

TANZANIA / JUDGMENT

JUDGMENT Ramadhani Faraji Konde vs

COURT
TANZLII

DECIDED
17 October 2024

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

THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA SUB - REGISTRY AT SONGEA LAND APPEAL NO. 30073 OF 2024 (Appeal from the decision of the District Land and Housing Tribunal for Songea at Songea in Land Application No. 120 of 2023 dated 17th October, 2024) RAMADHANI FARAJI KONDE
APPELLANT VERSUS IDDI WAJADI MBAWALA RESPONDENT

JUDGMENT

05th February and 2nd April, 2025 KAWISHE, J.: This appeal arises from the decision of the District Land and Housing Tribunal for Songea at Songea (the trial Tribunal), in Application No. 120 of 2023. The respondent successfully sued the appellant for trespassing into his five acres of land located at Nahimba Village, Mkongogulioni Ward, Namtumbo District within Ruvuma Region. Aggrieved by the trial Tribunal's decision the appellant filed an appeal before this court faulting that decision. In his petition of appeal, he has four grounds of complaint to the effect that: 1

1. That the trial Tribunal erred in law and fact by failure to visit the locus in quo taking into consideration that the dispute between the parties was on the boundaries.
2. That the trial Tribunal erred in law and fact by deciding the dispute before it without considering the heavy testimony given by the appellant that the boundary was the river.
3. That the trial Tribunal erred in law and fact by deciding in favour of the respondent while both parties' testimonies were not contradictory and what was required was for the trial Tribunal to visit the locus in quo to satisfy itself whether the appellant trespassed into the respondent's land.
4. That the trial Tribunal erred in law and fact by delivering a judgment which its execution will be difficult taking into consideration the exact boundaries of the disputed land. The facts leading to the present appeal can briefly be stated as follows: Before the trial Tribunal the respondent claimed to be the lawful owner of the disputed land measuring five acres located at Nahimba Village, Mkongogulioni Ward, Namtumbo District within Ruvuma Region. It was the respondent's testimony that, the disputed land was given to him by his late father Waja Idrisa Mbawala in 1990. The respondent told the trial Tribunal further that, after using the disputed land for eight years, the appellant sued him before the local

authority but he failed. Following the disturbances by the appellant, on 07th February, 1998, his father decided to give him the disputed land in writing which was received as exhibit IW2. He added that, he used the disputed land for more than twenty years without any disturbances up to 2020 when the 2 appellant trespassed on it. His testimony was corroborated by his sole witness, Mohamed Wajadi Mbawala. It was the appellant's testimony that, the disputed land was given to him by his father, Faraji Katembo in 1950 and the disputed land is a family property. He added that, the disputed land is bordered by the respondent's land and by a river. It was his witness's testimony that, the disputed land is bordered by his grandfather's land and he knows that in 2021 the parties referred their dispute before Mkongo Ward Tribunal and the appellant was declared to be the lawful owner of the disputed land. As stated above, from the above facts, the trial Tribunal decided the matter in favour of the respondent, hence this appeal. Before this court both parties appeared in person, they had no representation. With the leave of the court, the parties agreed the appeal to be disposed of by way of written submission. In respect to the first ground of appeal, the appellant submitted that, though it is not necessary for any adjudicating body to visit the locus in quo, but where there is a contradiction on the boundaries and size of the disputed land necessitate the visit at the locus in quo. He argued that, in the matter at hand there were contradictions on the 3 geographical location of the disputed land and it was necessary for the trial Tribunal to visit the locus in quo. He fortified his submission with the case of Avit Thadeus Massawe vs. Isdory Assenga, Civil Appeal No. 06 of 2017 [2020] TZCA 365 in which the Court of Appeal cited with approval the case of Evelyn Even Gardens NIC Ltd vs. The Honourable Minister Federal Capital Territory & Two Others, Case No. FCT/HC/CV/1036/2014. Arguing the second ground of appeal, the appellant lamented that, since the dispute was on the boundaries and size of the disputed land, the trial Tribunal Chairman erred in ignoring the appellant's testimony that the boundary was the valley and a river. He added that, it is not correct that the appellant failed to state when he was given the disputed land by his father while in his testimony he stated that it was in

1950. He argued that, if the trial Tribunal would have considered his testimony, it would have arrived into a decision that, each party must respect the natural boundaries set between their lands. He insisted that, the river and a valley was the boundary between their land. Submitting on the third ground of appeal, the appellant contended that, there was no any contradiction in the testimonies given by the parties. That, the major issue was on the exact position of the 4 boundaries. He argued that, what was required was for the trial Tribunal to visit the locus in quo to identify the correct boundaries of the disputed land and find whether the appellant had trespassed into the respondent's land or not. On the fourth ground of appeal, the appellant submitted that, it is a legal principle that, before delivering a decision, the court has the duty to make sure that it is executable. He contended that, the decision delivered by the trial Tribunal is not executable as the boundaries and the size of the disputed land as stated by the respondent and considered by the trial Tribunal in its decision includes the land which had been sold to other people. He added that, the decree will be executed against the land of the people who were not the party to the suit. Finally,

he prayed for this appeal to be allowed with costs and the decision of the trial Tribunal be nullified. Replying to the grounds of appeal, the respondent argued that, the trial court or tribunal always visits the locus in quo under exceptional circumstances. He amplified that, visiting the locus in quo is always made where there is a dispute on the location, size, boundaries or and notable physical features on the disputed land. To cement his argument, he cited the case of Nizar M. H Ladak vs. Gulamali Fazal 5 Janmohamed [1980] TLR 29. He went on submitting that, in the present appeal, there was no need of visiting the locus in quo given the fact that, in the testimonies given by the parties there was no dispute on either the size or boundaries as stated by the appellant. He further stated that the case of Avit Thadeus Massawe vs. Isdory Assenga (supra), is distinguishable to the case at hand. The respondent jointly replied to the second and third grounds of appeal. He contended that, the evidence given by the respondent and his witness proved his case to the required standard of proving a case. That is, on the balance of probabilities as provided under section 3 (2)(b) and 110 (1) of the Evidence Act (Cap. 6, R.E 2022). He also bolstered his stance by citing the case of Hemed Said vs. Mohamed Mbilu [1984] TLR 113. He stressed that, the appellant's testimony was weak compared to that of the respondent. The respondent added that, in this case, neither the parties nor the trial Tribunal stated on the issue of disputed land to be the clan land. He argued that, the appellant has come with a new fact at the appellate stage which is contrary to the law. He fortified his stance by relying on the case of Elias Moses Msaki vs. Yesay Ngateru Matee [1990] TLR 90. 6

Responding to the fourth ground of appeal, that the trial Tribunal's decision is not executable, the respondent argued that, the appellant is trying to mislead this court that the land is already sold to other people something which was not stated in anywhere in the decision made by the trial Tribunal. He reiterated his submission made in the second and third grounds of appeal that, this court has no power to deal with new facts which are not found either in the proceedings or in the judgment of the trial Tribunal. He prayed for this appeal to be dismissed with costs for it is devoid of merit. In his succinct rejoinder submission, the appellant reiterated his submission in-chief and insisted that the trial Tribunal erred by failure to visit the locus in quo. He added that, the fact that the disputed land is the clan land is not a new fact. He contended that, the respondent in his testimony failed to state clearly the boundaries of the disputed land and this makes the orders issued by the trial Tribunal to be inexecutable. He also reiterated his prayer for this appeal to be allowed with costs and the decision of the trial Tribunal be nullified. Having taken into consideration the grounds of appeal and the submissions made by both parties, I am of the view that, this court is duty bound to determine the following main issues. The first issue is 7 whether it was necessary for the trial Tribunal to visit the locus in quo. The second issue is whether the respondent proved his claim to the required standard. The third issue is whether the trial Tribunal decision and its orders are executable. Starting with the first issue, as clearly submitted by the appellant and conceded by the respondent, visiting the locus in quo is carried out in exceptional circumstances. This has been so purposely aiming at assisting courts and tribunal stay away from unintentionally playing the role of a witness rather than an adjudicator. Sometimes visiting locus in quo may occasion procedural

irregularities. This was well expounded by the Court of Appeal in the case of Depson Balyagati vs. Veronica J. Kibwana (Civil Appeal No. 21 of 2021) [2023] TZCA 17772 (23 October 2023). The Court warned that: “Yet in the further alternative, the appellate courts might have contemplated the possibility of some magistrates or judges making personal observations prejudicial to the case presented by either party and the inclusion of extraneous matters in the evidence not forming part of the proceedings. This can be occasioned by taking into account the views expressed by anyone at the locus in quo thereby leading to the visit being turned into a kind of a public meeting to solicit for public opinion on the case.” From the position of the Court in the excerpt quoted, therefore, courts or tribunals usually visit the locus in quo where there are 8 contradictions on the parties’ testimonies on the location, extent, boundary or permanent physical features on the disputed land as it was clearly stated by the Court of Appeal in the case of Avit Thadeus Massawe vs. Isdory Assenga (Civil Appeal No. 06 of 2017) [2018] TZCA 357 (14 December, 2018) cited by the appellant. In reaching into its decision in the case of Avit Thadeus Massawe vs. Isdory Assenga (supra), the Court of Appeal relied on the decision made in the Nigerian Court in the case of Akosile vs. Adeye (2011) 17 NWLR (Pt.

- 1276) p. 263 in which it was stated that: “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 on the land and boundaries.” Guided by the above authorities, I am of the view that, the purpose of visiting the locus in quo is to clarify the contradictions noticed on the parties’ testimonies. In the instant appeal, I have gone through the proceedings and decision of the trial Tribunal and found no any contradictions on the testimonies given by the parties to warrant the trial Tribunal to pay a visit to the locus in quo. Certainly, I am inclined to the respondent’s submission that there were contradictions as contended by the appellant. Likewise, the first issue whether it was necessary for the trial Tribunal to visit the locus in quo is answered in the negative. Finally, I find the first ground of appeal has no merit. The second issue is on whether the respondent proved his claim to the required standard. This issue covers the second and third grounds of appeal. It is the appellant’s contention that, since the dispute over the disputed land was only on the boundaries, he clearly proved that the boundary was on the valley and a river. He argued that, the trial Tribunal erred in holding that the appellant failed to state when he was given the disputed land by his father while in his testimony he stated that it was in 1950. He argued that, if the trial Tribunal would have considered his testimony, it would have arrived into a different decision. In reply the respondent contended that, his evidence together with his witness proved his case to the required standard of proving the case on the balance of probabilities as provided by the law. It is a trite law that, a first appeal is in the form of rehearing. The first appellate court is empowered to step into the shoes of the lower court and have its own consideration and views of the entire evidence and give decision thereon or do what that court failed to do if

no patent 10 failure of justice was not caused. There is plethora of case law on this principle of law including but not limited to D. R. Pandya vs. Republic

- [1957] E. A. 336, Juma Kilimo vs. Republic, Criminal Appeal No. 70 of 2012, Mussa Hassan Barie and Another vs. Republic, Criminal Appeal No. 292 of 2011 and Said Mshangama @ Senga vs. Republic, Criminal Appeal No. B of 2014 (unreported). Mindful of that, legal principle, I will re-examine and re-evaluate the evidence on record and weigh the decision of the trial Tribunal in light of the applicable law. Also, it is a legal principle that in civil proceedings, including land matters, the party with legal burden of proving has to prove on the standard of balance of probabilities. This is what is envisaged under section 110 of the evidence Act (Cap. 6, R.E 2022). It is from that legal position that the Court of Appeal in Godfrey Sayi vs. Anna Siame as Legal Representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012 (unreported) had this to state: "It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities." The Court also had the similar decision in Geita Gold Mining Limited vs. Twalib Ismail & Others (Civil Appeal No. 103 of 2019)
- [2021] TZCA 3526 (3rd December, 2021) TanzLII and Ernest 11 Sebastain Mbele vs. Sebastian Sebastain Mbele & Others (Civil Appeal No. 66 of 2019) [2021] TZCA 168 (4 May 2021) TanzLII. In the present appeal, it was the respondent who lodged the suit at the trial Tribunal claiming to be declared the lawful owner of the disputed land. He contended that the disputed land was given to him by his father in 1990 and the appellant invaded on it in 2020. His testimony was corroborated by exhibit IW2 and the testimony given by his witness, PW2 (SM2) Mohamed Wajadi Mbawala. On his party, the respondent claimed to have been given the disputed land by his father in 1950. His sole witness, Anafi Musa Mapunda, told the trial Tribunal that, he knows the disputed land to be bordered by the land of Faraji Katembo and Idrisa Salum Mbawala. He also added that, he knows that the dispute between the appellant and the respondent was referred before Mkongo Ward Tribunal. He had nothing else to testify. As pointed out earlier, in this appeal the respondent was to prove his claim on the balance of probabilities before the trial Tribunal. Enlightening the reasoning on proving an allegation, in Re Minor (1966) AC 563 it was held that: "The balance of probability standard means a court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not." 12 Having considered the two competing pieces of testimony, I am satisfied that, the trial Tribunal clearly found in favour of the respondent. The respondent's evidence proved his claim to be the lawful owner of the disputed land. His evidence has greater weight compared to the testimony given by the appellant. The respondent adduced a documentary evidence (exhibit IW2) showing that the disputed land was given to him by his father. The fact which was supported by PW2 (SM2) who witnessed the handing over of the disputed land from the respondent's father to the respondent. The appellant's (respondent before trial Tribunal) witness, DW2 just testified to have known the two and that they have a land dispute. He did not state whether he knew anything on how the

appellant acquired the disputed land. The appellant claimed to have been given the disputed land by his father in 1950. He did not tell how old he was by that time to allow him to be given the disputed land. In addition, the trial Tribunal's proceedings show that the appellant did not dispute the evidence (exhibit IW2) adduced by the respondent in support of his case. If the appellant did not agree with the respondent's ownership of the disputed land, he should have objected admission of exhibit IW2. Alternatively, he had an opportunity to cross examine. The fact which is not depicted in the trial Tribunal's 13 proceedings. Hence, it is a settled law that failure to cross examine on an important issue is as good as agreeing with it. Deliberating on the same issue like the one at hand, the Court of Appeal in the case of Paulina Samson Ndawavya vs. Theresia Thomasi Madaha (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) held that: "More often than not, the Court has held that failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence and it will be difficult to suggest that the evidence should be rejected." The same was held in the case of Shadrack Balinago vs. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General, Civil Appeal No. 223 of 2017 where the Court stated that: "As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account." Also see Bomu Mohamed vs. Hamisi Amiri (Civil Appeal No. 99 of

- 2018) [2020] TZCA 29 (27 February 2020). The position set by the Court of Appeal in the cited authorities shows clearly that, a person disputing an evidence has to utilize the right to object admission or cross examine 14 as the case may be. In the appeal at hand, exhibit IW2 claimed to be a document evidencing handing over the disputed land to the respondent was adduced and admitted at the trial Tribunal. The appellant did not cross examine on the same, which is inferred to be accepting the document and its contents. Therefore, second issue on whether the respondent proved his claim to the required standard is answered in the affirmative. As a result, I find the second and third grounds of appeal lack merit and they are dismissed. The third issue is whether the trial Tribunal decision and its orders are executable or not. This covers the fourth ground of appeal in the appellant's petition of appeal. It is the appellant's contention that, the decision delivered by the trial Tribunal is not executable as the boundaries and the size of the disputed land as stated by the respondent and considered by the trial Tribunal in its decision includes the land which has been sold to other people. He added that, the decree will be executed against the land of the people who were not the party to the suit. The respondent disputed the same by claiming it to be a new fact in this case. The respondent contends that, this was not testified by neither party before the trial Tribunal. In his rejoinder, the appellant reiterated his position that it is not a new issue. That the boundaries 15 identified by the respondent exceeds five acres. Having examined the records of this appeal, I agree with the

respondent that the issue of the suit property being sold to other people is new since it was not considered by the trial Tribunal. Neither the appellant nor the respondent testified that part of the disputed land has been sold to other people. It is a settled legal principle that, facts which were not presented before the trial court are precluded from being admitted and considered at the appellate stage. The same was the position set by the Court of Appeal in Elias Moses Msaki vs. Yesay Ngateu Matee

(1990) TLR 90, the Court of Appeal held that: “This Court will only look into matters which came up in the lower court and were decided; not on which were not raised nor decided by neither the trial court nor the High Court on appeal.” The same was stated in the case of Eliah Bariki vs. Republic, Criminal Appeal No. 321 of 2016 (unreported) and Yusuph Ngede & Another vs. Republic (Criminal Appeal No. 525 of 2019) [2021] TZCA 214 (27 May 2021) TanzLII. On the basis of the above stated position, I agree with the respondent that the fourth ground of appeal is devoid of merit and it is dismissed. 16 From the foregoing discussion, I find this appeal has no merit and I dismiss it in its entirety. The appellant is ordered to pay the costs of this appeal. It is so ordered. DATED and DELIVERED at SONGEA on this 2nd day of April, 2025. E. L. KAWISHE JUDGE Court: Judgment delivered in the presence of Mr. Ramadhani Faraji Konde the appellant and in the presence of Mr. Iddi Wajadi Mbawala the respondent. Right of Appeal explained to an aggrieved party. E. L. KAWISHE JUDGE 02/04/2025 17

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/347636/source_file/5beb22ae25418f54/JUDGMENT_Ramadhani_Faraji_Konde_vs._Idd_Wajadi_Mbawala.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/ramadhani-faraji-konde-v-iddi-wajadi-mbawala-locusinquo-tanzlii-2024--6a3ea5243b1caa912981a688

Prepared on 14 October 2026 · Esheria