

IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 129 OF 2018

(Originated from the decision of Mabibo Ward Tribunal in Land Application No. 40 of 2014 and the decision of the District Land and Housing Tribunal of Kinondoni in Land Appeal No. 100 of 2014)

ABBAS ABDALLAH ISHABAILU..... APPELLANT

VERSUS

FARIDA FUNGO..... RESPONDENT

JUDGMENT

Date of last Order: 20/8/2021

Date of Judgment:30/9/2021

T.N. MWENEGOHA, J:

This is the second appeal whereby the respondent filed his application at the Mabibo Ward Tribunal claiming that the appellant herein blocked a footpath, the 'uchochoro' by placing water tanks and a plant hedge popularly known as 'michongoma'. The Ward Tribunal entered decision against his favor. Dissatisfied the appellant herein filed the appeal at the District Land and Housing Tribunal of Kinondoni District at Mwananyamala (The Tribunal) in Land Application No. 100 of 2014 which was again determined against him, aggrieved the appellant herein filed the present appeal to this Court on the following grounds: -

1. That the Tribunal erred in law and in fact for not considering the first, second, fifth and sixth grounds of appeal as he only dealt with the third and fourth grounds of appeal.

2. That Tribunal erred in law and fact for holding that he has not seen where the appellant witnesses were refused to be heard while in fact, they were not accorded an opportunity to testify.
3. That Tribunal erred in law and fact for hearing and determining the appeal without sitting with assessors.
4. That Tribunal erred in law and fact in not holding that there was misjoinder of Kinondoni Municipal Council which issued Residential License No. 6677(w.e.f 6/2/2006) and No. 20354 (w.e.f 9/12/2014) to the parties without indicating the alleged foot-path (Uchochoro) in the sketch map of the Land in dispute.

The appellant prayed for the appeal be allowed, the decision of the Tribunal be set aside and the costs of the suit.

The appeal was disposed of by way of written submissions which were filed as scheduled. The appellant's submissions was indicated to be drawn by himself while the respondent enjoyed the service of learned counsel Zidadi Mikidadi.

The appellant submitted that the land in dispute has an area of 331 sqm as per Leseni ya Makazi Na. KND006677 registered by Halmashauri ya Manispaa ya Kinondoni on 24/2/2006 in accordance with provisions of section 23 and 179 of the Land act, No. 4 of 1999.

On the first ground of appeal, he submitted that on 01/11/2016 the Chairman visited the locus the locus in quo and noted the existing strongly constructed brick wall separating two plots of the appellant and the respondent. He submitted that the wall was constructed by the respondent

soon after the decision of the Mabibo Ward Tribunal, and that the judgment did not give weight on this. He added that to the appellant the constructed wall by the respondent meant that she had no genuine reason to claim for right of way in the appellant's premises. He also wanted this court to refer to the annexure AAAI-2 filed at the appellant's memorandum of appeal file at the Tribunal.

On the second ground of appeal, he submitted that the appellant had six witnesses to give evidence before the Ward Tribunal, to his surprise although they appeared on the date of hearing the Ward Tribunal failed or unreasonably refused to hear the evidence of the already summoned witnesses for the appellant. He also attached the said summons in the memorandum of appeal at the Tribunal.

On the third ground of appeal, he submitted that since the day of hearing that was 16/8/2016 to 9/2/2017 when the decision was made the appellant had never seen the assessors in the Tribunal chamber during all sessions, only he found out at the judgment that their opinion was taken. To him, this was a denial of the right to know the missing merits (sic) expected by the wise assessors of the Tribunal as they were not inserted in the judgment. He then cited and quoted section 24 of the Land Disputes Courts Act, act No. 2 of 2002 requiring the opinion of the assessors.

On the fourth ground of appeal he submitted that the respondent rushed to the Ward Tribunal without first complaining to the local authority which registered the land and issued a Leseni ya Makazi to the appellant on 24/2/2006. To him since it was the Government which issued the residential

license, the complaint should have been lodged in the Land Court of the High Court joining the Attorney General in accordance with the provisions of section 6 of the Government Proceedings Act, No. 5 R.E 2002, the Attorney General is the guardian of public interests and not the respondents.

He submitted further that the complaint of the right of way to Mabibo Ward Tribunal was made by Farida Fungo on behalf of pedestrians whose names have not been disclosed, in other words the respondent filed representative suit. To him the complaint was improperly before the Ward Tribunal for want of representative capacity. He therefore prays for the appeal be granted and quash the decision of the Ward Tribunal and the Tribunal.

In reply Mr. Mikidadi submitted that all grounds of appeal which were raised by the appellant were considered by the Tribunal. The area in dispute measured 6 feet to 6.8 in which the appellant put water tanks and 'michongoma' hence blocking path and it is not 331 square meter as alleged by the appellant. He added that it was ruled out by the Tribunal that the said 6 feet to 6.8 is not part of his 331 square meters measured as per Leseni ya Makazi. He submitted that all grounds raised were determined by the Tribunal.

On the second ground of appeal, he submitted that there is no proof to show that the summons annexed were received by the witnesses as alleged by the appellant and the Tribunal in its finding clearly stated that there is nowhere the appellants witness refused to be heard.

On the third ground of appeal, he submitted the hearing was conducted by way of written submission, to him the appellant is misleading this Court. He contended that during the judgment the chairman considered the opinion of the assessors as per section 24 of the Land Disputes Court Act (supra).

On the fourth ground of appeal, he submitted that section 15 of the Land Disputes Courts Act (supra) empowers the Ward Tribunal to entertain the matters limited up to three million, therefore the Mabibo Ward Tribunal had jurisdiction to entertain the suit. He submitted further that the suit filed at the Ward Tribunal was not representative suit and the allegation that the respondent should first complain to the authority which issued a "leseni ya Makazi" is baseless because there is no any law which require first to complain to the said authority, since the matter was valued 3,000,000/=. He therefore prayed for this appeal be dismissed.

In rejoinder the appellant reiterated his submission in chief and added that the respondent as an individual has no right to claim for footpath for public use on the appellant's land notwithstanding the existing respondent's brick wall separating the two lands for appellant and the respondent.

Having gone through submissions of both parties the issue for determination is whether the appeal has merits and in determining so I will tackle the grounds of appeal as they were raised seriatim.

On the first ground of appeal the appellant's main submission was about when the Tribunal visited the area in dispute. He alleged that they found the respondent to have constructed brick wall separating the two plots

soon after the decision of the Ward Tribunal and that the judgment delivered did not give weight in this. On the other side the respondent submitted that all grounds of appeal raised by the appellant were determined.

It is noted by this Court that the submission of the first ground is different from the first ground of appeal referred in the Memorandum of Appeal. Instead of advancing arguments of his referred ground that the District Tribunal did not consider the first, second and fifth grounds of appeal, the appellant's only claim was that act of the respondent to construct a wall is implication that she has no claim of right of way on the appellant's premises. The appellant did not submit anything on the first ground.

I have taken time to go through the record of this appeal and it was my observation that there is no dispute on the part of the land that has been fenced by the respondent herein. The Tribunal, visited the locus in quo and ruled that the dispute is on the part beyond the wall, the part that is alleged that the appellant blocked the 'uchochoro' by placing water tanks and 'michongoma'. My perusal on the record further revealed that the District Tribunal addressed issues raised in the memorandum of appeal. Having said that I find that this ground to have no merits.

On the second ground of appeal the appellant alleged that the District Tribunal erred in failing to hold that the appellant's witnesses were not accorded right to testify before the Ward Tribunal. I join hand with Mr. Mikidadi and the findings of the Tribunal that there is nowhere on the records showing that the witnesses were refused to testify.

On the third ground of appeal the appellant alleged that he did not see the assessors during the trial and that it was only in the judgment where it was noted that the Chairman agreed with their opinion.

I have gone through the record of this appeal; it is true that the assessors were not indicated when the appeal was set for mention and even during hearing. But notably, the hearing of the appeal was conducted by way of written submissions and the assessor's opinion are annexed in the Tribunal's file. The requirement of assessor opinion is necessary to complete the decision of the Tribunal. That necessity has been clearly indicated under section 24 of the Land Disputes Courts Act that

"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."

It is noted that in the decision which is subject to this appeal, the Chairman indicated in the last page that he had gone through the said opinions of the assessors and agreed with them as required by the law and the said opinions are attached in the record file as noted above. This Court is satisfied that the requirement has been complied with. Thus, this ground of appeal also has no merits.

On the last ground it was the appellant's complaint that the fact that the land is registered to the appellant by the government of Tanzania, hence the Attorney General had to be joined. He also submitted that the appellant

filed a representative suit on behalf of the pedestrians and no pedestrian have come to testify before the Ward Tribunal.

The issue of joining Attorney General as alleged by the appellant, can easily be termed as an afterthought for the fact that it has not been raised during the hearing at the Ward Tribunal nor the District Tribunal.

Moreover, the issue of representative suit, is not stated anywhere in the record of this appeal that the respondent filed the suit on behalf of the other. The only allegation from the respondent is that that easement/ (uchochoro) is for pedestrian, it does not mean that the responded filed the application on behalf of all pedestrians. The suit for easement can be filed by any person who is interested in the said path. The respondent being the one of the people who is affected by the blockage of the easement had the right to file the complaint.

This Court notes that the records reveal when the respondent filed the application at the Ward Tribunal her main complaint was found in the statement of claim that the appellant blocked the easement (uchochoro) used by pedestrian. This fact was noted by the District Tribunal in pointing out that the issue in dispute is not about the whole alleged 331 square meter by appellant but rather the easement. Hence correctly the argument that the area is worth more than three million cannot carry weight as the respondent herein was not in dispute of the whole area of the appellant. Otherwise, the appellant should have filed the valuation report to prove that the area in dispute is worth more than three million. In absence of such valuation report, this argument must also fall.

Having said that I join hand with both Tribunals findings that the said uchochoro does not belong to the appellant.

In conclusion, having made the above findings, I find the entire appeal to be lacking merits and the same is hereby dismissed with costs.

Dated at Dar-es-Salaam this 30th day of September, 2021.




T. N. MWENEGOHA
JUDGE