IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

PC. CRIMINAL APPEAL NO. 02 OF 2023

(C/F Criminal Appeal No. 10 of 2021 before District Court of Bahi)

VAILET NAGOLU..... APPELLANT

VERSUS

STANFORD MWANGOSI.....RESPONDENT

JUDGMENT

Date of Last Order: 25th March, 2024
Date of Judgment: 19th April 2024

MASABO, J:-

This is a second appeal. It arose from the Kigwe Primary Court (the trial court) before which the appellant was charged with the offence of criminal trespass contrary to section 299 of the Penal Code, Cap. 16 R.E 2019. After a full trial, he was convicted and sentenced to pay a fine of Tsh. 100,000/= or to serve a prison term for six months in default. Aggrieved by the conviction and sentence of the trial court he appealed to the District Court of Bahi (the first appellate court). The appeal ended fruitless after it was dismissed for lack of merit.

Aggrieved further, he wanted to appeal to this court but the time within which to appeal lapsed before she lodged her appeal. Still determined to pursue her rights, she applied for leave for an extension of time and after obtaining it she filed the present appeal based on the following grounds: **One**, that the Resident Magistrate erred in fact and law to uphold the

decision of Kigwe Primary Court whereas the respondent never proved his case to the required standards. **Two**, the trial court did not have jurisdiction to entertain the case.

On 15th February 2024, the matter was scheduled for hearing by way of written submissions. The submission by the appellant was drawn and filed by Mr. Sostenes Mselingwa, learned Advocate whilst that of respondent was drawn and filed by Mr. Charles Peter Simon, learned Advocate as well. All the parties filed their submission on time a summary of which shall follow the abbreviated background of this appeal as narrated bellow.

The background of this appeal is long and fascinating. The abbreviated version of it is as follows. It emanates from a love story between the parties herein who on ... tied their knots and became a married couple. Their matrimony lasted to19th March 2003 when it was dissolved by Kingwe Primary Court in Matrimonial Cause No. 16 of 2002 at the instance of the respondent who had petitioned for divorce and ably convinced the court that the marriage between him and the appellant had broken down irrepealably. Subsequent to the dissolution of marriage, the assets jointly acquired by the couple during the subsistence of their marriage was distributed among them. The appellant was given, among other things,·a house situated at Nkuhungu area, Dodoma District and the respondent got a plot at Kigwe which is the subject of the present appeal.

It would appear the appellant was unhappy with the distribution but she never appealed. Meanwhile she continued to occupy the house and the plot at Kigwe hence delimiting the respondent's occupation of the same. This prompted the respondent to go to the District Court of Bahi where, on 13/8/2003 he filed Civil Revision 30 of 2004. The application ended in his favour, the outcome which enraged the appellant. She appealed to this court in PC. Civil Appeal No. 8 of 2005. The judgment of this court delivered by Masanche , J (as he then was) on 6th June 2006, reversed the revision by quashing and set aside the revision order after it held that, the revision was wrongly instituted as what was at issue was not the irregularity of the trial court proceedings or judgment but the execution of its decree which could only be done by the same court. The parties were subsequently directed to or go back to the court for execution of the decree or in the alternative, for the agrieved party to appeal to the district court if he/she so wished.

Although the record is silent whether the parties complied with these directives. What it certain is that, in 2021, the respondent went back to the trial court with a completely new matter but rooted in the matrimonial cause. He instituted Criminal Case No. 90 of 2021 suing the appellant for criminal trespass the details of which being that, in disregard to the decree in Matrimonial Cause No. 16 of 2002 which gave him the house at Kigwe, on 4/4/2012, the appellant trespassed into it, built a house therein and started to live there. The appellant was found guilty, convicted and sentenced to a fine of Tshs 100,000/= or in default a jail term for 6 months. The appellant appealed to the district court but her appeal ended barren.

Back to the submissions, in support of the first ground of the appeal Mr. Mselingwa narrated the background of the appeal as summarised above. He then argued that, the appellant was committed no error in developing the suit property as she was exercising her bonafide claim of right as provided under section 9 of the Penal Code Cap 16. Thus, the trial court erred in disregarding the defence of a bonafide claim of right and in treating the appellant as a criminal trespasser. He added that had the trial and first appellate court carefully evaluated the evidence adduced by the appellant, they could not have reached at the impugned decision because section 299 of the Penal Code which create the offence of criminal trespass requires the respondent to prove not only unlawful entry but also an intention to commit offence, to annoy or intimidate the legal owner.

Submitting on the second ground of appeal, he argued that according to the provision of section 167 of Land Act, Cap 13, it is the land courts which have the jurisdiction to entertain land disputes. He argued that much as this provision does not ouster the jurisdiction of ordinary courts over criminal trespass, it was not proper for the appellant to be sued as a criminal trespasser as the case emanated from a matrimonial dispute. Thus, it ought to have been resolved differently. He contended further that, although criminal trespass could be invoked, it was unwelcome in the circumstances of the present case as the issue of ownership emanated from the distribution of assets after the dissolution of the marriage. The house was a family property and the execution of the decree in the matrimonial cause was yet to be done. Thus, it was materially wrong for the court to hold that the

ownership of the suit property was established. He referred the court to the case **of Sylivery Nkangaa vs. Raphael Albertho** [1992] TLR 110 where it was held that a charge of criminal trespass cannot succeed where the matter involves a disputed land whose ownership has not been finally determined by a civil suit and that, a criminal court is not a proper forum for determining the rights of those claiming land ownership. In conclusion, he prayed that the court allow the appeal.

In reply, Mr. Charles Simon also narrated the history of the aapeal.

Opposing the first ground of appeal Mr. Simon argued that the appellant in her submission has stated that she was given a house at Nkuhungu and there is no dispute that the house was handed over to her and witnessed by John Masaka who testified as SU 3. He argued further that, even when John Masaka was testifying in court the appellant didn't cross examine her an omission which in law suggests that he admitted the facts asserted by this witness. He bolstered his submission by citing the case of **Damiani Ruhele vs. Republic** Criminal Appeal No. 501 of 2007 and **Athanas Kiboyo vs. Republic** Criminal Appeal No. 88 of 1992. He then submitted that the respondent is the lawful owner of the house in dispute and the appellant wrongfully entered into it without the owner's consent an act which constitutes trespass.

Submitting on the second ground of the appeal he argued that the house at Kigwe is not under dispute of ownership because through Matrimonial Cause

No. 16 of 2002, it was awarded to the respondent by Primary Court of Kigwe. Thus, be entering into it and developing it, the appellant committed an offence as no legal rights over it. He then argued that the present case is distinguishable from the case of **Sylivery Nkangaa** (supra). In conclusion he prayed that the appeal to be dismissed with costs.

I have carefully and dispassionately considered the rival arguments by the counsels for both parties. From the record of appeal and the submission, the lower courts had a concurrent finding that the appellant committed the offence she was charged with hence guilty. In view thereof, this court being the second appellate court, I will proceed guided by the trite law that, in a second appeal like this one, the appellate court will not interfere with the concurrent findings of facts of the lower courts unless there is a misapprehension of evidence by misdirection or non-direction or where it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedures. Articulating this principle, the Court of Appeal in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31 stated that:

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> Where there are two concurrent findings of facts by two Courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure.

Cementing its position in **Raymond Mwinuka vs. The Republic,** Criminal Appeal No. 366 of 2017 [2019] TZCA 315 TanzLII, it held that: -

> Aware of the most decisions of this Court cautioning against our interference with concurrent findings of facts by two courts below, we shall guard against unwarranted interference of such facts. The decisions on that principle are in cases including; **Daudi Lugusi and 2 Others v. Republic** (supra) cited to us by Mr. Mwita, and **Jafari Mohamed v. Republic, Criminal Appeal No. 112 of 2006** (unreported). In the latter case it was held;
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> > "An appellate Court, like this one, will only interfere with such concurrent findings of facts if it is satisfied that they are unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance, **Petrers v. Sunday Post Ltd [1958] E.A 424**: **Daniel Nguru and Four Others v. R. Criminal Appeal No. 178 of 2004** (unreported); **Richard Mgaya (supra),** etc."

The ultimate issue to be determined at the end of this appeal is whether in view of the above, the concurrent findings of the lower court constitute the anomaly complained by the appellant in her two grounds of appeal and if so, whether as a result of such anomalies, there has been a misapprehension of evidence occasioning a miscarriage of justice or there is any violation of some principle of law or procedure warranting the interference of this court.

I will start with the second ground on jurisdiction of the trial court over the matter. This issue was raised in the first appeal as the second ground of appeal and the same argument was fronted that it ought to have been determined by a civil court, notably the land dispute courts. The first appellate having heard the parties resolved that as the ownership of the suit land had been vest on the respondent in the matrimonial court, there was no need for the respondent to go to such courts. I hold a different a different view. Much as the ownership is not at issue, the dispute ought not to have been resolved through a criminal court. As stated in the prelude, the issue between the parties was in the execution of the decree in the matrimonial court which vested the suit plot into the respondent. Just as it could not be resolved through revision as held by this court in.....; it could not be resolved through a criminal proceeding. The respondent was supported to heed to the directives of this court in ... but the record is silent about it. Thus, it can only be assumed that he did or did not. In any case, whether or not the execution had been done, it was a misconception, in the circumstances of this case, for the trial court to entertain the charges for criminal trespass.

Assuming that the respondent did not heed to the directives of this court that he should apply for the execution of the decree, the proper recourse for him was to pursue the execution. If he heeded to the directives of this court and had the decree executed, the proper recourse for him was to sue the appellant before the land disputes courts which, unlike criminal courts, enjoy jurisdiction over the determination of land ownership dispute as stated under section 167(1) of the Land Act, Cap 113 R: E 2019 which by which the exclusive jurisdiction to hear and determine land matters is vested in these courts. Needless to emphasisize what was held in **Sylivery Nkanga v. Raphael Albertho** (supra) that, a criminal court is not a proper forum for determining the rights of those claiming ownership of land. As the appellant had fronted a defence of bonafide claim of right, the parties ought to have been advised to pursue civil redress as stated in the case of **Mustapha Juma v. Selemani Bakari** [2017] TLR 427. The second ground is therefore meritorious. It is therefore upheld.

Turning to the first ground of appeal, I subscribe to the appellant's counsel that even if the criminal proceedings was the proper remedy, there was no sufficient evidence to warrant a conviction. To prove the offence of criminal trespass which had been laid at the appellant's door, the respondent not only ought to prove that the appellant entered into the suit premises, built a house or established his residence there. He has to prove that that she did so with the intent of intent of committing an offence or intimidating, insulting or annoying him. Section 299 of the Penal Code under which the offence of trespass is created expressly provides so. It states:-

299. Any person who- (a) unlawfully enters into or upon property in the possession of another **with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property;** or

(b) having lawfully entered into or upon the property unlawfully remains there **with intent thereby to intimidate, insult or annoy the person in possession of the property or with intent to commit an offence,**

is guilty of criminal trespass and liable to imprisonment for three months;"

As the proof of the appellant's ill motive was missing, there was no justification for convicting the appellant. The first ground of appeal, on the foregoing, similarly meritorious and is allowed.

Accordingly, I find merit in the appeal and I therefore allow it. The judgment of the first appellate court is quashed and set aside and so is the conviction and sentence metered by the trial court.

DATED and **DELIVERED** at **DODOMA** this 19th day of April, 2024

J. L. MASABO

JUDGE