IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.81OF 2022

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 97 of 2022 originating from Ward Tribunal of Wazo in Application No.088 of 2021)

RAMADHANI HASHIMU MBWANA ..... APPELLANT

VERSUS

SARAHA PATRIC ALMASI ..... RESPONDENT

JUDGMENT

Date of last Order: 14.03.2023

Date of Judgment: 20.03.2023

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Wazo in Application No.088 of 2021 and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Appeal No. 97 of 2021. The parties had a dispute on a boundary over a piece of land. The pertinent facts that gave rise to the present appeal may be

recapitulated thus. Ramadhani Hashimu Mbwana, the respondent in this appeal lodged a case at the Ward Tribunal for Wazo claiming for ownership of a piece of land. In the suit as well as in his evidence at the trial tribunal, the appellant claimed that he bought a piece of land from Saidi Maalimu Kihaku from one Somoye Ndengu to the tune of Tshs. 1,000,000/=. The respondent wanted the appellant to move out of the suit land contending that he was a trespasser. To effectuate his desire, he instituted a suit against the respondent before the Ward Tribunal for Wazo. Conversely, the appellant firmly refuted the respondent's assertion and in contrast, claimed that he is not a trespasser instead he had constructed his wall within his boundaries.

As it were, the trial tribunal after scrutinizing the parties' evidence, decided in favour of the appellant and held that the respondent is a trespasser and was ordered to demolish his wall which was constructed in the suit land. The suit was thereby allowed.

Dissatisfied, the respondent lodged an appeal at the District Land and Housing Tribunal for Kinondoni at Mwananyamala vide Land Appeal No.97 of 2021. The respondent complained that the trial tribunal erred in law and fact by deciding that Sarah Almasi encroached in the piece of land of Ramadhani Mbwana. She also claimed that the trial tribunal failed to

evaluate evidence on record and it was not proper to order her to demolish her wall. The appellate tribunal determined the matter and overturned the decision of the trial tribunal.

The finding by the appellate tribunal aggrieved the appellant hence the present appeal which is grounded on four complaints:-

1. *That, the Chairperson of the District Land and Housing Tribunal of Kinondoni erred in law and fact by finding for the respondent without supporting evidence while the appellant did.*
2. *That the trial magistrate erred in law and fact by holding that the appellant failed to prove that the respondent was the intruder while the proved it as required by law.*
3. *That the Chairperson of the District Land and Housing Tribunal erred in law and in fact by failing to consider the contradictory evidence adduced by the respondent hence he to quashed the proper judgment and order pronounced by the Ward Tribunal.*
4. *That the Chairperson of the District Land and Housing of Kinondoni erred in law and in fact by failing to consider the evidence adduced by the Appellant.*

When the appeal was called for hearing on 22nd February, 2023, the appellant enjoyed the legal service of Mr. George Timothy, learned counsel and the respondent had the legal service of Mr. Boniphance Uiso,

learned counsel holding brief for Mr. Said, learned counsel. The parties' contending arguments were, pursuant to the Court's order, presented by way of written submissions in conformity with the revised scheduling order drawn on 22nd February, 2023. The appellant filed his submission in chief on 1st March, 2023 and the respondent filed a reply on 7th March, 2023 and the appellant filed a rejoinder on 15th March, 2023.

Getting off the ground was the appellant's counsel. Mr. George opted to consolidate the 1st and 4th grounds and argue them together. Equally related are the 2nd and 3rd grounds.

Arguing in support of the first and fourth grounds of appeal, the appellant's counsel contended that, the appellate tribunal did not properly evaluate the evidence on record, otherwise he would not have come to the conclusion that there was no encroachment. The appellant argued that the appellant adduced sufficient evidence and tendered a sale agreement (exhibit K9) to establish that the suit land belonged to him. The learned counsel for the appellant decried the appellate tribunal's decision to hold that the appellant had failed to prove that the appellant encroached into his piece of land. He contended that the during site visit the trial tribunal found that the encroached piece of land was within the size of the suit land. To buttress his submission he referred this Court to

page 2 paragraph 2 of the trial tribunal judgment and cited the case of **Paskali Nina v Andrea Karera**, Civil Appeal No. 325 of 2020. The learned counsel defended the decision of the trial tribunal as sound and reasoned and urged this Court to quash and set aside the appellate tribunal judgment.

In support of the second and third grounds of appeal, the appellant's counsel contended that the appellant has proved that he is the owner of the suit land by producing a contract that shows that he bought the suit land from Said Kihaku on 1st May, 2012 and on the contrary the respondent bought the suit land on 18th February, 2019, the size and descriptions of the plots are different. Mr. George insisted that the appellant's evidence proves that the respondent encroached on his piece of land.

The appellant's counsel continued to argue the appellate tribunal failed to distinguish between the issue of neighbouring and encroachment as a result, the Chairman erroneously determined a new issue on whether the appellant called the neighbour to prove their neighbour ship which was not pleaded anywhere by the appellant. To support his argumentation, Mr. George referred this Court to page 2 of the appellate tribunal's Judgment.

The counsel for the appellant spiritedly argued that the respondent did not tender any document to prove if his land was a surveyed plot. Elaborating further, Mr. George went on to discuss at considerable length that the size of the suit land did not match the actual size of the suit land and during the site visit it was proved that the size of the suit land on his side matched the measurement which was done during the site visit.

On the strength of the above, the appellant's counsel beckoned upon this court to quash and set aside the appellate tribunal and uphold the judgment and orders of the Wazo Ward Tribunal.

In his rebuttal submission, Mr. Said took a swipe at the appellant's submission. The learned counsel defended the appellate tribunal's decision as sound and reasoned. Mr. Said began to narrate the genesis of the case which I am not going to reproduce in this appeal. The learned counsel opted to submit the grounds of appeal generally. He was brief and straight to the point. He contended that the respondent was able to describe the boundaries by naming his neighbours whereas the appellant was not among them and the appellant did not object. The respondent's counsel argued further that the allegations that the parties were neighbours not correct as the record bears out that, the appellant at the trial tribunal admitted that the parties were not neighbours. Mr. Said

forcefully argued that the two pieces of suit land were not adjacent to each other, thus, it was unnecessary for the trial tribunal to measure the size of the suit land.

With regards to analysis and evaluation of evidence, the respondent's counsel take is that the appellate tribunal properly evaluated the evidence on record and hold that the appellant failed to prove if his piece of land is adjacent to the respondent's land.

The learned counsel for the respondent went on to submit that the respondent's evidence was supported by DW3, a member of the survey committee who testified to the effect that the dispute between the appellant and respondent is on the easement and not trespass whereas the appellant encroached the easement.

In his further response, Mr. George stated that the respondent tendered a sale agreement to prove that the suit land belongs to him and the vendor's (DW2) testimony supported the respondent's claims. Rebuking the appellant's sloppiness, Mr. Said contended that the appellant has failed to prove his case and none of his witnesses supported his averment that the respondent has encroached on the appellant's piece of land.

In conclusion, the respondent beckoned upon this Court to dismiss the appeal for lack of merit.

The appellant's counsel reiterates that the suit land belongs to the appellant. Stressing on the point of boundaries, Mr. George stated the trial tribunal visited *locus in quo* to know exact the size of the suit land and discovered that the suit land belongs to the appellant. Ending, Mr. George urged this Court to quash and set aside the appellate tribunal Judgment and orders and uphold the trial tribunal decision.

I have taken into consideration all parties' submissions and gone through the trial tribunal and appellate tribunals' records. I am now in a position to confront the grounds of appeal on which the parties locking horns. I have opted to combine the first, third, and fourth grounds and argue them together because they are intertwined. The second ground will be argued separately.

Addressing the second ground, the appellant blamed the appellate tribunal for holding that she failed to prove that the respondent was a trespasser. As hinted above, the crux of the dispute between the parties is centered on trespassing to suit land. Before the appellate tribunal, there were two competing propositions.

One was by Sarah Patrick Almasi, the respondent who claimed that he has constructed a foundation within her boundaries. She claimed that in 2012, she bought the suit land from Said Maalimu. The respondent in her

testimony testified to the effect that she does not share a boundary with the appellant, therefore, she is not a trespasser. The second competing proposition was by Ramadhani Hashimu Mbwana, the appellant who vehemently alleged that the appellant encroached into his piece of land which he bought in 2019 from Winfrida Sanga.

To prove whether the respondent trespassed on the appellant's land, I had to peruse the trial tribunal records to find out what transpired. The record reveals that the appellant lodged a case at Wazo Ward Tribunal complaining that Sarah Patrick encroached into his piece of land and constructed a foundation.

The record bears out that, during cross-examination, the respondent asked the appellant how comes that she encroached into his land while he is not his neighbour? The appellant replied that his neighbour is Kabibi. For ease of reference. I find it apposite to reproduce part of the cross-examination dialogue as hereunder:-

> *"Sarah Patrick Almasi 'Umesema mimi nimemega eneno lako wakati kijografia ya eneno hilo mimi sijapakana na wewe, sasa iweje nimege eneno lako wakati hatujapakana?*
> *Ramadhani Hashimu Mbwana; mimi napakana na Kibibi na huyo Kibibi amepakana na wewe".*

Applying the above excerpt, it shows clearly that the appellant admitted that the parties were not neighbours. He contradicted himself and the contradictions goes to the root of the case since the nature of the case at the trial tribunal was trespass but during trial, the appellant failed to prove his claims.

For the aforesaid reasons, I find that the appellate tribunal was correct to rule out that the appellant and respondent are not sharing a boundary. I fully subscribe to the findings of the appellate tribunal that it is impossible for the respondent who was not the appellant's neighbour to trespass on the appellant's land. Therefore this ground is demerit.

On the third and fourth grounds, the appellant's main complaint hinges on the issue of failure by the appellate Chairman to evaluate the evidence on record which would have led him to find that the respondent did not prove the case in the preponderance of probabilities as required by the law. With respect, I am constrained to decline the energetic argument by the learned counsel for the appellant as I am decidedly of the settled view that the respondent ably proved his case through the testimonies of DW1 and to substantiate her evidence she tendered a sale agreement (Exh.9).

The appellant's counsel submitted in length on the issue of ownership, claiming that the appellant has proved that he is the owner of the suit

land. In my considered view, both parties at the trial tribunal tendered sale agreements to prove their ownership. However, the main issue at the trial tribunal was whether the respondent encroached on the appellant's land.

As I have pointed out earlier, the evidence on record shows that the parties were not neighbours. According to the appellant's sale agreement which was admitted in evidence as exhibit 10, the neighbours were Kibibi Kihaku on the North side, Mtuy on the South side, Mtuy on the East side and Sophia Ngapawa on the West side. Therefore, accordingly to the descriptions of boundaries; Sarah Patrick Almasi, the respondent is not his neighbour.

The respondent also tendered a sale agreement which was admitted in evidence as exhibit 9, the neighbours were Bone on the East side, is Mchina on the West side, Mtuwi ton the he South side and Acheni on the North side. The appellate tribunal's decision is based on oral evidence and documentary evidence on record. In my considered view, I find that it was proper for the tribunal to start analysing the issue of land descriptions before determining the latter issue of encroachment.

The appellant is the one who instituted a case at the trial tribunal, therefore, he had a burden to prove his allegation. In civil proceedings,

the party with the legal burden similarly bears the evidential burden and the standard in each case is on a balance of probabilities. In addressing a similar scenario on who bears the evidential burden in civil cases in **Barelia Karangirangi v Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 [Tanzlii TZCA 51 01 April 2019], the Court of Appeal of Tanzania cited the case of **Anthony M. Masanga v Penina (Mama Ngesi) and another**, Civil Appeal No. 118 of 2014 (unreported) whereas the Court of Appeal of Tanzania cited with approval the case of **Re B** [2008] UKHL 35, Lord Hoffman in defining the term balance of probabilities states that:-

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."*

From the evidence on record, there is no doubt at all that the appellant's evidence adduced at the Ward Tribunal was not proved to the standard

required by the law. The appellant who bears the burden of proof failed to discharge it, thus, it is treated as not having happened.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the findings of the District Land and Housing Tribunal for Kinondoni. I proceed to dismiss the appeal with costs.

Order accordingly.

DATED at Dar es Salaam this 20th March, 2023.

A.Z.MGEYEKWA

JUDGE

20.03.2023

Judgment delivered on 20th March, 2023 in the presence of Mr. Japhet Kyando, learned counsel holding brief for Mr. Said Nyawambura, counsel for the respondent.

A.Z.MGEYEKWA

JUDGE

20.03.2023

Right to appeal full explained.