

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 270 OF 2023

(Originating from Land Application No. 225 of 2019 Ilala

District Land and Housing Tribunal)

KESY ABDALLAH KAGELWA.....APPELLANT

VERSUS

LENARDA LEONARD NDIBALEMA.....RESPONDENT

JUDGMENT

14/09/2023 to 19/09/2023

E.B. LUVANDA, J

Kesy Abdallah Kagelwa the Appellant herein is aggrieved by a decision of the Tribunal adjudging the Appellant trespasser to a suit piece of land decreed in favour of the Respondent named above as the lawful owner. In the memorandum of appeal the Appellant grounded that:

One, the District Land and Housing Tribunal (the Tribunal) erred in law and facts in deciding in favour of the Respondent while knowing that the land in dispute belongs to the Appellant as he owned it peacefully since 2006; Two, the Tribunal grossly misdirected herself in law and fact in deciding that the Respondent is the legal owner of the disputed plot without strong evidence adduced at the trial by the said Respondent concerning her ownership of the

disputed land; Three, the Tribunal erred in law and facts in deciding in favour of the Respondent by failing to evaluate and analyzed the evidence hence reached the wrong decision.

The Appellant who was under pro bono of Ms. Everlasting Legal Aid Foundation, started to argue the second ground of appeal. The Appellant submitted that the Applicant (Respondent herein) failed to prove his (sic, her) case to the standard required because her exhibit P1 did not indicate the size and borders of the disputes land and resultantly failed to show the piece of land that has alleged encroached in by the Respondent (sic, Appellant), arguing that instead of deciding that the Respondent has not proofed (sic, proved) her case, the Chairperson used the alleged weakness in the Defendant's (sic, Appellant's) case to decide that the disputed land belongs to the Respondent. He cited the case of **Paulina Samson Ndawanya vs. Theresia Thomas Madaha**, Civil Appeal No. 45/2017; **Bright Technical Systems & General Supplies Limited vs. Institute of Finance Management**, Civil Appeal No. 12/2020 C.A.T.

The Appellant combined ground number one and three, he submitted that exhibit D2 bear the signature of the Chairman of Ward Tribunal of Kinyerezi and its rubber stamp, arguing it was a serious misdirection to say the

members of the ward tribunal were required to appear to prove its validity. He submitted that in 2015 the ward tribunal had powers to determine land disputes, citing sections 13(2) and 16 of the Land Disputes Settlement Act, Cap 216 R.E. 2002 (sic) before it was amended by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021, arguing that if the Respondent was aggrieved by the decision exhibit D2, he ought to appeal to the District Land and Housing Tribunal, citing section 19 of Cap 216. He submitted that in exhibit D2 parties had agreed to settle and the ward tribunal marked the disputes settled by an agreement to amend the border and the Respondent surrendered land to the Appellant. He submitted that the trial Chairperson misdirected herself to claim that the Appellant contradicted to say has not trespassed land and later saying there was a dispute of borders which were amicably settled at the ward tribunal, arguing that it was natural for a dispute of borders to arise in the circumstances where evidence adduced by both parties, indicate they were given title deeds that did not specify their borders.

In reply, the Respondent submitted that the Tribunal did not rely on weakness of the defence although she was of the view that the Appellant has weakness on his defence, arguing it is the balance of probability that the Tribunal used to decide the case in favour of the Respondent. She cited the

case of **Berelia Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237/2017 CAT, pages 7 and 8. She submitted that the Respondent discharged her duty by summoning three witnesses and tendered exhibits of her ownership over the disputed plot. She submitted that the Respondent (sic, Appellant) testified with his witness and tendered no exhibit. She submitted that Regina Seleman (PW1) for Respondent stated to have lived in the suit plot which is owned by the Respondent. She submitted that the Appellant denied to have trespassed but confirmed to had a dispute alleged was a settled, arguing the settlement deed were never signed. She submitted that a question of exhibit P1 that did not indicate size and borders of the disputed land, argued was resolved by the testimony of the Appellant himself of accepting the disputed area to have been on quarrel.

Ground number one and three, the Respondent submitted that exhibit D2 tendered by the Appellant himself for defence but was never signed by both parties. She submitted that the decision of ward tribunal which is in a form of consent decision is not appealable, arguing however that it was not signed by both parties which according to her it mean there was no decision made, as it was null and void.

On rejoinder, the Appellant submitted that the Respondent did not prove her case to the required standard, because did not indicate the size and borders of the suit property alleged trespassed, for it to be determined, arguing even her evidence did not prove anything substantial. He submitted that the judgment is very clear that the Chairperson based her decision on defence case saying that the defence admitted to the trespass which is not true. He submitted that the decision of Kinyerezi Ward Tribunal in Case No. BZK/KNY/IL/05/2015 exhibit D2, is valid and lawful because it contain orders and was signed by the Ward Tribunal Chairperson.

On my part, I will start tackling ground number two. It true that documentations for allocation of land to both the Appellant (exhibit D1) and Respondent (exhibit P1) the allocation committee or authority did not depict the size, borders, actual location and neighbors. However the oral account of the Respondent who testified as PW3 at the Tribunal supported by Regina John Seleman (PW1) neighbour to both Appellant and Respondent, who (PW1) was also care taker of the Respondent farm and wife of Mr. Karigwa who was allegedly participated allocation of the disputed land to the Respondent; Also John Andrew Mutalemwa (PW2) neighbour to both parties (and tendered his title deed exhibit P3), all supported the ownership of the Respondent and blamed the Appellant for trespassing the Respondent's land.

On the other hand the Appellant summoned Marwa Chacha (DW1) who in his testimony did not say if he is a neighborhood there, nor stated if he participated or witnessed allocation of the alleged five pieces of land measuring twenty by twenty to the Appellant. According to DW1 he was allocated his land on three different areas, but could not tell if any of the three border either the Appellant or Respondent for him to be said he is conversant or acquainted with the facts regarding allocation of the plots to the parties. In fact at cross examination, DW1 demonstrated to be ignorant or not aware of what is transpiring at the suit plot.

The Appellant also summoned Abdillah Ally Kassome (DW2), who bragged to have professed a title of Assistant Chairman to the allocation committee, in his examination in chief stated that he merely used to receive information regarding allocation and later visited to satisfy himself. When he was asked question by the Tribunal, DW2 said he did not participate to allocate land to the Appellant and he don't know as to how may pieces of land were allocated to the Appellant. In a celebrated case of **Hemedi Saidi vs. Mohamed Mbilu** (1984) TLR 113 at page 114, this Court speaking through Sisya, J as he then was, held, I quote,

"According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win"

In view of the recap above of evidence presented by the Respondent vis-à-vis a defence by the Appellant it is vividly that the evidence of the Respondent was heavier on the balance of probability. In fact, the Tribunal is faulted for nothing, in so far there is no where it ruled that the defence of the Appellant was weak, neither stated in express terms that the Respondent is declared the owner because of the weakness on the Appellant defence. To my view, through out its findings the Tribunal was making analysis and assessment of the evidence tendered by the Respondent against the defence by the Appellant. A mere fact that the learned Chairperson discussed exhaustively the Appellants defence, on itself do not portray that he was leaning to the weakness on defence. Be as it may, if the defence is weak, there is no harm or any rule which forbid or outlaw making a critical analysis and coming out with findings regarding the weakness or likewise the strength of defence. Therefore ground number two is unmerited, its dismissed.

Ground number one and three, on these grounds the Appellant partly faulted the Tribunal for failure to properly analyze the evidence adduced, which by large was covered and taken into board when I was deliberating on ground number two above. The other limb of this point, was focused on exhibit D2 alleged settlement and consent at Kinyerezi Ward Tribunal.

The Appellant submitted that the alleged Ward Tribunal assumed powers under sections 13(2) and 16 of Cap 2016. The said provisions cater for the establishment, composition and powers of the Ward Tribunal. However exhibit D2 reflect it was issued by Kinyerezi Ward Reconciliation Board. To my understanding the hierarchy in adjudication (mediation) of land matters or dispute the lowest grade is the Village Land Council, whose prerimary function is to mediate dispute or complaint concerning land, and in case of dissatisfaction the dispute is referred to the Ward Tribunal whose appeals lies to the District Land and Housing Tribunal, then High Court and finally Court of Appeal as the apex Court, see sections 3 and 9 of Cap 216.

Therefore, the alleged Kinyerezi Reconciliation Board, does not exist among the bodies conferred jurisdiction to deal with disputes or

complaints pertaining to land. Therefore exhibit D2 was a nullity. The first and third ground succumb.

In totality the appeal is without merit. Therefore, the verdict of the trial tribunal declaring the Appellant trespasser to the suit land decreed in favour of the Respondent as the lawful owner and an order for payment of a general damage a sum of Tshs. 3,000,000/= payable by the Appellant to the Respondent (which was not appealed for) are all upheld, including an order for demolition of the Appellant's structure to the extent of encroachment, to be demolished at the Appellant's expenses.

The appeal is dismissed with costs, this because the Appellant who is under pro bono, but he preferred this appeal without claim of right whatsoever to the suit land.



E.B. LUVANDA
JUDGE
19/09/2023

Judgment delivered in the presence of Ms. Rehema Mgwemu learned Counsel the Appellant and Ms. Monica Simbo learned Advocate holding brief for Mr. Kennedy Sangawe learned Counsel for the Respondent.



E.B. LUVANDA
JUDGE
19/09/2023