

TANZANIA / JUDGMENT

kimwenje juma vs halima dyamwale

2021 tzhclandd 524 30 september 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPEAL NO. 16 OF 2020 (Arising from the decision of District Land and Housing Tribunal for Kinondoni in Land Appeal No. 129 of 2017 originated from Mslgani Ward Tribunal in Land Complaint No. 17 of 2017) KIMWENJE

JUMA..... APPELLANT VERSUS HALIMA
DYAMWALE..... RESPONDENT

JUDGMENT

Date of Last Order: 13/09/2021 & Date of Ruling: 30/09/2021 T.N MWENEGOHA,J: This appeal traces its origins from the decision of the Msigani Ward Tribunal. Wherein the respondent sued the appellant for encroaching her piece of landed property, however the Ward Tribunal decision after visiting locus quo observed that the boundary of the respondent (herein the appellant) exceeded 3 paces in length and 6 paces in width, and therefore ruled out that parties should observe their boundaries as shown in the sale agreement. Appellant appealed to the District Land and Housing Tribunal for Kinondoni at Mwananyamaia (herein District Tribunal) so as to overturn the Ward Tribunal's decision via Land Appeal No. 129 of 2017. Even so the odd were against his favour as the District Tribunal ended up blessing the Ward Tribunal's decision by dismissing the appeal for lack of merit. The Appellant being aggrieved by the District Tribunal's decision has now filed the second appeal to this Court. By way of the petition of appeal on this matter the Appellant raised three grounds of appeal, that;

1. That, the Hon. Chairperson erred in law and in fact when dismissing the appeal in Land Appeal No. 129 of 2017, after she had failed to realize that there was procedural irregularity occasioned by the Ward Tribunal's Chairman who permitted ZABRON KALISA to stand as a member of the Ward Tribunal in Land Complaint No. 17 of 2017 at the same time as a witness during visit of locus in quo.
2. That, the Hon. Chairperson erred in law and in fact when he failed to nullify the Ward Tribunal's proceeding and set aside the judgment on the ground that the respondent never managed to alert the Ward Tribunal as to when the appellant started to trespass into the respondent's land taking into account the fact that the two are dose neighbours.

3. That, the Hon. Chairperson erred in law and in fact for failing to observe all the necessary steps in conducting site visit. Therefore, the appellant prayed for the appeal be allowed, an order of setting aside the decision of Ward and District Tribunal and the respondent to pay costs of the suit. In the conduct of this appeal, the matter was argued by way of written submissions. The appellant enjoyed the services of Mr Raphael David, learned counsel while the respondent had the services of the Legal Aid and Human Rights Centre. Mr. David consolidated 1st and 3rd grounds and discussed them together. He submitted that when the respondent took the matter before the Msigani Ward Tribunal as a complainant, she told the Ward that, the appellant had trespassed into her land. This is reflected in the scribbled hand written proceeding of the ward and I quote; Kiapo: Mimi Halima Dyamwale dini yangu muislam naapa kwamba maneno nitakayosema ni kweli tena kweli tupu ee Mwenyezi Mungu nisaidie. Maelezo yangu. Mimi Halima Dyamwale namlalamikia ndugu Kimwenje Juma kwa kumega sehemu ya eneo langu na kujiongezea mwenyewe bila idhini yangu. Saini..... The appellant tendered a copy of sale agreement dated 10th October, 2000 pointing out that he bought land measuring 15 x 25 paces (hatua za miguu) from one RAJABU DYAMWALE witnessed also by the ten Cell Leader No. 2 of Temboni. There was nowhere in the record suggesting that, HALIMA DYAMWALE tendered any other agreement signed by her and the appellant. He submitted further that, the complainant (herein the respondent), did not call the vendor and the one who measured when sale transaction took place as her witnesses to clarify the transaction which took place between the appellant and his vendor. He continued to state that, Ward Tribunal visited the disputed property and involved a member of the Ward named ZABRON G. KALISA who in the opinion of the Chairman of the Ward Tribunal resembled the one, who measured that land on October, 2000 when the sale transaction took place. He referred this Court to the case of Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed (1980) T.L.R at pg 31 where the Court of Appeal held that; "when a visit to a 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 such witnesses as may have to testify in that particular matter." The Ward Tribunal dispensed the attendance of ZABRON G. KALISA to be a witness and at the same time to remain as a member in the decision making. The District Land and Housing Tribunal Chairperson ought to not have ignored this irregularity as the first appellate tribunal. He further contended that, the appellant got his land on October, 2000 and he has been there until in 2017 when the respondent went to complain. The respondent should complain within a period of twelve years as expressed under Part One item 22 of the Law of Limitation Act, Cap 89 R.E. 2019. In reply, Mr Faustin Mushi, legal aid officer and learned counsel argued the 1st and 3rd grounds together as it was consolidated by the appellant's counsel. He submitted that the records of Ward Tribunal shows that there has never been a dispute as to the names and signature of the respondent on the sale agreement, but the dispute is that the appellant has unlawfully trespassed to the respondent's land. Both parties are aware that the disputed land was sold by the Rajabu Dyamwale (respondent brother) on behalf of the respondent and that the appellant never disputed this fact in the lower Tribunals. He cited the case of Elisa Mosses Msaki Vs. Ngateu

Matee 1990 TLR 90 (C.A) where it was held that. "The law is very dear that the Appellate Court will only look into the matters which came up into and were considered and decided by the trial Tribunals but not on the matters or issues which were neither raised nor decided or tested or considered by the Tribunals below". He further submitted that, the appellant's argument regarding the sale agreement is meritless and same should be dismissed. He submitted that if the appellant had an interest to bring Rajabu Dyamwale to the trial Tribunal as witness, then he would have done that in the trial Tribunal. This was not done. He contended that the records of the Ward Tribunal shows that the respondent's evidence was stronger than that of the appellant. The decision in the case of Hemed said vs Mohamed Mbilu 1984 TLR 113 as cited by the respondent's counsel held as follows: "According to the law both parties to the suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win..... In measuring the weight of evidence, it is not the number of witnesses that counts most but rather the quality of the evidence ". He submitted the records of the Ward Tribunal show that the appellant was accorded chance to bring his witness by the name Julius Elias whom he alleged to have measured the disputed land by feet (20x15). Following that, both parties and Ward Tribunal agreed to appoint 5 | Page Zabron G. Kalisa to measure the disputed land by feet for the Ward Tribunal to prove as to whether the disputed land has the size of 20x15 feet or not. He submitted that the record of the trial Tribunal is very open that Zabron G. Kalisa had never been a witness of any party as alleged by counsel for the appellant. It was his argument that if the appellant thought that Julius Elias who measured the disputed land by feet on the year of 2000 was important witness, then he had the duty to bring him to the Tribunal as his witness. That it is not the duty of the Court/Tribunal to force or choose type of witnesses on behalf of the parties to the suit. It was his contention that failure by the appellant to bring Julius Elias to the Tribunal as a witness made them to believe that if he were to be brought to give evidence, he would disclose some information which is not favourable to him and finally ruin his case as is stated under Section 122 of the Tanzania Evidence Act Cap 6 R:E 2019. Submitting on the 2nd ground he stated that the records of the trial tribunal are clear that the appellant trespassed to the respondent's land from

2015. That following that the respondent used all possible measure to solve the dispute amicably with the appellant, but her efforts ended up in vain, hence in 2017 the respondent filed a complaint before Msigani Ward Tribunal and hence the cause of action arose on 2015 and therefore 12 years had not passed. The respondent further submitted that, all necessary steps were observed when conducting site visit. He prayed for the appeal to be dismissed with cost for lack of merit. In rejoinder, counsel for the appellant simply reiterated and insisted what was stated in his submission in chief. 6 | Page I have taken time to read the submissions of both parties and I have carefully examined the records. The main issue in determination is whether this appeal has merit. I will be discussing 1st and 3rd grounds of appeal together as submitted by the appellant. Briefly, he has brought a new ground of appeal which was not stated in the 1st appeal in the District Tribunal. This ground is in relation to the procedure to conduct site visit which was done at the Ward Tribunal.

However, since this touches point of law, I will regard it in this appeal. In his submission Mr. David contended that the procedure for conducting site visit was not observed. He argued that the Ward Tribunal based its decision on site visit which was done by involving one of the presided members of the tribunal named Zabron Kalisa and that in the opinion of the Chairman of the Ward Tribunal resembled the one who measured the disputed land in 2000 during sale transaction. The appellant based his submission from the wording of the decision of the Ward Tribunal. The specific paragraph reads and I quote; "Baraza lilimshirikisha mjumbe a/iyesimamia eneo hi/o wakati wa mauziano, na kwa pamoja iiiiama kupima eneo hilo kupitia mmoja wa wajumbe wa baraza aliye/inganishwa na mpimaji wa awaii ambapo, urefu uipatikana hatua 28 badaia ya hatua 25, tofauti ni hatua 3, na upana ni hatua 21 badala ya hatua 15, tofauti ni hatua 6." This Court notes that from the sale agreement, it reveals that the sale was witnessed by the Ten Cell leader named Egidi Mpogole. However, it is not in record of the Ward Tribunal on how the site visit was conducted 7 I Page even though the quoted paragraph above shows that the Ward Tribunal visited the locus quo after hearing the parties. The purpose of visiting locus quo is to satisfy that the evidence given on record is what is available on site. In essence it is to check on the evidence already given in court/tribunal. See YESERI WAIBI VS EDISA LUSI BYANDATA

[1982] HCB 28, COURT OF APPEAL OF UGANDA which relied in YOWASI KABIGURUKA VS SAMUEL BYARUFU, C.A CIVIL APPEAL NO. 18 OF 2008 [2010] UGCA 7. I have satisfied myself that the tribunal is the one who visited the locus and had a better understanding of the dispute including measuring the suit land and made its decision according to those observations. However, as noted above, there is no record on how and when the site visit to the suit land was conducted, who was present, what the quorum was and whether all parties were present. In the case of YAKOBO MAGOIGA GICHERE VS PENINAH YUSUPH, CIVIL APPEAL NO. 55 OF 2017, the Court of Appeal held that; "Section 13 of Land Disputes Courts Act, underscores the spirit of simplicity and accessibility of Ward Tribunals, by reminding all and sundry that the primary functions of each Ward Tribunal is to secure peace and harmony, mediating between and assisting the parties to reach amicable settlements. That harmonious spirit cannot be attained if this Court accedes to the prayer of the appellant's learned counsel to prescribe judicially that record of proceedings should mention the »l rage member who presided the proceedings of the Ward Tribunal when the Chairman is absent for any reason." I have carefully considered the Ward Tribunal records and conduct in this matter and in the upshot I find that absence of the said record cannot render the findings of the Ward Tribunal a nullity. The testimony in the Ward Tribunal is clear that the area owned by him is 25x15. The findings in the site visit was that he had extended by 3 paces in length and 6 paces in width. The allegation that a member of the Ward Tribunal was present in locus quo as a witness, does not change the findings of the Ward Tribunal. In consideration of the above findings, this Court can not alter or reverse the decision of the lower tribunal on account of irregularity or improper procedure as prayed since doing so may occasion failure of justice. (Section 45 of the Land Disputes Court Act.) Appellant submitted on the 2nd ground that the respondent claimed that the

appellant trespassed to her land after a period of 12 years as prescribed under Part I, Item 22 of the Law of Limitation Act, Cap 89 R.E

2019. He counted the 12 years starting from the date of sale agreement to the date when the claim was submitted to the Ward Tribunal. However, establishment of the time accrued was construed in the case of Barelia Karangirangi vs Asteria Nyalambwa (Civil Appeal No.237 of 2017), to which the Court of Appeal held that; "The record reveals that, the respondent's father was given the disputed plot in 1957. It is not indicated in the record that there was any dispute in relation to the ownership of that piece of land until 2007 when the dispute arose. 9 | Page The right of action in this present case, accrued when the respondent claimed to have found the appellant and her children cultivating the suit land which according to the record, it was in 2007." In regard to the 2nd ground I find that the course of action arose when the respondent discovered that the appellant encroached a piece to her land. I therefore find the 2nd ground to have no merit. On those findings, I find that this appeal lacks merits and is hereby dismissed with costs. Dated at Dar es Salaam this 30th Day of September, 2021. 10 | Page

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