IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A, And KIHWELO, J.A.)

CIVIL APPLICATION NO. 113/08 OF 2020

IDRISA R. HAYESHI.....APPLICANT

VERSUS

EMMANUEL ELINAMI MAKUNDI.....RESPONDENT

(In the matter of intended Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated 14th day of February, 2014

in

Land Case No. 23 of 2009

.....

RULING OF THE COURT

13th & 16th July, 2021

FIKIRINI, J.A.:

The respondent, Emmanuel Elinami Makundi sued the applicant, Idrisa R. Hayeshi and other three persons not parties to this matter, on the tort of trespass, before the High Court, in Land Case No. 23 of 2009. The High Court decided in favour of the respondent.

Aggrieved the applicant lodged an appeal in this Court. Prior to the appeal being heard the applicant filed a notice of motion under Rule 36 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), supporting it

with his affidavit, and moved the Court to receive additional evidence on grounds that:

(a) The additional evidence will assist the Court to determine the appeal with clarity.

(b) The other additional evidence consists of existing survey map/plan which was unknown to the applicant at the time of the trial.

A supplementary affidavit sworn by one Richard Charles Temu was also filed backing the application and the respondent equally filed an affidavit in reply contesting the application. Through their counsel written submissions were filed and at the hearing Mr. Emmanuel John, learned counsel, appeared for the applicant and Mr. Silwani Galati Mwantembe, learned counsel, appeared for the respondent.

Mr. John, began his submission praying for the adoption of the two affidavits and the written submission filed on behalf of the applicant. His contention was that part of the land claimed by the respondent belongs to the applicant's plot and the demarcation shown in exhibit P1 shows the intrusion. He explained further, that there is evidence which came to light after the High Court had determined the suit, therefore an opportunity be given such additional evidence to be adduced; referring to paragraphs 5

and 8 of the applicant's affidavit. He thus implored the Court that without a visit of *locus in quo*, it will be difficult for the Court to arrive at fair conclusion.

Along the same line he prayed for the survey map to be received as additional evidence, as the map was not within the applicant's knowledge during the trial. The applicant came to learn of its existence on 12th June, 2018.

Answering the issue as to whether this application has fulfilled the conditions necessitating grant of the prayer, he impressed upon us that the applicant was willing and ready to visit the *locus in quo.* He however, admitted that the applicant did not make a specific prayer but his readiness was not heeded to.

Probed by the Court on the principle of visiting the *locus in quo,* as illustrated in the case of **Nizar M. H. Ladak v Gulamali Fazal Jan Mohamed** [1980] T.L.R 29, Mr. John's had no different answer from the one shared earlier on.

On the conditions to be fulfilled as propounded in the case of **Ismail Rashid v Mariam Msati**, Civil Appeal No. 75 of 2015, (unreported), Mr. John associated his submission to the case and concluded that the present application squarely fits in. That the evidence if given might probably have

an important influence on the result of the case. And that so far the respondent has not contested the fact that the additional evidence to be adduced would presumably be believed.

On the issue of the tendered map, it was Mr. John's argument that the four (4) defence witnesses fielded, made his client believe that all the evidence including documents would be availed to court. He only came to learn of the map intended to be tendered as additional evidence later, which ordinarily should have been in the knowledge of the 4th defendant. The significance of this map is that it will show where Plot No. 120 was during the colonial era, articulated the counsel. The counsel further submitted that based on what the respondent has averred in paragraph 8 of his affidavit, he did not dispute existence of the demarcation issue.

On the strength of his submission, he urged the Court to grant the application.

Mr. Galati outright opposed the application, and that the respondent's affidavit and the written submission on his behalf spoke volumes. Furthering his contention, he argued that the applicant has to fulfill all the conditions before receipt of additional evidence, citing to us the case of **Ladd v Marshall** [1954] 1 WLR 1489 at 1491.

Submitting on all the conditions together, it was Mr. Galati's explanation that there was no evidence that the intended additional evidence was not available or could not be procured even with due diligence. Exclusively narrowing on paragraph 8 of the applicant's affidavit and that of Richard Charles Temu, it was his assertion that it has clearly accounted how the alleged map was procured. He further explained that according to Richard Charles Temu's affidavit, the map was received from Tanzania Building Agency (TBA) on 12th June, 2018. During the sale of Government quarters, the applicant was one of those who entered in the sale agreement, therefore if there was any evidence it should have come from them as exhibited in the record that an officer from TBA came to testify and a map admitted as exhibit D2 was admitted during the defence stage of the case. If there was already a map admitted into evidence, why bring another one, was his query.

He summed up that after losing the case the applicant wants to add evidence, which the counsel thinks is not this Court's task to hear such evidence.

On the visit of *locus in quo,* disputing the applicant's contention on readiness for the site visit, it was Mr. Galati's response that the applicant's argument that the purpose of the visit was to allow the Court to see the

beacons, but looking at p. 10 of the judgment it is apparent that the applicant had already uprooted the beacons. If that is the situation then what was the Court being invited to go and see? Was his question. From his position what he sees is that the applicant wants the case to start afresh.

From his recollection it was the respondent who was ready and wanted the visit of *locus in quo* to take place. He emphatically opposed the grant of the application and prayed for its dismissal with costs.

In a brief rejoinder Mr. John reiterated his submission in chief and drew the Court's attention to p.149 of the record of appeal where the applicant's readiness is reflected. He concluded his submission challenging the respondent's counsel's attempt to argue the appeal instead of demonstrating whether the conditions required have been fulfilled.

After hearing the rival submissions and going through the affidavits as well as the written submissions filed, we will now embark on examining the merits of the application.

In determining the merit of this application our focus will be on the three conditions stipulated in the **Ladd v Marshall** which was cited with approval **Ismail Rashid** (supra), if they have been met. They are:

(i) That the evidence could not have been obtained with reasonable diligence for use at the trial.

(ii) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.

(iii) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

Starting with the issue on the visit to the *locus in quo*, Mr. John in both his oral and written submission has contended the applicant was ready for the visit of *locus in quo,* even though no request was made, despite placing importance on the said visit. What is more is that the applicant had already called witnesses and tendered documents. We thus find his willingness without any further action is not sufficient or good ground, since no reason was advanced as to why no such application was made.

Aside from that, we have been wondering what effect the visit will have while it is on evidence that the applicant has uprooted the beacons demarcating the boundaries of the two plots, the assertion not controverted. We have read the case of **Avit Thadeus Massawe v Isidory Assenga**, Civil Appeal No. 6 of 2017, (unreported), cited to us by

Mr. John. In the circumstances of the **Avit's** case, the court ordered taking of additional evidence. Much as we appreciate the principle in the cited case but in the application before us, we find it inapplicable. This is because the applicant had all the opportunity to bring his evidence, which he did by tendering into evidence exhibit D2 a map of the surveyed area and plots, we are therefore not persuaded that there is a need at this stage to consider the visit of the *locus in quo* being requested.

Now we move to the remaining question on whether the survey map should be admitted as additional evidence.

From the evidence gathered in the applicant's affidavit and that of one Richard Charles Temu, and amplified in the written as well as oral submissions have failed to persuade us that the application is merited, for the reasons which will be given below. *One,* the judgment in the Land Case No. 23 of 2009 was delivered on 14th February, 2014, to say that the applicant did not obtain such important evidence, not only it sounds awkward but also indicate that no efforts let alone serious one, were made to obtain the map in question. *Two,* and if we go by the averment in Richard Charles Temu's additional affidavit particularly in paragraphs 7, 8 and 9 one will find ample evidence that with concerted effort the map

could have been obtained. Excerpts from the paragraphs in Richard Charles Temu's affidavit are reproduced herein below:

> 7. "*That following the power of attorney the donors directed me to write the Tanzania Building Agency to show me the correct demarcations of the unit of the said semi detached house and I complied vide a* ***letter dated 15th May, 2018 annexed marked "C".***
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> 8. *That after shuttling between offices of Tanzania Building Agency and the City Council,* ***on 12th of June, 2018,*** *I was in Dar es Salaam before one B. M. Kimangano the Director of Estate and Housing at the agency who sent me to the headquarters of the Ministry of Lands and Urban Settlement.*
>
> 9. *That at the Ministry my issue was handled by one Lucy Katanga* ***who gave to me copies of the plan of the area dating from colonial times, a copy annexed marked "D.""***

From the reproduced paragraphs it shows that within less than two (2) months, which is from 15th May to 12th June, 2018, Richard Charles

Temu was able to obtain the map. If Richard Charles Temu could be given the map by directives from TBA which sold the Government houses to the applicant and the late Mnzava in whose shoes Richard Charles Temu stepped in, what difficulty was there for the applicant to be availed with the map? From the above piece of evidence which has not been discounted, it is evident that the applicant made no effort or if he did then he has failed to demonstrate that. One can even presume that consultation with Richard Charles Temu was certainly necessitated by losing the case and therefore an afterthought.

Mr. John in his written submission stressed that the applicant obtained the copy of the layout of the area showing the demarcation on the government quarters prior to the respondent's plot being created. The map could not be obtained during the trial as the applicant did not even know its existence. And to fortify his position he cited the case of **Jamaat Ansar Sunna v The Registereed Trustess of Umoja wa Vijana wa Chama cha Mapinduzi** [1997] T. L. R 99 at 100, where the Court allowed additional evidence on the ground that:

> *"....it will be more just that evidence alleged to have come to light after the determination of the matter in the High Court should be adduced."*

The explanation sounds attractive especially since there is an order for demolition, but as explained above, we find that there was no evidence in the offing that the intended additional evidence could not be obtained at the time of the trial, which lasted five (5) years.

In the case of **A.S. Sajan v Co-operative and Rural Development Bank** [1991] T.L.R. 44 at 46, the Court held:

> *"Except on grounds of fraud or surprise the general rule is that an appellate Court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available."*

We undoubtedly find the applicant has failed to display any effort made; he therefore cannot say the map could not have been obtained even with a reasonable diligence.

During the defence case TBA Regional Manager, Paul Fabian Ngowi testified as DW2. This witness in our view would have been the perfect person to acknowledge of the existence of the map in question. There was no evidence led whatsoever in that regard. And it is our conclusion that with reasonable diligence the applicant could have the map for use at trial.

The case of **Jamaat Ansaar Sunna** (supra) though relevant, but we find it distinguishable. In the application before us exhibit D2 which is a

survey map is already part of the evidence, which is different with what transpired in the cited case, where there was no evidence that there was already another piece of evidence such exhibit D2 which has tendered. The decision we admit is relevant, but inapplicable to the facts in the present application.

We thus agree to Mr. Galati that the applicant has failed to meet the condition on reasonable diligence.

Besides DW2 testifying, the court admitted into evidence a map marked as exhibit D2. The question is what would be the usefulness of the second map, if there is already another map on the same subject matter? By taking in the second map as additional evidence, definitely there will be two sets of alike evidence proving or disproving the same fact. The importance and influence of the second map will only be experienced if will end up contradicting exhibit D2, the map already part of the evidence, and if reasonable diligence would not have made it so available. Other than that, the exercise will be waste of Court's time and of course abuse of the court process, if there will be no effect at all of the second map.

Furthermore, in **Ismail Rashid's** case (supra) which quoted Sarkar on Evidence, the Court discouraged permitting parties to fill the gaps in

their evidence adduced during trial. This is what we said in reference to the book by Sarkar:

> *"The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where discovery is made outside the court, of the fresh evidence and the application is made to import it.... The rule is not intended to allow a litigant who has been unsuccessful in the lower court,* ***to patch up the weak parts of his case and fill up omissions in the court of appeal."*** [Emphasis added]

The passage speaks for itself discouraging the practice of patching up the omissions which might have occurred during trial. In the present case too, we see it more as an attempt to fill the gaps rather than genuinely a party wanting to bring on board the evidence which could not be obtained at the time either for not knowing that it existed or simply could not be found.

In the final analysis, when the contents of the affidavits and submissions both oral and written are weighed together, we agree with Mr. Galati that the applicant has not been able to meet the basic conditions as

well as establish good reasons to compel this Court to grant the application before us.

In view of the above, we find the application devoid of merit and hereby dismiss it with costs.

DATED at **MWANZA** this16th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 16th day of July, 2021 in the presence of Mr. Emmanuel John, learned advocate for the applicant and Ms. Tumaini Sanga, learned advocate holding brief of Mr. Silwani Galati Mwantembe, learned advocate for the respondent is hereby certified as the true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL