IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL No. 271 OF 2023

(Arising from the Judgement of District Land and Housing Tribunal for Kinondoni in Land Application No. 27 of 2021 delivered on the 24th day of May 2023 by Hon. R.L Chenya Chairman)

AMINI HASSAN LIUTIKE .....APPELLANT

VERSUS

JOHN ALLEN .....RESPONDENT

JUDGEMENT

12th September, 2023 &17th October, 2023

L. HEMED, J.

The disputants in this dispute are **AMINI HASSAN LIUTIKE (the Appellant)** and **JOHN ALLEN (the Respondent)** who, in fact, are neighbours. The appellant owns the landed property known as Plot No.363 Block 'E' Sinza, Ubungo Municipality while the Respondent is the owner of the neighbouring piece of land thereto. The source of the parties' dispute is the boundary separating the two. The Appellant instituted a suit in the District Land and Housing Tribunal for Kinondoni – at Mwananyamala *vide* Application No.27 of 2021 against the Respondent herein, claiming that his neighbour (the respondent) had encroached into his piece of land for about 1 and ½ feet by demolishing

the wall fence separating the two pieces of land. However, the suit before the trial Tribunal could not succeed, hence the instant appeal on the following grounds:-

"1. *That the Honourable trial Chairman erred in law and facts for failure to determine that the respondent has no locus stand to defend the matter for the not being administrator.*

2. That the honourable trial Chairman erred in law and facts to determine and finally ruled out in favour of the respondent who had weak evidence compared to the appellant

3. That the Honourable trial Chairman erred in law and facts for failure to consider that boundaries in dispute are for survey plots that need Land Officer prove.

4. That the honourable trial Chairman erred in law and facts to determine the matter basing on mere argument that the demolition and construction of wall fence was made after agreement parties without prove the same.

5. That the honourable trial Chairman erred in law and facts for failure to consider that it was necessary for the tribunal to visit area in dispute as it was prayed by the parties.

6. That the honourable trial Chairman erred in law and facts for failure to analyse the reasons for decision and finding thereof."

The appeal was argued by way of written submissions. Parties adhered to the schedule as directed by the court. At all the material time, **Mr. Sosteness Edson,** advocate represented the appellant while the respondent was appearing in person. The counsel for the appellant opted to drop grounds number 2 and 6. He argued grounds number 1, 3, 4 and 5 separately.

Beginning with ground 1, **Mr. Edson**, submitted that the respondent did not have *locus standi* defend the suit as he is not the administrator or executor of the alleged estate of his father. According to the learned counsel, this was proved through the certificate of Title tendered by the respondent before the trial tribunal bearing the names of his father. He fortified his argument by referring to the decision of the Court of Appeal of Tanzania in **Swalehe Juma Sangawe and Another vs Halima Swalehe Sangawe**, Civil Appeal No. 82 of 2021, on *locus standi.*

In reply there to, the respondent contended that the appellant is the one who instituted Land Application No. 27 of 2021 before the trial Tribunal and thus he was duty bound to ascertain as to whether he was

suing a proper party. To support his argument he cited the decision of the Court of Appeal of Tanzania in **Hadija Ally vs Geogre Masunga Msingi**, Civil Appeal No. 384 of 2019.

In determining the merits of ground 1 of appeal, I find apt to explain on the concept of *locus standi*. Of course, it is a common law principle, which envisages for the right to appear in court or before anybody and be heard on a given question. The concept was also highlighted in **Lujuna Shubi Ballonzi, Senior vs. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203 (HC) where it was stated that:

> *"Locus standi is governed by Common Law, according to which a person bringing a matter to court should be able to show that his rights or interest has been breached or interfered with"*

The question is whether the respondent had *locus standi* in the proceedings before the trial Tribunal. The respondent herein was the respondent before the trial tribunal against whom the allegations/claims of trespass to the appellant's land were raised. It is my firm view that the fact that the respondent was the one sued before the trial tribunal, then, by virtue of the said suit, he had the right to appear and defend

himself before the tribunal against such claims levelled against him. The duty to ascertain whether the defendants brought before the court are the proper ones, dwells in the shoulders of the persons instituting the suit. Otherwise, he is bound to prove his claims as alleged in pleadings against such defendants. If a person sues a wrong party and eventually fails to prove his case against such party, he cannot stand to challenge the decision basing on the *locus standi* of such wrong party because *Locus standi* of the defendant/respondent in any case is drawn from the case lodged in court against him.

In the present case, if at all the appellant discovered that the respondent was not a proper party, his remedy would have, probably, to amend his pleadings to join the proper party or withdraw the claims against the improper party. The fact that he kept adamant in prosecuting wrong claims against the respondent herein and failed to prove, he is precluded from relying on the *locus standi* of the respondent at this stage. From the foregoing, I find no merits in the 1st ground of appeal.

The 3rd ground of appeal was 'that the honourable chairman erred in law and facts for failure to consider the boundaries in dispute for surveyed plots that needs land officer to prove. It was argued that the boundaries in dispute involves two plots which are surveyed and whose

size and boundaries are indicated in their respective survey plans. According to the appellant, to resolve the dispute would have been by calling the Land Officer from the responsible land office to testify on the truth of measurement from the land system.

The respondent's response thereto was such that the trial tribunal decided the matter based on evidence tendered during the trial. According to him, evidence of the appellant was not strong to prove that the respondent had encroached into the appellant's land. He relied on sections 110 (1) and 111 of the Evidence Act [Cap 6 R: E 2019], arguing that it was the duty of the appellant to prove his allegations of trespass.

I am at one with the appellant that the suit landed property being on the boundaries separating two surveyed pieces of land would have been conclusively resolved by the appropriate authorities. In the present case, the appellant was complaining that the respondent herein had encroached to his piece of land for about 1 and ½ feet. I am of the settled opinion that, this allegation needed to be proved by the appellant himself. I am holding this position because, it is a trite law that the one who alleges is duty bound to prove. This principle is provided under sections 110 (1) of the Evidence Act, [Cap.6 R.E 2019] which state categorically thus:-

"110 (1) Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

I have gone through the proceedings of the trial tribunal and found that the appellant herein had three (3) witnesses who testified in favour of his case. PW1 (SM1) was the appellant himself, PW2(SM2) the Chairman of Street Council and PW3 (SM3) the Construction Technician (builder). The allegation being on encroachment in a surveyed land, neither of the witness called by the Appellant was and would have been able to prove if the respondent herein had encroached the appellant's land for the alleged 1 and ½ feet. The appellant never called the competent person, to wit, the land surveyor who would have told the trial Tribunal the extent of the alleged trespass. In fact, it was not and could not be the duty of the trial Tribunal to parade a witness to testify in favour of any party. The duty of courts in adversarial system like of ours is to play the role of an impartial referee, the role to adjudicate and not to give testimony.

In the circumstance of this case, the fact that the appellant failed to call material witness, the land surveyor, the trial Tribunal was entitled to draw inference that if the said witness would have been paraded, he would have given evidence contrary to the appellant's interests. In his submissions, the counsel for the appellant insisted that the Land Officer was the one ought to have been called. In the first place, if the appellant thought that such witness would have been of importance, he was the one obliged to call such witness. Besides, the dispute was not on ownership of either piece of land, rather it was on encroachment. The only evidence to resolve the dispute on encroachment in a surveyed land is cadastral evidence which was not given by the appellant. In **Hemed Said vs Mohamed Mbilu (1984)TLR 113, It was held that;-**

> *"According to the 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 the instant case, evidence of the appellant's case had no weight whatsoever to convince the trial Tribunal rule in his favour. I find this grounds to be short of merits.

With regard to the 4th ground of appeal it was stated by the appellant that the judgment and opinion of the assessors was based on argument that the demolition of wall fence and process to build the new one by the respondent was made after agreement of both parties. He asserted that, this was a mere argument stated by the Respondent and finally taken by the trial Tribunal in the Judgment. He was of the view that, if there would have been an agreement then the appellant would not have instituted the case. The arguments of the appellant with regard to the 4th ground were not responded by the respondent.

I have gone through evidence on record and I agree with the appellant contention that there was no proof that the appellant and the respondents herein had agreed to demolish and rebuild new fence wall. However, I could not find evidence showing the extent of demolition for purposes of awarding an appropriate relief in regard to the alleged demolition.

The records show that the appellant only stated that the respondent demolished his wall fence and rebuilt another one. The appellant could not state the value, size and location of the demolished wall fence. Failure to establish the size, value and location of the alleged demolished wall is as good as failure to prove the allegation as required

by section 110(1) of the Evidence Act, (supra). I am of the view that ground 4 has no merits either.

In the 5th ground of appeal, the appellant blames the trial tribunal to ignore the prayer of the parties to visit the *locus in quo*. The learned counsel for the appellant was of the view that visiting of the *locus in quo* was important for the trial Tribunal to settle the matter according to the size of their plots and nature of the dispute. The respondent did not respond to this ground.

Let me start by putting the question whether it was important to visit *locus in quo* bearing in mind the nature of the suit before the trial Tribunal. Of course, there is no law that forcefully and mandatorily requires the court or tribunal to conduct a visit of *locus in quo*. Visit of *locus in quo* is done at the discretion of the court or the tribunal depending on the nature and circumstance pertaining to the case. This was observed by the Court of Appeal of Tanzania in **Nizar M.H. v.Gulamali Fazal Janmohamed** [1980] TLR 29, thus:-

> " *When a visit to a locus in quo is necessary or appropriate, and as we have said,* ***this should only be necessary in exceptional cases****..."* [Emphasis added]

In the case at hand, it is my firm opinion that visiting of the *locus in quo* was not necessary because; **first**, it was the duty of the appellant to bring material witness so as to prove the alleged encroachment without visiting the *locus in quo*. **Secondly**, the suit property being a surveyed land, the alleged encroachment could only be proved by parading a land surveyor. **Thirdly**, the appellant had proved nothing, which necessitated the trial Tribunal to visit the *locus in quo* for purposes of verification. Basing on the cited case of **Nizar M.H. vs Gulamali Fazal Janmohamed***(supra)* there was no exceptional circumstance to warrant the trial tribunal visit the *locus in quo*. This ground of appeal lacks merits.

From the foregoing, all grounds of appeal have failed. It follows therefore that the entire appeal has to be dismissed. I hereby dismiss the entire appeal with costs. It is so ordered

DATED at **DAR ES SALAAM** this 17th October 2023.

L.HEMED

JUDGE