IN THE HIGH COURT OF TANZANIA

AT IRINGA

LAND APPEAL NO. 12 OF 2016

(Originating from the Decision of the District Land and Housing Tribunal of Iringa District at Iringa in Application No. 53 of 2013)

JOFREY NZALI ..... APPELLANT

VERSUS

SALUM MKWANGA *(The Administrator of Estate of Musa Mkwanga)* **..... RESPONDENT**

JUDGMENT

18TH NOVEMBER 2016 & 8th DECEMBER 2016

SAMEJI, K. R. J

The appellant in this appeal is appealing against the decision of the District Land and Housing Tribunal of Iringa hereinafter referred to as "the Tribunal". Initially, before the Tribunal, the respondent instituted a suit against the appellant over a land property for the Tribunal to order vacant possession and declare the respondent the lawful owner of the suit land located at Kinyika Village, Pawaga Division, Iringa Rural. The suit was instituted against the

appellant, who was alleged to have trespassed into the suit land. Among others the respondent prayed for the following orders:-

(a) *That, the suit land be declared the respondent's property;*

(b) *That, the appellant be ordered to pay compensation of Tshs 40,000,000/= to the respondent;*

(c) *That, the appellant be ordered to vacate the suit premise;*

(d) *An order for permanent injunction against the appellant to enter the suit premise; and*

(e) *Costs of the case to be born by the appellant.*

After full consideration of evidence adduced before it, the Tribunal decided the case in the favour of the respondent. Having aggrieved by that decision of the Tribunal, the appellant without much ado filed this appeal, which consisted the following three (3) grounds of appeal:-

(a) *That, the Tribunal erred in fact and law in holding in favour of the respondent without visiting the locus in quo so as to gather proper knowledge concerning the said old home, graves and irrigation schemes, hence a prejudiced decision;*

(b) *That, the Tribunal erred in fact and law in holding that, the allocation done to my father by the respective village was incoherence with the law, while the fact was that the whole village was properly informed, involved and thus participated fully in the allocation; and*

(c) *That, the Tribunal erred in fact and law for ruling in favour of the respondent in belief that the disputed land involves graves of his deceased's relatives while it was not true, such graves are not on the land being occupied and used by the appellant's family.*

At the hearing of this Appeal the appellant was represented by Ms. Gladness Fungo, the learned Counsel while the respondent enjoyed services of Mr. Rutebuka Samson Anthony, the learned Counsel. On 13th October 2016, upon request by the appellant and, which was conceded to by the Counsel for the respondent, this appeal was argued by way of written submission whose schedule was issued by the Court and was dully complied with by the parties, and I am grateful to all of them.

Counsel for the parties have filed somewhat lengthy submissions, but the crucial issue in this appeal is whether the appellant has advanced sufficient reasons and grounds to warrant this Court to overrule the findings and the decision of the trial Tribunal.

It is a settled principle of law that, where the appeal is on a point of law the appellant Court can evaluate evidence afresh and make its own findings of fact, where there are misdirection or non directions by the trial court or Tribunal.

In her submission, while amplifying on the 1st ground of the appeal, Ms. Fungo emphasized that, *locus in quo*, is one of the most important aspect in arriving at a fair decision, as it helps to confirm the correctness of the evidence adduced by witnesses during the trial. That, the Tribunal, in this case, before delivering its Judgement, was supposed to conduct a *locus in quo* to verify the evidence adduced. The act of the Tribunal not to carry on a *locus in quo* excersion misdirected itself and ended up giving an erroneous decision.

On his part Mr. Rutebuka valiantly contended that, the *locus in quo*, is crucial when the dispute is on boundaries, but the dispute herein is on

the ownership of the suit premises, which in his view was well proved by the respondent. As regards the issues of presence and existence of an old home, graves and irrigation schemes at the suit premise, Mr. Rutebuka noted that, the respondent with his witnesses' (PW1, PW2, PW3 and PW4) successfully proved that fact and the appellant side never disputed the same. Thus, there was no need for the Tribunal to conduct a *locus in quo,* as the same is not mandatory in law. Mr. Rutebuka substantiated his position by citing the case of **Daniel J Mhanga V Habasi Kalamba** Misc. Land Case No. 13 of 2013, High Court of Tanzania at Iringa at page 5 (Unreported) and **Jeremia Bundala V Yuda Katanga**, Msc. Land Case Appeal No. 102 of 2009, High Court of Tanzania at Dar es Salaam (unreported). In **Jeremia Bundala's** case the court held that:-

> " *...there is actually no law which requires visit of locus in quo as mandatory requirement. Visit of locus in quo was in my view done only when it is necessary so that the trial court or tribunal can asses the situation on the ground based on the dispute before it. That's why it is common for such visit to occur on land matters where the boundaries are an issue...*"

Mr. Rutebuka emphasized that, since in the case at hand there was no issues touching on the boundaries of the disputed premises and considering that, there were sufficient evidence on the side of the respondent that proved the issue of ownership, there was no need for the Tribunal to visit the said premises.

I have considered the evidence on record and the submission of parties on this matter and I wish to note that, as eloquently submitted by Mr. Rutebuka, there is no law forceful and mandatorily requires the court or the tribunal to conduct a *locus in quo* the same is being done at the discretion of the Court or the Tribunal particularly when the court or the tribunal deem it necessary to verify the evidence adduced before it. It is on record that PW1, PW2, PW3 and PW4 clearly testified, how the late Musa Mkwanga acquired the disputed land. All respondent's witnesses testified on the existence of the old home, graves and irrigation scheme. This fact was however, never disputed by the appellant's side during the trial.

I have however, observed that, in her written submission, Ms. Fungo had indicated at page three (3) that, in the disputed premises there is a small portion of the land which is being used to burry (graves) a number of

Nzali's relatives and other people. I must state that, this is a new fact and evidence, which had been just introduced by the appellant at the appeal but is no-where indicated on the record of the trial Tribunal. With due respect to Ms. Fungo, it is settled principle of law that, matters that were not pleaded or taken during the trial cannot be raised on appeal. See the case of **Hotel Travertine Ltd and 2 Others V National Bank of Commerce Ltd** [2006] TLR 133. See also the case of **Vidhyarti V Ram Rakha** [1957] EA 527, where the Court held that:-

> *"Parties have to confine themselves to pleadings. Introduction of new matters has to be brought into the proceedings by amendment of pleadings".*

I therefore do not find any merit on her argument and I must emphasize that, this is not a good practice in law, as during appeal parties are only required to stick to their pleadings.

I do therefore join hands with the submission and the authorities submitted by Mr. Rutebuka on this matter and conclude that, given the testimonies adduced at the trial Tribunal by the respondent and his

witnesses, the *locus in quo* by the Tribunal was not necessary. As such, ground number one is answered in the negative.

As regards the 2nd ground of appeal the law is very clear, where there is a re-allocation of land from the previous occupiers issues of legal procedures including notice and compensation are crucial as per Sections 3(1) (c) (h) and 45(4)(a)(b) of the Village Land Act, [Cap. 114 R.E.2002].

In the case at hand, it is on record that, the disputed land was cleared and occupied by the respondent's father from 1960 till 1975, when he stopped due to drought and then continued with occupation till 2002 when he passed away. This fact was testified by witnesses from the respondent's side and as well corroborated by witnesses from the appellant's side. See for instance the testimonies of DW3. I have also noted the testimony of PW4, Ignas Kwangulilo who testified that:-

> *"I was the Village Executive Officer for Kinyika Village, I worked from 2000-2008, problem started with the Land Committee. The Land Committee wrongly allocated an already occupied land. It was not vacant. It was the property of Musa Mkwanga, the applicant's blood father"*

This fact was also corroborated by DW3 who also acknowledged that, " *Musa Mkwanga is the applicant father, he also abandoned the suit land following the drought*" I have as well noted the letter (*Annexure 'B'*) dated 17th November 2005 from the office of the Village Executive Officer, Kinyika Village on the settlement of the matter. The letter clearly elaborated that, the suit plot was wrongly allocated to Salum Nzali. The lawful owner of the suit plot is the late Musa Mkwanga. The letter emphasized that Nzali's family was restrained from using the suit plot.

All these are clear evidence that, the suit plot was initially the property of the late Musa Mkwanga. I have however noted that, in her submission, Ms. Fungo, while justifying the omission of the Village Land Committee in issuance of the required notice, she argued that, the rationale behind Section 45(4) of the Village Land Act, (supra) is to give information to the public to enable people to take part in the decision making on the land they are living. That, since the Village Assembly is the supreme authority in making decisions concerning land, then the occupation of the suit land is lawful. With due respect to Ms. Fungo, procedures entailed in the law are not there to decorate the statute books, but to be strictly adhered to and observed. Since, the prescribed procedure

in re-allocation of the land previously occupied was never followed by the said Village Land Committee then, the said re-allocation is illegal and *void ab initio.* I have as well noted that, the word used in the said section is '***shall***' as opposed to '***may,***' therefore the Village Land Committee was supposed to comply with the legal procedure without any further justification.

In his submission Mr. Rutebuka while arguing on this issue he eloquently highlighted provisions of Section 45(4) of the Village Land Act, (supra) and referred to the case of **Bunzari Mpiguzi V Lumwecha Mashili** [1983] TLR 354, where the High Court of Tanzania at Mwanza stated that:-"...*that nobody should be deprived of his property contrary to law and without compensation commensurate to the value of such property if such deprivation is necessary.*" Mr. Rutebuka further cited the case of **Mulbadawa Village Council and 67 Others V National Agricultural and Food Corporation**, [1984] TLR 15 where it was held that:- "*Where someone is in lawful occupation of land no valid right of occupancy can be offered to anyone else over the same land...*"

Hence the legal procedures were not followed during the re-allocation of the said suit land, as explained above, I do join hands with Mr. Rutebuka and I associate myself with the authorities he had since cited and as such, I have no hesitation to answer the 2nd ground of the appeal in the negative.

On the last ground, it is clear that, before the trial Tribunal, the appellant, though claimed that, the land is his, he had not produced any tangible and concrete evidence to prove the same. Furthermore, the testimonies adduced on his side were tainted with inconsistencies and irregularities. DW1 testified that, the Village Land Committee, allocated the disputed land to his late father, in 2003. On the contrary DW3 testified that, the land belonged to him and he donated the same to the appellant's father in 1982. The highlighted contradictions and inconsistencies make the evidence of DW1 and DW3 not only inadmissible, but also completely unreliable.

It is also on record that, the father of the appellant who is said to be the owner of the suit land, was never summoned to adduce evidence to clear some of these doubts and contradictions and there were no reasons

stated. See for instance the case of **Hemed Saidi v. Mohemed Mbilu** [1984) TLR 113 where the court held that;

> *"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."*

It is also a settled principle of law that, where doubts are created in evidence, the same should be resolved in favour of the opposite party. See the case of **Jeremiah Shemweta Vs. Republic** (1985) TLR 228.

On the other side, PW1 testified that, his late father cleared the land and occupied it since 1960 – 1975 when he stopped because of drought. PW2 corroborated what was said by PW1 and testified that, he was one of the laborers who worked on the land of Mzee Musa Mkwanga. He worked as a casual employee. There are graves of the late Mkwanga issues and young bothers. PW3 also confirmed that, the late Musa Mkwanga used the land since 1960 and PW3 as one of his son used to work on the suit land. The late Mkwanga used the suit land till 2002, when he passed away. PW4, the former Village Executive Officer for the Kinyika Village, confirmed that,

the land belong to the late Musa Mkwanga and that, in 2003 it was wrongly allocated to the appellant by the Village Land Committee, but the said mistake was since corrected. The appellant was informed and stopped from using the suit land. He was further requested to surrender the suit land to the owner.

In the circumstances, I declare that, the respondent has proved his case on balance and preponderance of probabilities. The land in dispute is the sole property of the respondent. The respondent is hereby declared the lawful owner of the disputed land. The appellant or his agent or any person on his behalf are permanently restrained from entering or trespassing into that land without respondents' consent and follow up of appropriate legal procedures and processes.

All said and done, the Judgment is entered in favour of the respondent, and I hereby dismiss the appeal and uphold the decision of the Iringa District Land and Housing Tribunal. The appellant is condemned to pay costs of the case.

It is so ordered.

DATED at IRINGA this 08th day of December 2016.

R. K. Sameji

JUDGE

08/12/2016

Judgment delivered in Court Chambers in the presence of the Appellant and Mr. Samson Rutebuka, the learned Counsel for the Respondent.

A right of Appeal explained.

R. K. Sameji

JUDGE

08/12/2016