IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

LAND APPEAL NO. 10OF 2018

(From the Decision of the District Land and Housing Tribunal for Ruvuma at Songea in Land Application no.37 of 2017)

IMELDA DANIEL MILANZI ..... APPELLANT

Versus

MAURUS NYONI ..... RESPONDENT

JUDGMENT

Date of Last Order: 09/06/2020.

Date of Judgment: 13/08/2019.

BEFORE: S.C. MOSHI, J.

At the District Land and Housing Tribunal for Ruvuma at Songea, the respondent successfully sued the respondent for trespass to the suit land which is located at Peramiho B within Songea District.

The appellant, being aggrieved by the judgment and decree has appealed to this court on the following grounds;

1. *That, thetrial Tribunal erred in law when it decided the matter against the appellant without conducting a locus quo while being aware that the center of the dispute was boundary between the appellant and the respondent.*

2. *That, the trial Tribunal erred in law and in fact when it held that the suit land was sold by PW2one Faustine Maurus Nyoni while there was no proof to prove the same.*

3. *That, the trial Tribunal erred in law when it declined to admit sale agreement between the respondent and appellant without justification of doing so.*

4. *That, the trial Tribunal erred in law and in fact when it decided the matter against the appellant while there was serious inconsistence of evidence from the respondent and his witness.*

5. *That, the trial Tribunal erred in law and in fact when it decided the matter contrary to the law and evidence tendered before the court.*

This appeal was heard by way of written submissions whereby the appellant was represented by Mr. Elseus Ndunguru, learned Advocate. The respondent enjoyed the services of Mr. Melkion Mpangala, learned Advocate.

Mr. Elseus Ndunguru submitted on the background of the case among other thing that the appellant owns an adjacent piece of land with the respondent. That sometimes in 2017 a dispute rose where the respondent claimed that the boundary between the two is "Misederea" trees where currently there is a stamp which marks the boundary. The appellant on the other hand claims that the boundary is a path way (kichochoro) and that the claimed Misderea are within her land. He said that it was therefore this issue of boundary which culminated the filling of the case before the trial Tribunal. The trial Tribunal held in favor of the respondent hence as a result the appellant has been aggrieved by the said judgement and decree.

On the first ground he argued that, the trial Tribunal erred in law and fact to decide that the boundary of the two plots is the two stamps of trees without visiting a *locus in quo* taking into consideration that the appellant testified that her boundary was a small path.

He submitted further that the respondent testified that one of the boundary was misederea tree. Pw2 testified that the two plots were separated by a stamp of misederea trees. The appellant on her part and her witnesses testified that the boundary was kichochoro not the said trees. He argued that, therefore it was necessary from the trial Tribunal to visit the land in dispute so as to clear all the above doubts, as the parties did not describe to the required standard the said boundaries hence the suit land was not properly described.

He argued that, the purpose of visiting the land in dispute was for ascertaining the uncertained issues and not to collect evidenceas it was held in the case of **Avit Thadeus Massawe Versus Isidory Assenga,** Civil Appeal No. 6/2017 Court of Appeal of Tanzania Sitting at Arusha (Unreported), where it was held thus: -

"The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims".

He said that, in the case at hand there was a lot of discrepancies regarding the identity and location of the suit land, for instance while the respondent testified that he sold the appellant a piece of land measuring ¼ acre, PW2 on the other hand testified that he sold the appellant a piece of land measuring ¾. Therefore, there are serious inconsistencies and they had different implications with regards to the boundary.

On the second ground he argued that, before the trial Tribunal PW2 testified that he sold the suit land to the appellant but the appellant testified that she purchased the suit land from the respondent who instructed his young brother DW2 to dispose the same on his behalf. It was further testified that the respondent is the administrator of the estate of their late parents and the said respondent did not dispute. The trial Tribunal did not assign any good reason why it did not trust DW2. He argued that, there was no any proof whatsoever that PW2 sold the suit land to the respondent. Even more while PW1 said that he sold the

appellant a land measuring ¼ the, PW2 on his party testified that he sold ¾ acre to the appellant. He made reference to section 115 of the Evidence Act Cap. 6 R.E 2019 which provides that in civil proceeding when any fact is within the knowledge of any person, the burden of proving that fact is upon him. He said that in this case since PW2 claimed to have sold the land to the appellant the fact which was denied by the latter, then it follows as a matter of principle that the said DW2 was duty bound to prove this fact and the only way to prove was to produce the written agreement or at least to call witnesses who witnessed the same, the duty which he failed to discharge.

On the third ground he submitted that the trial Tribunal erred in law when it declined to admit the sale agreement between the respondent and the appellant without justification. He said the certified copy was tendered due to the fact that the original document was worn out. He said that this was contrary to the dictates of section 67(1) (c) of the Tanzania Evidence Act Cap.6 R.E 2019 which allows secondary evidence to be admitted when the original document has been destroyed.

On the fourth ground he argued that there was no dispute that the appellant has a piece of land which borders the respondent's land which

she claimed to have purchased from the respondent through DW2 and DW2 confirmed this fact. The respondent testified that the appellant purchased the suit land from PW2 whereas the appellant denied this fact. As it has been submitted above that there was a serious inconsistences on the part of the respondent, including the size of the land, boundary and the person who actually sold the land to the appellant the trial tribunal been serious in evaluating evidence the same would have been resolved in favor of the appellant.

On the fifth ground, Mr. Ndunguru said that the trial Tribunal was biased as it created its own evidence to the effect that PW1 testified that the suit land was sold by PW2; this shows that the trial Tribunal manufactured its own evidence. Furthermore, it was submitted that the size of the disputed land which the appellant said to have purchased was ¼ while pw2 said he sold to the appellant a land measuring ¾ but still the trial Tribunal proceeded to believe him.

The respondent on his part replied by submitting that, it is not true that the center of the dispute is boundary rather the trespass after the appellant have been invaded into the land of the respondent and started

cutting down trees and made timber on the basis that the suit land belongs to her.

He said that, respondent alleged that, the appellant had invaded into his land and started cutting down trees; under the circumstance it is obvious that someone has crossed the boundaries and entered into someone's land and commits illegal activities into the said land. In order to deal with the dispute the trial tribunal raised three issues namely; whether the applicant is the lawful owner, whether the respondent is a trespasser and what reliefs parties are entitled to. He said that the appellant is trying make us believe that the central issue was a boundary. The appellant's evidence during trial is ownership of a suit land that; is the dispute, the dispute is not over the boundary.

He argued that it is only in exceptional circumstances where a Tribunal visits a locus in quo. He referred to the case of **Avit Thadeus Massawe (supra)** where it was held thus:-

"we have observed above that the evidence on the record was insufficient for the court to determine the appeal justly with clarity and

certainty in the view of the conflicting evidence in respect of the location of the property".

He contended that the court could visit the locus in quo only where there is conflicting and or insufficient evidence regarding the disputed land and not otherwise. In the case at hand there are no conflicting evidence or insufficient evidence as the records are very clear and the witness produced their evidence clearly that both parties and the tribunal saw no need to visit locus in quo, the witnesses identified the location, size, boundaries of the disputed land the structure present in the suit land.

He also stated that there were no discrepancies in evidence as PW1 never testified that he sold the piece of land measuring ¼ acre to the appellant rather he testified that the appellant purchased about ¼ acre before it was measured by the government officials and he was not present when it was measured.

He said that, parties and their advocates had a duty to pray before the trial tribunal to visit the *locus in quo* if there was a need to do so but they did not ask to visit the *locus in quo* despite the fact that they were

both represented by advocates, this means that there was no need for them to visit the locus quo.

He respondent to the second ground that it is clear from the record that PW2 never sold the suit land to the appellant rather he sold to the appellant a nearby piece of land. The respondent was not claiming the ownership over a land which was sold rather he was claiming his land; that the appellant invaded it thus it was necessary for the appellant to prove that the suit land was sold to her.

He argued that PW1 clearly stated that the suit land had never been sold to the appellant and even the District Land and Housing Tribunal did not hold that the suit land was sold by PW2 rather the Tribunal said in its judgement that PW2 sold only nearby land to the appellant; he referred to page 5, 7 and 8 of the type proceedings.

On ground number four of the appeal, he submitted that, there is nowhere in the proceeding of the trial tribunal where the respondent has testified that the suit land was sold to the appellant by the PW2.

In regards to the last ground of Appeal, he contended that, the ground is baseless as the trial tribunal did not cook evidence rather

appellant's counsel is cooking the evidence since PW1 did not testify that the suit land was sold by DW2. PW1 said the nearby land was sold to appellant by PW2 narrated by the trial tribunal in its judgment at page 5 paragraph 4. He said that furthermore, there was no any other factor which was testified by the appellant to make the chairman believe her since the nature of civil cases are based on balance of probability.

The issue is whether the appeal has merits. I discuss all issues together as they revolve around analysis of evidence.

The duty of proof in civil cases is on the balance of probabilities. See **Daniel Apael Urio Versus Exim (T) Bank,** Civil Appeal Number 185 of 2019, Court of Appeal sitting at Arusha (Unreported).

It is trite principle of law that a person who asserts existence of facts must prove that those facts do exist; See section 110 and section 111 of the Tanzania Evidence Act, Cap. 6 R.E 2019. It is common ground that PW1 (respondent) and PW2 sold the suit land to appellant, the respondent's complaint before the District Land and Housing Tribunal which was filed on 27-4-2017 did not indicate the measurements and description of the boundaries of the suit land. Therefore they failed to describe the suit land.

Similarly, the evidence in support of the application is inconsistent, it did not reveal clear measurements of the disputed land while PW1 testified that the suit land measured ¼ an acre, Pw2 stated that it measured ¾ an acre. Be as it may be the application as a whole does not describe the suit land.

The dispute as drawn in the issues is ownership of the land. However, in determining ownership the question of boundaries cropped up. The court may visit the locus in quo in exceptional circumstances where the trial court wishes to ascertain the state, size, location etc. of suit land, etc. See **Avit Thadeus Massawe Versus Isdory Assenga,** Civil Appeal Number 6 of 2017, Court of Appeal sitting at Arusha.

In the case at hand as indicated earlier, the complainant did not indicate the size of the land in the complaint. Further more the measurements which were indicated by PW1 and PW2 differed. Therefore, visiting the locus in quo could not have helped the court, thus ground number one fails.

However, having discussed as shown above I find that the fourth ground has merits. I find that second and third ground have no basis because there was no dispute that the suit land was sold to the appellant

likewise thereis no dispute that the same was reduced in writing. The District Land and Housing Tribunal correctly refused to admit the certified copy while the party who wished to tender it failed to bring the original which according to evidence it was in existence.

That said and done, I find that the respondent failed to prove the case on the balance of probabilities. The appeal succeeds basing on the fourth ground of appeal. The decision is reversed. I declare the appellant the rightful owner of the suit land. Costs to be paid by the respondent. Appeal is allowed.

Right to appeal fully explained.

S.C. MOSHI

JUDGE

06/08/2020.