IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., ISSA, J.A. And ISMAIL, J.A.)

CIVIL APPEAL NO. 494 OF 2021

SAID H. LIPITE & 680 OTHERS ..... APPELLANTS

VERSUS

MINISTRY OF DEFENCE & ANOTHER ..... RESPONDENTS

(Appeal from the judgment and decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Makani, J.)

dated the 20th day of August, 2021

in

Land Case No. 85 of 2016

.....

JUDGMENT OF THE COURT

8th & 22nd November, 2023

MWANDAMBO, J.A.:

Before the High Court (Land Division), the appellants instituted a suit against the respondents for alleged trespass to land they claimed to have owned at a place known as Tondoroni Village, Kisarawe District, Coast Region. In its judgment, the High Court (Makani, J.) dismissed the suit after being satisfied that the appellants had not discharged their burden of proof that they owned the suit land. They are now before the Court on appeal against the trial court's judgment as founded on erroneous findings as gleaned from the plaint.

The facts from which the appeal has arisen are largely common ground. They arise from a claim by 712 persons; the plaintiffs (now appellants) who alleged to have been residents of a village called Tondoroni in Kisarawe District, Coast Region (the village). Each claimed to have acquired his piece of land through clearing bushes by some of them and allocation by Tondoroni Village Council upon its registration in 1993. It was alleged further that, each of the appellants developed his piece of land by erecting permanent dwelling houses and for agricultural and livestock activities.

To the appellants' surprise, sometime in October 2015, the first respondent through the Tanzania Peoples' Defence Forces (TPDF) trespassed onto that land by demolishing houses erected thereon and evicting the occupants claiming that such land belonged to TPDF for its military operations. As their attempt to claim compensation hit a snag, the appellants instituted the suit before the trial court for several reliefs; in particular, a declaration that the appellants were lawful owners of the land measuring about 5000 hectares and payment of TZS 500,000,000.00 in special damages.

The respondents resisted the suit claiming that the land, subject of the suit, belonged to the TPDF having been acquired prior to the

registration of Tondoroni village which was subsequently deregistered in 2002, vide Government Notice No. 301 of 22 August 2014 upon discovery that it was mistakenly registered in a land lawfully owned by the TPDF.

From the pleadings, the trial court framed three issues for determination of the suit namely; (1) whether Tondoroni Village was de-registered under the law; (2) who was the rightful owner of the suit land and; (3) reliefs the parties were entitled to.

Four witnesses out of 712 plaintiffs testified orally tendering several documentary exhibits to prove their case. The testimonies of 110 witnesses was by way of affidavits out of whom, five witnesses appeared before the trial court for cross-examination. Upon such evidence, the case for the appellants was marked closed albeit without the evidence of 566 plaintiffs. On the other hand, the respondents' case was defended through the evidence of four witnesses who also tendered several documents before closing their case and conclusion of the trial.

Before composing judgment, the learned trial judge found it necessary to visit the *locus in quo* for clarification on some aspects of the evidence from which she made a number of observations. At the end of it all, the trial court answered the first issue negatively being

satisfied that, the de-registration of the village was lawfully done. As to ownership of the suit land, the learned trial judge found the appellants' evidence wanting to prove ownership of the pieces of land each claimed to have owned. Consequently, the trial court entered a judgment for the respondents, now challenged in this appeal.

Acting through Mr. Edward Chuwa, learned advocate who acted for them before the trial court, the appellants have preferred eight grounds of appeal followed by written submissions in support. At the hearing of the appeal, Mr. Chuwa and Ms. Anna Lugendo, learned advocates appeared to prosecute the appeal for the appellants. Ms. Happiness Nyabunya, learned Principal State Attorney and Mr. Erigh Rumisha, learned State Attorney advocated for the respondents.

Mr. Chuwa addressed the Court by way of emphasis on the written submissions lodged earlier on. As it will become apparent shortly, we do not wish to reflect the substance of the submissions in this judgment except in connection with ground six on which the determination of this appeal turns. The complaint in ground six is that the visit to the locus in quo was not conducted in accordance with the law resulting into wrong and erroneous findings.

Before we delve into the merit of the complaint, we find it apposite to address one aspect which cropped up in the course of the hearing of the appeal. As indicated earlier on, 566 of the plaintiffs did not testify before the trial court. Yet are included in this appeal as aggrieved appellants. Initially, Mr. Chuwa was not forthright in his submission when asked by the Court the effect, if any, such omission had on the appeal. A little later, the learned advocate argued that the fact that such plaintiffs, did not testify that was tantamount to failure to prove their individual claims. It was his submission that, although they could not have been aggrieved by the impugned decision, the appeal cannot be rendered incompetent. Without citing any authority, Mr. Chuwa urged that the remedy lies in striking them off without affecting the whole appeal. For his part, Mr. Rumisha found the infraction fatal to the appeal, again without citing any authority in that regard.

Apparently, the issue regarding the absent plaintiffs arose before the trial court as evident from pages 552 and 553 of the record of appeal. It is glaring that, the trial High Court was moved to dismiss the case against the no show plaintiffs on the authority of the Court's decisions in **National Agricultural Food Corporation v. Mulbadaw Village Council & Others** [1985] T.L.R 188, **Haruna Mpangaos & 932 Others v. Tanzania Portland Cement Co. Ltd**, Civil Appeal No.

129 of 2008; and a decision of the High Court in **Peter Junior & 17 Others v. Mohamed Akibal & Chairman Kifungamao Village**, Land Case No. 104 of 2015 (both unreported). Nevertheless, the trial court made no determination on this aspect presumably because it found that the appellants had not proved the suit, hence its dismissal.

Be it as it may, it is our firm view that since the no-show plaintiffs had not adduced any evidence unlike the rest, the trial court ought to have dealt with their claims separately. This entailed making a determination on the prayer for the dismissal of the claims involving the no-show plaintiffs followed by evaluation of the evidence by those plaintiffs whose evidence was received orally and by way of affidavits. Ordinarily, this Court sitting as an appellate court would have done what the trial court failed to do. However, in view of the path we have chosen to take in the disposal of the appeal we decline making any determination on the issue. Next we shall turn our attention to ground six.

Mr. Chuwa's submission in this ground, both written and oral was predicated upon the parameters of a proper visit to the *locus in quo* set out by case law. The learned advocate cited to us two decisions of the Court guiding the procedure to be followed where the court decides to

conduct a visit to the *locus in quo*, notably, Nizar **M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29 and **Kimon Dimitri Mantheakis v. Ally Azim Dewji & 7 Others** (Civil Appeal No. 4 of 2018) [2021] TZCA 663 (3 November 2021, TanzLII). Apart from the procedure, the latter decision discussed the essence of the visit to the *locus in quo* in land matters aimed at seeing objects, boundaries and places referred to in evidence physically in order to clear doubts arising from conflicting evidence, if any.

Armed with the above decisions, the learned advocate argued that, the trial court's visit to the locus in quo was irregular as it did not accord with the parameters set out in the said cases. In elaboration, Mr. Chuwa pointed out that the learned trial judge made observations at page 356 of the record of appeal which do not appear to have been extracted from evidence of any of the witnesses at the *locus in quo*. In view of the irregularities in the manner the visit to the *locus in quo* was conducted which is incompatible with the established procedure during such visits, the learned advocate urged the Court to take the path it took in its previous decisions, particularly, **Kimon Dimitri Mantheakis** (supra) and hold the visit invalid and proceed to nullify the trial.

For his part, Mr. Rumisha found nothing objectionable from the visit to the *locus in quo* to warrant nullification of the trial.

Having examined the record and the judgment, there can be no doubt that part of the finding made by the trial court when determining the second issue was influenced by the visit to the *locus in quo* conducted on 17 March 2021, pursuant to its order made on 22 February 2021. It is gleaned from the record that the decision to conduct the visit was made after the trial had been concluded and judgment reserved. It would seem that the learned trial judge saw the need to visit the site as she put it, to get more clarification from the parties. From such visit, the learned trial judge made a number of observations reflected at page 356 of the record. In the judgment that followed, she referred to some of the observations particularly boundaries said to have been explained by Jumanne S. Mwamposhi (DW2). Addressing itself on the description of the suit land, the trial court stated the following: -

> *"...when the Court visited the site, the plaintiffs who were available at the site could not clearly point out boundaries of individual pieces of land ..." [At page 563 of the record].*

While appreciating that the trial court's finding on the ownership of the disputed land was critical to the determination of the suit necessitating the visit to the *locus in quo*, the nagging question is, did the visit follow the requisite procedure enough to achieve its intended objective? The cases cited to us by Mr. Chuwa say as much on the procedure guiding trial courts in such eventualities. In **Nizar Ladak** the Court stated:

> *"... 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 road or width of a 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 notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by courts in future."*

That decision features prominently in **Kimon Dimitri Mantheakis** (supra) and **Depson Baiyagati v. Veronica J. Kibwana**, (Civil Appeal No. 21 of 2021) [2023] TZCA 17772(23 October 2023, TanzLII) and many other decisions we need not mention here. In its deliberation on an issue similar to what is before us, in the latter decision, the Court subscribed to the holding of the High Court of Uganda in **David Acar and 3 Others v. Alfred Acar Aliro** [1982] HCB 60 on the essence of visit to the *locus in quo* which we consider worth reproducing here:

> *"When the court deems it necessary to visit the locus in quo, then both parties and their witnesses must be told to be there. When they are at the locus in quo, it is .... not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact, the purpose of the visit of the locus in quo is for the witnesses to clarify what they stated in courts; he/she must do so on oath: The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party.* ***Any observation by the trial magistrate must form part of the proceedings..."*** (extracted from page 10 and 11 in **Balyagati**'s case).

Subjecting the foregoing to the record from which the impugned decision has emanated, it is glaring, particularly at page 355 thereof that, the only witness who is recorded to have been present is DW2. It is not clear to us from which witnesses did the court extract the observations which formed the basis of the finding on the ownership of the suit land. There is no evidence that all witnesses were in attendance neither does the record show that witnesses were allowed to give evidence and cross-examined by either party or their counsel at the locus in quo. Similarly, there is no record of any proceedings at the locus in quo followed by observations, views, opinion or conclusion of the court including drawing a sketch map.

As we observed in **Balyagati**, it is difficult for us to test the evidential value of the observations made by the trial court appearing at page 356 of the record. It is significant that those observations were the basis on which the trial court held that the appellants did not discharge their burden of proof regarding ownership of the suit land because they failed to describe their individual pieces of land. Indeed, in the absence of any proceedings recorded at the *locus in quo* necessitated by the need to get clarifications on the uncertainties in the oral evidence, we cannot help but agreeing with Mr. Chuwa that, the observations at page

356 of the record cannot stand the test of what is expected from the visit worth forming part of the evidence by any of the parties.

In view of the glaring irregularities in the visit to the *locus in quo*, we cannot but agree with the learned advocate and in consequence we unhesitatingly sustain ground six. The next question is on the way forward. Mr. Chuwa suggested that the irregularities vitiated the trial proceedings and so we should nullify them.

Despite espousing for nullification, the learned advocate did not go further justifying it against the entire trial when the only offensive part relates to the observations at page 356 of the record and in the judgment. While we are alive to the path we took in the cases cited to us, we are reluctant to do alike in this appeal because the extent of the infractions in the instant appeal are distinct from the cases we have been referred to. In **Ladak**, for instance, the irregularities occurred in the course of the trial whereby, upon the plaintiff's request, the trial magistrate inspected premises meant to be provided as alternative accommodation for the respondent. After the visit, the trial court made some observations and the trial continued but no witnesses testified as to the locus in quo which the trial magistrate had visited. Yet, in the judgment, the trial magistrate referred to the premises he visited and

made a determination on them for the defendant tenant. On appeal to the High Court, the first appellate judge too visited the premises and in his judgment he relied on the notes made by the trial magistrate and his own observations and reversed the trial court's judgment. On a second appeal, the Court found the trial and the first appeal vitiated by the roles played by the trial magistrate and the first appellate judge and ordered a retrial. The position in the instant appeal is that the visit to the locus in quo was made after the conclusion of the trial only to be reopened later upon the learned trial judge finding it necessary to do so. If the need for more clarification from the parties had not arisen, the trial court could have proceeded to compose judgment already on record. In effect, the only part of the proceedings which is offensive relates to the observations made after the visit. In our view, it does not appear to us to be in the interest of justice to nullify the trial proceedings and order a fresh trial in a case in which the trial had been concluded waiting for judgment. That being the case, we do not, with respect, accept the invitation extended to us by the learned advocate for nullification of trial proceedings as he put it.

On the contrary, we are firm that, logic, common sense and justice dictate quashing the offensive observations of the *locus in quo* as appearing at pages 356 as well as the judgment and the decree which

we hereby do is the right course of action. Having so done, we remit the record of the High Court to the trial court for conducting a fresh visit to the locus in quo by another judge if that will be necessary before composing a fresh judgment based on the evidence already on record.

That said, the appeal is allowed in ground six to the extent indicated. Considering that none of the parties is to blame for the irregularities resulting in our order, we make no order as to costs.

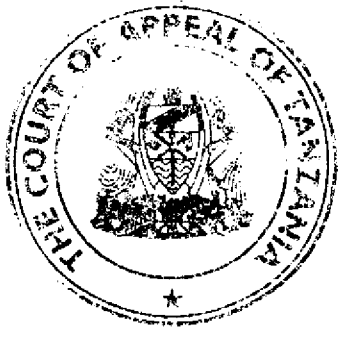
DATED at **DAR ES SALAAM** this 21st day of November, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of November, 2023 in the presence of the 1st appellant in person and Ms. Happiness Nyabunya, learned Principal State Attorney for the Respondents, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL