IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A And KOROSSO, J.A.)

CIVIL APPEAL NO. 4 OF 2018

KIMONIDIMITRI MANTHEAKIS..... APPELLANT

VERSUS

ALLY AZIM DEWJI AND 7 OTHERS.....1st RESPONDENT
SUFI KITWANA SADI.....2nd RESPONDENT
OMARI KITWANA SADI.....3rd RESPONDENT
MUSSA KITWANA SADI.....4th RESPONDENT
JUMA KITWANA SADI.....5th RESPONDENT
TEMEKE MUNICIPAL COUNCIL.....6th RESPONDENT
THE COMMISSIONER FOR LANDS.....7th RESPONDENT
THE ATTORNEY GENERAL.....8th RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Mutungi, J.)

dated the 30th day of June, 2015
in
Land Case No. 132 of 2008

JUDGMENT OF THE COURT

26th October & 3rd November, 2021

MUGASHA, J.A.:

In the High Court of Tanzania at Dar-es-Salaam, the appellant herein lodged a suit against the respondents. He claimed to be a lawful owner of a piece of land (suit premises) situated at Ngobanya village Kimbiji Ward in the Municipality of Temeke which he had purchased from various people, planted therein, 600 teak trees and erected a fence of about 400 metres. However, it was alleged, the 1st, 6th and 7th respondents illegally surveyed

and registered such land as Plot No. 8 with certificate of Title No. 79075 and on 20/5/2008 the 1st and 2nd respondents herein and their workmen, trespassed into the suit premises, uprooted the teak trees and destroyed the fence. On this account, the appellant sought the declaratory orders jointly and severally against the respondents to the effect that: **One,** that he is the rightful owner of the suit premises; **two,** that the 1st to 5th respondents are trespassers, **three,** payment of: TZS. 188,000,000.00 as specific damages on the destroyed teak trees in the suit premises; TZS. 35,000,000.00 as general damages and TZS. 5,000,000.00 as exemplary damages, costs and other reliefs as the court shall deem fit. On the other hand, in their respective written statements of defence the respondents opposed the claims by the appellant.

After a full trial, the High Court dismissed the appellant's case on ground of lacking evidence on proof of ownership. Aggrieved, the appellant has lodged the present appeal fronting 8 grounds of complaint. However, for reasons to be apparent in due course, we shall not reproduce the grounds of appeal save for the third ground which reads as follows:

> *"That the honourable trial Judge erred both in law and fact by failing to conduct the visit of the locus in*

quo property and hence arrived at a wrong decision."

At the hearing, the appellant was represented by Messrs. Edward Peter Chuwa and Roman Selasini Lamwai, learned counsel, the 1st to 5th respondents had the services of Mr. Edward Mwakingwe whereas the 7th and 8th respondents were represented by Ms. Consesa Kahendaguza, learned Senior State Attorneys and Messrs. Emmanuel Mkwe and Felix Chakila learned State Attorneys.

Upon being called upon to address the Court on the stated ground of complaint, following a brief dialogue with the Court, upon reflection, the learned counsel for either side were at one that, the visit of the *locus in quo* was not properly conducted in the absence of proceedings to show who was in attendance and what had actually transpired during the respective visit. That apart, it was Mr. Chuwa's submission that, the learned trial Judge turned herself as a witness as reflected in the impugned judgment which was irregular. To bolster his proposition, he cited to us the case of **NIZAR M.H LADAK VS GULAMALI FAZAL JANMOHAMED** [1980] T.L.R 29. On this account, it was the submission of the learned counsel for either parties that the trial was vitiated and the proceedings

and resulting judgment are a nullity and cannot be spared. On the way forward, they urged the Court to nullify the entire trial proceedings, quash the judgement and order a retrial before another Judge.

Having considered the submissions of the parties and the record before us the issue for determination is the propriety or otherwise of the trial proceedings and the respective judgment.

It is evident that, at page 277 of the record of appeal, after the close of the plaintiff's case, his respective counsel prayed for a visit of a locus in quo on advancing the ground that ends of justice be achieved. Later a similar prayer was made after the close of the defence case as reflected at page 333 of the record of appeal. This was subscribed to by the learned counsel for the respondents herein and the trial court having noted the same, granted the prayer and scheduled the visit to be conducted on 22/5/2015 at 9:00 am. From what is evident in the observations and findings in the impugned judgment as reflected at pages 572 and 573, we could discern that the visit of the locus in quo was done as follows:

> *"Having come to the end of the hearing and considering the parties' prayer, the court visited the locus in quo. What was found by the court is that*

the first defendant's plot is a small plot within a big area which is owned by the plaintiff. The boundaries are such that on one side is the plaintiff (an area he bought from Silima Makungu), the front part bordered by the Ocean. There is also the land belonging to one Sykes. There are two routes to the suit land. One is through Salehebahi's plot, the plaintiff's plot bought from Silima then straight on to the suit plot. The other route is through the area the plaintiff has planted teak trees to the suit plot.

The plaintiff did not show any beacons for the court to ascertain his boundaries. The court further found that the suit plot is actually a beach plot and the rest of the area that belongs to the plaintiff is not a beach area, there is quite a distance to the ocean.

The Court was also able to properly observe the plaintiff's area and found to be very different from that of the suit land. His area is fully planted and

covered all over with very old teak trees. These are planted in rows and at even spaces. The suit land has very few young teak trees which clearly show they have been planted in the recent years. There is not even a single old tree or tree stamp which is shooting. The whole area has been enclosed by the plaintiff's fence including the suit plot."

Despite the above, the proceedings in the locus in quo are not in the record before us. Apparently, the quagmire faced the respective parties and that is why their respective counsel submitted to the effect that the visit of the locus in quo was not properly conducted.

Whereas the visit of the locus in quo is not mandatory, it is trite law that, it is done only in exceptional circumstances as by doing so a court may unconsciously take a role of witness rather than adjudicator. In this regard, where the court deems it warranted, then it is bound to carry it out properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because the visit is not for the purposes of filling gaps in evidence. Therefore, where it is necessary or appropriate to visit a locus in quo, 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. See: **NIZAR M.H LADAK VS GULAMALI FAZAL JANMOHAMED** (supra). The essence of the court attending the locus in quo with the parties was emphasised in the case of **WILLIAM MUKASA VS UGANDA** [1964] E.A 696 at page 700, Sir Udo Udoma CJ (as he then was) held as follows:

> *"A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence oculary demonstrated in the same way a court examines a plan or a map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view of a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."*

Similarly, in the case of **AVIT THADEUS MASSAWE VS ISIDORY ASSENGA**, Civil Appeal No. 6 of 2017 (unreported) in determining the

propriety or otherwise of the locus in quo considered as well its essence having relied on the Nigerian case of **AKOSILE VS ADEYE (2011) 17 NNWLR** (Pt 1276) p.263 where it was held:

> *"The essence of a visit in locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbour, 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."*

In the light of the cited decisions, for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: **one,** ensure that all parties, their witnesses, and advocates (if any) are present. **Two,** allow the parties and their witnesses to adduce evidence on oath at the locus in quo; **three,** allow cross-examination by either party, or his counsel, **four,** record all the proceedings at the locus in quo; and **five** record any observation, view, opinion or conclusion of the court including

drawing a sketch plan if necessary which must be made known to the parties and advocates, if any.

In the matter under scrutiny, in the event neither the Court nor the parties could land its eyes on the proceedings during the visit in the locus in quo, it can safely be concluded that nothing was recorded during the said visit. Therefore, in the absence of the recorded proceedings we cannot discern as to who was in attendance; if the witnesses were asked to clarify what they stated at the trial under oath; if opportunity was given to the respective parties to make cross-examinations and any observation by the trial judge must form part of the proceedings. See: **BONGOLE GEOFREY AND FOUR OTHERS VS AGNES NAKIWALE,** Civil Appeal No. 0076 of 2015 (Court of Appeal).

The said omission occasioned a miscarriage of justice as the Court sitting on first appeal cannot make a proper re- evaluation of the entire trial evidence including what had transpired at the visit in the locus in quo. In view of what we have endeavoured to discuss, we agree with learned counsel of either parties that, the trial was vitiated and as such, its proceedings and resulting judgment cannot be spared. In the circumstances, we hereby nullify the trial proceedings, quash the

judgement and order an expedited retrial before another Judge. In the premises, we allow the appeal and considering the circumstances surrounding the matter, we make no order as to costs.

DATED at **DAR ES SALAAM** this 1st day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered on 3rd day of November, 2021 in the presence of Ms. Mary Lamwai and Anna Lugendo, both learned counsel for the appellant and Mr. Felix Chakila learned State Attorney appeared for the 6th to 8th Respondents who is also holding brief for Mr. Edward Mwakingwe, learned counsel for the 1st to 5th Respondents, is hereby certified as a true copy of original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL