

TANZANIA / JUDGMENT

ISRAEL NELSON

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB-REGISTRY AT
ARUSHA LAND APPEAL NO. 80 OF 2023 (C/F District Land and Housing Tribunal for Arusha at
Arusha, Application No. 81 of 2022) BETWEEN ISRAEL
NELSON.....APPELLANT VERSUS LAWRENCE LINUS
WALELE.....RESPONDENT

JUDGEMENT

26/09/2024 & 25/10/2024 MWENDA, J.: In the present appeal, the appellant is challenging the decision of the District Land and Housing Tribunal for Arusha at Arusha which dismissed his suit/application. Before the trial tribunal, the appellant filed an application against the respondent for allegedly trespassing unto his land measuring 18 meter's length and 24 meters' width located at Kimandolu area, within the District and Region of Arusha. He prayed to be declared as the rightful owner of the suit land and the respondent to be considered a trespasser. He further 1 I Page prayed for permanent injunction against the respondent, their agents or servants and any other person acting under his instruction from alienating or selling or otherwise entering and dealing with the suit land, and costs of the said application. After a full hearing and analysis of the evidence, the trial tribunal dismissed the appellant's suit for his failure to prove on the balance of probability that the land in dispute belongs to him. His application was thus dismissed with costs. Seemingly, the appellant felt aggrieved by the trial tribunal's decision. He preferred the present appeal consisting of three grounds, to wit.

1. That, the trial tribunal erred in law and fact by finding that the Appellant is not the rightful owner of the suit land without determining his legal status as to the ownership of the said land/
2. That, the trial tribunal erred in law and fact by disregarding the Appellant's testimony that clearly proved his case to the required standard of proof. 2 | Page
3. That, the trial tribunal erred in law and fact by failure to declare who is the lawful owner of the land in dispute while Respondent never claimed to be the lawful owner of the suit land. When this appeal was called on for hearing, the appellant fought solo, unpresented whilst Mr. HAMIDU JUMA MUSHI, learned advocate represented the respondent. It was consensually agreed that this appeal be disposed by way of written submissions. After the

court's order, the appellant and the advocate for the respondent filed their respective written submissions. The same shall be considered while determining the issue(s) framed by this court. Based on the grounds of appeal which were argued jointly, the issue is whether the appellant proved his ownership of the land in dispute through his oral and documentary evidence (Exhibit P-2). In his submission, the appellant alleged that he acquired the land in dispute from his father. According to him, to prove trespass onto his land measuring 33 paces on the northern side, 24 paces on the eastern side and 18 paces on the southern side, he relied on his own evidence, SM2's evidence and exhibit P-2. With this evidence he believed he managed to prove the size, location 3 | Page and boundaries as per Regulation 3(2)(b) of the Land Disputes Courts Act- GN-174 of 2003. Further to that, the appellant believed that since Exhibit P.2 provided the respondents land, then any piece of land beyond measurements in that exhibit is not the respondents land but his. Moreover, he said that the trial tribunal erred in law and facts by failure to declare who is the lawful owner of the land in dispute while the respondent never claimed to be the lawful owner of the land. While citing the case of JAMES FUNKE NGWAGILO V. ATTORNEY GENERAL & BARCLAYS BANK T. LTD VS JACOB MURO, where the court said parties are bound by their pleadings, the appellant stressed that the respondent never pleaded nor testified on his ownership over the disputed land. In the end he prayed for the decision of the trial tribunal to be quashed and set aside by declaring him the lawful owner of the disputed land with the costs of the suit. On the other hand, Mr. MUSHI, the learned counsel for the respondent raised a legal issue regarding jurisdiction. He asserted that this matter is res judicata to Land Appeal No. 55 of 2015 and Land Appeal No. 21 of 2017 4 | Page which were filed before this court. According to him, since an attempt to tender their respective copies before the trial tribunal proved futile, then this court is enjoined to take judicial notice under section 42 and 43 (1) (a) and

- (b) of the Land District Court Act, Cap 216 R.E 2019. In support for that, he referred this court to the case of R.S.A LIMITED V. HANSPUL AUTOMECHS LIMITED AND ANOTHER, CIVIL APPEAL NO. 179 OF 2019 where the court held that issues touching jurisdiction are points of law which may be raised at any stage. Reverting to the merit of the appeal, Mr. MUSHI submitted since before the trial tribunal, the respondent alleged to have inherited the land in dispute from his parents, then he was bound to prove how the respondent interfered with his right over the disputed land based on the principle that he who asserts must prove. In support to this, the learned counsel cited the case of LAMSHORE LIMITED AND ANOTEHR V. BIZANJE K.U.D.C [1991] TLR 330. Having submitted as such he prayed for this appeal to be dismissed with costs. In a brief rejoinder, the appellant said that this matter is not res judicata to Land Appeals No. 55/2015 and 21/2017. He said that the mentioned appeals were in respect of different persons, different subject matter and were not 5 | Page heard and finally decided by the court of competent jurisdiction. On that note he believed that the conditions set to apply the principle of res judicata as stated UMOJA GARAGE V. NBC HOLDING COMPANY [2003] TLR and PINEL LOTTA VS. GABRIEL TANAKI AND OTHERS [2003] TLR 312 were not met. Having considered the submissions for and against this appeal, the main issue for consideration is whether the trial tribunal was justifiable to adjudge that

the appellant failed to prove his ownership over the disputed land. Before delving on the merit of this appeal, I found it prudent to briefly consider the legal issue raised by the learned counsel for the appellant that this matter is *res judicata*. In his written submission, the learned counsel asserted that there were previous cases between the appellant and the respondent's parents over the same subject matter. He referred them to as Land Appeal No. 55 of 2015 and Land Appeal No. 21 of 2017. On his part, the appellant opposed this argument in that Land Appeals No. 55/2015 and 21/2017 were in respect of different persons, different subject matter and were not heard and finally decided by the court of competent jurisdiction. Based on the submission by the parties, I am aware that *Res judicata* touches the jurisdiction of the court and the same can be raised at any stage. 6 | Page I am also aware that in some cases the court may take judicial notice by revisiting previous records to clarify some matters. However, based on what was submitted by the appellant before the trial tribunal, the said appeal were in respect of different persons and different subject matter. On that note, this court is of the view that this matter is not *res judicata* and as such, the point raised by the learned counsel for the respondent is hereby overruled. Back to the merits of this appeal, it prudent to point out that in civil cases it is a cardinal principle that he who alleges must prove. This is by virtue of Section 110(1) of the Evidence Act. This section reads as follows that. S.110.- (1) "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist". This principle was also adumbrated in the case of PAULINA SAMSON NDAWAVYA VS THERESIA THOMASI MADAHA (Civil Appeal No. 45 of 2017)

[2019] TZCA 453 (11 December 2019) (Tanzlii) where the court held that: "It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 7 | Page 6 [R.E 2002], It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved." [Emphasis is mine]. Again, in the case of ABDUL-KARIM HAJI VERSUS RAYMOND NCHIMBI ALOIS & ANOTHER, CIVIL APPEAL NO. 99 OF 2004, CAT, (Unreported) the same Court held: "It is elementary principle that he who alleges is the one responsible to prove his allegations" In this appeal, since the appellant is the one who alleges to be the lawful owner of the Suitland then he had the duty to prove the said ownership as claimed. In his testimony the appellant said the following, and I quote, that: "Tarehe 15 February 2022 mjibu maombi alienda kuzungushia nguzo za zegekwenye eneo la Said Walele akamega na eneo langu kwa hatua 18 kwa 24 kwa 33. Nilipoumuuliza kwa nini amechukua eneo langu alisema yeye anafuata mkataba wa 8 | P a ge mauzo wa eneo lile kati ya mnunuzi Said Walele na muuzaji William Tarangire wa tarehe 20 Juni 1994." (sic) From the above quote, and as hinted earlier on, the appellant alleged the respondent encroached onto his piece of land measuring 18 by 24 by 33 paces. This evidence by itself is however insufficient to support his claim of ownership. He ought to have testified on how he acquired the said land in dispute and to state its boundaries. On his part, the appellant relied on Exhibit P2 only, a sale agreement between SAID WALELE

(the respondent's father) and WILLIAM TARANGEL. In his submission in support of this appeal, the appellant alleged that since in the said exhibit, the respondent alleged to own the land measuring 18 by 24 by 33 paces, then in the occupied land, any portion exceeding the said measurements is not part of the respondent's land. That assertion might be true but still that by itself does not do away with the requirement of the claimant to prove his claims of ownership. Without such evidence, even if there is a land exceeding the said measurements, since the respondent is in occupancy of the same, then the appellant being a stranger is bound to prove his allegation which he failed to do. The appellant is reminded that a person with the legal duty of proof 9 | Page also bears the evidential burden of the same (proof). This is in accordance with Section 110(2) of the Evidence Act which goes as follows: S. 110(2) "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." Thus, based on the said oral and documentary evidence, this court agrees with trial tribunal that nothing was submitted by the appellant to prove his ownership over the land in dispute and the alleged encroachment. That being said, this appeal is unmerited and is hereby dismissed with costs. Ordered accordingly. DATED at ARUSHA this 25th day of October, 2024. JUDGE 10 | Page

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