IN THE HIGH COURT OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA.

LAND CASE APPEAL NO. 40 OF 2016

(Arising from Application No. 258 of 2008 of District Land and Housing Tribunal for Kagera at Bukoba)

HAMADA KAUNGU ..... APPELLANT

VERSUS

MATHIAS MUSHUTI ..... RESPONDENT

Date of Last Hearing: 11/10/2018.

Date of Judgment: 19/10/2018.

JUDGMENT

I. ARUFANI, J

This appeal arises from Application No. 258 of 2008 of the District Land and Housing Tribunal for Kagera at Bukoba dated 22nd July, 2016 (hereinafter to be referred in a short form as the tribunal). The application was filed in the tribunal by the respondent in this appeal, Mathias Mushuti praying for judgment and decree against the appellant in the appeal at hand, Hamada Kaungu for a declaratory order that, the suit land is lawfully owned by the respondent, an order for removal of piled up stones against the respondent's premises, an order for perpetual injunction against the appellant from encroaching into the suit

land, the appellant to pay the sum of Tshs. 35,000,000/= to the respondent being general damages suffered by the respondent, costs of the suit and any other relief the tribunal may deem just to grant.

The brief background of the matter as can be grasped from the records of the tribunal is to the effect that, in 1978 the respondent purchased a land measuring about 25 to 50 paces located at Nshamba township within Muleba District in Kagera Region from one person namely Gerase Muhabuta. After purchasing the land he surveyed the same and after being granted letter of offer he constructed a one storey building containing the guest wing and rooms for business.

The respondent averred that, in 2006 the appellant who is his neighbour and claimed to have inherited the land from his late father in 1968 encroached into his land claiming the rightful ownership of the piece of land adjacent to the land of the respondent. The respondent averred further that, the appellant blocked the main guest's entrance doors by using huge stones which caused cracks to the building and cessation of the guest house business.

The appellant denied to have encroached the land of the respondent and stated that, each one own land different form each other. He also denied to have blocked the respondent's main guest's entrance doors and stated that, the respondent's premises doors faces the main road of Nshamba - Birabo and Nshamba – Bunyagogo village. He stated to have put the stones in his personal land and not in the land of the respondent. After full hearing of the matter the tribunal decided the matter in favour of the respondent. The appellant was aggrieved by the decision of the tribunal and filed his petition of appeal in this court containing the following four grounds of appeal:-

1. That the Hon Chairman DLHT erred in law by refusing to take into consideration the facts of evidence adduced on my side by relaying on mere say allegations of the respondent without getting the facts from the one who sold the land in dispute to him who was supposed to be joined as allowed by Land Act No. 2 of 2002.
2. That the Hon. Chairman erred in law by mediating the case without visiting the area in dispute to prove all facts that were made by the Hon. Chairman for the reasons of being one sided.

3. That it is surprising to note from the judgment page one where it is stated that the parties appeared in person which is a mere lie since in fact we were represented by advocates on my side I had Hon. Chamani Advocate and on the side of the of the appellant was represented by Hon. Lameck John in fact that is bad in law and against the interest of justice for the parties in dispute.
4. That even my evidence adduced were not recorded properly as allowed by law and since the vendor was not joined and failure to visit the area in dispute all that proves that the trial chairman was one side.

The appellant prays the court to allow the appeal by quashing one sided judgment of the tribunal to enable him to get his legal right. During hearing of the appeal the appellant appeared in court in person and the respondent was represented by Mr. Lameck John Erasto, learned advocate. The appellant told the court that, the trial chairman erred in law to determine the matter in favour of the respondent who failed to call in court the person sold the land to him as a witness. He said that, although he prayed the tribunal to visit the land in dispute but the matter was determined without visiting the land in dispute.

The appellant submitted that, the tribunal erred to order him to remove his boundary stones while the same are in his land and said there is no path between their lands. He alleged that, the tribunal Chairman refused to admit in the case his exhibit which was a letter from the NMB Bank and refused to hear the evidence of his witnesses namely Muswadiko Abdallah and Jaffari Athuman. He also said the sale agreement of the land between the respondent and his vendor which was admitted in the case as an exhibit had a forged signature of the vendor.

In his reply the learned counsel for the respondent told the court that, although the appellant is saying the person sold the land to the respondent was not joined in the case but the law and specifically Order 1 Rule 9 of the Civil Procedure Code, Cap 33 R.E 2002 is very clear that, none joinder of a party to the suit is not fatal. He said that, if you look into paragraph 6 (a) of the Amended Application filed in the tribunal you will find there was no need of joining or calling the vendor of the land to the case because the cause of action or reason for the respondent to go to the tribunal was because of the act of the appellant to block the path of going to the respondent's business premises.

As for the argument relating to failure to visit the area of dispute the learned counsel for the respondent stated that, there

is nowhere in the proceedings of the tribunal stated the appellant prayed the tribunal to visit the land in dispute and refused. He said the proceedings of the tribunal shows at page 23 that, when the appellant was adducing his testimony he was being represented by Mr. Alli Chaman, learned advocate and there is nowhere the learned counsel or the appellant himself prayed the tribunal to visit the land in dispute and the tribunal refused.

He argued that, there is always a presumption that, what is in the record of a court is what transpired in court and to bolster his argument he referred the court to the case of **Halfani Sudi V. Abieza Chichili** 1998 TLR 527 where it was held that, there is always presumption that a court record accurately represents what happened in court. He argued in relation to the issue of visiting the land in dispute that, generally courts are restricted to visit the locus in quo to avoid the court to turn into a witness. He cited in his submission the case of **Nizal M. H. Ladack V. Gulamal Fazal Janemohamed** [1980] TLR 29 where it was stated it is only on a special circumstances the court should visit the locus in quo.

As for the allegation that the tribunal Chairman refused to admit the appellant's exhibits the learned counsel for the respondent stated that, this allegation is untrue. He said that, if

you look into the written statement of defence filed in the tribunal by the learned counsel for the appellant you will find there is no any documentary evidence annexed to the defence of the appellant. He added that, even the proceedings of the tribunal shows that, there is nowhere the appellant prayed in his testimony to produce any documentary evidence and denied a chance of tendering the same and said that is an afterthought.

The learned counsel for the respondent stated that, the issue of the appellant being denied chance of calling his witnesses has no any grain of truth. He said the witnesses the appellant is saying he was denied chance of calling them one of them whose name is Muswadiku Abdallah testified before the tribunal as RW-2 and after finishing to adduce his evidence the counsel for the appellant prayed to close the appellant's case. The respondent's learned counsel stated that, as the appellant had other witnesses but failed to summon them the court should draw an adverse inference that, if he summoned them they would have gave evidence which is against what the appellant had testified before the court. He bolstered his argument by using the case of **Hemed Said V. Mohamed Mbilu** [1984] TLR 113.

The learned counsel for the respondent argued that, the argument by the appellant that the sale agreement tendered

before the tribunal by the respondent and admitted in the case as an exhibit had a forged signature has no basis because when the same was tendered in court the appellant was present in court and said he had no objection for the same to be admitted in the case as an exhibit. In his rejoinder the appellant reiterated what he stated in his submission in chief.

As it appears from the arguments and submissions made to this court by the appellant in support of the appeal he didn't argue properly all the grounds of appeal he filed in this court as he even submitted on grounds which are out of the grounds contained in his petition of appeal. However, as is a layman the court will try to use what he submitted before the court to determine the appeal he filed in this court. I will start with the first ground of appeal where the appellant is faulting the decision of the trial tribunal on the ground that the person sold the land to the respondent was not called to testify before the tribunal and he was not joined in the matter as a party as required by the Land Act No. 2 of 2002.

As the appellant did not say anything in relation to the Land Act No. 2 of 2002 he cited in his first ground of appeal the court has failed to comprehend which Land Act he was referring to. However, as the matter was filed and determined by the tribunal

the court has taken the view that, he was referring to the Land Disputes Courts Act, Act No. 2 of 2002 which is now Cap 216 of the R.E 2002. My reading of the said statute did not lead me to any provision of the law stating a person sold a land in dispute is supposed to be joined in a suit even if the parties are not claiming any interest or relief from him. In addition to that the court has found as rightly argued by the learned counsel for the respondent a mere none joinder of the seller of the land to the respondent in the matter where there is no any interest or relief the parties are claiming from him cannot make the decision of the tribunal to be wrong.

The above finding of this court is supported by what is provided under Order 1 Rule 9 of the Civil Procedure Code cited by the counsel for the respondent which states clearly that, no suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it. Therefore failure to join the seller of the land to the respondent in the matter cannot be a ground to establish the tribunal erred in its decision.

Coming to the issue of failure to call the seller of the land in dispute to the respondent to testify before the tribunal the court

has found that, although it is true that the seller of the land to the respondent was not called to testify before the tribunal but that cannot be a sufficient reason to establish the respondent did not manage to establish his claims against the respondent. The court has found the proceedings of the tribunal shows clearly that there were other witnesses who were called by the respondent and testified before the tribunal to support his claims against the appellant and the appellant called his witness to rebut the evidence of the respondent.

Under that circumstances the duty of the tribunal was to evaluate the evidence of those witnesses to see if it had managed to prove the claims of the respondent to the standard required by the law which is on balance of probability or preponderance of probability. Although the chairman of the tribunal did not indicate clearly in his judgment how he performed the duty of evaluating and analyzing the evidence adduced before the tribunal by both side but he stated in his judgment that, after going through the submissions and evidence of the parties he found the appellant encroached the land in dispute after the respondent had stayed peacefully on the land for thirty years and blocked the entrance of going to the business premises of the respondent by pouring heap of huge stones on the entrance.

Therefore despite the fact that the seller of the land to the respondent was not called to testify before the tribunal but there were other witnesses who on the side of the respondent were Flugence Mzaula (AW-2) and Peter Mashuti, (AW-3) and testified before the tribunal that, the appellant blocked the entrance of going to the respondent business place by pouring heap of the stones on the entrance. The court has considered the appellant's evidence and that of his witness Muswadiku Abdallah (RW-2) who stated the appellant did not pour the stones on the respondent's land but poured on his land and the evidence that the appellant has not blocked the entrance of going to the respondent's business premises as the premises uses the entrance from main road of going to Bunyagongo and Birabo village and found that, that evidence was not believed by the tribunal and this court has not seen any convincing reason which can make it to differ with the finding of the tribunal.

The court has arrived to the above finding after seeing it is not in dispute that the respondent has stayed in the land in dispute for thirty years and as testified by AW-2 and AW-3 that entrance was being used by the respondent for all that period of time to enter into his business premises without any problem. Therefore the act of the appellant to block the said entrance

cannot be justified by any reason to make the court to find the claims of the respondent were not genuine. Even if it would have been accepted that the area were the appellant poured the stones is on his land but as there is no dispute that he has blocked the entrance of going to the respondent's business premises it is not safe for the said blockage to be allowed to remain as it might be dangerous to the users of the premise in case of emergency of disasters like fire and others.

Another argument made by the appellant that the signature of the seller of the land to the respondent is forged has been found by this court has no any merit in the case. The court has arrived to the above finding after seeing the dispute between the parties is not on sale agreement entered between the respondent and the person sold the land to him. The dispute is on the entrance to the land which was blocked by the appellant after the respondent used the same peacefully for thirty years.

In addition to that the court has found as rightly argued by the learned counsel for the respondent when the sale agreement between the respondent and the seller of his land was tendered before the tribunal the appellant did not dispute its admissibility basin on the said ground. To the contrary the court has found the proceedings of the tribunal shows that, when the sale agreement

was prayed to be admitted as evidence in the matter the appellant's learned counsel said they had no objection. Therefore his argument before this court that the signature of the vendor in the sale agreement of the respondent is forged is an afterthought which cannot be accepted by the court.

Coming to the second ground of appeal where the appellant is faulting the judgment of the tribunal on the ground of none visit of the land in dispute the court has found that, although it is true that at the beginning of the case the parties prayed the tribunal to visit the land in dispute but the tribunal did not visit the land in dispute. However, as rightly argued by the learned counsel for the respondent a mere none visit of the land in dispute cannot be sufficient ground to fault the decision of the tribunal as that would have not be the only evidence which would have been used by the tribunal to determine the matter. The court has found there was other evidence from the witnesses mentioned hereinabove which was used by the tribunal to determine the matter.

Coming to another argument made to this court by the appellant that the tribunal chairman refused to admit his documentary evidence in the case as evidence and denied him a chance of calling his witnesses the court has found as rightly

argued by the learned counsel for the respondent this argument is not supported by the proceedings of the tribunal. The court has also found as correctly argued by the learned counsel for the respondent it is clearly stated at paragraph 8 of the written statement of defence of the appellant filed in this court by his learned counsel, Mr. Alli Chamani that there is no any document annexed to his defence and there is nowhere indicated in the record of the tribunal the appellant prayed to tender any document to the tribunal and his prayer refused.

As for the argument that he was denied a chance of calling his witnesses who one of them was Muswadiko Abdallah the court has found this complaint of the appellant is baseless because it is not only that the proceedings of the tribunal shows the said Muswadiku Abdallah testified before the tribunal as RW-2 but also there is nowhere indicated either the appellant or his learned counsel prayed for chance of calling any other witness and denied a chance of doing so. As argued by the learned counsel for the respondent the position of the law as stated in the case of **Halfani Sudi** (supra) is that, always what is recorded in the record of the trial court is presumed to be what transpired before the tribunal and not what the appellant is arguing before this court.

As for what is stated in the third ground of appeal that the tribunal chairman stated in the judgment of the tribunal that the parties appeared before the tribunal in person while were represented by counsel the court has found even if that assertion it is true but it has not been stated how that statement affected the finding of the tribunal so that it can be used to reverse the decision of the tribunal. As for the fourth ground of appeal the court has found all what is raised therein has already been determined in the preceding grounds of appeal hence there is no need of repeating to deal with them.

Before coming to an end the court has tried to consider the reliefs sought by the respondent which all were awarded by the tribunal and find that, the claim of general damages which was sought and awarded as prayed need to be reviewed by this court. The court has found that, although it is a settled principle of law (see **Peter Joseph Kilibika and CRDB Bank Public Company LTD V. Patric Aloyce Mlingi,** Civil Appeal no. 37 of 2009, CAT at Tabora, (unreported)) that the appellate court is not justified in substituting a figure of general damages awarded by the lower court or tribunal by its own figure simply because it would have awarded a different figure if it had tried the case but there is no any reason given by the tribunal chairman as to what led him to

find proper to award the claimed general damages in a whole sum of Tshs. 35,000,000/= as claimed by the respondent.

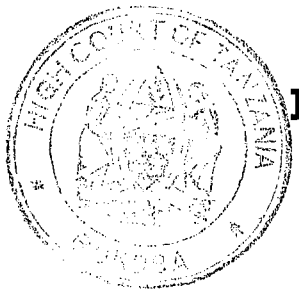
The court is of the view that, despite the fact that the tribunal chairman stated in his judgment that he was satisfied the appellant blocked the entrance to the respondent's business premises and caused him to suffer loss of business and caused cracks to the premises but there is no evidence led to prove the extent of loss and damages suffered by the respondent because of the said act of the appellant. Also the chairman of the tribunal did not state any reason which caused him to award the sought general damages. The requirements to state in the record of the case how the court arrived to the amount awarded and give reason for the general damages awarded was put clear by the Court of Appeal in the case of **Anthony Ngoo & Another V. Kitindi Kimaro**, Civil Appeal No. 25 of 2014, CAT (unreported) where it was held at page 15 that:-

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign reason which was not done in this case."*

Since the chairman did not stated the reason led him to arrive to the amount of general damages awarded to the respondent the court has found this court is entitled to intervene and see the respondent is awarded the amount which is not too high unjustifiably. The court has found as there is no evidence adduced to establish the extent and value of the cracks alleged to have been caused by the appellant to the respondent's business premises and there is no evidence adduced to establish the loss suffered by the respondent for not using the entrance the court has found the sum of Tshs. 10,000,000/= will be sufficient and justifiable to compensate the respondent for whatever loss he might have suffered because of the appellant's action.

In the strength of all what has been stated hereinabove the court has found the appeal filed in this court by the appellant against the decision of the tribunal has no merit and it deserve to be dismissed. Consequently, the appeal is hereby dismissed in its entirety and all what was awarded in the decision of the tribunal save for the award of general damages which is reduced to the sum of Tshs. 10,000,000/= are accordingly confirmed and the costs to follow the event. It is so ordered.

Dated at Bukoba this 19th day of October, 2018



I. ARUFANI, J

19/10/2018

Date: 19/10/2018

Coram: I. Arufani, J

For the Appellant: Present in person

For the Respondent: Absent.

Court:

Judgment delivered today 19th day of October, 2018 in the presence of the appellant in person and in the absence of the respondent but his son George Mathias Mushuti is present to receive the judgment. Right of Appeal is fully explained to the parties.

I. ARUFANI, J

19/10/2018