IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 427 OF 2023

(Arising from the judgement and Decree of the District Land and Housing Tribunal of Ilala at Wizara ya Ardhi Building- Kivukoni in Land Application No. 103 of 2022 dated 02nd October 2023, by Hon. Mgulambwa, Chaiperson.)

YOHANA THOMAS MTENGA.....APPELANT

VERSUS

THE REGISTERED TRUSTEES OF

AFRICA INLAND CHURCH OF TANZANIA.....RESPONDENT

JUDGMENT

Date of last Order: 08/02/2024

Date of Judgment: 15/02/2024

A. MSAFIRI, J.

The appellant hereinabove having been dissatisfied with the judgment and decree of the District Land and Housing Tribunal of Ilala (herein as the trial Tribunal) in Land Application No. 427 of 2022 which was delivered on 02/10/2023, has appealed to this Court and advanced four (4) grounds of appeal as follows;

1. *That, the trial Tribunal erred in law and fact by holding that the appellant had no right of easement while the appellant testified that she had used the disputed easement which is located on*

the west side of the appellant's house passing through an easement between land originally owned by Marijani Rajabu (on the south side) and the respondent (on the North side) for more than twenty (20) years.

2. *That, the trial Tribunal erred in law and fact by holding that the appellant had no right of easement while ignoring the applicant's exhibit KM3 (Residential License) which was granted in 2012 that imposed conditions upon the owners of the adjacent lands to respect and preserve the right of existing easements.*
3. *That, the trial Tribunal erred in law and fact by holding that the respondent's exhibit KU2 (minutes of the meeting) authorized and invited the appellant's deceased husband to use the disputed easement temporarily while there were no evidence tendered to prove the terms and conditions of the use of the disputed easement.*
4. *That, the trial Tribunal erred in law and fact by deciding in favour of the respondent while ignoring contradictory testimonies of the respondent's witnesses on the true owner and seller of the land exhibited by the respondent's exhibit KU1 (affidavit).*

The appellant prays for this Court to set aside the judgment and decree of the trial Tribunal with costs.

The appeal was heard by way of written submissions whereby the submission in chief and rejoinder by the appellant was drawn and filed by Ms.

Mr. Osward L. Mpangala, learned advocate for the appellant and the reply submission by the respondent was drawn and filed by Mr. Ngassa Ganja Mboje, learned advocate for the respondent.

Before going through the submissions, the brief back ground of the dispute is apposite.

According to the record of the proceedings at the trial Tribunal, the appellant and the respondents are neighbours. The appellant claim to have been using an easement which pass in front of the area of the respondent for about twenty (20) years now. The dispute arose when the respondent erected a fence wall around the area and hence blocked the passage way for the appellant. That the appellant has complained of the respondent's acts at various authorities including filing a complaint before the Ward Tribunal but all the efforts were futile as the respondent refused to open the disputed easement. Being aggrieved by the trial Tribunal decision which was in favour of the respondent, the appellant has therefore knocked the doors of this Court by way of the current appeal.

On the 1st ground of appeal, Mr Mpangala submitted that the appellant and her husband who is now deceased had purchased their piece of land in 2000, constructed their house and settled therein. That the appellant and her husband has always used an easement laying

between the land originally owned by Marijani Rajabu on the south side and the respondent (on the north side) as the only passage to and from the appellant's house located at Mwembe Madafu, Ukonga in Ilala Municipality. That the appellant has been using the disputed easement for more than twenty (20) years peacefully and without any interference from 2000 until March, 2021 when the respondent started to obstruct the appellant from accessing the disputed easement.

The counsel for the appellant stated further that it is trite law that when a person claims for right of easement he or she has been using for more than 20 years peacefully and without interference or preconditions from any person whatsoever, the same becomes absolute. This is as per the provisions of section 31(1) of the Law of Limitation Act, Cap 89 R.E. 2019. That this position was confirmed in the case **of Alex Sonkoro and 3 others vs. Eliyambuya Lyimo,** Civil Appeal No. 16 of 2017, CAT at DSM (Unreported). He prayed for the Court to make a finding in favour of the appellant on this 1st ground as she had discharged the burden of proof.

In reply, Mr Ngassa submitted on the 1st ground of appeal that the submission of the counsel for the appellant on her right of easement under section 31(1) of the Law of Limitation Act is misconceived. That the

evidence on record is clear that sometimes in 2003, the respondent invited and permitted the husband of the respondent to use the disputed way as per exhibit KU2 (minutes of the meeting). That the dispute started in 2021 which was almost 18 years from the time of permission to the period when the dispute arose.

That, section 31 of the Law of Limitation impose some conditions which have to be met. That, the conditions are first, the period of use of the easement must be clearly demonstrated that it is 20 years or more. Second, that there must be peacefully and openly enjoyment of the easement and lastly, that there must be no interruption. He pointed that there was evidence of parties concern on the disputed easement hence there was no peaceful, open use without interruption. He said further the case of Alex Senkoro (supra) has no assistance to the appellant.

In rejoinder, the counsel for the appellant mostly reiterated his submission in chief.

In this ground of appeal, the appellant argued that she has used the easement in dispute for more than 20 years hence she is entitled to the same as provided under the provision of section 31 of the Law of Limitation Act. I have observed that the appellant does not claim that the land which the passage cross to her house and which she claim to use for

more than 20 years belongs to her. She admits that the easement is between the respondent's land on the north side and on the land originally owned by one Marijani Rajabu. From the evidence on record, I have gathered that the appellant has been passing across the respondent's plot to go to her house and that the appellant and respondent are neighbours.

I have read the records along with the impugned judgment. The main issue framed at the trial was whether the suit land is the lawfully passage to the appellant? In determining this issue, the trial Chairperson considered the evidence by the appellant's witnesses that the appellant have been using that easement (or passage), peacefully for many years. The trial Chairperson decided the issue in negative. In her findings the trial Chairperson beside other evidence, relied on the evidence of SM5 (PW5) a Land Officer who testified to the effect that the disputed passage cannot be a right of way to the appellant as each party has their own pieces of land, the land which was unsurveyed.

In determining this ground of appeal, I read Section 31 of the Law of Limitation Act which I hereby reproduce for easy of reference;

"31(1)- 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"(emphasis added).*

From the above provision, the important question is whether the appellant has been using the disputed passage as of right, and without interruption for twenty years. The trial Chairman was of the view that according to exhibit KU2 which was produced by the respondent and admitted in Tribunal, the appellant was allowed to use the passage on temporary terms by the respondent.

I have read the contents of exhibit KU2 which is the Minutes of the meeting of the council of the respondent who is the church. It is shown that the husband of the appellant by the name Rogath Mosha who is now the deceased, asked to use the disputed passage. His request was granted by the respondent but on temporary terms. It was not shown the period of offer. The meeting was done on 29/03/2003. It says that;

"Mwombaji(Ndugu Rogath Mosha) apewe ruhusa ya kutumia eneo husika kwa muda tu na kwa sababu za kiujirani"

This statement from exhibit KU2 shows clearly that the appellant has no absolute right of the disputed passage, and she did not use the land peacefully and without interruption from 2000 to 2021 as her counsel has submitted before the Court. Yes the appellant might have been using the passage from 2000 but in 2003 she was interrupted in such way that she (or her late husband) has to ask for permission to use the said passage.

It is from the above analysis that I find that this matter does not fall under the conditions or the requirement set in the provisions of Section 31 of the Law of the Limitation Act. The appellant might have used the passage from 2000, and in 2003 she has to seek for permission of usage from the respondent who is the rightful owner of the said passage. And in 2021, having used the passage for 18 years, the respondent reclaim her right of exclusive use of the passage in dispute. For this reason, the 1st ground have no merit.

On the 2nd ground of appeal, Mr Mpangala submitted that the trial Tribunal erred by holding that the appellant had no right of easement while ignoring the applicant (appellant's) exhibit KM3, a residential License which was granted in 2012. That the trial Chairperson relied only on the evidence of Godfrey Rodrick Mlotwa (SM5) who tendered exhibit KM3. That the trial Tribunal did not assign reasons for not giving credence to the testimony of other appellant's witnesses.

He submitted further that exhibit KM3 was issued in respect of unsurveyed area in accordance with the provisions of Section 23 and 179 of the Land Act, Cap 113 and therefore, main roads and other easements leading to the residential or other areas were not expected to be shown in exhibit KM3 in the incorrect manner stated by the trial Tribunal. That

according to the clause settled in Exhibit KM3, it was expected of parties to the dispute to honour the right of use of the existing easement but the respondent decided to deprive the appellant from accessing the disputed easement after more than 20 years of peaceful use.

He contended that the trial Tribunal did not uphold the provisions of the law as stipulated in exhibit KM3. He added that the appellant have discharged her burden of proof.

In reply, Mr Ganja submitted that the applicant's complaints in the submissions does not match the contents of the 2nd ground of appeal. That in the submissions, the counsel for the appellant has claimed that there was contradictions in the evidence of the witness SM-5 and the contents of exhibit KM-3 (Residential License). He said further that the 2nd ground of appeal is on the complaint that the trial Tribunal ignored the contents of KM-3 that imposes conditions upon the owners of the adjacent lands to respect and preserve the right of existing easement.

Mr Ganja argued that, there is no any conditions demonstrated in exhibit KM-3 that were imposed thereof and that failure to argue the ground of appeal sufficiently deny the respondent her right to make rebuttal. He invited the Court not to allow new submission of this ground of appeal.

In rejoinder, Mr. Mpangala insisted that exhibit KM3 contains terms and conditions that needed to be observed and honoured by parties as reproduced twice at the bottom of page 12 of the appellant's submission.

It is true that in the 2nd ground of appeal, the counsel for the appellant submitted on various issues which was not raised in the said ground. However basing on the arguments in the 2nd ground, the counsel for the appellant did submit that clause 5 of page 1 of exhibit KM3 stipulates that; *"mmiliki/wamiliki wataheshimu na kuhifadhi haki za njia zilizopo".*

That, the law in force which led to the issuance of exhibit KM3 expect the parties to honour the easement/passages. He argued that surprisingly the trial Tribunal did not uphold the provisions of law as stipulated in exhibit KM3. I have read clause 5 of exhibit KM3. It state that the owner(s) of land property will honour and preserve the right of use of the existing paths. But as correctly said by the counsel for the appellant in his submissions, exhibit KM3 does not stipulate or show the existing small paths/ easement but only shows the streets/ roads.

It is my finding that the trial Chairperson was correct when she relied on evidence of SM-5 the Land Officer who testified that the pieces of plots owned by the parties were unsurveyed and exhibit KM3 does not

show the small paths/ easement which cross the plots but each party has his/her own passage to their respective plots.

In addition, I maintain my finding in the 1st ground that the appellant had no freely, unconditional use of easement because the respondent who is the owner of the plot which the appellant used to pass to her house has made condition to the appellant to use the path on temporarily basis and upon neighbourhood spirit. I also find the 2nd ground of appeal to have no merit.

On the 3rd ground of appeal, the counsel for the appellant submitted that the appellant's husband purchased a piece of land in 2000, constructed a house and later settled in the said house in the same year 2000. That all that time he was using the disputed easement laying between a lands originally owned by Marijani Rajabu on the south side and the respondent on the north side.

That it was not possible then for the appellant's deceased husband to ask permission to use an easement in 2003 to pass the building items while the construction of his house was completed in 2000. The counsel urged the court to see the appropriateness of exhibit KU2 and that it ought not to believe it.

In reply, the counsel for the respondent submitted that Section 146 of the Land Act which allegedly gives the appellant the right of easement is not applicable to the respondent's land since it is unsurveyed land and hence not registered by the Registrar of Titles. He referred to section 143(2) of the Land Act. He added that the permission on use of land was made in accordance with accepted practice of Tanzania Community.

In rejoinder, the counsel for the appellant contended that the respondent's submission on the applicability of Section 143(2) of the Land Act was erroneous because the disputed easement is located at Mwembe Madafu, Ukonga in Ilala Municipality within Dar es Salaam City which is an urban area.

I have read the provisions of Section 146 of the Land Act. I find that the circumstances in the present dispute of easement between the appellant and the respondent does not fall under the said provisions. For easy of reference, I will herein below reproduce Section 146(1) of Land Act;

> *146(1): An occupier of land easement under a right of occupancy or a lessor may by an instrument in the prescribed form, grant an easement over the land comprised in the right of occupancy or lease or part of any that land to the occupier*

under a right of occupancy or a lessee of other land for the benefit of that other land.

As observed earlier it is my view that the circumstance in the dispute is different form the circumstances set under the above cited provision. First the land on which the disputed easement is located is unregistered despite the fact that it is located in urban area. Second, there was no any agreement made under any instrument between the parties in dispute where it was agreed that the appellant will use that easement. What is on record is that each of the disputing parties have their own pieces of land and that the appellant have been using the path across the respondent's land to reach her house. This was done before the respondent has decided to build a fence across her land. It is also in the record that the respondent on neighbourhood spirit, allowed the appellant to use her land as an easement to pass through and this permission was temporary. I find that the 3rd ground of appeal has no merit.

On the 4th ground of appeal, the counsel for the appellant submitted that there was contradictions in the testimonies by the respondent's witnesses about the true owner and seller of the land exhibited by the respondent's exhibit KU1. That, unfortunately, the trial Tribunal did not pay attention to the contradictions revealed by the respondent's witnesses or made any thorough analysis and evaluation on the appropriateness of

exhibit KU1 which attempted to extinguish the appellant's right of easement between land that was originally being owned by Marijani Rajabu on the south side and the respondent on the north side.

In response, the counsel for the respondent submitted that first, there was no dispute of ownership of the respondent's land and there was no framed issue on who is the lawful owner of the respondent's land. On rejoinder, the counsel for the appellant reiterated his submissions which are based on the contradictions of the respondent's witnesses on the ownership of the land by the respondent.

Determining this ground, I went back and read the proceedings during the trial. Indeed, the two issues which were framed for determination was whether the suit land is the lawful passage to the applicant and the reliefs entitled to the parties. The trial Tribunal made finding and decided on the framed two issues. The applicant herself (who is now the appellant) was not claiming for ownership of the land but was claiming for the right of use of an easement which is between the respondent's land. Therefore whether there was a contradiction of the respondent's witnesses on how she had acquired the land she owned or who sold the respondent the land she owns was not the issue for determination before the trial Tribunal.

In determining the major issue as whether the suit land is the lawful passage to the applicant, as observed earlier, the trial Tribunal found that the appellant had no right to the disputed easement. I find no strong reason to differ with the Tribunal's findings. It is in the evidence that the respondent has allowed the appellant to use the disputed easement for some time before she decided to build a fence to surround her property. By that reason I also find that the 4th ground have no merit.

Basing on the analysis and reasons given herein above, this Court finds that this appeal lacks merit and it is hereby dismissed in its entirety with costs.

It is so ordered.

Right of appeal explained.

A. MSAFIRI

JUDGE

15/02/2024