IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 99 OF 2018

BOMU MOHAMEDI ..... APPELLANT

VERSUS

HAMISI AMIRI ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Msuya, J)

Dated 25th day of June, 2014
in
(Land Appeal No. 3 of 2013)

JUDGMENT OF THE COURT

11th & 27th February, 2020

MZIRAY, J.A.:

This matter commenced in the District Land and Housing Tribunal of Tanga at Tanga wherein the respondent sued the appellant claiming ownership of a parcel of land and also seeking for an ancillary order of injunction to restrain the respondent to halt the construction which was on progress in the suit land.

After a full trial, the respondent was granted all the reliefs sought. The appellant being dissatisfied, appealed to the High Court of Tanzania

at Tanga but his appeal was dismissed on 25/6/2014. Still aggrieved, he sought leave to appeal which was granted and subsequently lodged the appeal to this Court.

The facts which gave rise to this appeal are simple and straight forward. They are as follows: the respondent was allocated a piece of land by the Horohoro Village Government. After sometimes, he started to develop the same by constructing a foundation of his house. The appellant intervened and reported the matter to the Village Land Council seeking a restraint order on allegation that the disputed land was an open space. He claimed that the construction had blocked his right of way. The Village Land Council failed to mediate the dispute. It referred the dispute to the Duga Ward Tribunal. The said tribunal declined to entertain the dispute alleging that it had on previous occasion adjudicated another dispute over the same piece of land between the respondent and one Bakari Shauri.

To find a solution, the respondent filed an application against the appellant in the District Land and Housing Tribunal which in its decision dated 31/1/2013, declared the respondent as the legal owner of the suit land. The appellant was aggrieved by that decision and preferred an

appeal to the High Court where he lost. Still discontented he filed this appeal, raising four grounds of complaint which are:

1. *That the High Court Judge erred in law by failing to evaluate the proper size of the suit land between 45ft by 60ft and 10ft by 25ft, assess its credibility, so as to make a legal recognized finding of being a plot or an open space.*
2. *That, the High Court erred in law by failing to physically locate and measure the suit land in locus in quo, so as to make a proper finding on the contested facts in issue.*
3. *That, the High Court Judge erred in law by failing to evaluate the designed usage of the suit land by the District Council Urban area town planner.*
4. *That, the High Court Judge erred in law by failing to evaluate the documentary evidence adduced by the respondent during trial of the allocation letter alleged to have been issued by Horohoro Village Government, its validity and veracity, as the same was never signed by the Village Chairman.*

When the appeal was placed before us for hearing, the appellant appeared in person, unrepresented, whereas the respondent was present, represented by Mr. Obediodom Chanjarika, learned advocate. Both

parties filed written submissions in compliance with Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), as amended, which were supplemented by the oral submissions made before us on 11/2/2020.

The appellant adopted the contents of the written submissions he filed earlier and prayed for the Court to determine the appeal on the strength of his memorandum of appeal and the written submissions. He combined grounds 1, 2 and 3 and argued them jointly. He challenged the decision of the High Court in its finding that the suit land measures 45ft x 60ft and maintained that the said land being an open space was small at an estimated size of 10ft x 25ft. He blamed the High Court for its failure to physically visit and measure the suit land in the *locus in quo* so as to make a proper finding on the contested size of the disputed land. He conceded that he did not raise the allegation of forged letter of offer in the trial tribunal due to constant threats of incarceration made by the trial chairman. That was all for the three grounds of appeal. On the fourth ground, he briefly submitted that the High Court Judge failed to scrutinize carefully the tendered letter of allocation which according to him was not signed by the Horohoro Village Chairman.

On the foregoing reasons, he invited us to consider the grounds of appeal in his favour and allow this appeal with costs.

In response, Mr. Chanjarika adopted his reply written submissions and argued the four grounds of appeal raised generally. He supported the finding of the High Court Judge on the allegation that the size of the suit land was exaggerated and contended that the decision of the High Court is backed by the evidence adduced before the trial tribunal. On the visit to the *locus in quo,* he submitted that the High Court being an appellate court was not supposed to visit the *locus in quo*. He added that the visit by the trial tribunal sufficiently verified the evidence adduced by the parties during the trial.

The learned advocate disputed the allegation of forgery in the letter issued by the Horohoro Village Government and maintained that it was a genuine document, properly signed by the village authority. Had it been a forged document, the appellant would have objected to its admissibility, he argued. He highly disputed the allegation that the appellant was interrupted and threatened by the chairman in the course of the proceedings in the trial tribunal. He argued that such serious allegation was not raised in the High Court and if anything, this is a new issue, hence an afterthought.

The learned advocate rested his submission by praying for the decision of the High court to be upheld and the appeal be dismissed with costs.

In rejoinder, the appellant did not have anything useful to add. He insisted for his appeal to be allowed with costs.

Having examined the grounds of appeal, written submissions as well as the oral arguments for and against the appeal presented by the appellant and the learned advocate for the respondent, we should now be in a position to confront the four grounds of appeal and determine whether this appeal has merit. Save for the 2nd ground of appeal, the complaint generally in the remaining three grounds of appeal is basically on the allegation that the decision of the trial tribunal which apparently was confirmed by the first appellate court was against the weight of the evidence. The second ground of appeal specifically criticizes the High Court for failing to visit the *locus in quo* and verify the actual size of the suit land.

At the hearing of the application, the trial tribunal received the evidence of the respondent who was the complainant, which was supported by the evidence of Vunde Athman, the Ward Tribunal Secretary to the effect that the suit land measures 45ft x 60ft and was within

Horohoro township. On the other side, it heard the evidence of the appellant who was the respondent, supported by the evidence of one Gilbert Meshack alleging that the suit land is an open land used as a public pathway measuring 10ft x 14ft. He called the Land Officer one Benjamin Kajato whose evidence in a nutshell is to the effect that the pathway leading to the respondent's house is blocked but he did not go further to tell the trial tribunal the size of the blocked area and the person who did the mischief.

After the conclusion of the parties evidence, the trial tribunal visited the *locus in quo* on 19/11/2012 in the presence of the appellant in person and the respondent's advocate one Mrs. Kabwanga.

In its decision, the trial tribunal believed the respondent's version to the effect that he was allocated the suit land by the Village Council. The relevant portion of the trial tribunal's judgment found at page 54 of the record of appeal reads as follows;

> *"I find as did the assessors that it is evident that the suit plot is in the unsurveyed area and the applicant was allocated the same by the Village Council. Exhibit A1 collectively are documents supporting the applicant's title to the suit plot. On the other hand*

there is nothing substantial to warrant the respondent's claim of title to the suit plot. As evidenced by the visiting of locus in quo even the respondent's assertion that the suit plot is his pathway is not justified."

In other portion of the judgment reads;

"I share the assessors opinion that there is a ring of falsehood in the respondent's version . . ."

From the above excerpt, it is clear in our minds that the trial tribunal carefully analysed the evidence before it and after visiting the *locus in quo,* was more inclined in the version by the respondent and on the evidence by the appellant the trial chairperson found as he put it, "*a ring of falsehood.*"

The decision of the trial tribunal was wholly endorsed by the first appellate court. In its conclusion, the first appellate court supported the assertion that there was ample evidence on record which indicated that the suit land was not an open space as the same was legally allocated to the respondent by the Horohoro Village Authority. It also confirmed that the respondent acquired the plot which is measuring 45ft x 60ft.

On our part, we have passionately weighed and considered the competing claims from either side. To begin, we have to point out at the outset that the entire case rests on the credibility of the witnesses. In its decision, the trial tribunal after analyzing the evidence tabled before it, believed the version of the respondent to be true and endorsed as a fact that the suit land measured 45ft x 60ft. It also confirmed the respondent to be the lawful owner. It dismissed the version of the appellant to the effect that the respondent had blocked a right of way measuring 10ft x 25ft, which leads to his residence. The findings of the trial tribunal were fully blessed by the High Court.

We are very alive to a well established rule of practice that on a second appeal, the Court will not normally interfere with a concurrent finding of fact of courts below unless there are sufficient grounds to do so. These grounds will be things like misdirections, non-directions or misapprehension of the evidence. (See **Maulid Makame Ali v. Kesi Khamis Vuai,** Civil Appeal No. 100 of 2004 (unreported)).

The immediate question we pose at this juncture is whether the concurrent finding of the two courts below are correct. The appellant through his memorandum of appeal and his written submissions has challenged these findings. He has challenged the evidence in respect of

the size of the suit land, failure for the High court to visit the *locus in quo* and the allocation letter tendered, alleging that it is a forged document.

We note that both courts below unreservedly relied upon the testimony of the respondent to the effect that the suit land measured 45ft x 60ft. We have no reason to querry the finding on a question of fact found by the trial chairperson because he was in a better position and had an advantage of seeing and hearing the respondent when he was testifying. Like the two courts below, we agree with the evidence of the respondent that the size of the suit land was 45ft x 60ft and the said land was not an open space as alleged.

We come now to the issue of *locus in quo*. In the first place we would like to put it clear that a visit to the *locus in quo* is purely on the discretion of the court. It is done by the trial court when it is necessary to verify evidence adduced by the parties during trial. There is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the *locus in quo.* (See **Sikuzani Said Magambo and Kirioni Richard v. Mohamed Roble**, Civil Appeal No. 197 of 2018 (unreported).

The complaint of the appellant is that the High Court Judge erred in law by failing to physically locate and measure the suit land in the *locus in quo,* so as to make a proper finding on the contested fact in issue. With

respect, the High Court in the exercise of its appellate jurisdiction is not mandated to visit the *locus in quo* and make its own finding. If for example it finds that the procedure in the trial tribunal was faulted, then it will order for a fresh visit. It is possible that the intention of the appellant in this ground of appeal was to challenge the whole procedure in the *locus in quo* but on our side we are satisfied that the procedure was proper. We say so because at page 54 of the record, it is clear that the trial tribunal applied the evidence obtained in the *locus in quo* to reach a decision that the respondent's assertion that the suit plot is his pathway is not justified. With that observation, we find that the visit to the *locus in quo* was procedurally proper.

In the last ground, the appellant questions the authenticity of the letter issued by the Horohoro Village Government tendered as exhibit, contending that it does not bear the signature of the Chairman of the Village Council, hence contravenes section 24 (1) of the Village Land Act, Cap. 114, R.E. 2002. It is apparent in the record of the trial tribunal that he did not object to the admissibility of the document. He had also a chance to cross-examine the witness on the genuiness of the document. He did not utilize this opportunity. It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the

acceptance of the truth of the witness evidence (See **Daimian Ruhele v. R,** Criminal Appeal No. 501 of 2007 (unreported).

In the same parity of reasoning, we observe in **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 (unreported) that:

> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

The appellant imputes forgery in his written submissions. However, such a serious allegation was not pleaded in his written statement of defence. In our view, where a party relies on a serious allegation with criminal implication like forgery, that forgery must be specifically pleaded. In a situation where such allegation is not specifically pleaded, it cannot be raised and entertained at appellate stage. We therefore decline to entertain the allegation of forgery at this stage. That said, we find this ground of appeal to lack merit.

In Court, the appellant registered a new complaint that there was no fair trial in the trial tribunal because he was intimidated by the Chairperson. With respect, this is not one of his grounds of appeal. All

the same, we took pain to go through the entire record but we did not come across anywhere in the record to support this serious allegation. We take it as a baseless and unfounded allegation.

To this end, we are of the settled view that this appeal is filed without sufficient cause. We dismiss it with costs.

DATED at **TANGA** this 25th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 27th day of February, 2020 in the presence of Mr. Bomu Mohamed, Appellant in person and Mr. Obediodom Chanjarika, learned counsel for the Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL