IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 93 OF 2021

PROF. T. L. MALIYAMKONO.....APPELLANT

VERSUS

WILHELM SIRIVESTER ERIO .....RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam]

(Mallaba, J.)

dated the 22nd day of November, 2019

in

Land Case No. 131 of 2016

JUDGMENT OF THE COURT

8th & 18th February, 2022

KWARIKO, J.A.:

Formerly, the respondent Wilhelm Sirivester Erio instituted a suit against the appellant Prof. T. L. Maliyamkono before the High Court of Tanzania, Land Division at Dar es Salaam (henceforth the trial court). The respondent claimed that he is the legal owner of a piece of land situated at Mapinga area within Bagamoyo District in Pwani Region (the disputed land) having bought it from one Abdallah Mohamed Mwanga in 1983. A sale agreement to that effect was tendered and was admitted as exhibit P1. The agreement was executed at the local government office and one of the witnesses was Peter Mziwanda (PW2). The

respondent complained that the appellant trespassed into the disputed land alleging that he bought it in 1989.

For his part, the appellant claimed that he bought the disputed land from one Shamsa Ally in 1989 vide a sale agreement concluded at the Mapinga CCM office which was admitted in evidence as exhibit D1. One of the witnesses to the agreement was Mohamed Omar Ally (DW3). The appellant claimed that following the purchase, he planted some coconut trees but later found them uprooted and later permitted his driver Salum Mohamed Ngungwini (DW2) to plant cassava. Further, in 1993, he constructed a temporary farm house but again it was demolished by unknown people and the bricks were stolen. According to the appellant, in 2005, he divided the farm into seven smaller parts and gave some of them to his children including his son who constructed a house therein before he later sold it to one John Kinabo (DW4).

In the end, the trial court adjudged in favour of the respondent. It established that since the respondent had already purchased the disputed land from Shamsa Ally's father in 1989 when the appellant was purchasing the same from her, no title passed to the appellant.

Aggrieved by that decision, the appellant preferred this appeal raising the following seven grounds:

1. *That the Honourable High Court (Land Division) at Dar es Salaam erred in law and in fact not to dismiss Land Case No. 131 of 2016 upon the respondent, then the plaintiff, failing to file amended plaint within the time granted by the court (on or by 12. 7. 2016) without leave of the court to file it outside that time;*

2. *That the Honourable High Court (Land Division) at Dar es Salaam erred in law and in fact to hold that a person who was invariably stated to be Abdallah Mohamed Mwanga or Abdallah Mohamed Mmanga and who the Respondent mentioned to be the one who sold to him the suit land, which was described in paragraph 3 of the amended plaint as 'that piece of land measured approximately 6 acres situated at Mapinga area, within Bagamoyo District, Pwani Region', was the owner of that land at the time of the sale;*

3. *That suppose it was shown that the alleged Abdailah Mohamed Mwanga was the owner of the suit land, which is disputed, the Honourable High Court erred in law and in fact by holding that the evidence adduced demonstrated that the alleged seller sold the suit land to the Respondent;*

4. *That suppose it was right for the court to rule that the alleged seller of the suit land to the Respondent was truly its owner and he truly sold it to the Respondent in 1983 and that was the same land which the Appellant was occupying from 1989, the Honourable High Court erred in law not to hold that the Appellant had got title which entitled him to be*

declared owner of the same by adverse possession by 2016 when the suit in the Trial Court was filed;

5. *That the Honourable High Court erred in law and in fact to hold that the evidence adduced in court showed that the person who sold the suit land to the Appellant in 1989 was the daughter of the one who had allegedly sold the same land to the Respondent in 1983;*

6. *That the Honourable High Court erred in law and in fact to conduct visitation to the iocus in quo after the parties had closed their cases, and even after the parties had filed their final submissions, and to base on what it allegedly acquired from the mentioned visitation to decide the suit against the Appellant; and*

7. *That the Honourable High Court erred in law and in fact to act on the objected sale agreement (Exhibit P1) whose authenticity was doubted right from the pleading stage and to dismiss the Appellant's application to refer the same to the forensic expert for examination of its disputed authenticity for no good cause, and to proceed from there to recognize it as genuine and base on it to decide the suit against the Appellant.*

At the hearing of the appeal, Messrs. Audax Vedasto and Living Raphael, learned advocates, appeared for the appellant and the respondent, respectively. Since each party had filed written submissions

for and against the appeal, both advocates adopted them to form part of their oral submissions.

When he took the stage to argue the appeal, Mr. Vedasto submitted in respect of the first ground of appeal that on 5th July, 2016, the respondent was granted leave to file an amended plaint within seven days from that date which period expired on 12th July, 2016. He contended that, the respondent's amended plaint was filed on 18th July, 2016 thus beyond the permitted time and without extension of time to do so as required under Order VI rule 18 of the Civil Procedure Code [CAP 33 R.E. 2019] (henceforth the CPC). It was the learned counsel's contention that failure to file the amended plaint within the time limited by the court meant that there was no plaint filed and the trial proceeded without the plaint since the order of amendment rendered the former plaint nonexistent. To support this proposition, Mr. Vedasto referred us to the decision of the High Court of Tanzania in **Robert Damian v. The Registered Trustees of the University of Bagamoyo,** Civil Case No. 116 of 2013 (unreported). He also cited the Court's decision in **Morogoro Hunting Safaris Ltd v. Halima Mohamed Mamuya,** Civil Appeal No. 117 of 2011 (unreported). The learned counsel argued that since the respondent failed to file his plaint as ordered, there was no

base upon which the suit could proceed and thus the trial court ought to have dismissed the respondent's case.

Responding, Mr. Raphael admitted that the respondent was late to file the amended plaint. However, he was quick to point out that the omission did not prejudice the appellant anyhow and, in any case, this matter ought to have been raised at the earliest stage before the hearing commenced so that it could be addressed by the trial court. In his aid, the learned counsel relied on the Court's decision of **Nimrod Elirehema Mkono v. State Travel Services Limited & Masoo Saktay** [1992] T.L.R 24. Mr. Raphael further implored us to consider that the omission did not occasion any injustice to the appellant as it amounts to a mere technicality and more so with the coming of the overriding objective principle in our law, the cited authorities should be read in conjunction with this principle.

On our part, having considered the contending submissions by the learned advocates, we would like first to address the issues that were involved in the authorities cited to us by Mr. Vedasto. As regards the case of **Robert Damian** (supra), apart from not being binding upon this Court, it is distinguishable from the case at hand. This is so because it did not deal with the failure to file a pleading within the time limited

by the court. In that case the court stated that once an order for amendment is made, the former pleadings cease to exist. Whereas, the issue in the case of **Morogoro Hunting Safaris Ltd** (supra) was the cessation of the former written statement of defence (WSD) with the filing of an amended WSD.

Coming to the instant case, it is not disputed that the respondent was late to file the amended plaint thus contravening the law under Order VI rule 18 of the CPC. However, we have found the omission not fatal for the following reasons. **One,** the amended plaint was really filed and acted upon to decide the suit; **two,** the appellant acted on the amended plaint and filed his WSD, hence he was not prejudiced; **three,** by not raising this issue at the time when it happened, the appellant acquiesced to it. We have taken into account that the omission did not affect the jurisdiction of the trial court.

From what we have shown above, we are of the view that since the omission did not occasion any injustice and with the coming of the overriding objective principle in our law which propagates for the substantial justice by the Court without regard to undue technicalities, it was not fatal to the proceedings. We are supported in this view by our

earlier decision in the case of **Nimrod Elirehema Mkono** (supra) cited to us by Mr. Raphael where it was stated thus:

> *"Coming to the amendment of the written statement of defence without leave of the court we agree that this offended clear provision of O. 8 R. 13 of the Civil Procedure Code but it is also our view that this lapse on part of the respondent did not prejudice the appellant/plaintiff; this is especially so taking into account that the plaintiff had been given leave to amend the plaint. We would like to mention, if only in passing, justice should always be done without regard to technicalities."*

For the foregoing, we find that the first ground of appeal unmerited.

Next, we have decided to deal with the sixth ground of appeal which also raises a point of law. Arguing this ground, Mr. Vedasto submitted that after the closure of the case from both sides and upon filing of the final written submissions, the trial court erred to re-open the case and order a visit of a *locus in quo*. He went on to contend that there is no court record to show the notes taken and who were the witnesses that attended the visit. The learned advocate argued that despite this omission, the trial Judge based its decision on the purported

finding from the *locus in quo.* As to the proper procedure to be followed in respect of a visit of the *locus in quo,* Mr. Vedasto referred us to the Court's decisions in the cases of **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed** [1980] T.L.R 29 and **Sikuzani Said Magambo & Another v. Mohamed Roble,** Civil Appeal No. 197 of 2018 (unreported). Basing on these submissions, the learned advocate urged us to declare the visitation illegal and nullify it.

On his part, Mr. Raphael submitted that the trial Judge consulted the parties before the visit of the *locus In quo* was conducted as shown at page 178 of the record of appeal. He argued further that the reference of the visit in the judgment came from the witness who had testified in relation to the dispute.

Having considered the foregoing submissions, it is not disputed that after the closure of the case from both sides, as revealed at page 178 of the record of appeal, the trial court re-opened the case and ordered the visit of the disputed land. However, the disturbing feature in this state of affairs is that there is no record to show who attended that visit, who the witnesses were and what happened thereat. It was not shown whether the court re-assembled to revisit the notes taken at the *locus in quo.* Despite the foregoing, in the judgment, the trial Judge

went ahead and considered the purported finding of the visit and essentially the visit influenced the Judge. For instance, regarding the boundaries at the disputed land, it was stated at page 256 of the record of appeal that:

> *"This court visited the locus in quo and in that regard, there is no any dispute on the boundaries of the disputed land. Thus, whatever defect may be established on this aspect, it is not material to the case and does not affect the credibility of the evidence on record."*

Similarly, in rejecting the appellant's claim of the disputed land basing on the principle of adverse possession, the trial Judge referred to the visit of the locus in quo and stated at page 259 of the record of appeal thus:

> *"This court visited the locus in quo, it could not observe any un-attended planted permanent crops like cashew nut or coconut trees. Had trees of such permanent crops been seen, it could be inferred that the defendant indeed planted permanent crops as evidence of his adverse possession..."*

The trial Judge went on to state in the same page as follows:

"Also, the defendant claimed to have a farm house at the disputed shamba. When this court visited the locus in quo, it was shown what was claimed to be the foundation of that house. This court observed that, the same was outside the disputed land. It cannot be the basis of adverse possession."

It is our considered view that the stated notes in relation to the *locus in quo* ought to have been documented before being used in the judgment. The procedure pertaining to a visit of the *locus in quo* was well enunciated by the Court in the celebrated case of **Nizar M. H. Ladak** (supra), where it was stated 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 the road is a matter in issue; have the room 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 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."

According to this decision, a visit of the *locus in quo* is not mandatory, and it is done oniy in exceptional circumstances. However, where it is necessary to conduct such visit, the court must attend with the parties and their advocates, if any, and such witnesses who may have to testify in that particular matter. Further, notes should be taken during the visit and then all those in attendance should re-assemble in court and the notes be read out to the parties to ensure its correctness. See also the Court's decisions in the cases of **Avit Thadeus Massawe v. Isidory Assenga,** Civil Appeal No. 6 of 2017; **Kimoni Dimitri Mantheakis v. Ally Azim Dewij & Seven Others,** Civil Appeal No. 4 of 2018 (both unreported) and **Sikuzani Sadi Magambo & Another** (supra).

It is therefore clear that the trial court did not adhere to the procedure laid down in the above quoted authorities when it visited the *locus in quo.* In the absence of the record, this Court cannot predict what transpired in relation to the visit and make a meaningful evaluation

of the evidence on record as a whole to decide this appeal. We are thus of the decided view that the omission by the trial court occasioned injustice and thus vitiated its decision.

We thus nullify the trial court's proceedings with effect from 8th November, 2019 when the visit of the *locus in quo* was ordered, quash the resultant judgment which was delivered on 22nd November, 2019 and set aside all orders emanating therefrom. The proceedings before the order of the visit have no problem and thus, they are left undisturbed. From the foregoing, we find the sixth ground of appeal meritorious and in the circumstances, we find no need to determine the remaining grounds of appeal.

As to the way forward having nullified the decision of the trial court and part of the proceedings, Mr. Vedasto suggested two options. One; the Court to pronounce judgment in favour of the appellant on account of adverse possession of the disputed land. Two; the Court to pronounce judgment on the basis of the available evidence. We have considered these options and we are of the decided view that in the circumstances of this case we decline to take any of them.

In the interest of justice, we remit the case file to the trial court for completion of the trial by a different judge, and if it will be necessary

to visit the *locus in quo,* it should be done in accordance with the procedures laid down herein above. Finally, we allow the appeal and since the parties did not occasion the said omission, we make no order as to costs.

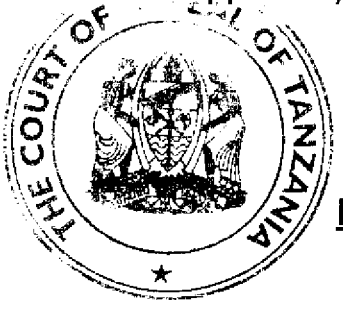
DATED at **DAR ES SALAAM** this 17th day of February, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered on 18th day of February, 2022 in the presence of Mr. Richard Mbulu learned counsel for the respondent, who is also holding brief for Mr. Audax Kahendaguza Vedasto, learned counsel for the applicant, is hereby certified as a true copy of original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL