IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA.

(CORAM: LILA, J.A., MWAMPASHI, J.A And MURUKE, J.A.)

CIVIL APPEAL NO. 623 OF 2022

ALLY MHIDINI IVAMBI..... 1ST APPELLANT
MIKIDADI KAITA..... 2ND APPELLANT
HAMISI SALUM..... ..... 3RD APPELLANT

VERSUS

SAMBWA VILLAGE COUNCIL.....RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Dodoma]

(Masaju, J.)

dated the 21st day of May, 2019

in

Land Appeal No. 08 of 2019

JUDGMENT OF THE COURT

08th & 13th December, 2023

MWAMPASHI, J.A.:

In the District Land and Housing Tribunal for Kondoa at Kondoa (the DLHT), the appellants herein, namely; Ally Muhidini Ivambi, Mikidadi Kaita and Hamisi Salum instituted Application No. 11 of 2015 against the respondent, Sambwa Village Council. In the said matter, among other orders, the appellants prayed for the following; **one**, a declaration that they are the lawful owner of about 190 acres of land at Sambwa Village within the District of Kondoa, (the suit land) **two**, an order restraining the respondent and other persons from claiming title or right of use of the

suit land and **three**, an order for payment of Tshs. 42,322,960/= being the value of crops destroyed by the Village pastoralists. On the other hand, the main and sole defence by the respondent was that the suit land is within the Village land specifically allocated and demarcated for animals grazing or pastoralism.

The appellants' suit before the DLHT was dismissed with costs on account that they had failed to prove their claims to the required standard. Their appeal to the High Court against the decision of the DLHT, was again dismissed with costs on 21.05.2019 hence the instant appeal on the following five grounds of complaint:

1. *The High Court failed to consider the legal position regarding the period of forty years the appellants were in undisputed occupation of the suit land before the dispute arose.*
2. *The High Court did not address the contradictions in the evidence of the respondents.*
3. *The High Court failed to consider the legality or competence of Sambwa Village Land Use Plan.*
4. *The High Court acted on inadmissible and irrelevant exhibits to uphold the decision of the District Land and Housing Tribunal.*
5. *The High Court failed to consider relevant evidence of the Appellants hence arrived at a wrong decision.*

At the hearing of the appeal, the appellants were represented by Mr. Constantine Kakula, learned advocate whereas the respondent had the services of Ms. Jenipher Kaaya and Ms. Selina Kapange, both learned Senior State Attorneys.

Upon taking the floor, Mr. Kakula abandoned the 1st and 3rd grounds of appeal. He also amalgamated the remaining three grounds into one ground which reads as follows; that the High Court erred in law and in fact in not considering and properly re-evaluating the evidence on record in order to come up with its independent findings.

For reasons to be apparent in due course, we do not intend to reproduce in full, the submissions made for and against the appeal. However, for purposes of the decision we are going to make in this appeal, it suffices to note that Mr. Kakula thoroughly argued the said single ground of complaint. He insisted that, had the DLHT and the High Court properly evaluated the evidence adduced in support of the appellants' claims, the finding that the case was not proved to the required standard, would not have been arrived at. He also faulted the evidential value and the propriety of the *locus in quo* visit which was conducted by the DLHT on 24.09.2017.

On the other side, Ms. Kaaya, for the respondent, strongly resisted the appeal. She supported the finding by the two lower courts that the appellants failed to prove their claims on the balance of probabilities. Regarding the visit to the *locus in quo*, Ms. Kaaya's stand point was that the visit cannot be faulted in any way.

Having duly considered the submissions made for and against the appeal, and after we have dispassionately examined the record of appeal, particularly the pleadings and the evidence adduced before the DLHT including the notes made on the *locus in quo* visit appearing at page 99 of the record of appeal, it has come clear to us that, one of the questions arising therefrom is an important issue on whether the suit land is within the Village land allocated and demarcated for animal grazing purposes or not. Undoubtedly, though *locus in quo* visit is discretionary and not mandatorily required, given the circumstances of this matter, the above stated issue required a properly conducted *locus in quo* visit. It is our considered view that the instant case is one of the cases that its effectual and just decision needed sufficient evidence from the *locus in quo* for an ascertainment of the location, size and boundaries, not only of the suit land but also of the relevant Village land allocated and demarcated for animal grazing purposes.

It should also be borne in mind that in the instant case, the evidence appear to show that the fact that there is a land allocated and demarcated by the respondent for animal grazing purposes and also that the appellants have been in occupation and use of a certain piece of land for a considerable period of time, is not much disputed. There is also undisputed evidence that the land allocated and demarcated for animal grazing is a grassland (mbuga) and has black/clay soil and not red or sandy soil which is for agriculture. Further, the appellants tendered in evidence letters from the Village Executive Officer (VEO) which are to the effect that the suit land is not within the land allocated and demarcated for animal grazing. The said VEO testified for the respondent as DW2 and his evidence is to the same effect. It is from these pieces of evidence that we find a properly conducted visit on the *locus in quo* was crucial and indispensable for the fair and effective adjudication of the instant case. We are of a settled mind that a properly conducted visit could have ascertained whether the suit land is within the land allocated and demarcated for animal grazing or not.

At this juncture, and as we have alluded to above, we should note that in the instant case, the DLHT conducted the *locus in quo*. However, the irritating question is not only whether the said *locus in quo* visit observed the required guidelines and procedures but also whether it was

conducted in the manner that it could have rendered any assistance to the DLHT in effectually and justly determining and resolving the dispute before it.

Regarding the requirements that need to be observed when a court or tribunal has to visit the *locus in quo*, the Court in **Nizar M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] T.L.R. 29, observed that:-

> *"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 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. Witnesses then have to give evidence of all those 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. We trust that this procedure will be adopted by the courts in future".*

Further, in the case of **Avit Thadeus Massawe v. Isidory Assenga**, Civil Appeal No. 6 of 2017 (unreported) the Court, was highly persuaded by and relied on the decision of the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division, in the case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others**, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 which relied in the decision in the case of **Akosile v. Adeye** (2011) 17 NNWLR (Pt 1276) at page 263 where it was held that:

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

In the instant case, it is clear from the record, particularly as evidenced by the notes made by the DLHT on its visit to the *locus in quo* appearing at page 99 of the record of appeal that, the *locus in quo* visit did not comply with the relevant guidelines and procedure. First of all, the counsel for the parties were not in attendance. Further, there is no

indication that the witnesses whose testimonies in court related to the location, size and boundaries of the suit land and the Village land demarcated for pastoralists, were re-called to testify on that matters at the *locus in quo*. Worse still, there is no indication that the DLHT re-assembled and that the notes made on the visit was read out to the parties and their respective counsel.

The ailments pointed above render the *locus in quo* visit evidentially valueless. The fact that the visit was not properly conducted has denied us an opportunity to properly appreciate the evidence on record and we thus cannot make any proper re-evaluation of the evidence including the evidence on what had transpired and gathered at the *locus in quo* on the DLHT visit. For the same reason, we are of a settled mind that, even the High Court faced the same quagmire hence failing to properly appreciate and re-evaluate the evidence on record.

In view of what we have endeavoured to discuss above, it is our observation that in the absence of proper and sufficient evidence obtained from the *locus in quo*, the DLHT could not have resolved the dispute at hand justly, effectually and with certainty. That being the case and for the interests of justice, we find it apt to invoke the provisions of rule 38 of the Tanzania Court of Appeal Rules, 2009 and remit the proceedings to the DLHT with a directive that the DLHT should visit the locus in quo, collect

additional evidence therefrom while observing the relevant guidelines and procedure. Having done so, the DLHT should act on such evidence together with the evidence on record to compose a fresh judgment. In the same vein, we hereby quash and set aside the judgments of both the High Court and the DLHT. Considering the circumstances surrounding this matter, we make no order as to costs.

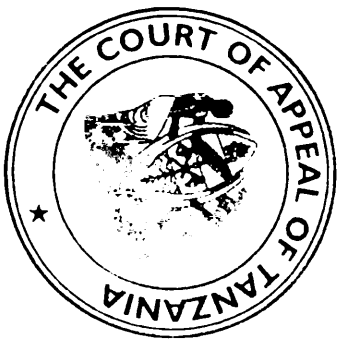
DATED at **DODOMA** this 12th day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of Mr. Omary Ngatanda, learned State Attorney for the Respondent and also holding brief for Constantine Kakula, learned Counsel for the Appellants is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL