respondent's premise in relation to the alleged public way and how it was being used by the respondent since he acquired his premises in 2010 from one, Obadiah Kisamo. The evidence does not exhibit how the alleged public way crystalised, and was identified as such and as having a 4 metres width.

There were sale agreements which were tendered and admitted in evidence. They were a sale agreement between the respondent as the buyer, and Obadiah Kisamo, as the vendor, admitted as Exhibit P.1, and a sale agreement between the appellant as the buyer, and one, Obadiah Kisamo, as the vendor, admitted as Exhibit D.1. It is not on the record that the agreements demarcated the public way in dispute.

It is however on the record that when cross-examined, PW.1 was clear that the sale agreement did not show the public way but the same was shown to him by the vendor, namely, Obadiah Kisamo. PW.2 and PW.3 respectively testified that the said pathway was identified as of 3.5 and 3

metres width. As argued by the appellant, the said Obadiah Kisamo, who is alleged to have shown the respondent the public way was not called as a witness to confirm the assertion by the respondent.

In any case, the assertion that the public way was shown to the respondent by the said vendor upon conclusion of the sale, or that the said pathway was identified as having 3.5 Metres or 3.0 Metres in width was not as the basis of a claim of existence of the said pathway was not at all reflected in the respondent's pleading in the trial tribunal. It is worthwhile to say that the respondent's pleadings had no factual basis for the claimed right of the alleged pathway, other than only claiming that it was 4 metres in width, and showing that it has since been blocked by the appellant from 4/12/2014.

I have no doubt in my mind that, with the absence of the evidence of Obadiah Kisamo, the testimony of DW.3 that there was no public way across the plot which he sold to the appellant to the respondent's premises remains unchallenged as the only evidence. Apparently, the evidence as to non-existent of the pathway is consistent with the sale agreements which do not in any show the public way on any of the relevant plots.

The respondent testifying as PW.1 had it that he acquired his premises in 2010, started construction of his house in 2013, and the blockage of the pathway occurred in 4/12/2014. With such factual evidence, and going by the authority of section 31 of the Law of Limitation Act (supra), and the case of **Shadrack Balingo v Fikiri Mohamed Hamza and Others** (supra) one cannot say that the right of a pathway was validly created, enjoyed peaceably, and openly, as of right, and without interruption for twenty years.

It is instructive in respect of the above that DW.2 was not contradicted in cross-examination on his respective pieces of evidence that he sold the plot on which the disputed right of way is situated, that the alleged pathway passed through the plot he sold to the appellant, and that he allowed the respondent to pass his building materials through his plot when the respondent started to construct his house.

I also recalled in line with the foregoing reasoning that there was no sufficient evidence from the respondent that the respondent was indeed granted the right of way when he purchased the premise on which he constructed his house. The only evidence had it that the vendor, one,

Obadiah Kisamo, showed the respondent the pathway when he purchased the premise from him. On the contrary, the evidence of one Kamir Samuel Kisambo, who testified as DW.3 had it that there was no pathway in the area which was demarcated as such when the respective parcels of land were sold to the respondent. Rather, the buyers of such parcels of land had to agree on the pathway as they wish.

The foregoing analysis and finding also take care of the third grounds of appeal which relate to failure to consider the evidence of one Obadiah Kisamo. I say so because, Obadiah Kisamo is mentioned in the evidence as one who sold pieces of the parcels of land to the parties herein. There is no record that he testified in the trial tribunal, as the one whose evidence is on the record is, Kamir Samuel Kisambo, who testified as DW.3 and not Obadiah Kisamo. There is nothing clearly suggesting that he is one and the same person.

Going by such record and as reasoned herein above, it meant that Obadiah Kisamo who was not joined as a party in the matter before the trial tribunal was never called to testify in the trial tribunal. As is evident on the record that the said Obadiah Kisamo is not occupying or in possession of the premise that he sold or the disputed area, I do not

think that he ought to have been joined as party in terms of the holding in the case of **Juma B. Kadala v Laurent Mkande** (supra). I say so also because the evidence on the record is apparent that the area in dispute is in the parcel of land that originally belonged to DW.2, and which was eventually sold to the appellant.

However, I think, as earlier suggested, that the said Obadiah Kisamo should have been called by the respondent to testify on the pathway he allegedly showed the respondent. The evidence would have answered the question whether the assertion by PW.1 was well founded and whether or not it was in respect of the disputed area. The failure to call him means in my view that adverse inference must be drawn against the respondent that had such witness been called, he would have testified against the respondent. I noted that there were no reasons on the record as to why he was not called to testify in support of the respondent's case.

In relation to the ground on the visit of the locus in quo, I took time to revisit the proceedings of the trial tribunal particularly from 10/02/2020 when the enter-parte hearing started upto 9/7/2021 when the impugned judgment was delivered. Within such period, I could not find anything in

the nature of proceedings taken in the locus in quo visit nor did I see anything in the nature of an order for visiting locus in quo.

With the above finding, I broadened my scope of revisiting the proceedings on the record. It was at this juncture that I learnt of an order of 24/06/2015 for visiting locus in quo, and a tribunal's proceedings of 10/07/2015 recording observation of the tribunal of the locus in quo in the presence of two assessors, and respondent's Advocate, one Roma but in the absence of the appellant. I was not in doubt that such proceedings were taken when the matter was set for ex-parte proof and hence an ex-parte judgment which pursuant to the record was eventually set aside.

In line with the above, it meant that the record relating to the ex-parte proof could not apply in the proceedings that ensued after the setting aside of the ex-parte judgment. Whilst mindful of what is on the record, and the nitty gritty of the rival submissions, and the procedure applicable in matters of locus in quo visit as alluded to in the cases of **Jovent Clevery Rushaka & another vs Bibiana Chacha, Civil** Appeal No.236 of 2020 (CAT-DSM), and **Kimonidimitri Matntheakis vs Ally Azim Dewji and 14 others, Civil** Appeal No.4 of 2018, I found it safe to find

that there was no locus in quo properly so called that was conducted. To be clear, there was nothing akin to what is envisaged by the Court of Appeal in **Kimonidimitri** when it stated:

> *"...for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to; one, ensure that all parties, their witnesses and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo. Three, allow cross examination by either party, or his counsel. Four, record all the proceedings at the locus in quo. Five record any observation, view, opinion or conclusion of the court including drawing, a sketch plan, if necessary, which must be made known to the parties and advocates, if any"*

The trial tribunal was thus justified in not considering anything from the locus in quo as there was no such visit conducted as is required by the law.

As regard to the fifth ground of appeal relating to giving weight to the opinion of the assessors while they were not the ones who visited the

locus in quo, I am in agreement with the argument of the counsel for the respondent that the law requires consistency in the case of assessors in the proceedings and this was adhered to throughout the proceeding. I say so because, my scrutiny of the proceedings showed that the assessors who sat at the commencement of the proceeding were the same throughout the trial. In addition, the record of the proceedings does not show that there was a locus in quo conducted in accordance with the law. I therefore, hold that this grounds, has no merits.

In view of deliberations and findings I have made herein above, I am of the finding that it is only the first, second, three and sixths grounds of appeal are meritorious for reasons given above. The fourth and fifth grounds of appeal are devoid of merit and they accordingly fail. With such findings, I am satisfied that the decision of the trial tribunal as it related to the public way was not supported by the evidence on the record. Had the learned Chairman properly analysed the evidence, he would not have arrived at the decision which is herein faulted. On the strength of the grounds that are meritorious, I am inclined to allow the appeal.

In the results and for the reasons stated, the appeal is hereby allowed with costs.

It is so ordered.

Dated at Dar es salaam this 14th day of July 2022.

B.S Masoud
Judge