IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

LAND APPEAL NO. 34 OF 2023

(C/F Application No.06 of 2021and Land Appeal No. 44 of 2020 in the District Land and Housing Tribunal for Moshi at Moshi)

OBEDI EDUARD NDOSI……APPELLANT

VERSUS

MAGDALENA SAMSON MASSAWE……..RESPONDENT

JUDGEMENT

Last Order: 25.01.2024
Judgment: 20.03.2024

MONGELLA, J.

The appellant herein was an applicant in Application No. 06 of 2021 in the District Land and Housing Tribunal for Moshi at Moshi (hereinafter, the Tribunal). He sued the respondent for destruction of his fence built on Eastern boundary of his property (hereinafter, the suit property). Upon hearing both parties, the trial Tribunal found in favour of the respondent and therein dismissed his application. Aggrieved, the appellant filed this appeal on two grounds, to wit:

1. *That the Honourable Chairman erred in law and fact by alleging that the appellant is a neighbour of the respondent bordering her, on the Eastern side of the suit property.*

2. *That the Honourable Chairman erred both in Law and fact first by not taking into consideration the fact that the respondent disobeyed the order of the Hon Chairman P.J. Makwandi in his judgment in Land Appeal No. 44 of 2020 which marked the birth of the present suit.*

The appeal was argued by written submissions whereby the appellant was unrepresented while the respondent was represented by Mr. Philemon Justin Shio, learned advocate.

In his submission, the appellant averred that this appeal originates from Shauri No. 11 of 2020 in the Masama Mashariki Ward Tribunal (WT, hereinafter) which was determined in his favour on 24.08.2020. That, aggrieved by said decision, the respondent appealed to the Tribunal, whereby the appeal was allowed, proceedings of the WT quashed and set aside. That, in its decision, the Tribunal ordered the matter to be heard as a fresh case before it.

He alleged that on the date of Judgement, both parties were present and the chairman ordered for the *status quo* to be maintained until expiry of 45 days. However, the respondent ignored the said order and destroyed the fence. This prompted him to write a letter to the chairman who ordered him to file an application. He then filed Application No. 06 of 2021 and thereafter the appeal at hand.

He contended that he had purchased land from one Traufoo Ngatara Massawe on 03.08.1981through contract No. KJ Na.

250/MAUZ/25/27. That the same was bordered on the North by Samson Ngatara Massawe, South by Elisisa Meesa Mboro, west by Traufoo Ngatara Massawe and East by "Mfereji wa Masama." He alleged to have been in use and occupation of the land until 17.08.2021 when the respondent trespassed and claimed that he erected a fence in her piece of land while he is bordered by "Mfereji wa Masama" on the East and not the respondent.

The appellant alleged that the Hon. Chairman did not study the previous proceedings by the past chairman so he could proceed therefrom. That, the trial chairman erred in treating the application as a main application ordered by the Tribunal on 16.12.2021. He thus prayed for the appeal to be allowed with costs.

The appeal faced stiff opposition. In reply to the appellant's submission, Mr. Shio narrated that the appellant successfully sued the respondent at Masama Mashariki WT vide Application No. 11 of 2020. Aggrieved, the respondent appealed to the District Land and Housing Tribunal for Moshi vide Land Appeal No. 44 of 20220 whereby the Chairman, P.J. Makwandi, quashed and set aside the decision of the WT and ordered the matter to be heard afresh. The appellant then filed Application No. 06 of 2021 in the District Land and Housing Tribunal for Moshi against the respondent over a demolished fence, claiming that the fence was erected in her boundary. The application was heard on merit and delivered in favour of the respondent.

Mr. Shio further alleged that the appellant had not submitted on his grounds of appeal other than referring to the order made by Hon. Chairman Makwandi in Land Appeal No. 44 of 2020. He considered the appellant to have abandoned his grounds of appeal. Despite this observation he continued to address the appellant's grounds of appeal. On the 1st ground he submitted that the appellant is neighbours with the respondent. That, since there were arguments as to who owned the place, the presiding chairman visited the *locus in quo*. In the said visit it was revealed that before the said fence was planted, there was a brick wall built by the respondent that lasted for several years.

He contended further that the problem started when the respondent demolished the brick wall so she could put building materials in her premises and develop the area. That, after she removed her brick wall, she found a wooden fence. She decided to remove the fence, but was arrested and taken to the Police station at Bomang'ombe. Later the appellant went to the WT, hence this appeal.

Addressing the 2nd ground, he contended that the Tribunal Chairman's order was for the matter to be heard afresh whereby the appellant filed a fresh application in the Tribunal and the matter was heard on merit and determined in the respondent's favour. He averred that it was for the appellant to raise grounds of appeal connected to Application No. 06 of 2021 and not raise issues on

orders he himself followed. In addition, he contended that the appellant admitted not being the owner of the suit land.
Alternatively, and without prejudice, Mr. Shio submitted that in Land Appeal No. 44 of 2020, the Tribunal ordered the matter to be heard afresh, and in that regard the appellant filed Application No. 06 of 2021 from which this appeal originates.

He further challenged the appellant for attaching annexures in his submission as part of evidence. He faulted the same on the ground that the respondent cannot cross examine on the said annextures for the matter at hand being an appeal. He thus prayed for this court to disregard and expunge the annexures for containing evidence, which cannot be tendered during appeal. He supported his argument with the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Ltd vs Mbeya Cement Company Limited and Another** [2005] TLR 42 and prayed for the appeal to be dismissed with costs.

Rejoining, the appellant averred that the respondent treated the matter as a preliminary objection whereby facts are not allowed, but only points of law. Referring to his submission in chief, he contended that the trial chairman accepted the sale contract over the suit land, which indicated the boundaries of the suit land that persist to date. He added that there was no evidence produced by the appellant to shows that she acquired the suit land at any time from the date of his purchase of the land.

In that regard, he considered the chairman misdirected himself in assuming that he neighboured the respondent from date of purchase. Speaking about the neighbours to his land, he contended that when he bought the suit land no one was living in the neighbourhood. That the respondent came to live in the neighbourhood in 2002 and bordered him on the South. That, they had lived peacefully until the date of judgement in Land Appeal No. 44 of 2020. In the upshot, he maintained his prayers for the appeal to be allowed with costs.

I have keenly considered the rival submissions of both parties. Prior to addressing the grounds in this appeal, I wish to point out that contrary to the argument by Mr. Shio, the appellant did in fact discuss his grounds of appeal, but generally. This is well reflected in his submissions.

I have also considered the issue advanced by Mr. Shio to the effect that the appellant annexed exhibits in his submissions. This is indeed the case, he not only made reference to a letter he wrote to the Tribunal Chairman, but also attached the same in his submissions. The law is trite law that submissions are not evidence and as such annexures cannot be presented therein and admitted. See; **Mway Arago Jombo vs. NMB Bank PLC** (Civil Application No. 627/08 of 2021) [2023] TZCA 17825 (13 November 2023) TANZLII and; **Jao Oliveira & Another vs. IT Started in Africa Limited & Another** (Civil Appeal No. 186 of 2020) [2023] TZCA 7 (8 February 2023) TANZLII.

In the above authorities, the Court of Appeal referred its previous decision in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman of Bunju Village Government and Others**, Civil Appeal No. 147 of 2006 (unreported), whereby it held:

> "With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

The consequences of annexing exhibits in submissions are that the same would be ignored. To this point I shall proceed to address the two grounds of appeal whereby I prefer to start with the 2nd ground. On this ground, the appellant claims that the dispute emanates from the respondent's act of ignoring an order issued by the Hon. Tribunal Chairman in Land Appeal No. 44 of 2020. On the other hand, Mr. Shio's argument is to the effect that the Hon. Chairman ordered the matter to be heard afresh. He however, did not address as whether there was an order issued for parties to maintain the *status quo* for 45 days. Given the nature of the ground and arguments by the parties, this matter calls for inspection of records to determine the disputed issue.

Upon observing the records, I found that in 2020, the appellant filed a claim in the WT (Shauri Na. 11 la 2020) against the respondent

alleging that the latter had cut off his fence (*seng'eng'e*) along the road heading to his home. The WT found in favour of the appellant. Aggrieved, the respondent filed an appeal in the District Land and Housing Tribunal for Moshi at Moshi vide Land Appeal No. 44 of 2020, which was heard by Hon. Chairman P. J. Makwandi. The presiding Chairman, having found irregularities in the decision of the WT, partly allowed the appeal and ordered the matter to be heard afresh in the District Land and Housing Tribunal. I shall hereunder reproduce the said orders as reflected in his judgement delivered on 16.12.2020, as I find it pertinent:

> - The Appeal is partly allowed.
> - The proceedings of Trial Tribunal and decision thereof are hereby quashed and set aside respectively.
> - Let the matter be heard as a fresh case before this Tribunal.
> - Due to the nature of the decision, I order neither party to pay costs.

On 08.01.2021, the appellant filed a case against the respondent in the District Land and Housing Tribunal for Moshi at Moshi vide Application No. 06 of 2021. His claim was that the respondent had broken the fence he had built on the Eastern side of his boundary. He also accused her of acting contrary to the Order made in Land Appeal No. 44 of 2020.

In this appeal, the appellant still claims that there was a subsisting order made in Land Appeal No. 44 of 2020. However, apart from the orders I have reproduced hereinabove, there was no any other

order made in the said judgement. Even upon observing the Tribunal record in the said matter, in assumption that perhaps there might have been a confusion with regard to an order for temporary injunction or maintenance of *status quo*, I found no such application being made.

The orders were clear directing that the matter be heard afresh and before the same Tribunal. The appellant himself filed that fresh matter before the Tribunal, that is, Application No. 06 of 2021. He as well, made reference to the judgment in Land Appeal No. 44 of 2020. In the premises, I find it surprising his argument that the matter was a miscellaneous application while he himself filed a main application before the Tribunal. His arguments are baseless rendering this ground to lack merit. It is dismissed.

With regard to the 1st ground, the appellant faulted the Tribunal decision for declaring that he neighboured the respondent on the eastern side of the suit property. Mr. Shio, on the other hand, averred that they are neighbours. That, a dispute between then as to who is the lawful owner of the suit land prompted the trial Tribunal to visit the *locus in quo* and thereafter declared the respondent the lawful owner of the suit land. In my view, Mr. Shio did not reply to the said issue properly as he failed to note that the appellant's claim was that the respondent was not his neighbour on the Eastern side and was responsible for destructing the fence.

From their presentations, it appears that the issue in dispute, on 1st ground, is on whether the claim was proved. In addressing this issue, I observed the Tribunal record in Application No. 06 of 2021 from which this appeal originates. Considering the nature of the claim, I find it necessary to briefly evaluate the evidence adduced at the trial Tribunal.

The appellant gave his evidence as SM1 and had one witness, Godwin Ulomi, who gave his evidence as SM2. On the other hand, the respondent testified as SU1 and had one witness, Traufoo Ngatara Massawe who testified as SU2.

The appellant alleged that he purchased the suit land from SU2 in 1981 as evidenced by Exhibit P1, the sale contract signed between him and SU2. That, he built his residential home in 1982 and lived there since then. On 16.12.2020, at around 15:00hrs, he found the respondent cutting down his fence with an axe. He alleged that the said fence was on the west facing the road on the Northern part. He admitted that they both used a road passing across the respondent's two plots although he claimed to have purchased the right of way. He also admitted that initially there was a wall in the area that the respondent demolished. He further stated that he had planted the fence after the wall was demolished.

SM2 had nothing much to say other than that, on the material day of 16.12.2020, he witnessed the respondent cutting down the

appellant's fence with an axe and she was accompanied by two men.

The respondent testified that she built a wall on her compound which lies on the North of the appellant's land. Later, she demolished part of the wall to build a house for leasing purposes. The appellant followed her and asked why she demolished the wall. Later on, the appellant put thorns in the area to restrict her from passing through. She alleged that the wall was on her plot and a road crossed through two of her plots.

SU2 admitted to have sold the suit land to the appellant in 1981. He narrated that since 2000, the appellant started troubling them. That, at some point, he complained that the road he used could not get a car through. Eventually, the hamlet chairman measured the area in the respondent's plot and made a road which is now used by all people.

The record shows that the trial Tribunal visited the *locus in quo* and made the following observations: first, the suit land was on the Eastern side while the appellant's home was on the Northen part. Second, there was a wall that stood at foundation and the same separated the respondent's plot from the alleged road that heads to the appellant's home. That, beside the wall, there were flowers and a fence "*michongoma*" planted by the appellant. The planted fence blocked access to the house which is located behind the respondent's house, which is a leased property. Third, the road used

by the appellant was found to be passing through two plots of land belonging to the respondent. One of the plots, she had bequeathed to her child.

In consideration of the evidence adduced, it is evident that the dispute is rather on destruction of planted fence and not over any piece of land. The appellant and respondent are neighbours as correctly found by the trial Tribunal. Since there is uncertainty on which side they border each other, I will address the question of boundaries in regard to the evidence adduced, including Exhibit P1.

According to the map drawn from the visit on *locus in quo*, the parties' homes are side by side. The appellant's home is on the South of the respondent's home. According to Exhibit P1, the respondent's late husband, one Samson Ngatara Massawe, borders the appellant on the North. According to the map of the *locus in quo*, there is a road passing through the respondent's plot heading to the appellant's home.

From the observation at the *locus in quo*, the evidence of the SU2 with regard to the appellant being given a right of way through the respondent's plot was accurate. Although it seems that the two border each other on the North or South, due to the road that divided the respondent's plot making the appellant's home somewhat between the two, the respondent somehow appears to be on the Eastern side of the appellant on one part.

Further, the map of the *locus in quo* shows that the wall was replaced with the fence blocking passage to the road passing through. While it was agreed that the fence was made by the appellant, the land in which it was made belonged to the respondent and not in any way bordering the appellant's land. In that respect, the appellant's claim that the respondent cut off/removed his fence which shielded his land is not true.

It is trite law that he who alleges must prove. This was well expounded in the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019) TANZLII whereby the Court of Appeal held**:**

> "It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on particular fact to be proved."

As evident on record, it is clear that the appellant failed to discharge his burden rendering his claim unproved. In addition, on the other hand, the appellant has demonstrated malicious intent to restrict access to the road by planting the fence in the respondent's compound, the reason the respondent went forth to remove the said fence.

In the foregoing, it is evident that this appeal lacks merit. It is hereby dismissed with costs.

Dated and delivered at Moshi on this 20th day of March 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA