

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

PC. CRIMINAL APPEAL NO. 3 OF 2022

(Arising from the District Court of Mbozi District at Vwawa in PC. Criminal Appeal No. 1 of 2022, Originated in the Primary Court of Mbozi District at Mlowo in Criminal Case No. 223 of 2021.)

ZABRON NGAILO.....APPELLANT

VERSUS

FELISTA MWENDAKWIJALA KALINGA.....1ST RESPONDENT

NEEMA MWENDAKWIJALA KALINGA.....2ND RESPONDENT

ROSEMARY MWENDAKWIJALA KALINGA.....3RD RESPONDENT

JUDGEMENT

Date of last order: 31.10.2022

Date of Judgement: 02.12.2022

Ebrahim, J.

The Appellant herein (Zabron Ngailo) was a complainant before the Primary Court of Mbozi District at Mlowo in Criminal case No. 223 of 2021. He filed a criminal case against Felista Mwendakwijala Kalinga, Neema Mwendakwijala Kalinga and Rosemary Mwendakwijala Kalinga (the 1 – 3rd Respondent respectively). The Respondents were charged with the offence of Criminal Trespass contrary to **section 299(4) of the Penal Code, Cap. 16 Revised Edition 2019 (now 2022).**

It was alleged that on 2nd December, 2021 at Ilonga Suburb within Mahenje Village in Mbozi District and Mbeya Region the Respondents together and jointly with intent and unlawfully entered into the farm of the Appellant and sawed maize seeds.

They pleaded not guilty to the charge, in their defence they all said that they did not trespass the land but it is their land distributed to them by the administrator of the estate of their late father. The primary court however, declared the appellant to have legally purchased the suit land from one Angumbwike Mwendakwijala Kalinga as he held a customary certificate of occupancy and concluded that there is no dispute on land ownership since certificate of occupancy is conclusive evidence of ownership of land. At the end result the trial court convicted the Respondents and sentenced them to pay fine of TZS 50,000/= each in lieu of which each respondent to serve a custodial sentence of three months.

The Respondents were aggrieved with the decision. They appealed to the District Court of Mbozi District in Criminal Appeal No. 1 of 2022. The District Court overturned the decision of the Primary Court on the reason that it was a land dispute thus ordered any interested party to refer a land matter to the land tribunal. The District Court also granted costs.

Dissatisfied, the Appellant preferred the instant appeal raising six (6) grounds of appeal as follows:

- 1. That the honourable Magistrate erred in law and in fact by deciding that the case is land case while the said case is pure criminal trespass because the seller has the certificate of title.*
- 2. That the honourable Magistrate erred in law and fact by not considering that the appellant did bought(sic) (buy) the said land from the real owner who has the customary certificate of title.*
- 3. That the honourable Magistrate erred in law and fact by not considering the matter to the land tribunal while there was no dispute of ownership because the seller had a customary certificate of title hence, he is the true owner.*
- 4. That the honourable Magistrate erred in law and fact by saying that the customary certificate of title was illegally obtained while there was no any evidence adduced at the trial court that the title was illegally obtained.*
- 5. That the honourable Magistrate erred in law and fact by failing to take judicial notice that the existence of certificate of title is final and conclusive evidence of ownership.*

6. That the honourable Magistrate erred in law stating that there is land case exists at the tribunal while the said case does not involve the trespassed land.

The appellant prayed for this court to allow the appeal, quash the decision of the District Court and restore the decision of the Primary Court and grant costs.

The appeal was heard by way of written submissions. The Appellant was advocated by Mr. Justus R. Zege, learned counsel whereas the Respondents appeared in person unrepresented.

Arguing the appeal, counsel for the Appellant submitted regarding the grounds of appeal generally that the District Court erred to hold that there is a land dispute between the Appellant and the Respondents while the dispute which existed involved the Respondents and one Angumbwike Kalinga over the issue of probate involving another piece of land. According to advocate Zege, the requirement that in criminal trespass the issue of ownership should be referred to the land court is when there is a clear dispute between the parties. He cited the case of **Julius Mkwashu vs Republic**, DC Criminal Appeal No. 44 of 2021 where the case of **Ismail Bushaija v R.** [1991] TLR 100 was cited. Counsel for the Appellant argued therefore that in the instant case there

is no clear dispute about the ownership of land but it was a pure criminal trespass to the land. He insisted that the Appellant purchased the land from a vendor who had a certificate of title. He submitted further that the authenticity of the certificate was not questioned before the Primary Court. He added that the referred land dispute is quite different from the trespassed land.

Advocate Zege contended further that the Respondents have been continuing trespassing into the Appellant's land as they claim that it belongs to them after the decision of the District Court. He kept insisting that the Appellant had purchased the land from the lawful owner. Counsel for the Appellant complained that the act of the District Court of ordering costs in criminal case was improper. He prayed for this court to allow the appeal and punish the Respondents according to the law.

In reply, the respondents similarly argued all grounds of appeal together. They submitted that the appellant bought a piece of land from their blood brother one Angumbwike Mwendakwijala Kalinga. That the land was owned by their father. The respondent stated further that their brother sold a piece of land to the Appellant without informing them which caused the Appellant to file Land Case No. 38 of 2021 which is still pending before the District Land and Housing Tribunal.

The Respondents cited the case of **Sylivery Nkangaa vs Raphael Albertho** [1992] TLR 111 and argued that the ownership of land ought to have been determined first as the District Court correctly decided. They concluded by urging the court to dismiss the appeal for lack of merits.

I have considered the rival submissions by the parties. The main issue for determination is whether the District Court was justified in its decision that the dispute between the parties is land dispute instead of criminal trespass.

Having read the decisions of both lower courts alongside the submissions by the parties in the instant appeal; it is common ground that the charge of criminal trespass cannot be conclusively determined if parties dispute over the ownership of the land alleged to be trespassed. The landmark cases on the position are the cited cases of **Sylivery Nkanga v. Raphael Albertho** (supra) and **Ismail Bushaija v. Republic** (supra). In Sylivery for example, it was held that:

"..... A charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined by a civil suit in a court of law...."

A criminal Court is not the proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine matters of land ownership."

Equally, in the amendment effected through the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022 which has amended **section 4 of the Criminal Procedure Act, Cap. 20 R.E 2022** by adding subsection (3); it has made it mandatory to resort to civil remedies where a matter is of that nature. I am abreast that the CPA does not apply in the matter originating in the Primary Court but, its invention is relevant to the instant matter hence I borrow a leaf. The subsection (3) of section 4 of the CPA provides that:

"...., where a matter is of a civil, administrative or criminal nature, as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process" (Bold emphasis added).

Though the requirement to resort to civil domains where the matter is of civil and administrative nature was made mandatory in the provisions of the statute, the same has been in existence through case law as above seen.

The determination whether the matter is of civil cum criminal nature in my view, depends on the circumstances and facts of each case. In the instant case, the determination whether the case is criminal or land dispute can be discerned from the pleading or defence evidence of the accused/Respondents. This means, a court needs to look if an alleged

criminal trespasser disputes the ownership over the land claimed by the complainant.

Under the circumstances, having gone through the impugned judgment and the evidence adduced by the respondents before the Primary Court, the first Respondent denied to have trespassed the land but said that the land belonged to their late father. She also claimed that the dispute over the same land began in 2015. She added that the certificate of occupancy held by her brother is invalid. To substantiate the claim of the dispute on the disputed land, she tendered a judgment from the District Land and Housing Tribunal. Again, the 2nd Respondent denied to trespass into the disputed land. She stated that it is the family land and they buried their siblings in that land. She stated further that they referred a dispute to the District Land and Housing Tribunal where they were advised to petition for the appointment of the administrator of the estates and that the administrator distributed the same land to them. The 3rd Respondent's evidence resembles that of the 1st and 2nd Respondents. They also called another witness (i.e Maiko Mwendakwijala) who testified that the disputed land is a family land, and that he was appointed as an administrator of the estates of their late father. He distributed the disputed land to the legal heirs.

The Primary Court having encountered with the above evidence declined to order the case to be referred to the land courts on the reason that it was a wastage of time of the court and the parties as there was conclusive evidence of the certificate of occupancy. The Primary Court held further that the vendor of the disputed land was a rightful owner of the disputed land.

Counsel for the Appellant is basing on the Primary Court's decision and argue that there must be a clear dispute between the complainant and the accused.

With respect, as I have already intimated above where evidence of the parties relates to the ownership of disputed land, a criminal court cannot justly decide on the criminal trespass charge before the fate of the land ownership is resolved. For the sake of clarity, it is easier for a criminal court to rely on a judgment of a land court in which a land dispute had been determined to its finality than relying on a disputed certificate of title. While I agree with the Primary Court and counsel for the Appellant that a certificate of title is a good proof of ownership of land, I do not agree that such certificate cannot be challenged or that there cannot be a dispute over the ownership which requires determination of the land dispute court/tribunal.

Additionally, counsel for the Appellant has continued complaining that the Respondents are still trespassing in the disputed land as they construed that they won the case and the land was declared theirs by the District Court. The complaint is another evidence that parties' dispute over the ownership of land and it is supposed to be determined to its finality to enable the declared owner by the court to be able to resort to Criminal remedy in case of trespass.

Owing to the above findings, I conclude that the District Court was correct to fault the decision of the Primary Court and order the dispute to be referred to the District Land and Housing Tribunal. In the circumstances, the appeal is hereby dismissed for want of merits. Since it is a criminal case, I make no order as to costs. I also quash and set aside costs awarded by the District Court to the Respondents in Criminal Appeal No. 1 of 2022.

Ordered accordingly.



Mbeya

02.12.2022.

R.A. Ebrahim

JUDGE.