IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 203 OF 2023

RAMADHANI ALLY MALETA..... 1ST APPELLANT

ISSA SALUM (AS LEGAL REPRESENTATIVE

OF SALUM KONDO KINEGA.....2ND APPELLANT

VERSUS

DONART KAIZ ALWATANI..... RESPONDENT

JUDGMENT

Date of last Order: 18/7/2023

Date of Judgment: 27/7/2023

A. MSAFIRI, J.

The appellants Ramadhani Ally Maleta (1st appellant) and Issa Salum (as administrator of the estate of Salum Kondo Kinega) (2nd appellant) have lodged this appeal against Donart Kaiz Alwatani (the respondent).

The brief facts are that initially the respondent instituted a suit against the appellants and one Helmegird Mboya. The matter was filed before the District Land and Housing Tribunal of Ilala at Ilala (herein as the trial Tribunal) on Application No. 77 of 2010.

The then applicant was claiming that he is the lawful owner of land property known as Plot No. 1620 Block S Tabata, Tabata Segerea (suit property) and that the 2nd respondent and one Helmegird Mboya has encroached his plot (suit plot) erecting their structures in their plots which overlapped by approximately one meter in the suit plot.

The applicant also claimed the now 1st appellant, also in the process of developing his plot, he extended into 1/3 of the applicant's plot. The applicant prayed for declaration that the now appellants are trespassers on the land they have encroached in suit plot, and other reliefs as per his Plaint. Having heard the evidence of both sides to the suit, the trial Chairman decided in favor of the applicant, an act which aggrieved the appellants hence the current appeal.

The appeal is filed on eight grounds of appeal which will be reproduced herein as I determine them after having read the submissions by parties along with the evidence in the lower Court records. The respondent also filed reply to the memorandum of appeal in which he denied every claim in the memorandum of appeal by the appellants.

The hearing of the appeal was by way of written submissions and the submissions in support of an appeal was written and filed by Ms. Neema Massame, learned advocate while the reply submissions was drawn and filed by Mr. Mutakyamirwa Philemon, learned advocate.

The first ground was that, the trial Chairman misdirected himself in law and facts when he rightly held that, the respondent failed to prove or substantiate his claims for the alleged 1/3 encroachment of the suit land by the 1st appellant, but he still went on to hold that, the respondent's application is granted.

In this ground of appeal, Ms. Masame submitted that the respondent/applicant as per his pleadings filed at the trial Tribunal he claimed that the suit plot was encroached by the 1st appellant. That, however, upon hearing of evidence, the respondent failed to prove or substantiate his claim and that the trial Chairman held rightly so.

Ms. Masame submitted further that, with such observation and holding of the trial Chairman, it is obvious that the respondent failed to prove his claims/case as required by the law of evidence under the provisions of Acts

Section 110 which provides that a person who alleges must prove and the burden of proof lies upon him.

The counsel stated that, surprisingly, instead of dismissing the case for lack of evidence, the trial Chairman went on to rule in favor of the respondent.

To bolster her arguments the counsel cited the case of **Brella Karangirangi vs. Asteria Nyalwamba**, Civil Appeal No. 237 of 2017 CAT (Unreported) and the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madala,** Civil Appeal No. 45 of 2017 CAT (Unreported).

She prayed that ground No.1 of the appeal be allowed to the effect that the Application No. 77 of 2010 at the trial Tribunal ought to be dismissed for lack of proof by the applicant (respondent).

Replying to the 1st ground of appeal, Mr. Mutakyamirwa for the respondent submitted that, although he agrees with the counsel for the appellant on the principle enshrined in the quoted cases on the burden of proof, he differs with the counsel's claims that the respondent has failed to prove his claim on balance of probabilities.

The counsel submitted that the respondent then applicant first claimed relief before the trial Tribunal was that;

"The respondents be declared trespassers on the land they have encroached in Plot No. 1620 Block S, Tabata, Segerea Area".

That, the primary duty of the respondent with regard to his claim as per the claim in the application plus the framed issues was to bring evidence and prove as to whether the appellants, had trespassed in the suit premises, and that this duty was conclusively discharged on balance of probabilities.

Mr. Mutakyamirwa stated that the trial Tribunal could not be faulted by the respondent's failure to indicate to what extent the appellants had trespassed on his land as discovery of land boundaries on surveyed plots are done by land surveyors from the Ministry of Lands.

He submits further that, the 1st appellant by purchasing the land which did not belong to the 2nd appellant and erecting structures on the suit premises, he was the trespasser on the respondent's suit premises.

The counsel prayed for the Court to find this ground of appeal to have no merit and dismiss it.

In rejoinder, Ms. Masame submitted that the issue to be considered herein is whether the 2nd appellant acquired, owned and occupied the disputed land sometimes back before the same was illegally surveyed and acquired by the respondent in 1998 and registered as Plot No. 1620 and whether or not the 2nd appellant was compensated for such acquisition.

She argued that the 2nd appellant was proved to be the original owner of the disputed land under customary tenure for over 12 years since 1983, and later in 2003 he sold the disputed land to the 1st appellant. Hence, when the respondent surveyed and register the disputed land in 1998 as Plot No. 1620, the 2nd appellant was still the lawful owner of the said land for over 12 years under customary tenure.

She maintained that the first ground is meritorious and the same be granted.

In determination of this ground, I have to read the impugned judgment along with the evidence in the record of the trial Tribunal.

During the trial, the issues framed were as follows;

1. Who is the lawful owner of Plot No. 1620 Block S Tabata. Ardh.

2. Whether the survey of Plot No. 1620 Block S Tabata was lawfully done.
3. Whether the respondents encroached on Plot No. 1620 Block S Tabata.
4. What reliefs are parties entitled to.

In proving his case on balance of probabilities, the applicant testified as PW1, stated that the respondents (now appellants) have encroached his suit property in 2005 when they were developing their plots which are neighboring the suit plot for about one metre while the 1st respondent encroached into the suit plot for about 1/3 of the said plot. He tendered Exhibit P1 which is the Title ownership of the suit Plot No. 1620 Block S.

In determining the first issue, the trial Chairman found that the respondent (then applicant) has proved that he is the lawful owner of Plot No. 1620 Block S, the suit property.

He found further that the appellants merely assertions that the previous original owner one Salum Kondo Kinega was not paid compensation were with no any proof.

On the issue of whether the respondents have encroached on suit plot, the trial Chairman held that the applicant has no proof or evidence that the 1st respondent has encroached 1/3 of the suit property. He held further that; the suit plot be resurveyed by land surveyors to retrieve/re-identify the boundaries of the suit Plot No. 1620.

The trial Chairman held further that, after the said resurvey, the Report of resurvey be prepared by the Land Surveyor and submitted to the trial Tribunal within 30 days so that the trial Tribunal could use it to grant reliefs to the parties.

I will reproduce the part of the trial Chairman's findings at page 13 and 14 of the impugned judgment as herein below;

> "*Hata hivyo, kwa upande wa mdai,* ***hajatoa ushahidi au uthibitisho kama ni kweli mdaiwa Na. 1 ameingia 1/3 ya kiwanja chake.*** *Kwa mazingira ya viwanja vilivyopimwa, ilibidi iwepo taarifa ya ufufuaji wa mipaka ili kujua kiasi cha uvamizi kilichofanyika kwenye kiwanja Na. 1620.*

Kwa mazingira hayo, Baraza hili litatoa taarifa ya mpimaji baada ya kufufua mipaka ya kiwanja hicho Na. 1620 ili kutoa amri stahili."(emphasis added).

*"**Kwa hiyo madai yamekubaliwa lakini nafuu zitasubiri taarifa ya wapimaji ardhi,** ambao mdai anapaswa awagharamie ili wakafufue mipaka, na taarifa iletwe ndani ya siku thelathini kwa ajili ya kutoa nafuu stahili kwa wadaawa". (emphasis added).*

Having observed this, I am inclined to relive the cardinal principle that it is the party who alleges who must prove. This principle is enshrined under our laws specifically Sections 110,111 and 112 of the Evidence Act, Cap. 6 R.E 2019 and further elaborated by numerous authorities by the Court of Appeal and this Court.

In the case of **Brella Karangirangi vs Asteria Nyalambwa, (supra)** which was referred to this Court by the Counsel for the appellant, the Court of Appeal reiterated the said principle and had this to say;

"....We think it is pertinent to state the principle governing the proof of cases in civil suits. The general rule is that, he who alleges must prove.....It is similarly that, in civil proceedings, the

party with legal burden also bears evidential burden and the standard in each case is on balance of probabilities".

Guided by this principle, it is my firm view that in the dispute before the trial Tribunal, it was the applicant who had the evidential burden to prove his claims.

The trial Chairman found that the applicant has neither produced any proof or evidence that the 1st respondent encroached 1/3 of the suit plot as per his claim. Having found that, the trial Chairman erred then when he proceeded to order that the disputed plot be resurveyed by the surveyors so as to revive or re-identify the boundaries to know the extent of encroachment.

It is my view that the order of the trial Chairman for resurvey should have been issued BEFORE the trial Chairman has delivered his decision and having already found that the applicant has failed to prove his claims of 1/3 of the encroachment by the 1st respondent.

It is judicial practice and procedure that the Courts, in the course of composing decisions/judgment, might encounter a point of law, which needs Aells.

to be addressed or a piece of evidence which needs more clarification before the Court can give its decision on the matter.

This is where it can be said that the Court has raised a point of law *suo motu*. However, the Court must summon the parties who must be given a right to be heard by addressing the Court on that point of law.

Similarly, if in the course of composing the judgment and the Court encounter evidence which needs clarification, the Court has power to recall a witness or witnesses for more clarification on that evidence.

Furthermore, the Court has power to summon what is called Court's witnesses, who are not witness of adversaries, so as to get clarification on certain evidence or matter regarding to the circumstances of the case before it.

I believe that the Court has to exercise all these powers BEFORE it has given its findings on the matter. If the Court will summon for more evidence AFTER it has already decided in favour of one party then this Court will be at the risk of being the advocate of the winning party and hence vacate from its neutrality position.

I say so because, the Court will be gathering evidence in favour of that particular party whereas it has to be neutral.

In the dispute at hand, the trial Chairman stepped into the shoes of the applicant and or his advocate for reason that, having found the applicant has failed to prove that his land was encroached to the extent he claimed, the trial Chairman went on to order for more evidence in favor of the applicant, that the suit plot be resurveyed and the boundaries revived or re-identified so as to know the extent of encroachment.

In addition, after receiving the Report from the surveyor, the trial Chairman should have then summoned the parties, and they should have been given rights to be heard on the findings of the Report of the surveyor. Instead, the trial Chairman went on to give reliefs to the parties after receiving the Surveyor Report and granted the reliefs to the applicant who is now the respondent.

The trial Chairman did not even analyse the contents of the Surveyor Report as compared to the evidence already adduced before the Tribunal. The Chairman did not give reason for his findings after having received the Report.

I have seen and read the Report of the Surveyor which is in a form of a letter from the Director, Dar es Salaam City, to the Chairman, District Tribunal of Ilala. The Report is in the trial Tribunal records. The Report as I have read it, does not reveal the extent of encroachment. Hence it is not clear how the trial Chairman reached to conclusion that the 1st appellant has encroached the suit plot and what was the extent of encroachment?

To my view, the Surveyor Report was an expert report and the Surveyor should have been summoned as a Court witness to explain /analyse Report.

In the award granted by the trial Chairman after receiving the Surveyor Report, the trial Chairman went on to grant the reliefs without stating how he has reached to that decision.

I reproduce that part of the decision as follows;

"Tarehe 23/01/2023, Baraza hili lilitoa nafuu kusubiri taarifa ya mpimaji kujua ni kwa kiasi gani kiwanja cha mdai kimeingiliwa. Baada ya kupata taarifa ya mpimaji inayoonyesha kiwango kiwanja cha mdai kilivyovamiwa, Baraza hili linatoa nafuu zifuatazo;....."

Here, the trial Chairman is admitting to receive the Surveyor Report. However, as I have already observed above, the trial Chairman did not analyse the said Report and did not give his findings on to the extent of the encroachment because he has already found that the applicant has failed to prove the extent of encroachment he claims the 1st respondent have done.

With the Report of the Surveyor, to what extent was the encroachment? The decision of the trial Chairman is silent on that.

What are the consequences of Court's decision not stating the extent of the encroachment? The consequences will be faced during the execution of the Court's decree.

The Court's order is to the effect that the 1st respondent is the trespasser to the suit plot hence should demolish all the structures he has erected/built in the suit plot.

However, the 1st respondent has not trespassed in the whole of the suit plot. According to the applicant's previous claims which were not proved, the 1st respondent has encroached only 1/3 of the suit plot.

Since these claims were dismissed by the trial Tribunal, then what is the extent of the encroachment by the respondent according to the Surveyor's Report? The decision and Order of the trial Tribunal are silent.

For the analysis and reasons hereinabove, I find that the first ground of appeal has merit and I allow it.

Having found that the first ground of appeal has merit, I am of the firm view that I don't have to labour on determining the rest of the grounds of appeal except for the fifth ground of appeal which I shall give my analysis.

I say so because once this Court has found that the first ground of appeal has merit then the whole of the decision, and award/decree of the trial Tribunal cannot stand for the reason that the decision/ impugned judgment and decree contains an error material which goes to the root of the case and which may cause injustice to the party or parties to the suit.

The whole of the judgment and decree shall have to be quashed and set aside.

Before I conclude, I will determine the fifth ground of appeal which states that, the trial Chairman erred in law and facts in his failure to hear and determine on merits, the counter claim of the 2nd appellant who was Aells.

claiming original ownership of the suit land as well as disputing the illegal survey and acquisition of the suit land by the respondent without being paid compensation.

In her submissions, Ms. Massame, counsel for the appellants argued that upon the filing of the Application No. 77 of 2010 by the respondent at the trial Tribunal, the 2nd appellant later by leave of the trial Tribunal, amended his written statement of defence and filed a Counterclaim.

The counsel submitted further that when the Counterclaim was set for hearing, the trial Chairman *suo motu* ordered some amendments to be done to the counterclaim and when the same was done, the trial Chairman strike out/dismissed the counterclaim on the ground of legal technicalities. That by that action, the 2nd appellant was denied his rights to be heard on counterclaim.

Replying on this ground of appeal the counsel for the respondent Mr. Mutakyamirwa, contended that the principal of natural justice on the right to be heard is not absolute. That, when the matter is struck out for any technicalities it can be brought back to Court after rectification of the defect. That, there is no reason as to why did the appellant fail to bring back the

counter claim if at all it was struck out on technicalities. He urged the Court to disregard this claim and to find that this ground has no merit.

In rejoinder, Ms. Massame contended that, according to the records of the Tribunal, the issue of counterclaim came after both the prosecution and defence case for the main application was concluded. That, immediately after striking out the counterclaim, the Tribunal proceeded with the stage of hearing opinion of assessors and later the judgment was delivered.

She submitted further that, under such situation, it was not possible for the 2nd applicant to reinstitute the counterclaim hence the right of 2nd appellant to be heard on that was denied. She prayed that this ground of appeal be allowed.

I have gone through the record of proceedings of the trial Tribunal. The records shows that indeed, the 2nd appellant (by then the 2nd respondent), filed his Amended written statement of defence in which he also filed a counterclaim. The applicant also filed a Reply to the amended written statement of defence of the 2nd respondent and also a written statement of defence to the counterclaim.

After the hearing of evidence of all parties whereby the defence closed their cases, the counsel for the 2nd respondent, prayed for the hearing of the counter claim. This was on 11/8/2022. The hearing of a counterclaim was set to be on 27/9/2022. On that date, the matter could not proceed, so it was set for hearing on 24/10/2022.

On 24/10/2022, the counsel for the 2nd respondent, Ms. Masame prayed for amendment of the counterclaim, so as to reveal parties to counterclaim (so it was not true that it was the trial Chairman who moved *suo motu* as claimed by Ms. Masame). The prayers were granted and the trial Tribunal ordered that the amendment should specifically be done as prayed i.e. only to reveal the parties to the counterclaim. The same was set to be heard on 11/11/2022.

On 11/11/2022, before commencement of hearing, the respondent to the counterclaim, raised an objection before the trial Tribunal that the applicant to the counterclaim have contravened the Tribunal's order to the extent that, the counterclaim was not amended only to reveal parties but the applicant has gone further to introduce new facts which were not in the former claim.

The counsel for the applicant responded by admitting that it is true that there are new facts but they don't change the nature of the claims, and prayed for the hearing to proceed with the amendments as they are.

After hearing the submissions of the parties on the objection raised by the respondent to the claim, the trial Chairman, having compared the former counterclaim with the amended one, he found that the applicant has contravened the Tribunal order by changing contents of counterclaim and introduce facts which were not in the former counterclaim.

The trial Chairman proceeded to struck out the counterclaim on the reason of contravention of the Court's order.

Having read the proceedings, it is clear that the claims of the counsel for the appellants on the fifth ground of appeal are misconceived and baseless. According to the proceedings, the counterclaim was set to be heard separately from the main case. This is not a strange practice since the Counterclaim is a separate suit. The Court can opt to hear and determine both the main case and the counterclaim at the same time (together) or it can opt to hear them separately.

In the matter at hand, the trial Tribunal intended to hear the counter claim separately and went on to fix a date of hearing.

Hence it is not true that the 2nd appellant was denied his right to be heard. The proceedings reveals that the 2nd appellant who was the applicant to the counterclaim was given a right to be heard but contravened the Court's order by amending the said counterclaim beyond the said Court's order, and without seeking for the leave of the Court to do so.

It is my finding that the trial Chairman was right to strike out the counterclaim. I agree with Mr. Mutakyamirwa's submissions that the 2nd appellant had a chance to reinstitute the Counterclaim as the same is the separate and independent claim.

I rule that the fifth ground of appeal has no merit and I dismiss it.

As the first appellate Court, this Court have mandate to revisit the proceedings and assess the evidence adduced therein. In the proceedings, dated 11/8/2022, it shows that the 1st respondent prayed for the Tribunal to visit locus in quo, and the applicant had no objection. After striking out the counterclaim, the Tribunal set for date of site visiting on 18/11/2022.

However, it seems that on that date, the Tribunal did not went to the locus in quo for the reason given that it was late.

After that, the proceedings are blank. It is not shown whether the Tribunal visited the locus in quo or not. The proceedings only shows that part where the trial Tribunal is summing up the case to the assessors.

The issue of site visiting does not even feature in the judgment of the case. The judgment is silent on whether the Tribunal visited the locus in quo and the findings of the Tribunal on the visit. The judgment is also silent on whether the Tribunal DID NOT visit the locus in quo and the reasons thereof.

Although visiting the locus in quo is not mandatory, but in some exceptional cases it is necessary for the Court to visit locus in quo so as to reach to just and fair decision. I am of the opinion that this matter was among the cases with exceptional circumstances which necessitated the Court to visit the locus in quo especially on the day the Surveyors were revisiting and re-identifying the boundaries of the disputed plot.

The judgment is also silent on the fact that there was a counterclaim and it was struck out.

For these reasons and others I have already determined herein above, I find that the trial Chairman misdirected himself in his analysis, findings and the decision of this matter which was before him.

This necessitates me to invoke this Court's powers under Section 43 of the Land Disputes Courts Act, Cap 216 R.E 2019 and hereby quash and set aside the Proceedings, Judgment and Decree of the trial Tribunal in the Application No. 77 of 2010 before the District Land and Housing Tribunal for Ilala. I hereby order retrial before another Chairman as expeditiously as possible.

The appeal is allowed but according to the circumstances of the matter, each party shall bear its own costs of this appeal.

It is so ordered.

Right of further appeal is explained.

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A. MSAFIRI

JUDGE

27/7/2023