

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF TABORA
AT TABORA**

LAND CASE APPEAL NO. 6 OF 2020

*(Arising from the District Land and Housing Tribunal for Tabora, in Land
Application Case No. 83 of 2017)*

KAMILI KALUNDAAPPELLANT

VERSUS

RAMADHANI SAIDI MKADI..... RESPONDENT

JUDGEMENT

Date of Submissions: 15/07/2022

Date of Delivery: 17/07/2022

AMOUR S. KHAMIS, J:-

Kamili Kalunda and one Mnubi Khamis were the respondents in Land Application No. 83 of 2017 of the District Land and Housing Tribunal for Tabora.

In the said suit, Ramadhani Said Mdaki moved the tribunal for declaration that he was true owner of the suit land and for an order of eviction against Mnubi Khamis and Kamili Kalunda.

It was averred that Ramadhani Said Mdaki acquired the disputed land located at Imalamihayo Village, Uyui Ward, Tabora region through a contract with one Kisinza Izengo.

It was pleaded that despite of knowledge on ownership of the land by Ramadhani Saidi Mdaki, Mnubi Khamisi trespassed onto the disputed land and subsequently sold it to Kamili Kalunda.

In a Joint Written Statement of Defence, Mnubi Khamis and Kamili Kalunda stated that Mnubi Khamis was a lawful owner of the disputed land through adverse possession since 1992 and lawfully sold it to Kamili Kalunda on 20 August 2011.

On 16/05/2019, the trial chairman (Waziri M.H) granted the application and declared Ramadhani Said Mdaki as a lawful owner of the land in dispute.

Kamili Kalunda was declared a trespasser to the suit land and ordered to vacate therefrom.

Aggrieved, Kamili Kalunda preferred the present appeal premised on five grounds that can be rephrased as hereunder:

1. That the trial chairman grossly erred in law and fact in misdirecting itself by not considering that the application was a claim of the whole farm of five (5) areas allegedly unlawfully sold by Mnubi Khamis.
2. That the trial chairman erred in law and fact in making decision based on purported village reconciliation minutes which were nevertheless overruled by the District Commissioner for not being specific with no boundary marks, neighbours were less concerned and he issued a letter dated 7/04/2017 which ordered reconciliation by the Ward Executive Officer.

3. That the trial chairman erred in law and fact by not considering the document evidence (sale agreement date 25/06/2011) produced by the appellant visa vis the respondent who produced no document of ownership.
4. That the trial chairman erred in law and fact in deciding that the appellant encroached “maters to the respondent while the two are not neighbours.
5. That the trial chairman erred in law and fact in refusing to receive WEO Reconcilian Report dated 19/05/2017 with no tangible reason for such refused.

Both parties appeared in person and the appeal was canvassed by way of written submissions.

The timeline set by the Court was duly observed and I am glad that despite of being lay persons the rival submissions sufficiently addressed the grounds of appeal.

I will now focus on the grounds of appeal and where necessary, relevant submissions will be referred to.

In the first ground of appeal, Kamili Kalunda faulted the trial chairman for not considering that the claim was for the five (5) acres allegedly sold by Mnubi Khamis to Kamili Kalunda but the judgment focused on eleven (11) meters encroachment.

On this ground, Kamili Kalunda contended that the trial chairman failed to resolve uncertainties on size of the disputed land.

Responding on this, Ramadhani Said Mdaki asserted that the trial chairman made findings that the dispute rested on trespass and not the whole five (5) acres.

He summed up that the trial chairman did not misdirect himself but took the misdirected parties into proper issues to be determined.

The respondent Ramadhani Said Mdaki further asserted that:

“.....the real dispute in this case was on boundary. The appellant trespassed into the respondent’s land for fact as properly found and determined by the tribunal.”

The pleading filed by both sides are silent on size of the disputed land except for annexure “MK – 1” to the Joint Written Statement of Defence showing copy of the sale agreement.

The said sale agreement between Mnubi Khamis and Kamili Kalunde was admitted in evidence as Exhibit D.1.

The agreement dated 20/8/2011 show that Mnubi Khamis Mandi sold six (6) acres of land to Kamili Kalunda Bikayamba for Tshs. 300,000/=

PW1 RAMADHANI SAIDI MDAKI testified that the disputed property originally belonged to his father who died in 1972.

He said his father owned the land before operation Vijiji of 1974/75. During Operation Vijiji, the family was relocated to Karumuna Village, Uyui District, Tabora Region.

In 1995 PW1 went back to Imalamihayo Village, Uyui District and demanded for the same land.

On further testimony, PW1, stated that:

“In 1995 I was given the land by the Village Government (Council) of Imalamihayo after I applied for same”

On further examination in chief, Ramadhan Said Mdaki stated that the disputed land was occupied by Kamili Kalunda after buying it from Mnubi Khamis.

He added that the dispute was initially mediated by the Imalamihayo Village Council on 19/5/2014 and both sides were happy with the decision (exhibit P.1)

Describing the centre of the dispute, PW1 said after the decision of 19/05/2014, Kamili Kalunda:

“..... is still disturbing me by not recognising the boundaries which all of us have agreed. That is why I came here to fight for my rights....”

On cross examination by Mnubi Khamis, PW1 stated that:

“I do not remember when the first respondent came to the disputed plot. The Kisinza Izengo was my neighbour. Kisinza Izengo came in 1995 to the area.”

On further cross examination, PW1 said after departure of Kisinza Izengo, Charles Izengo occupied the area.

He added that Kamili Kalunda trespassed into his land in 2016. PW1 further testified that there was no problem when Mnubi Khamis sold the land to Kamili Kalunda.

Expounding on that assertion, he stated that:

“.....The problem has been caused by second respondent (Kamili Kalunda). The plot is mine”.

On cross examination by Kamili Kalunda, PW1 Ramadhan Said Mdaki said there was only one settlement between parties dated 19/5/2014 and not otherwise.

On cross examination by the tribunal’s assessor (Maria Mgwira), PW1 said:

“The plot in dispute the one which I got from one Isinza Izengo. The problem is the boundary. We have tried to solve the problem but in vain”.

There was no other witness or exhibit tendered in support of Ramadhan Said Mdaki’s case.

Two witnesses testified for the respondent’s case in the tribunal: DW1 Mnubi Hamisi and DW2 Kamili Kalunda.

DW1 MNUBI KHAMIS disputed to have trespassed onto Ramadhan Said Mdaki’s land. To the contrary, he stated:

“.....What I can say is that the applicant is the one who trespassed inside plot of one HAMISI KITUNGULU.”

On examination in chief, Mnubi Khamis @ Hamisi, gave a detailed history of the disputed area, thus:

- 1) *"The first owner of the Shamba was one Mr. Kisinza Izengo from 1994 to 2003 and left the Shamba to his brother Charles Izengo.*
- 2) *In 2004 Charles Izengo sold the plot to one Hamisi Kitungulu.*
- 3) *After the sale by Charles Izengo to Hamis Kitungulu in 2004, the Shamba was in the hands of Hamisi Kitungulu. It is also in this time whereby the applicant started to disturb the new owner Hamisi Kitungulu.*
- 4) *The problem is that the applicant disturbed Hamisi Kitungulu claiming that the Shamba is his property as he is indebted of the first owner of the Shamba one Kisinza Izengo as the applicant claimed that he sold two goats to Kisinza Izengo but Kisinza Izengo did not pay his money which is Tshs. 30,000/= the fact which is not true as (since) I was ten cell leader (Balozi) of the area".*

On further examination, Mnubi Khamis @ Hamisi testified on how Ramadhani Said Mdaki came into the disputed land, thus.

"The debt to the applicant and on behalf of his young brother Kisinza Izengo since Charles Izengo had no money they have agreed between the applicant in front of me that the applicant would be given a portion of the land which (was) worth Tshs. 60,000/=. They have signed the document in front of me."

Testifying on aftermath of the dispute, DW1 stated that:

“In 2006 the applicant came again to Hamisi Kitungulu and claimed that the plot is his. They fought each other. I was the one who escorted them to the Village Executive Officer of Imalamihayo whereby the matter was solved amicably.”

In further testimony, DW1 said when the dispute intensified, Hamisi Kitungulu shifted to Mambali and left the Shamba without handing it over to anyone.

The witness said following departure of Hamisi Kitungulu, Ramadhan Said Mdaki “used the trick” with the Village Land Committee and Hamlet Land Committee to tailor matters in his favour. On this, he added that:

“.....They came (Committees) to our area and forced us to put demarcation to the Shamba of HAMISI KITUNGULU and the second respondent as they claimed that Hamisi Kitungulu has sold the plot to the applicant.

Since we have been forced we have signed the document me and the second respondent..”

On cross examination by Ramadhan Said Mdaki, DW1 said the lawful owner of the disputed land was Hamisi Kitungulu.

On further cross examination, DW1 said:

“I have sold my own plot to the second respondent (Kamili Kalunda).”

On examination by the tribunal’s assessor (Mama Mgwira), DW1 Said Hamisi Kitungulu was at Mambali.

On further cross examination, he stated that:

“I have my Shamba and the applicant has his Shamba. The applicant started the problem in 1995 after he came back to the Village and claimed that the area is his property i.e. property of his late father.....”

On examination in chief, DW2 KAMILI KALUNDA @ KINYOTA testified that he bought the disputed Shamba in 2011 from Mnubi Khamis and became a neighbour to one Hamisi Kitungulu.

On further examination, DW2 Said Hamisi Kitungulu peacefully lived as his immediate neighbour between 2011 and 2015 and there was no conflict whatsoever.

Regarding whereabouts of Hamisi Kitungulu, DW2 said:

“Hamisi Kitungulu shifted to Mambali Village but his plot was still in his hands. He has never abandoned his Shamba which is neighbour to me.”

On further examination, DW2 explained how the dispute arose, thus:

“After Hamisi Kitungulu moved to Mambali.....(after) two months time (the) applicant encroached into the Shamba of Hamisi Kitungulu.....”

On further questioning in chief, DW2 Said Ramadhan Said Mdaki encroached his Shamba for three (3) meters.

Records show that on 6/4/2019 the tribunal visited the locus in quo and drew a sketch map of the area showing the parcels of land owned by Ramadhan Said Mdaki and Kamili Kalunda.

Between the two parcel's of land, the sketch map show a stretch of land measuring eleven (11) meters and described it as the disputed land.

Apart from the submissions, the evidence on record reveals that no witness testified at the locus in quo and it is unclear as to how the trial chairman collected the evidence relied upon in the impugned judgement.

In **AVIT THADEUS MASSAWE V ISIDORY ASSENGA, CIVIL APPEAL NO. 6 OF 2017**, the Court of Appeal cited with approval the decision in **AKOSILE V ADEYE (2011) 17 NWLR (PT. 1276) P. 263**, which summarised the procedure on visiting the locus in quo thus:

“The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbour, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects in the land and boundaries.”

On a procedure applicable, the Court of Appeal cited its previous decision in **NIZAR M. H GULAMALI FAZAL JANMOHAMED (1980) TLR 29**, thus:

“When a visit to Locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses

as may have to testify in that particular matter, and for instance if the size of a room or width or road is a matter in issue, have the room or road measured in presence of the parties, and a note made thereof. When the Court re – assembles in the Court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant and court only refers to the notes. In order to understand or relate to the evidence in Court given by the witnesses. We trust that this procedure will be adopted by the Court in future”.

In the present case, the above well elaborated procedure was not applied by the trial tribunal rendering activities at the locus in quo defective.

From the evidence on record as summarised above, it is undisputed that the parties dispute rested on a boundary issue that demarcated the appellant’s land from that of Hamisi Kitungulu.

Another question that featured related to ownership of a parcel of land adjacent to the land sold by Mnubi Khamis to the appellant, Kamili Kalunda.

Was that parcel of land owned by Hamisi Kitungulu or Ramadhani Said Mdaki?

What were boundaries of the land owned by Ramadhan Said Mdaki and or Hamisi Kitungulu? What was the size of that land?

All these questions were not tackled owing to lack of evidence from Hamis Kitungulu, who was said to be at Mambali Village.

In my view, the evidence on record did not suffice to declare any of the parties owner to the disputed parcel of land.

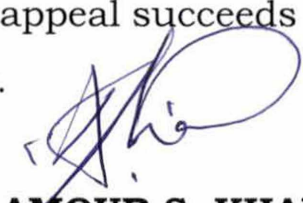
In the circumstances, a retrial by a different chairman is an appropriate remedy.

Consequently the trial tribunal's Proceedings, Judgment and Decree are hereby quashed and the file is remitted to the lower tribunal for retrial.

The trial chairman is mandated to ensure parties pleadings make a full disclosure on nature of the dispute which is missing in the pleadings on record.

In the upshot, the appeal succeeds to the extent above stated. I make no order for costs.

It is so ordered.



AMOUR S. KHAMIS

JUDGE

17/08/2022

ORDER

Judgement delivered in Chambers in presence of both parties.
Right of Appeal Explained.



AMOUR S. KHAMIS

JUDGE

17/08/2022