

TANZANIA / JUDGMENT

hunja suzo vs kipea shabani others wananchi wa mtaa wa kwihara 2023 tzhc 20890 11 september 2023

COURT
TZHCDECIDED
11 September 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF TABORA (LAND DIVISION) AT TABORA MISC, LAND CASE APPEAL NO. 3 OF 2023 (Arising from the District Land and Housing Tribunal for Tabora in Land Appeal No.55/2021 and originating from Land Application no. 24 of 2021 at Mwinyi Ward Tribunal) HUNJA SUZOAPPELLANT VERSUS KIPEA SHABANI & OTHERS (WANANCHI WA MTAA WA KWIHARA).....RESPONDENTS

JUDGMENT

Date of Last Order: 06/09/2023 Date of Judgment: 11/09/2023 MATUMA, J. Kipea Shabani and his fellow Mtaa members (Wananchi wa mtaa wa Kwihara) who are now standing as the respondents herein sued the appellant at Mwinyi ward Tribunal for right of easement. They alleged that the appellant made construction of a foundation at his plot but extended it to the street road thereby blocking the street road. i After a full trial the trial tribunal was satisfied that the appellant constructed the foundation exceeding to the street road which is not part to his plot. It thus ordered; 'Baraza Hmezingatia maelezo ya pande zote mbili pamoja na ushahidi wa mashahidi kama uviyowasiishwa, kwa kuzingatia umuhimu wa barabara ikiwa ni njia ya utoaji huduma muhimu za kiia siku kwa wananchi. Baraza Hmetoa maamuzi shughuli zozote zinazoendelea kwenye barabara hii ziondolewe Hi barabara ibaki wazi kwa ajiii ya kuendeiea kuhudumia wananchi. Baraza Hnamuamuru miaiamikiwa Hunja Suzo kuondoa ma/i zake kwenye eneo ia barabara na Hnastisha shughuli yoyote isifanyike kwenye eneo ia barabara. Aipishe barabara ibaki kama Hivyokuwa zamani.' The appellant still maintaining that he lawful persons the suit land was dissatisfied with such decision. He thus appealed to the District Land and Housing Tribunal for Tabora but on 18/11/2021 he lost the appeal when the appellate tribunal held; "Rufaa ya mrufani haina mashiko yoyote kisheria hivyo basi inatupiiiwa mbaii kwa ujumia wake. Badaia yake naungana na maamuzi ya baraza ia kata ya Mwinyi kwa kueieza kuwa Barabara ya mtaa inayotumiwa na wananchi sio maii ya mrufani. Mrufani haruhusiwi kuiziba barabara hiyo kwa namna yoyote na ameeiekezwa kuiacha wazi barabara hiyo ya mtaa kwa matumizi ya umma na si vingineyyr^ 2 The appellant became further aggrieved hence this appeal with seven grounds. At the hearing of this appeal, the appellant was present in person and was represented by Mr.

Akram Magoti learned advocate. On the part of the respondents Mr. Kipea Shabani was present together with some other members of Kwihara street but for the purposes of determining this appeal, I allowed Kipea to speak on behalf of others (Respondents) but when he took the floor he invited his fellow Moscow Gerald Muhanya to speak on their behalf. Mr. Akram Magoti learned advocate in arguing this appeal condensed the grounds of appeal into two major complaints to the effect that;

- i. That the appellate tribunal did not deal with the 9 grounds of appeal which is bad in law. ii. That taking evidence on record generally, the respondents did not establish their claims at the trial tribunal. In the first complaint the learned advocate argued that the appellant had lodged nine grounds of appeal in the first appellate tribunal but the tribunal disregarded them. He pointed some examples of the grounds which were lodged but not considered at all to be pecuniary jurisdiction of the trial tribunal, lack of cause of action and locus standi and wrong execution of the decree by the trial tribunal. The learned advocate then started to argue such grounds at length as if they were grounds before this court but again arguing the grounds contrary to how they were argued in the first d'p pel I ate tribunal. On the second complaint relating to the evidence generally, the learned advocate argued that the suit land did not in law qualify to be a public road because it has not been in use for more than twenty years as preconditioned under section 31 (1) and (2) (b) of the Law of Limitation Act. He finalized his submission by arguing that the appellate tribunal erred to rule out that the measurement of the plot bought by the appellant was not disclosed while the appellant's own evidence disclosed that it was measured 25 X 55. Mr. Moscow Gerald Muhanya on behalf of the respondents in lieu of Kipea Shaban in response thereof on behalf of all other respondents argued that the first appellate tribunal reached to its decision after scrutinizing all the grounds of appeal and the evidence on record. He also then counter argued the submissions of the learned advocate in that the evidence on record shown that the appellant's claimed land was valued at Tshs. 400,000/= which is well within the pecuniary jurisdiction of the trial Ward tribunal. He also argued that the suit land was not measuring 25 X 55 in accordance to the evidence on record and that there is a list of street members dully signed and presented in the trial tribunal and thus no issue of locus standi. Mr. Moscow went on that currently their locality is on the plan as a linear settlement area in which they are required to construct their houses facing the road and therefore they each left some paces for the road from their respective plots and built their houses facing the road but the Appellant wants to block such road. He finally prayed the appeal to H^e dismissed. 4 From the grounds of appeal, the arguments of the parties and the evidence on record, I am of the firm finding that this appeal can be justifiably be determined by addressing only two issues as to; /. Whether the first appellate tribunal disregarded the nine grounds of appeal lodged by the appellant before it. ii. Whether in accordance to the evidence on record, the appellant is the lawful owner of the suit land. Starting with the first issue, it is my firm finding that the learned advocate for the appellant Mr. Akram Magoti misapprehended the manner in which the grounds of appeal were argued at the first appellate tribunal and how they were finally determined. Admittedly, the appellant had

lodged nine grounds of appeal but at the hearing which was done by way of Written submissions the appellant abandoned the 9th ground of appeal and condensed some grounds arguing them together. Therefore, there were no nine grounds of appeal at the District Land and Housing Tribunal and the manner in which the grounds were argued necessitated the first appellate tribunal to draw out the real issue between the parties to be determined for the rights of the parties. In so doing the appellate tribunal raised the following issue for determination; "Kwa upande wangu baada ya kupitia maelezo ya pande zote mbH! na pia baada ya kutazama mwenendo wa baraza la kata, maoni yangu ni haya yafuatayo; Kimsingi mgogoro ni barabara ya mtaa inayotumiwa na wananchi wa mtaa wa Kwihara kwa matumizi ya kijamii ya kupita kwenye njia hiyo lakini Mrufani Mwalimu Hunja Suzo amezibitidoarabara hiyo 5 kwa madai kuwa kiwanja chake kinafikia mpaka kwenye barabara hiyo" The appellate tribunal then scrutinized the grounds of appeal generally and observed that they had no merits because the decision at the trial tribunal was reached on the strength of the evidence on record; 'Kwa upande wangu naona kuwa rufaa hi! ya mrufani haina mashiko kisheria kwani kesi katika baraza /a kata imeamu/iwa kwa kuzingatia Ushahidi na ikaonekana kuwa Ushahidi wa wananchi wa Kwihara una mashiko zaidi ku/iko wa mrufani" In that respect the appellate tribunal rejected all other grounds out the evidence on record because such grounds were not raised and decided at the trial tribunal. It dealt with the evidence on record which was the basis of the decision of the trial tribunal and finally dismissed the appellant's appeal. The appellate tribunal was justified to rule out as such because it is the law that matters not raised at the trial court should not be entertained on appeal. That was stated in among others cases that of Elisa Mosses Msaki v. Yesaya Ngateu Matee (1990) TLR 90 (CA) in which it was held; " The Court of Appeal will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by either the trial court or the High Court on appeal". The learned advocate for the appellant tries to employ technicalities to defeat justice by invoking strict rules in the Civil Procedure Code which do not even apply to the Ward tribunals. Issues of representative suit and Locus 6 -■ standi for instance are all technicalities because essentially those street members who went to complain to the Ward tribunal are known and their names are well listed on record. Some of them gave evidence during trial and each of them is a direct victim to the appellant's action. Therefore, there is no question of representative suit or locus standi. The mere fact that the trial tribunal in drafting the title of the suit did not opt to record all names of the complainants and instead recorded them in short as Kipea Shabani & Others (Wananchi wa mtaa wa Kwihara) did not prejudice the rights of either party. Issues of pecuniary jurisdiction of the trial tribunal were in fact an afterthought. The Appellant throughout the trial did not raise the issue of pecuniary jurisdiction of the trial tribunal. Instead he tendered the Sale agreement which evidenced that he bought his plot at Tshs. 400,000/=. The said contract did not state the size of his plot. The alleged value of Tshs. 8,000,000/= of his plot were his own allegations came at the appellate stage and without any evidence to substantiate the same. Even though, the suit at the trial tribunal was not relating to the Appellant's plot but the street road. There was no monetary value of that specific area which was the subject matter of the claim. It should

come to the knowledge of the learned advocate that currently our laws do not encourage technicalities. Substantive justice is paramount over technicalities. Thus, for instance, The Constitution of the United Republic of Tanzania, 1977 provides under article 107 A^jCfe) that; 7 "Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani-

- (e) kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka." That is the essence of the current overriding objective as provided for in the Civil Procedure Code, Cap. 33 R.E 2019 under Section 3 A (1) (2), 3B
- (1) (a) & (e) as amended by section 6 of the Written Laws (Miscellaneous Amendments) Act No.8 of 2018 which requires application of the overriding objective of the law which is to facilitate the just, expeditious, proportionate and affordable resolutions of all matters governed by the Act. The overriding objective is thus to do away with technicalities for the sake of substantive justice for all. The dispute between the parties at the trial tribunal was of the nature of public interest litigation in which any member of the Public may commence any suit for the interest of the whole public. Under the circumstances there is no need of each and every member of the Public to be party to the suit nor leave to represent the general public is required. I therefore dismiss this ground of complaint for having no merits. That takes us to the second ground of complaint relating to the evidence on record. Without hesitation, I find that the evidence on record is favoring the respondents as against the appellant. It is on record by the evidence of both parties that the suit land was a road designed for public use for many 8 years ago and when the appellant bought a plot nearby, the road was in existence and use by the public at large. As rightly held by both tribunals below, the appellants contract in which he purchased the plot from Angelina Stivini did not state expressly the demarcations of the land he bought or even its size. It is just showing that he was sold a foundation. Therefore Mr. Akram Magoti learned advocate with due respect he is wrong to argue that there is evidence on record showing that the plot in dispute was measuring 25 X 55. I have not seen such evidence on record. It was just an averment came by way of submissions at the appellate stage which was given without oath and was not subjected to cross examination. In the case of Morandi K Petro (1980) TLR 49, the court rejected to act on allegations coming by way of submission. In doing so the court remarked; "submissions made by a party to an appeal in support of grounds of appeal, are not evidence but are arguments on the facts and laws raised before the court. Such submissions are made without oath or affirmation, and the party making them is not subject to cross - examination by his opponent." In the same way, the appellant's arguments on the measurements of the plot is not evidence at all. Most important the question is not the size but the value. In the same way, the appellant brought in arguments of value at the appellate stage. He did not do so at the trial tribunal. It is in evidence that when the plot (foundation) was sold to the appellant, the street road at issue was in existence and use. It was 9 independent of the Appellant's purchased land. The appellant himself during clarification examination by the tribunal admitted that at the time he was getting there the road was in existence; "Mjumbe: Kipindi unanunua barabara uiiikuta hukuikuta? Miaiamikiwa; Ni/

iikuta" Most important is that when the appellant bought his plot, he involved the street chairman one Maganga Haruna who came at the trial tribunal as his own witness. In his evidence he made it clear that the appellant was not sold the road area; "Mauziano ya eneo hili kati ya Anjeiina Stivini na Hunja Suzo niiyashuhudia mwaka 2010 na aiikuwa anakomea kwenye mnyaa kama mpaka, na uiikuwa hauvuki barabara mpaka huo. Hili eneo ni ia barabara ninaitambua hivyo na hakuuziwa mpaka eneo ia barabara." This witness of the appellant himself was even astonished to have found the appellant blocking the road and since he had retired, he decided to report the matter to the current street chairman; "Nimekuta huyu bwana kamwaga mawe juzi nikabaki nashangaa ikanibidi nimpatie taarifa mwenyekiti wa mtaa wa sasa ndugu Hussein Sikanda afatiiie kwa kuwa mimi sio mwenyekiti wa mtaa kwa sasa." This very witness of the appellant finalized his evidence by insisting that the suit land is a road for public use; 10 "Hii ni barabara eneo alilouziwa haiikufika hapo barabarani. Na aliuziwa iikiwa na msingi amekwishaubomoa. Mimi natambua hii ni barabara na si eneo ia mtu ia makazi na hakuoneshwa mpaka eneo ia barabara." It is my firm finding that the evidence of this witness who was a person in authority is credible and reliable as rightly argued by Mr. Moscow Gerald Muhanya. He is the one who witnessed the sale agreement as a leader in the locality and reduced the same in writing. His evidence was further corroborated by Boniphace Richard the husband of Angelina Stivini (the seller). The said Boniphace Richard also participated in the sale and signed the sale agreement. In his evidence he made it clear that he himself and his deceased wife decided to sale a plot to the appellant but they did not sell him the suit land which is a public road for many years ago; "Namfahamu aiiyeuziwa na marehemu mke wangu.... tuiimuuzia kwa maandishi na mwenyekiti aiikuwepo. Kipindi namuuzia barabara iikuwepo na ni barabara ya miaka." Their respective evidence is further corroborated by Msabaha R. Amani the son of the original owner of not only the suit land but also some other areas thereat. In his evidence this witness testified that his late father sold pieces of land to various people and never sold the road area which was at first started by brick layers. Speaking on the selling of pieces of land by his In that respect even Angelina and his husband Boniphace Richard supra when buying the area from Msabaha's father did not buy the road area and that was in fact confirmed by Boniphace Richard himself supra. What I have noted from the evidence of the appellant is that after he had purchased the plot in the locality, he stayed for quiet sometime without any quarrel with the residents therein. Later, he formed an opinion to extend his bought land to cover the road area. In that respect he went to the land office to inquire the land use at that place (road area). From his inquiry he discovered that the said road is not recognized by the land authority because it does not feature in the land plan. It is from that background he became greed and wanted to swallow (grab) the road area on the pretext that it is not in the land plan of the land office. He then demolished his small purchased foundation and started to reconstruct another foundation extending to cover the road area hence this dispute. My observations herein above results from the appellant's own evidence as he testified at the trial tribunal; "Wana/aiamika kuwa nimeziba barabara. Kama kuna kikao tulikaa kuidhinisha kuwa hii ni barabara naomba huo muhtasari wa hicho kikao. Niiinda kujiridhisha kwa mkurugenzi matumizi sahih/ ya eneo hili watu wa ardhi waiikuja

pamoja na ramani yao wakadai kiwanja changu kiko sawa kwa mujibu wa ramani ya mwaka 2004..... Nikamwambia mtendaji awataarifu wananchi kuwa hapo si barabara." 12 From such quotation of the appellant's own evidence, it is obvious that he acted on greediness after realizing that the street road adjacent to his plot was not in the land plan of the land office. He forgets however that the area including his own plot is not yet surveyed and the road at issue was started by the residents themselves from their own respective lands and used the same for years and years prior to his coming in the locality. In no way could such road be seen on the land Authority's plan because the area is not yet surveyed. I wonder when the appellant testified that the land officers told him that his plot was okay; "watu wa ardhi.... wakadai kiwanja changu kiko sawa kwa mujibu wa ramani ya mwaka 2004." How did they realized that the appellant's plot was okay while the area as a whole is not yet surveyed as put by the appellant himself;"Nikawaambia wanipimie wakadai itakuwa ngumu kunipimia peke yangu. "Even those who sold him that piece of land they just pieced their land into two parties and sold one of the pieces to the appellant as per the evidence of Boniphace Richard; "Namfahamu aHyeuziwa na marehemu mke wangu. KHikuwa kiwanja chetu chote Ha tuiikigawa katikati na tukaamua kumuuzia upande" If he was locally sold the land without any measurement just by the seller piecing out her land, how could the land officers have assured him that his plot was okay in accordance to the land plan of 2004 while by 2004 that piece of land was covered together with other huge land before having been pieced into various pieces by its original ownerandsold to various people. Where is that iand plan. Does it show that such area (plot) is owned by the appellant? Was the appellant present in the locality by 2004? All these questions if honestly answered reveal that the appellant is a trouble maker in his community. The appellant's behavior is wanting. He seems to take actions prejudicial to the general public at the locality without involving even his neighbours and without any concern. Such habit is not accepted at all and highly condemned. The road was started by the residents at the locality for public use prior to the coming of the appellant at that street and it should remain as such until when the survey in the locality is made and the land plan thereat made in accordance to the law. At that time the land plan in accordance to the survey shall prevail. That being said, this appeal fails. It is hereby dismissed in its entirety with costs. Court: Judgment delivered in the presence of the appellant in person and his advocate Mr. M.K. Mtaki and in the presence of Kipea Shabani for the respondents. Right of appeal explained. 14 15

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/302137/source_file/hunja-suzo-vs-kipea-shabani-others-wananchi-wa-mtaa-wa-kwihara-2023-tzhc-20890-11-september-2023.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/hunja-suzo-easement-tzhc-2023>

Prepared on 13 October 2026 · Esheria