

TANZANIA / JUDGMENT

# **mwanaharusi ramadhani said vs ramla ali another 2021 tzhclandd 6696 8 november 2021**

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8 November 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 200 OF 2020 (Originating from the Judgment of the District Land and Housing Tribunal for Ilala at Ilala in Land Application No. 239 of 2018) MWANAHARUSI RAMADHANI SAID APPELLANT VERSUS RAMLA ALI RESPONDENT SUMA MOHAMED MWENDA RESPONDENT

## **JUDGMENT**

Date of last Order: 5/11/2021 Date of Judgment: 8/11/2021 T.N. MWENEGOHA,J: This is the first appeal whereby the appellant originally filed his application in the District Land and Housing Tribunal for Ilala at Ilala (the tribunal) claimed among other orders that the respondents to be declared trespassers to her land. The Tribunal in its findings dismiss the application with no orders as to costs. Aggrieved by the decision of the tribunal, the appellant this lodged appeal with three grounds of appeal complaining that:

1. The trial tribunal Chairman erred in both law and fact by holding that the appellant was limited by law of limitation to raise her claim without considering that the Respondent was using the part of the area in dispute as access road with the consent of the appellant but later on claimed the whole area in dispute whose claim has not survived over 12 years.
2. The trial Chairman erred in both law and fact by holding that the respondent has a right to use the whole area in dispute as access road to her premises while there is vivid evidence that she only claimed part of that land.
3. The trial Chairman erred in both law and fact by holding that the whole area in dispute should access road/passage for the Respondent while there is vivid evidence that only part of that land should be a passage for the respondent. Wherefore the appellant prays to this court for the following orders: -
  - a. The appeal be allowed in favor of the appellant.

- b. The decision of the Tribunal be quashed.
- c. The respondent be ordered to use a 3feet width which she used to use as a road to her house.
- d. Costs of this appeal.
- e. Any other relief(s) this honorable court may deem fit and just to grant. The application was heard by way of written submission whereby the appellant was represented by Charles Alex, Advocate while the P<sup>and</sup> 2<sup>nd</sup> Respondent's submissions was drawn gratis by Advocate Felister Deogratias Rugazia under Legal and Human Rights Centre Legal Aid Clinic. Submitting in support of the appeal Mr. Alex opted to submit all grounds of appeal together that the application was not time barred in the light of the Law of Limitation as held by the Trial Chairman. He submitted that it is on records that the appellant has left the passage/way she used to pass and the 1<sup>st</sup> respondent has gone to demolish the appellant's foundation constructed in the appellant's land, which does not block the passage which the 2<sup>nd</sup> respondent gave the respondent. He submitted that her testimony is collaborated with the testimony of PW2, DW1, DW2, DW3, DW4 and DW5 whereas all these witnesses clearly stated that the respondent used to pass through a foot passage of about one meter but now the respondent wants a road of 5 meters the act which intrudes into appellant's land by 4.5 meters' land. He submitted that the dispute on 4.5 meter arose when the respondent broke the appellant's foundation in the year 2018, which is the year the appellant filed the application in the Tribunal which the Trial chairman held to be time barred. He argued that since that period the appellant broke the foundation until filing of this matter at the Tribunal is the same year 2018, a period of 12 years had not passed as held by the trial Chairman. He submitted further that there are no records showing that the application was time barred. He added that no issue framed by the Tribunal nor testimony of the parties and their witnesses established that the area in dispute has ever been used by the appellant or members of the public as a road/passage. The record is on the foot passage. He added further that the respondent was not even blocked by the appellant's foundation. He then prayed for the appeal be allowed. In reply Ms. Rugazia submitted that the respondent purchases the land from the 2<sup>nd</sup> Respondent in 2001 whereby the disputed land was considered as pathway for the 1<sup>st</sup> respondent to reach her premises. She submitted that the dispute arose when the appellant blocked the pathway which was used by the respondent since she had purchased her land way back in 2001 whereas the appellant and the respondent are neighbors. She argued that the usage of pathway falls under easement and she has been using the same pathway for more than 12 years and that the 1<sup>st</sup> respondent states further that there is no any other passage for her to use and that she has been using that passage throughout the time she has been in possession of her land and that right of way was given through the written agreement with his neighbor who is the 2<sup>nd</sup> respondent herein. She submitted further that the appellant and the 2<sup>nd</sup> respondent built a house before selling their land to the respondent and after selling it on 2001 the disputed area was the way accessed ever since the 1<sup>st</sup> Respondent was collecting materials for constructing her residential house. she added that the disputed land is 3.5 meters and not 4.5 meters as

claimed by the appellant, she submitted that that 3.5 meter were orally included in the sale agreement between the respondent and the 2<sup>nd</sup> respondent in the year of 2001 and later on substituting in writing. She therefore prayed for this appeal be dismissed. 2<sup>nd</sup> respondent in his submission supported the P'respondent submission. In rejoinder Mr. Alex reiterated his submission in chief. Having heard submission from both parties, there are two issues for

### determination.

- i. Whether the application was time barred as held by the Tribunal.
- ii. To whom the disputed land belongs. In determining the first issue, I have carefully gone through the pleadings and testimonies of the witnesses in the Trial Tribunal and the record in general I did not see anywhere this issue of time limitation been raised by either party or even the Tribunal. The parties were not afforded the right to be heard on this issue. In the case of *The Registered Trustees of Shadhily Vs. Mahfudh Sallm Omary Bin Zagar (Administrator of the Estate of the Late Salim Omary)*, Civil Application No. 512/01 of 2018, (Unreported)\N}nere Court of Appeal of Tanzania at Dar es Salaam held that: "In my view a point involving alleged breach of the right to be heard is undoubtedly not insignificant to be ignored. Whether or not there is merit in that claim is beyond the preview of this ruling. The Court need only be satisfied that there exists an issue involving illegality apparent on the face of the record." Had the Tribunal find this to be an issue they were supposed to let the parties address it so as it may compose the ruling pertaining to that Failure of that is procedural irregularity as the parties were condemned unheard. Having said that, I hold that the Tribunal erred in law and fact in discussing the said issue without affording opportunity to the parties right to be heard. On the second issue as to whom the disputed land belongs to the basis of this dispute is on easement, whereby the appellant claim that the size of the area in dispute is 4.5 meters while the respondent in his submission claimed that it is 3.5 meters while the 2<sup>nd</sup> respondent submitted that it is 3 meters. Apart from that contradiction on the size of the land in dispute, the record also reveals that the appellant's witness (PW2) who was the street Chairman and had opportunity to resolve this dispute out of court while answering questions for clarification from assessor he stated that, "The road is which is not in dispute is the size of 1 meter while the claimed road is of the size of 5.0 meters the owner of the disputed road is the applicant the area in dispute is about 4- 5 meters." (emphasis supplied) This testimony was backed up by the DW1 who is the current respondent, while cross examined by the counsel for the applicant at page 15 of the typed proceeding, he testified that, .. what I need is to reach/access my premise by foot, urgently and access my premise and the road was dose that that I wouldn't access my premise if at all I get access of my premise by foot I will have no problems" (emphasis supplied) Again, while answering question for clarification from assessors the said DW1 at page 16 of the typed proceeding, he stated that, "I have no dispute a part from this dispute with the applicant. The access of foot road to my premise two meters is enough" (Emphasis supplied) These testimonies were sufficient enough to dispose off this application. The respondent is major claim is to access his land by foot as testified above. Had she had any right apart from foot passage, she would have testified otherwise before the

Tribunal. From the gathered fact from the record, I am in agreement with the appellant that the P'respondent claim is on foot passage and I see one meter is sufficing. The appeal is allowed. As held by the Tribunal I make no order as to costs for keeping good neighborhood. It so ordered. Dated at Dar es Salaam this day of November, 2021. T.IVWWEWEGOHA  
JUDGE !

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