

TANZANIA / JUDGMENT

saully luwoneko vs mwamvua ngocho 2012 tzhc 28 29 june 2012

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TZHCDECIDED
29 June 2012

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IN THE HIGH COURT OF TANZANIA A T DAR ES SALAAM LAND APPEAL NUMBER 12 of 2011
(Originating from the Judgment and Decree of the District Land Housing Tribunal for TEMEKE at
TEMEKE-Application No. 13 of 2008-J.T. Kaare-Chairman) SAULLY
LUWONEKO..... APPELLANT VS MWANAMVUA NGOCHO.....
RESPONDENT

JUDGEMENT

Date of last Order: 18-05-2012 Date of Judgment: 29-06-2012 JUMA, J.: This appeal originates from an Application Number 13 of 2008 which the appellant Saully Luwoneko filed on 23rd January 2008 in the District Land and Housing Tribunal for Temeke. In that application the appellant claimed that sometime in 1988 he bought a half an acre of un-surveyed land at Maweni Kigamboni. After his parcel of land had been surveyed and designated as Plot Number 53/1 Block G, the appellant obtained a building permit from Temeke Municipality before he erected his house. Appellant told the trial Tribunal that there was a road separating his plot from that of the respondent Mwanamvua Ngocho. According to the appellant that road was created following a public meeting involving the residents of Maweni who proposed to the Municipal Council of Temeke for alteration of the drawing of a layout of the area. Appellant further claimed that in its meeting on 23/06/2006 the Municipal Council, approved the layout plan of the Maweni area which included the provision of a road. At the centre of the appellant's grievance at the trial court was his claim that the respondent had blocked the road by placing logs of wood across. Appellant in addition claimed that the respondent had trespassed into the appellant's parcel of land to cultivate and to excavate sandstones. Respondent had denied these allegations. In his decision, the Chairman of the trial Tribunal found that there was no road separating the appellant's plot of land from that of the respondent, and concluded that the respondent could not be said to have blocked any such road. The Chairman also found that the appellant had failed on balance of probability, to prove his claim that the respondent had trespassed into his plot. While dismissing the Civil Application No. 13 of 2008, the Chairman directed the appellant and respondent to remain within their original demarcations of their plots. The appellant has filed seven grounds of appeal to manifest his dissatisfaction with the decision of the District Land and Housing Tribunal. At the hearing of this appeal on 18 May 2012, Mr. Komba the learned Advocate

represented the appellant whereas the respondent was represented by Mr. Nyika, the learned Advocate. From the submissions of the two learned Counsel on grounds of appeal, three main questions stand out for my determination. First, is whether the trial Tribunal erred in fact and law by failing to find the existence of a public road separating the appellant's plot from the respondent's. The second question is whether the trial Tribunal erred for failing to find that the respondent had blocked appellant's access to his plot. The third question is whether the trial Tribunal should have found that the respondent had trespassed into the appellant's plot and excavated material there from. Submitting in support of the appellant's claim that there was a road that had been blocked by the respondent, Mr. Komba the learned Advocate pointed at the evidence of the Sale Agreement between the appellant and one Dilunga which was presented for identification purposes (ID-1) as an example of evidence which the trial Tribunal should have taken into account. Mr. Komba further pointed at a drawing which was accepted by the Urban Planning Committee and approved on 23 February 1994 as evidence before the Tribunal proving the existence of a road. Mr. Komba submitted that evidence was also presented to prove the attempts by Temeke Municipality to construct the road and all these attempts were blocked by the respondent. In the understanding of Mr. Komba, documents that were presented at the trial court for identification purposes carried the same evidential weight as the documents which were formally admitted as exhibits. In his replying submissions Mr. Nyika supported the conclusion which the Tribunal Chairman had reached, describing it as based on evidence of witnesses on the manner the road was curved out of a once un-surveyed area of land. The learned Mr. Nyika submitted that the Chairman was right to point out that all the witnesses except the appellant confirmed that no meeting of local residents took place to initiate the change of existing layout map to introduce a road. According to Mr. Nyika, the learned Tribunal Chairman was correct to point out the need to abide by the 4 mandatory procedures for amending existing survey plan as explained by Mr. Denis Kitale Ernest (PW3) (an Urban Planning Officer for Temeke Municipality). Mr. Nyika submitted that it was wrong for the Urban Planning Committee to approve a proposed amendment of survey plan that included a road, without consulting the residents of the area concerned like the respondent. Mr. Nyika urged me to disregard the evidence of the Sale Agreement. According to Mr. Nyika this Agreement was executed in 1998 while the dispute over the road emerged very much later in 2007. I now propose to re-evaluate the evidence that was presented at the trial Tribunal. Mr. Denis Kitale Ernest (PW3), the Urban Planning Officer for Temeke Municipality testified that he did not know if a new drawing for the Maweni area which was tendered as exhibit had been approved. Further, PW3 noted that the original drawing of 1993 was not tendered at the trial Tribunal together with the amended drawing. PW3 did not know whether the new drawing was displayed at Temeke Municipality to draw the attention of the people like the respondent who were likely to be affected by its operation. 5 Evidence of Lilian Josephat Rweyemamu (PW4) a resident of Maweni Street at Mjimwema did not support the claim by the appellant that there was a public road separating the appellant's plot from that belonging to the respondent. PW4 provided the background history of land belonging to the appellant, respondent and the land presently occupied by the Maweni Primary School was originally owned by respondent's (Mwanamvua) family. PW4 explained that before Maweni Primary School came into existence, there were no road separating the

appellant's and respondent's lands. There was merely a footpath ("uchochoro"). Although Mrs Rweyemamu (PW4) was a neighbour to both the appellant and respondent, and was also at one time a ten cell leader, and Councilor for the area; she was not aware of the procedures which was used to create a road alleged by the appellant. Mrs Rweyemamu (PW4) recalled an incident which occurred at night between 20.00 and 21.00, when the appellant planted boundary pins/beacons on land belonging to the respondent. According to PW4, not a single local leader was invited by the appellant to witness the planting of the beacons on respondent's land. PW4 also testified that she was chased away by the appellant 6 when she attempted to go near the place where beacons were being planted. In my re-evaluation, the evidence of Mr. Fortunatus Tasilo Tamba (DW2) does not support the existence of the road appellant claimed. Mr. Tamba (DW2) was at one time employed by the respondent. He had known the appellant since 1993, and the respondent since 1986 when she employed him. DW2 recalled that in 1993 there was a boundary dispute between the appellant and respondent which was resolved by Mzee Haji who had earlier sold the plots to the disputing parties. Mzee Haji was able to show the respondent her boundary wherein the respondent planted coconut trees to mark the boundary. The appellant was similarly shown his own boundary where he had earlier planted michongoma trees. In so far as DW2 was concerned, the dispute between the appellant and respondent had ended in 1993 when they were shown their respective boundary marks. DW2 was surprised when the appellant continued to encroach on respondent's land. DW2 remembered the incident when Mrs Lilian Rweyemamu (PW4) went to the disputed land but was chased away by the appellant who was 7 brandishing a bush-knife. According to DW2, even the caterpillar/grader from Temeke Municipality which was allegedly used to clear the road was brought to the site by the appellant. The operators of caterpillar/grader had to stop when they failed to show any permit to make a road. Significantly, the appellant chose not to cross examine DW2. The claim by the appellant that residents of Maweni had presented written complaints over blockage of a road was disputed by Joseph Nyalandu (DW3) who lived at Maweni Mji Mwema from 2007. Mr. Nyalandu (DW3) was an Executive Officer of the Mtaa from 2007-2009. He recalled how some time in August 2007 he received a letter from two people who introduced themselves as residents of Maweni. The two were complaining about boundary dispute. It turned out to DW3 that the two complainants were not residents of Maweni area. Mr. Nyalandu (DW3) followed up on this complain with the appellant. The appellant promised to bring the people listed as complainants in that letter. According to the evidence of DW3, the appellant could not even substantiate his claim over the disputed land when called upon to do so by the Municipal Director who had also visited the scene. DW3 8 further testified that there were times when the Municipal Director visited only for the appellant not to show up. Mr. Komba has on behalf of the appellant urged this Court to re-evaluate the weight of documents which according to the learned Advocate, the trial Tribunal failed to attach probative value. It is important to point out that the appellant presented for identification purposes four copies of photographs (ID-3 and ID-4), a letter ref. TP/TM/P.1/Vol 111/34 from one M.A. Lupala addressed to the Director of Human Settlement (ID-2). Although this letter (ID-2) was dated 14 July 2006, it was stamped to have been received by the Director of Human Settlement five months later on 2 January 2007. This letter enclosed what is described as: "k u w a silish a m arekebisho y a m ichoro y a m ip an g o m iji y a M ago go n i P la n n in g Scheme No. 1/729/893 na M b ag a la

Charam be R esid en tia l Layout No. D SM /M isc/19/891 na M b ag a la M w an am to ti Squatter U pg rad ing No. SS/101/1997." Exhibit P2 is another document which Mr. Komba thinks had probative value but was not considered by the learned trial Tribunal Chairman. This document is a photocopy of what is described as MAGOGNI PLANNING SCHEME PART III. From my re-evaluation of documents which were presented for identification purposes and those which were formally admitted as court exhibits, there is nothing that can persuade me to arrive at a different conclusion from that of the trial Chairman of the Tribunal. Courts in Tanzania can and should only act upon evidence that is legally admissible. When a document is used for identification purposes it cannot be acted upon by courts till when it is formally tendered and admitted as an exhibit of the court. All the documents which the appellant described as admitted for identification purposes (i.e. ID2, ID3 and ID4) fall under the category of documents which have no probative value because they were not formally tendered and exhibited as evidence before the trial Tribunal. I do not with due respect agree with Mr. Komba that documents admitted for identification purposes have same probative weight as documents formally tendered as court exhibits. Similarly, exhibit P2 being an uncertified photocopy of what is described as MAGOGNI PLANNING SCHEME PART III has no probative value. Appellant did not offer any further evidence as to the accuracy of the Magogoni Planning Scheme 10 and how it affected the dispute between the appellant and respondent The evidence of Mr. Denis Kitale Ernest (PW3), the Urban Planning Officer for Temeke Municipality is important here. W hen being cross examined by Prof. Kulaba- a M em ber of the trial Tribunal, PW3 said that he did not know if the drawing for the area which had tendered as exhibit had been approved. He also did not know if the respondent and others who were likely to be affected by the new scheme were given the 30-day statutory notice. After accepting the conclusion reached by the trial Tribunal that no new Planning Scheme was lawfully approved for Maweni Kigamboni, the question of existence of a public road, separating the appellant's parcel of land from that of the respondent Mwanamvua Ngocho does not arise. In addition, there is no evidence on record to support the allegation that the respondent had trespassed onto the appellant's plot by excavating or by blocking his access to his land. In view of the above, I am of the considered opinion that the dismissal of Application No. 13 of 2008 by the trial District Land and Housing Tribunal of Temeke was correct In view of 11 this conclusion, this appeal before me lacks merit and is accordingly dismissed with costs. jL I.H. Juma JUDGE 29 06-2012 - Delivered in presence of Mr. Komba, Advocate (for the appellant) and Mr. Nyika, Advocate (for the respondent). I.H. Juma * JUDGE ■ 29 06-2012 - "J : 12

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