

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)**

**CIVIL APPEAL NO. 6 OF 2017**

**AVIT THADEUS MASSAWE .....**  
**APPELLANT**

**VERSUS**

**ISIDORY ASSENGA .....**  
**RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at  
Moshi)**

**(Sumari, J)**

**Dated 16<sup>th</sup> day of June, 2016**

**in**

**(Land Case No. 8 of 2014)**

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**ORDER OF THE COURT**

*7<sup>th</sup> & 14<sup>th</sup> December, 2018*

**LILA, J.A.:**

This appeal emanates from the Judgment of the High Court at Moshi District Registry (Sumari, J,) in Land Case No. 8 of 2014 dated 16<sup>th</sup> June 2016. Central to the dispute between the parties is on which Plot between No. 16 and 17 Kindi Msasani within Moshi District is the house , the subject matter of the suit located. The appellant claimed, before the trial High Court, that the suit

property is on Plot No. 16 and he is the registered owner of it. He alleged that the respondent had trespassed on it. On the rival side, the respondent contended that the suit property is on Plot No.17 and he had not trespassed on it. The High Court was satisfied that the appellant had failed to prove his claims hence it dismissed the suit. Dissatisfied, the Appellant has preferred the present appeal.

The appeal is grounded on the following points of complaint:

- 1. That, the learned High Court Judge erred in law and fact by holding that the house in dispute is located on Plot No. 17 contrary to evidence adduced at the trial.*
- 2. That, the learned trial Judge erred in disregarding the testimony of PW2 and the weight of exhibit P2 which clearly proved that Plot No. 16 has a house on it.*
- 3. That, the learned trial Judge of the High Court erred in fact and in law by finding that the Appellant who was then Plaintiff is not the owner of Plot No. 16 a fact not disputed by either party and contrary to evidence adduced at the trial.*
- 4. That, the learned trial Judge of the High Court erred in dismissing the suit.*

The background giving rise to this appeal may briefly be stated as follows. Mr. Avit Thadeus Massawe, the appellant, filed a

suit in the High Court of Tanzania at Moshi against Isidory Asenga, the respondent, praying for eviction of the respondent from the suit premises, perpetual injunction restraining the respondent and their agents from dealing with the suit premises, costs of the suit, special damages at the rate of TZS. 400,000.00/= from 1<sup>st</sup> June 2014 to the date of full payment and general damages. The basis of the claims was that the respondent had trespassed into his house situated on Plot No. 16 with Certificate of Title No. 28084, L. O. 192645 at Kindi Msasani within Moshi District (the suit property).

In his evidence Mr Avit Thadeus Massawe (PW1) told the trial court that he bought the house on Plot No. 16 on 25/4/2013 from Richard Assery Kweka (DW3) at TZS. 96 Million. By then, title of the house No.28084 L.O. 192645 (Exh. P1) was with the bank after Mr. Kweka had failed to settle the loan he had borrowed from the bank. That, when he went with a tenant to the house so as to let it at TZS. 400,000.00/= per month, he found the respondent therein. That the respondent refused to move out of the house hence he failed to let it. Charles Gabriel Laseko (PW2), a land surveyor working with Moshi District Land Office said he

visited the area where he saw Plots No. 16 and 17. He said according to the survey plan (Exh. PE2), the house is on Plot No. 16 and on Plot No. 17 there was no house. He further said he was not the one who did the survey but Exh, PE2 was from his office. He said that Exh. PE1 does contain a copy of a smaller survey plan (deed plan). He said there was no house in Exh. PE1. In respect of the demarcations of the two plots, he said the beacons for Plot No. 16 are FAY 804, FAY 805, FAY 806 and FAY 809 while for Plot No.17 are FAY 806, FAY 807, FAY 808 and FAY 809. When shown Exh. PE1, he said the beacons could not be seen. He said the deed plan does not show a structure while survey plan does. He said a survey plan is done upon request and that he was not aware who requested Exh. PE2 be prepared.

In his defence, the respondent called four witnesses. He gave evidence as DW1. He said he was given the house by his son one Deo Asenga (DW2) who bought it from Richard Kweka (DW3) and started living in it on 3/9/2013. That he witnessed the sell agreement between them. That he renovated the house and when he was painting it, in June 2013, the appellant visited the house claiming it to be his. He said he was living in a house on

Plot No. 17. When shown Exh. PE2, he said it shows a structure on Plot No. 16 but he could not recognize it at the place where he was living as he was living in a house on Plot No. 17. Deogratius Isidory Assenga (DW2), said he bought an unfinished house on Plot No. 17 with Certificate of Title No. 28085 (Exh. D1) from Richard Assenga Kweka (DW3) at TZS 105 Million inclusive the TZS 48 Million he paid to KCB bank for the loan DW3 was indebted by it. That a valuation report of the house was at the bank ( ID1). That thereafter he renovated the house. In respect of Exh. PE1, he said it is in the name of the appellant and is in respect of Plot No. 16 which he is not the owner.

On his part, Richard Assery Kweka (DW3), said he owned Plots No. 16 and 17 and that he sold a house on Plot No. 17 to Deo Assenga (DW2) who is the son of the respondent. That he sold the house because the KCB bank wanted to sell it following failure to repay TZS 50 Million loan he was advanced. That DW2 first paid the loan and the outstanding amount was paid latter on. In respect of Plot No.16, he said he had not sold it but put it as a bond to the appellant upon being borrowed TZS 30 Million. One Honest Adieli, a banker working with KCB said DW3 did not repay

the loan that was secured by a house on Plot No. 17. That the Bank started the process of recovering the money and that was when the house was sold to DW2 and the Bank recovered its money.

The High Court (Sumari, J.), in its reasoned judgment found the appellant's claims not proved and it held that the suit property in which the respondent was residing is on Plot No. 17 and is the property of DW3. She was convinced that there was no receipt showing that the appellant paid TZS 96 Million to DW3 and that there was no evidence from the Bank that the appellant paid DW3's loan before obtaining the title deed. She discredited PW2 on the ground that he was not the one who surveyed the Plots, that Exh. PE1 had no small survey plan as he said it should have and the valuation report (Exh. ID1) which was done before the loan was granted to DW3 indicated the suit house is on Plot No. 17. She further stated that PW2 did the survey of the two Plots guided by the appellant and without involvement of neighbours. That he did not do it professionally. She was satisfied that the evidence by DW2, DW3 and DW4 proved that the suit house is on Plot No. 17 and it belongs to DW3. We think we should pose here

and note that according to her reasoning, we hope the judge meant that the suit property belongs to DW2, the respondent's son.

The appellant was aggrieved by that decision and has appealed to this Court.

Before us, at the hearing of the appeal, as was before the trial High Court, Mr. Elikunda George Kipoko, learned advocate, appeared for the appellant and Ms. Elizabeth Minde, learned advocate, appeared for the respondent.

Arguing in support of the appeal, Mr. Kipoko adopted the written submission he had filed in Court on 16/12/2016 and he prayed That the appeal be allowed with costs. In his written address, Mr. kipoko narrated what the witnesses for both sides told the trial court. He is emphatic that the respondent does not claim ownership of Plot No. 16 where he said the suit property is located. He said the appellant (PW1) and his witness (PW2) proved that PW1 bought the house which is on Plot No. 16 from one Kweka (DW3) and then transferred the title to himself and the title deed (Exh. PE1) shows the name of the appellant. He stated

that the mere fact that the title deed was mortgaged does not prove that it was the house that was mortgaged. He insisted that the respondent had only led evidence to prove that he was living in his son's house located on Plot No. 17 and that his son bought it from DW3. Based on the evidence, he said, the trial court ought to have held that the suit property is located on Plot No. 16 and the same belongs to the appellant as was conclusively proved by PW2.

Regarding the claim for damages, he said the appellant deserves to be so paid on account that the respondent trespassed in his house. He cited the case of **Said Kibwana & General Tyre Vs. Rose Jumbe** [1993] TLR 175 and **Joshua Shija Kisendi Vs. Paulo Katoto and Another** [1086] TLR 111 to bolster his contention. He maintained that there is no house on plot No. 17 which fact could have been discovered had the respondent made due diligence before buying the house. In respect of the renovation, he said the respondent can not benefit from his own wrong and he cited the case of **Haji Hassan Chimbo Vs. Mshibe Iddi Ramadhani** [1995] to that effect.



Ms. Minde did not file reply submission. She argued the appeal orally. Arguing in respect of ground one, Ms. Minde contended that it hinges on the issue as to where is the suit property located; on Plot No. 16 or No. 17. She said according to evidence, PW1 said he bought the house on Plot No. 16 from one Kweka (DW3) but the latter told the trial court that he sold the house on Plot No. 17 to DW2 who also confirmed so. She also said PW2 could not confirm on which Plot the suit property is located because he did not participate in preparing Exh. PE2 and that the Certificate of Title for Plot No. 16 has survey plan but does not show whether there was a house or not. She thus said the totality of the evidence clearly point to the fact that the suit property is on Plot No. 17.

In respect of ground two of appeal, Ms. Minde stated that the judge analysed the evidence of PW2 at page 111 of the record and found him unreliable. She thus said that the complaint that his evidence was not considered by the trial judge is unfounded.

With regard to ground three of appeal, Ms. Minde contended that nobody is claiming ownership of Plot No. 16 hence that complaint is also unfounded.

As for the last ground of appeal (ground 4), Ms. Minde submitted that the appellant failed to establish that, the suit property is on plot no. 16 because no one was able to show that the same is on that plot hence the suit was properly dismissed. She, at the end, urged the Court to dismiss the appeal with costs.

In his rejoinder, Mr. Kipoko said that it was not true that survey plan (Exh. PE2) was prepared after the title deed was issued. That, while the trial judge found PW2 as a competent witness to tender the survey plan (Exh. PE2) because he was the custodian of all survey plans, she ended up discrediting him in her judgment at page 111. He also faulted the trial judge for relying on the evaluation report which was received for identification purposes only (ID1), hence had no evidential value. He said it was therefore improper to rely on it to determine the location of the suit property. He said that the trial judge wrongly disbelieved PW2 who was from the Land Office and he visited the Plots. In respect

of Exh. PE1 not showing that it was mortgaged, he argued that the counsel for the respondent was proposing that it was the house which was mortgaged. He instead, said according to PW4 it was the title deed which was mortgaged. He finally urged the Court to allow the appeal.

We have given due consideration to the rival addresses by counsel for the parties. From the totality of the submissions, the fundamental issue that calls for determination by the Court remains to be whether on the evidence adduced at the trial, the presiding judge was justified to find that the suit property is located on Plot No. 17 and that the same belongs to the respondent's son (DW2).

In any event, from the totality of the appellant's pleadings and evidence of his witnesses at the trial and the counsel's submission before us, it is evident that the appellant's contention is that the suit property belongs to him and it is located on Plot No. 16. He further, contends that the respondent is a trespasser. On the rival side, the respondent's pleadings, evidence of his witnesses at the trial and the learned counsel's submission before

us, with similar vigour, is intended to move the Court to agree with the trial judge that the suit property is located on Plot No. 17 and it belongs to the respondent's son (DW2).

The above explained state of affairs is what really obtained at the trial. The High Court was faced with a conflicting evidence of the parties with regard to the proper location of the suit property.

Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the *locus in quo* so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja

Judicial Division in the case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others**, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the *locus in quo*. The factors include:

1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence ( see Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56.*
2. *The essence of a visit to locus in quo in land matters includes **location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land** (see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*
3. *In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see Ezemonye Okwara Vs. dominic Okwara (1997) 11 NWLR (Pt. 527) p. 1601).*
4. *The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the*

*land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (Emphasis added).*

In the above cited case, the applicant was seeking the court and the parties in the suit to visit the *locus in quo*. In its ruling the Court relied on the decision in the case of **Akosile Vs. Adeye** (2011) 17 NWLR (Pt. 1276) p. 263 which summarized the above factors thus:

*“The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries.”*

We find the above principles very relevant not only to the present case but are also very relevant and crucial in providing general guidance to our courts in the event they, either on their

own accord or upon request by either party, exercise their discretion to visit the *locus in quo*. We fully subscribe to them.

In the present case, as alluded to above, the evidence on record shows very clearly that there are conflicting contentions in respect of on which Plot the suit property is located. While the appellant contends that it is on plot no.16 the respondent contends that it is located on plot No. 17. The suit property, a house, is a structure on land. It is an immovable property. Its location can very easily be ascertained so as to resolve the dispute justly, properly and with certainty.

In the circumstances of this case, we are highly persuaded by the principles in the above cited Nigerian case that, a visit to *locus in quo* will definitely help the Court determine the appeal with clarity and certainty. We, however, wish to note that the practice of visiting a *locus in quo* is not novel in our jurisdiction. The Court, in the case of **Nizar M. H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29, faced a scenario whereby the trial magistrate visited the locus in quo and the judge sitting on appeal also did so. The Court was of the view that such visit should be

done only in exceptional circumstances by the trial court to ascertain the state, size, location and so on of the premises in question. Clarifying on the point, the Court stated:

*“It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator. At the trial, we ourselves can see no reason why the magistrate thought it was necessary to make such a visit. Witnesses could have given evidence easily as to the state, size, location and so on of the premises in question. Such evidence could, if necessary, be challenged in cross-examination. But at least the magistrate made his visit on the application of a party to the trial. We completely fail to see why the first appellate judge thought it was necessary for him to visit the premises. He was dealing with an appeal.”*

The Court then went further to explain the procedure to be followed at the locus in quo, thus:

*“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 such 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.”*

We have endeavored to demonstrate on the need to visit locus in quo, the procedure to be observed thereat and the precaution to be taken by the judge not without a purpose. We have observed above that the evidence on record was insufficient for the Court to determine the appeal justly, with clarity and certainty in view of the conflicting evidence in respect of the location of the suit property. We are of the view that this is a fit

case for the trial court to exercise its discretion to visit the *locus in quo*. Had the trial court done so the question regarding where the suit property is located would have either not arisen or would have been easily determined.

For the foregoing reasons we are inclined to invoke the provisions of Rule 36(1)(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and hereby direct the trial High Court to take additional evidence in respect of the actual location of the suit property. A high ranked Land Officer from the responsible Land Office, Moshi District be involved in the exercise of identifying Plots. No. 16 and 17 Kindi Msasani within Moshi District and locate on which Plot the suit property is. The trial High Court should then certify such evidence to the Court with a statement of its own opinion on the credibility of the witness or witnesses who had given additional evidence. The trial High Court shall also make sure that the parties to the appeal and their advocates are present when the additional evidence is taken.

In the circumstances, we deliberately refrain from dealing with the merits of the appeal. The determination of the appeal is stayed pending the availability of the additional evidence.

**DATED** at **ARUSHA** this 13<sup>th</sup> day of December, 2018.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. A. LILA  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**