**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**LAND APPEAL NO 49 OF 2020**

**MAKENGE CHACHA .....APPELLANT**

**VERSUS**

**SHAIRA OMARI .....RESPONDENT**

*(Originating from Application No. 02/2019 at the District Land and Housing Tribunal for Mara at Musoma)*

**JUDGMENT**

*3rd & 12th November, 2020*

***Kahyoza,* J**

**Shaira Omary** and **Makenge Chacha** own adjacent parcels of land. **Shaira Omary** instituted claims in the district land and housing tribunal (the tribunal) alleging that on 2018 **Makenge Chacha** invaded her land, by cutting trees and sisal plantation forming the boundary, and destroying cotton plants. **Makenge Chacha** refuted the claims. The tribunal adjudicated **Makenge Chacha** a trespasser. Aggrieved, **Makenge Chacha** (the appellant) appealed to this Court.

The appellant raised four grounds of appeal as follows-

1. The trial tribunal erred in law and in facts by making decision in favour of the respondent whose evidence were contradictory and unreliable.
2. That, the trial tribunal erred in law and in facts by deciding in favour of the respondent who failed to prove her case in the

balance of probabilities as there is no evidence whatsoever from the appellant and his witnesses which shows that common boundaries marked by sisals were destroyed by the appellant.

3. That, the trial tribunal erred in law by making decision in favour of the respondent by considering the evidence[,which] transpired from the visit of *locus in quo* while the procedures governing visit at the *locus in quo* were improperly observed by the trial tribunal and the proceedings of the trial tribunal are silent on what is so transpired at the *locus in quo.*
4. That, the trial tribunal erred in law and in facts by granting victory in favour of the respondent whose claim of Tshs. 1,254,016/= was not specifically proved.

The grounds of appeal raised three issues to be considered by this Court as follows-

a. Did the respondent prove her claim?
b. Was the tribunal justified to make a reference to the evidence obtained from visiting the *locus in quo?*
c. Was the tribunal justified to order compensation?

**Did the respondent prove her claim?**

It is our cherished principle of law that generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. See the case of ***Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)*** Civil Appeal No. 118 of 2014 CAT (Unreported) and ***Sections 110 and 111 of the law of Evidence Act, [Cap. R.E. 2002]***. **Shaira Omary,** (the respondent) had a duty to prove on balance of

probability that the appellant invaded her land and destroyed cotton plants. This is a first appellate Court, thus, dutiful to re-evaluate the evidence if necessary come to its own conclusion. See **Siza Ptrice V. R Cr. Appeal No 19/2010**

> *"We understand that it is settled law that a first appeal is in the form of a rehearing.* ***The first appellate court has a duty to re-evaluate the enter evidence*** *in an objective manner and arrive at its own findings of fact, if necessary."*

There is no doubt that the parties' dispute hinges on trespass. There is no dispute that they owned adjacent pieces of land. **Shaira Omary**'s evidence was that the respondent uprooted sisals and "utamaduni" trees demarcating a common boundary, valued at Tshs. **1,254,161.** She testified at length how she obtained her piece of land. There was no dispute over ownership. She did not testify in support of her claim. **Shaira Omary** replied to the question asked by one of the tribunal assessors, that the appellant invaded her land **measuring 7 x 100** walking paces, destroying her cotton plants.

The respondent's witness, Pw2 **Marco Makongoro**, deposed that he owns a farm close to the suitland and that the appellant invaded the respondent's land disturbed the common boundary. Pw3 **Zakaria Amos Balele**, the agricultural extension officer valued the destroyed plants. He contended that the destroyed sisal plants valued at Tshs. **1,000,000/=** and cotton plants valued at Tshs. **254,016.** The last witness was Pw4 Godfrey whose evidence was not relevant. He explained how the respondent obtained her piece of land.

The appellant on his part did not deny to cut down the sisal plants. He stated that he cut his own sisal plants. He deposed that they (appellant and respondent) owned adjacent pieces of land demarcated by two different fences, each piece of land has its own fence and with a piece of land between the two fences. The appellant described the land between the two fences as a road. He deposed that he cut his own fence. The appellants evidence was supported by **DW2 Swere Saimon** and **Dw3 Taabu Salum**.

I must point out at the outset that the respondent did not prove her case. I find the appellant's case more probable than the respondent's case. Trees or sisal plants demarcating the boundary between two pieces of land cannot be a property of one person in the exclusion of the other. Such trees or sisal plants demarcating two adjacent pieces of land must be co-owned and they should be managed by both of them. However, if each party has his own fence leaving a piece of land between them, then, each person owns his own fence in the exclusion of the other. I therefore, find the appellant's evidence that there were two different fences, separated by a land between them more credible than the contention by the appellant that she owned the trees that marked the boundary in exclusion of the appellant.

The respondent's evidence was unreliable. The appellant did account for reasons why the respondent fabricated the claims against him. The appellant had quarrels with the respondent's husband. This piece of evidence was not disputed. The respondent did not cross-examine the

appellant regarding that piece of evidence. It is deemed that the respondent accepted that the appellant and her husband had spats.

The respondent spent time to prove how she obtained her piece of land. There was no dispute of ownership. The dispute was whether the appellant trespassed to her land and destroyed the boundary marked by sisal plants and "utamaduni" trees, and cotton plants.

The respondent's evidence tendered to establish that the appellant invaded her land and destroyed plants was wanting. On one hand, exhibit PExh2, the report showing the value of the destroyed plants, prepared by Pw3 **Zakaria Amos Balele**, showed that the sisal plants destroyed were worth **TZS 1,000,000/=** and cotton plants were worthy **TZS 254,016/=.** On the other hand, the respondent told the tribunal that the sisal plants and "utamaduni" trees destroyed valued **TZS 1,254,016/=.** She did not mention the value of the cotton plants. Thus, oral evidence of the respondent contradicted her exhibit. This contradiction went into the root of the case. it weakened the credibility of the respondent's case. I quote;

> *"The respondent uprooted common boundaries. The common boundaries were sisals and utamaduni trees, all valued Tshs. 1,254,016/=. I brought the agricultural officer to do the valuation..."*

The above quoted piece of evidence establishes; **one**, that the boundary destroyed was a common boundary, hence the respondent had no reason to claim its value solely. If, it was a common boundary, then its

value ought to be shared; **Two**, the appellant did not destroy cotton. He only destroyed *sisals and utamaduni trees*, which marked the boundary.

The respondent's advocates **Mr. Philipo** supported the **tribunal's** judgment. He submitted that the appellant admitted to have destroyed the boundary. He added that there were no separated boundaries between the parcels of land.

The appellant contended that there were two separate boundaries and a piece of land between them, while, the respondent deposed that their lands were separated by a common boundary. It is unfortunate that this question was not answered by the tribunal. There is evidence that the tribunal visited the *locus in quo*. It did not make any record of what transpired. Had the tribunal made any record this question would have been resolved easily.

The respondent and Pw2 Marco deposed that the applicant destroyed a common boundary. The appellant and **Dw2 Sware Saimon** told the tribunal that applicant cut down sisal marking his parcel of land and not a common boundary. I find the appellant's evidence more credible than that of the respondent.

I am alive of the trite law that the credibility of a witness is a domain of the trial court. That principle applies unchallenged in as far as the demenour is concerned. The first or second appellate court may determine credibility of the witnesses when assessing the coherence of the testimony of that witness and when the testimony of that witness is compared the evidence of other witnesses. See **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (CAT unreported). In the circumstance of this

case, I find the appellant credible on the account that the respondent exaggerated her claims. She alleged in her application and vide exhibit PExh2 that the appellant destroyed her cotton plants, but she was unable to prove that. For that reason, her evidence was required to be treated with caution. Her evidence was not whole true. I find in favour of the appellant that their pieces of land were marked by two separate boundaries with a piece of land between them. Consequently, the appellant destroyed his own boundary.

**Was the tribunal justified to order compensation?**

I will not belabour on the issue whether the tribunal was justified to grant the respondent compensation as prayed. As shown above there is no evidence to prove on balance of probability that the appellants destroyed the respondent's cotton plants. The trees and sisal plants demarcating the parties' pieces of land did not belong to the respondent. They belonged either to both of them, as common boundary or to the appellant being a boundary of his land which is separated from the respondent's land by a piece of land between the two fences. The respondent has not right to be compensated.

In addition to the above, the respondent's claim was specific claims, being specific claims, they were required to be proved specifically. The law is clear that specific or special damages must be specifically pleaded and proved. (See **Zuberi Augustino v Anicet Mugabe** [1992] TLR 137). There is also another principle that a party is awarded damages which he pleaded and proved by evidence. See **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] TLR. 165.

Eventually, I find that the tribunal erred to grant compensation to the respondent. I set it aside.

**Was the tribunal justified to make a reference to the evidence obtained from visiting the *locus in quo?***

The appellant alleged that the DLHT relied on the evidence obtained when it visited the *locus in quo* to decide in favour of the respondent. He added that such evidence was obtained by contravening the procedures of visiting the *locus in quo*. The Respondent's advocate refrained from submitting on this issue.

It is true that the tribunal relied on the evidence it gathered at the *locus in quo*. It stated –

> *"The humble assessors are of the unanimous opinion that this case be allowed. I concur with them.* ***Having considered the evidence adduced in court and having paid me visit of the locus in quo*** *it is my firm view that the applicant has proved his case against the respondent. That it is the respondent Makenge Chacha, who has jumped over the common boundaries uprooted the sisals, and jumped over into the land of the applicant."*

The assessors anchored their opinion on the evidence collected when the tribunal visited the *locus in quo.*

It is unfortunate that the tribunal's record does not contain any piece of evidence collected when it visited the *locus in quo*. The tribunal's record indicates that it fixed to visit the locus in quo on the 27/2/2020. However, it is silent on what transpired on that date. It is not even clear if the tribunal visited the *locus in quo*. This Court and the Court of Appeal have in

cases without number explained the procedures to be followed. It is unlucky, that the tribunal is not paying attention to the direction of superior courts. The Court of Appeal in **Nizar M. H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29l stated-

> *When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and* ***a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated****. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future."*

It is clear as day follows night that the tribunal did not follow the procedure laid down nor did it take any record that assisted it to reach a decision. The tribunal's visit was useless, meaningless and wastage of resources.

There was no evidence to be relied upon by a tribunal well-meaning its name. I allow the third ground of appeal, that the tribunal violated the procedure of visiting the *locus in quo* and that there was nothing to rely upon by the tribunal in deciding the case at hand from the said visit.

Given the above finds I order that-

1. The appellant should replace the boundary whether common boundary or his own boundary. This will prevent future disputes.
2. Compensation order is set aside
3. Having found that the tribunal's act of visiting the *locus in quo* was a wastage of resource, parties are entitled to claim costs incurred to move the tribunal to the *locus in quo*. Many times, we directed what a tribunal should do when it visits the *locus in quo*. The tribunal do not seem to heed to the clear direction.
4. Since, I have partly allowed the appeal, by ordering the appellant to replace the uprooted sisal plants, each party shall bear its own costs of this appeal and below.

**J. R. Kahyoza**

**JUDGE**

**12/11/2020**

**Court:** Judgment delivery in the absence of parties at 02:00 pm. B/C Catherine present.

THE HIGH COURT OF TANZANIA
MUSOMA

**J. R. Kahyoza**

**JUDGE**

**12/11/2020**