

TANZANIA / JUDGMENT

Land Appeal No

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TANZLIIDECIDED
1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LAND DIVISION AT PAR ES
SALAAM LAND APPEAL CASE NO. 8042 OF 2024 (Appeal from the Judgment and Order of the
District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.94
of2020) SIMON NJAMA ASSEYI..... . APPELLANT VERSUS KIJAZI
MAULIDI..... RESPONDENT

JUDGMENT

Date of last Order: 03/10/2024 Date of Judgment: 21/10/2024 LALTAIKA, J. The Appellant herein
SIMON NJAMA ASSEYI is dissatisfied with the decision of the District Land and Housing Tribunal
for Kinondoni at Mwananyamala in Land Application No.94 of 2020. He has appealed to this
Court by way of a Petition of Appeal containing the following grounds:

1. That, the Honourable Chairperson of tribunal erred in law and fact by relying on hearsay evidence to render judgement/justice.
2. That the Honourable Chairperson of tribunal erred in law and fact by not taking into account that the Appellant evidence tendered in relation to the provision of title deed obtain from the Ministry of land by the Respondent. Page 1 of 11
3. That, the Honourable Chairperson erred in law and in fact by not putting into consideration the site evidence which was never disputed by the Respondent.
4. That, the Honourable Chairperson erred in law and in fact by not putting into test the credibility of the Respondent's witness into account. When the appeal was called on for mention, the Appellant and Respondent enjoyed the legal services of Ms. Enid Makame and Mr. Goodchance Lyimo, learned Advocates, respectively. Parties opted for hearing by way of written submissions. With a nod of approval from this Court, a schedule to that effect was ordered. I take this opportunity to register my commendations to the learned Advocates for their commitment and spotless compliance to the scheduled order. The next part of this judgment is a summary of rival submissions, my analysis and the verdict. Ms. Makame, Counsel for the Appellant, after a brief background on the matter proceed to the first ground of appeal. She asserted that the Honourable chairperson of the tribunal erred in law and fact by relying on hearsay evidence to render judgment. She argued that the claim made by DW1 on page 8 of the judgment—that the Respondent had left two steps on every side of the plot

after purchasing it—was never proven before the tribunal. Ms. Makame contended that the Appellant was disputing the Page 2 of 11 Respondent's construction of a toilet, part of which encroached on the Appellants land. Additionally, she pointed out that on page 14, the trial chairperson explained how the tribunal considered the evidence from DW1 and DW2, noting that neither witness was present during the transaction when the Respondent purchased the property, as indicated in the annexure marked KM1 in the Respondent's written statement of defense. Ms. Makame emphasized that it is a well-established principle that courts should not base their conclusions solely on hearsay evidence. To buttress her argument, Ms. Makame cited *Jongo Mwikola v. Geita Gold Mining Limited* (Civil Appeal No. 344 of 2020) from the Court of Appeal of Tanzania, which highlighted the inadmissibility of hearsay evidence according to Section 62 of the Evidence Act. She also referenced other cases, including *Lukondo Luseke v. Shukrani Lusato* (PC) Civil Appeal No. 19 of 2019, to further reinforce her argument. Regarding the second ground, Ms. Makame stated that the Honourable Chairperson erred by failing to consider the Appellant's evidence related to the title deed obtained from the ministry by the Respondent. She noted that Page 3 of 11 during the hearing, PW4 tendered a letter dated December 21, 2018, which was marked as P1 and indicated that the ministry of lands prohibited any land surveying until the boundary disputes were resolved. Ms. Makame strongly criticized the tribunal for not adequately evaluating the documents presented by both parties from the same office. Transitioning to the third ground, Ms. Makame asserted that the Honourable Chairperson erred by not considering site evidence that was never disputed by the Respondent. She contended that although the chairperson acknowledged visiting the site, the assessors did not visit, and the tribunal's findings from this visit were not included in their deliberations or final decision. Ms. Makame cited procedural guidelines for visits to the locus in quo as articulated in various cases, such as *Sikuzani Said v. Magambo and Another* (Civil Appeal No. 197 of 2018), and *Kimonidimitri Mantheakis*

- v. *Ally Azim Dewji and 7 Others* (Civil Appeal No. 4 of 2018), which emphasized the importance of adhering to proper procedures during site visits to ensure a fair trial. She argued that the tribunal's disregard for site evidence compromised the validity of their proceedings and conclusions. Page 4 of 11 Finally, for the fourth ground, Ms. Makame claimed that the Honourable Chairperson erred by not adequately testing the credibility of the Respondent's witnesses, particularly DW1 and DW2, who had previously aligned with the Appellant regarding the toilet encroachment. She pointed out that these witnesses' testimonies were flawed, containing discrepancies that undermined their reliability. Ms. Makame forcefully argued that the lack of clarity regarding the boundaries before the official survey contributed to confusion surrounding the Respondent's claims. Counsel emphasized that the case before the tribunal concerned encroachment rather than ownership of the land, and that not considering the Appellant's evidence, and the site evidence led to a miscarriage of justice. Mr. Lyimo, Counsel for the Respondent, on his part, stated that the court record was clear, indicating that two issues were framed for deliberation: whether the Respondent had trespassed on the Appellant's land, and what reliefs the parties were entitled to. He noted

that the Respondent remained hopeful that the court would dispose of the appeal straightforwardly. Page 5 of 11 In addressing the first ground of appeal, Mr. Lyimo responded to the Appellant's argument that the tribunal relied on hearsay evidence. He contended that the tribunal based its decision on the unchallenged testimonies and evidence from the Respondent and her witnesses, including DW1 and DW2, who testified as neighbours and had lived in the area since 1980. According to the learned Counsel, these witnesses provided credible testimony, noting that the Respondent, who purchased the suit land in 1986, had left an alleyway separating their properties and had not encroached on the Appellant's land, as supported by the tribunal's findings on page 14 of the judgment. Mr. Lyimo quoted the tribunal's analysis, highlighting that the neighbouring witnesses confirmed the separation of the properties. He further cited the case of Mbumbumbu Ngwale vs. All Said Kidowe, PC Civil Appeal No. 12 of 1992 which emphasized the importance of neighbours' testimony in land disputes, arguing that the ground was therefore baseless, as the tribunal relied on credible evidence rather than hearsay. Regarding the second ground, Mr. Lyimo stated that this ground should not occupy the court's attention, as the allegation concerning the title deed Page 6 of 11 was not part of the issues agreed upon before the hearing. He explained that the issuance of the title deed followed proper procedures, as outlined in the testimonies of various witnesses. He clarified that no restrictions or objections had been placed on surveying the land and pointed out that the Appellant failed to cross-examine relevant witnesses, which he argued amounted to an acceptance of their testimonies. Mr. Lyimo strongly countered the Appellant's claim that the tribunal acted inappropriately by siding with the assessors, insisting that the deliberation was based on the framed issues, clearly noting that the Respondent had not encroached on the Appellant's land. In discussing the third ground, Mr. Lyimo rejected the Appellant's claim that the tribunal failed to consider site visit evidence. He argued that the court records accurately reflected what transpired during the site visit and asserted that the burden of proof lay with the Appellant, who had not substantiated their claims. He emphasized that the tribunal's decision was based on substantial evidence rather than site visit findings. For the fourth ground, Mr. Lyimo argued that the testimonies of the Respondent's witnesses were credible, without discrepancies or Page 7 of 11 contradictions. He referenced the long-standing relationship and knowledge of the neighbourhood shared by the witnesses, asserting that the tribunal had no reason to doubt their testimonies. In closing, Mr. Lyimo reiterated that the Appellant had not met the burden of proof required under the law and concluded by imploring the court to dismiss the appeal with costs for lack of substance, resting his submission on the importance of upholding the tribunal's decision. He concluded by stating that the Respondent sought dismissal of the appeal, emphasizing the integrity of the court records and the necessity of evidence in land disputes. In her rejoinder submission, Ms. Makame addressed the first and fourth grounds of appeal, reiterating their initial submission and emphasizing that DW1 and DW2 were not credible witnesses and that their testimony was primarily hearsay. She pointed out that DW1 claimed the Respondent, upon purchasing the disputed plot, had left two steps on each side. However, Ms. Makame asserted, DW1 was not present during the purchase, and his testimony relied entirely on

what he had heard from the Respondent or others, qualifying it as hearsay. Page 8 of 11 Ms. Makame further asserted that while DW1 and DW2 were neighbours, they could not provide credible testimony about the sale since they had not witnessed the agreement or any discussions regarding the boundaries. She maintained that their evidence could not be deemed reliable, and that mere proximity did not grant them comprehensive insight into the details of the dispute. I have dispassionately considered the rival submissions in the light of the grounds of appeal and the tribunal's records. The Appellant's assertion that the Tribunal failed to consider the letter from the Ministry of Lands is critical. This document clearly prohibits any land surveys until the boundary disputes are resolved. The Tribunal's oversight in not addressing this directive casts doubt on whether it aimed at resolving the root of the conflict. As a result, in my considered opinion, the entire dispute remains unresolved. The testimonies of the neighbours, which I think are by no means excludable simply because they were not there during the sale, should have added value to the decision of the Honourable Chairman if there were some bold and deliberate attempts to analyse the situation before and after the survey. This, unfortunately, leaves me with only one option to contemplate upon and that is to order retrial. Page 9 of 11 I am alive to the settled position of the law that an order for a retrial arises when the appellate court finds out that the judgment of the trial court or tribunal is defective for leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. See, Stanslaus Rugaba Kasusura & Attorney General vs Phares Kabuye [1982] T.L.R. 192. As established in the famous case of Fatehaji Manji v. Republic (1966) EALR 343, certain conditions must be met for a retrial to be appropriate. In my opinion, taking the big picture perspective as Ms. Makame tried to do, the dispute is between two neighbours centred on alleged encroachment. It is not on ownership. I am inclined to state albeit in passing that as I read through the impugned Judgment of the Tribunal, I noted that the learned Advocates who were representing the parties, avoided the issue of analysing the situation before the survey. So much energy was directed towards ancillary issues I would say which, unfortunately, would never resolve the dispute. In the upshot, the decision of the trial tribunal delivered, and consequential orders thereof is hereby nullified. I hereby order the matter to Page 10 of 11 be retried with the following directives: the trial tribunal should study the facts carefully and ensure that issues formed do touch upon the core of the dispute. It is so ordered. I. LALTAIKA JUDGE SJ21/10/2024 Court Judgement delivered this 21st day of October 2024 in the presence of Ms. Edin Makame and Mr. Goodchance Lyimo, learned Advocates, Counsel for the Appellant and Respondent respectively. JUDGE 1/10/2024 Page 11 of 11

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Prepared on 14 October 2026 · Esheria