**IN THE HIGH COURT OF TANZANIA**
**(IN THE DISTRICT REGISTRY)**
**AT MWANZA**
**LAND APPEAL NO.72 OF 2019**

(Arising from the District Land and Housing Tribunal for Mwanza in Land Application No. 77 of 2015)

**1. PHILBERT MAHENDA**
**2. FAUSTIN MASEBU** } **..... APPELLANTS**

**VERSUS**

**Y.P INVESTMENT CO. LTD ..... RESPONDENT**

# JUDGMENT

*Date of last order: 06.11.2020*

*Judgment Date: 18.11.2020*

**A.Z.MGEYEKWA, J**

At the centre of controversy between the parties to this appeal is a parcel of land, Plot located at Nyanza Fishing and Processing Company in Ilemela at Mwanza. I shall elsewhere refer to it as the disputed land. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Mwanza in Land Application No. 77 of 2015 in which Y.P Investment Co. Ltd, the respondent successfully sued Philibert

Mahenda and Faustin Masebu, the appellants for, *inter alia*, trespass and a declaration that he is the lawful owner of the disputed land. Dissatisfied, he filed the instant appeal.

The material background to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the respondent filed a suit at the District Land and Housing Tribunal of Mwanza claiming that in 2015 the appellants had trespassed the respondent's plot around 1,500 square meters. The respondent claimed that he bought the disputed land from Tannol Holdings Ltd. To substantiate his claims he tendered a certificate of occupancy (Exh. PE1) which was issued to the respondent in 1978. The respondent claimed that the appellants are illegally within the respondent's plot.

The appellants on their side claimed that the disputed land belongs to the chiefs' clan and they are among them. They claimed that they offered the respondent part of the land and they remained with a piece of the land which is in dispute. The appellants claimed that the respondent did not respect the boundaries. The District Land and Housing Tribunal decided in favour of the respondent declaring the appellants' trespasser and the respondent a lawful owner of the disputed land. The appellant

was also ordered to demolish the fence and give vacant possession on the disputed land.

Aggrieved, the appellants filed the instant appeal before this Court. Undeterred, they have come to this Court seeking to assail the decision of the District land and Housing Tribunal on six grounds of appeal; namely:-

1. *That, the trial honourable learned Chairman grossly, erred in law and fact by declaring the Respondent herein to be the legal owner of the disputed part of the land without considering the documentary and historical evidence on how part of the disputed demarcation of the plot come into possession of the Appellants herein.*
2. *That, the trial Honourable learned Chairman erred in law and in fact by determining the matter leaving contested issued unresolved, on unevaluated evidence and unreasoned judgment.*
3. *That, the trial Honourable learned Chairman erred in law in fact by failure to afford the 2nd Appellant his right to be heard, hence ending up with an unreasonable decision.*
4. *That, the trial Honourable learned Chairman erred in law and in fact by composing a judgment of which one of the assessors namely Mama Juma was not part of the column during hearing of the case.*

5. *That, the Honourable learned Chairman erred in law and in fact by hearing the dispute without visiting the locus in quo.*

6. *That, the trial Honourable learned Chairman misdirected himself by granting to the Respondent prayer that was not, prayed for by them.*

When the appeal was placed before me for hearing on 15th November, 2020, both parties agreed to argue the appeal by way of written submissions whereas the appellants filed their submission in chief on 23rd October, 2020. The respondent filed his reply on 30th October, 2020 and a rejoinder was filed on 6th November, 2020. Both parties complied with the court order.

In the written submission of the appellants, the learned counsel for the appellant started his onslaught by seeking to abandon the second and third grounds and maintained the first, fourth, fifth, and sixth grounds of appeal. Submitting on the first ground, Mr. Rutahindurwa argued that the trial Chairman erred in law and fact by declaring the respondent a legal owner of the disputed part of the land without considering the documentary and historical evidence. He argued that the respondent used the disputed piece of land for burials and in between they agreed with Nyanza Fisheries to shift the graves to a nearby place. He added that in 1978, the survey indicated the demarcations and boundaries between the

disputes piece of land. He referred this court to page 43 of the trial tribunal proceedings.

The learned counsel for appellants went on to argue DW1 evidence was corroborated by the testimony of PW2, Rashid Issa Nassoro. It was Mr. Rutahindurwa contentious that had the trial Chairman considered the historical perspective as to the land in dispute and the evidence of the appellants he could have ruled in favour of the appellants.

Arguing for the fourth ground of appeal that the trial Magistrate erred in law and fact by composing a judgment while one assessor namely Mama Juma was not part of the column during hearing of the case. Mr. Rutahindurwa argued that the law under section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] provides that the District Land and Housing Tribunal shall be composed when the Chairman who sits with no less than two assessors, who at the end of the trial shall be required to give their opinion before the Chairman reaches the judgment. To support his position he referred this court to the cases of **The General Manager Kikwegwa Strand Hotel v Abdalaah Said Musa**, Civil Appeal No. 13 of 2012 (unreported), **Samson Njarai and Another v Jacob Mesoro**, Civil Appeal No. 98 of 2015 (unreported) and **John**

**Masweta v General Manager MIC (T) Ltd**, Civil Appeal No.113 of 2015 the Court of Appeal of Tanzania at Mwanza.

The learned counsel for the appellant continued to argue that the records show that from the beginning of hearing the matter, the trial Chairman sat with two assessors namely; Mr. Methusel and Mr. Lusato. He added that surprisingly, on page 9 of his judgment the Chairman added a new assessor and was invited to give her opinion.

He went on to argue that there are a plethora of precedents that state that it is an incurable irregularity to allow the assessor who had not heard the testimonies and observed the demenours of witnesses to give his/her opinion. Mr. Rutahindurwa fortified his submission by referring this court to the case of **John Masweta v General Manager** (supra) whereas the Court of Appeal of Tanzania quoted with approval the case of **Joseph Labui v Regiham** [1954] E.A.C.A Vol. XXI, 260 which held that:-

> *" Where an assessor who has not heard the evidence all the evidence is allowed to give an opinion on the case, the trial is a nullity."*

Mr. Rutahindurwa did not end there, he stated that it is a prerequisite condition of the law that opinions of the assessors should be

reflected on records of the trial proceedings and not on the judgment. He added that the opinion of the assessors are not reflected anywhere in the trial tribunal proceedings. To bolster his argumentation, he cited the cases of **Amer Mbaraka and Azania Bank Corp Ltd v Edgar Kahiwil**, Civil Appeal No. 154 of 2015 and **Sikuzani Said Magambo and Another v Mohamed Roble**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania at Dododma (unreported). He ended by stating that the whole proceedings and judgment were a nullity.

On the fifth ground, Mr. Rutahindurwa faulted the trial tribunal for failure to visit *locus in quo*. It was his contentious that there is no law that forcefully and mandatory require the court or tribunal to conduct a visit at the *locus in quo*, but the same is done in exceptional cases. To revitalized his submission by citing the cases of **Kuyate v Republic** [1967] E.A 815, **Nizar M.H Ladak v Gulamal Fazal** (1980) TLR 29 and **Sukuzani Said** (supra) and **Avit Thadeus Masawe v Isidory Asenga**, Civil Appeal No.06 of 2017.

He further contended that it was necessary for the trial court to visit the *locus in quo* since the rivalry between the parties was boundaries/ demarcations of the suit land. He also cited Order XVI Rule 14 of the Civil Procedure Code Cap. 33 [R.E 2019] and section 51 (2) of the Land

Disputes Courts Act, Cap. 216 [R.E 2019] and stated that the surveyor officer from land allocation authority could clarify the location of the suit land, the extent, boundaries, boundary neighbor, and physical features on the land.

With regard to the sixth ground, he submitted that the trial tribunal misdirected himself by granting the respondents prayers that were not prayed for by the appellants. The learned counsel cited the case of **CRDB Bank Ltd v Gozibert Aboluganda**, Civil Appeal No.39 of 2008, High Court of Tanzania at Mwanza (unreported) to buttress the point that pleadings are not evidence and cannot be the basis of the decision unless they amount for the admission.

He added that the court will only grant the pleadings which were pleaded. Mr. Rutahindurwa fortified his submission by referring this court to the case of **Maulid Makame Ali v Kesi Kahamis Vuai**, Civil Appeal No. 100 of 2004, the Court of Appeal of Zanzibar (unreported).

On the strength of the above arguments, Mr. Rutahindurwa beckoned upon this court to allow the appeal, the judgment and decree of the trial tribunal in Land Application No. 77 of 2015 dated 25th October, 2019 be set aside and the appellants to be declared the legal owner of

the land in the dispute or in the alternative as per ground four and five the trial tribunal decision in Land Application No. 77 of 2015 dated 25th October, 2019 be declared a nullity.

Mr. Malongo for the respondent resisted the appeal with some force. Submitting on the first ground, he contended that the learned counsel for the appellant has not captured the nature of the disputed land since. He stated that the disputed land belongs to the respondent and the appellants were permitted to perform their rituals and bury their chiefs in the said area but were not given ownership of the disputed area. He went on to state that the dispute started when the appellants without the respondent's permission and without colours of right started to construct poles around the disputed plot.

The learned counsel for the respondent went on to state that the ownership of the suit land was confirmed by DW1. Mr. Malongo fortified his argumentation by referring this court to page 43 of the trial tribunal proceedings. He added that DW1 confirmed that the certificate of title was issued to Nyanza Fishing Processing Company. He added that the appellants were given a way to visit the graves on which the said permission did not pass ownership to the appellants. Insisting the learned

counsel for the respondent argued that the trial Chairman was right to declare the respondent the legal owner of the disputed land.

Submitting on the fourth ground, Mr. Malongo argued that the inclusion of Mama Juma as one of the assessors is a typing error or slip of a pen. He argued that the judgment does not state that Mama Juma was an assessor instead her name appeared at the end where the trial Chairman stated that the judgment is signed by Mama Juma instead of Mr. Lusato. Mr. Malongo went on to state that the record reveals that the two assessors gave their opinion in writing. The learned counsel quoted the following excerpt from section 45 of the Land Disputes Act, Cap. 216 [R.E 2019] which state that:-

> *" No decision or order of the District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity.. in such decision or order unless such error, omission or irregularity has in fact occasioned a failure of justice."*

Mr. Malongo added that the error in the name of the assessor has not occasioned failure of justice to the parties. He urged this court not to revise the tribunal judgment based on the said error. He faulted the learned counsel for the appellant for redrafting the fourth ground by

stating that the appellants without leave of the court raised a new ground that the opinion of two assessors were not reflected in the trial proceedings. To buttress his argumentation he cited Order XXXIX Rule 2 of the Civil Procedure Code Cap. 33 [R.E 2019] that the appellant is not allowed except with leave of the Court to urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. He added that if this court deems it fit to determine the issue of assessors opinion then the respondent be allowed to address the court.

On the fifth ground of appeal, Mr. Malongo argued that as correctly stated by the learned counsel for the appellants that there is no law that forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo, the same is done by discretion of the court. Mr. Malongo went on to argue that the law does not oblige the tribunal to visit locus in quo thus the tribunal's judgment cannot be faulted on the ground since the Chairman did not do anything against the requirement of the law. He argued that the tribunal acted within the ambit of the law thus this ground is demerit.

He distinguished the cited cases of **Avit Thadeus** (supra) that at the Tribunal main issue was ownership of suit premises which according to the evidence of both parties was proved without contradiction. He refuted

that the dispute was on the boundaries of the disputed land as alleged by the learned counsel for the appellant. He insisted that the dispute arose when the appellants without permission started to elect poles in the disputed land. He distinguished the cited cases of **CRDB Bank Limited** (supra), **Maulid Makame** (supra), and **Joram Molel** (supra) for the reason that they are inapplicable to the case before this court.

On the strength of the authorities and provision of law, he urged this court to dismiss the appeal with costs.

In his rejoinder, Mr. Rutahindurwa reiterated his submission in chief and insisted that the dispute is about the boundaries/ demarcation of the disputed piece of land rather than ownership. He argued that the respondent's counsel has admitted that the disputed land has graves for many years and the place was used for ritual and that in order to get to that area the appellants had to seek permission for way. He firmly argued that since the appellant seeks permission from the respondent to enter into their land does not mean that the respondent owns the land. He went on to state that the exceptional circumstances to visit locus in quo were narrated in the recent case of **Avit Thadeus** (supra).

On the strength of the above argumentation, the learned counsel for the appellant beckoned this court to allow the appeal, set aside the Judgment and Decree of the District Land and Housing Tribunal for Mwanza in Land Application No.77 of 2015 dated 25th October, 2019 and declare the appellants' legal owners of the disputed land. In the alternative, to nullify the Judgment and the resultant decree of the District Land and Housing Tribunal for Mwanza in Land Application No. 77 of 2015 dated 25th October, 2019.

Having summarized the facts of the case and submissions of the appellant, I now turn to confront the grounds of appeal in determination of the appeal before me. Mr. Rutahidurwa abandoned the second and third grounds and maintained the first, fourth, fifth, and sixth grounds of appeal. Therefore, I shall tackle the grounds of appeal in the order they appear as reproduced above.

On the first ground, the appellant faults the trial Court for declaring the respondent a legal owner of the disputed part of the land without considered the documentary and historical evidence on record. I have gone through the court records and found that the appellant at the trial court fended his case whereas, DW1 narrated the historical background that the disputed place was owned by chiefs to substantiate his testimony

he tendered the following documents; a minute of meeting held by chiefs which was tendered in court and admitted as (Exh.DE1), reminder letters from the appellants to the respondent; a letter dated 3rd July, 1976 (Exh.DE2), two letters dated 17th July, 1976 and 10th February, 1977 were collectively admitted and marked as (Exh.DE3) and a last reminder letter dated 13th July, 1977 was admitted and marked as (Exh.DE4). Apart from the tendering the said documents, the appellants prayed for an order to direct the respondent to respect the boundaries.

The record reveals that the previous owner, Nyanza Fishing Processing Company is the one who initiated the buying of the disputed land thus it uncontested that the whole plot was in the hands of the appellant. Also, it is uncontested that the appellant had a piece of land within the disputed land and it is uncontested that the respondent bought the plot which had a part of the appellants' grave land.

The trial Magistrate in his judgment summarized and analysed the evidence of the respondent and appellant's side and reached a decision that both parties agreed to remove the graves but scrutinizing the evidence of PW2 it seemed the appellant was still owning a part of the disputed land. PW1 in his evidence claimed that the appellants have trespassed the suit land and banked on the certificate of occupancy which

was issued to Nyanza Fishing and Processing Company in 1978. However, when he was cross-examined PW1 admitted that the disputed plot is within the respondent's plot. DW1 evidence was to the effect that the chiefs agreed to remove the graves, however, it seems the place which the appellant are using to bury the chiefs are still within the disputed land.

The learned counsel for the respondent in his submission acknowledged that the appellants were permitted to perform their rituals and bury their chiefs. Therefore construing the evidence on record, it is clear that this matter was required to be determined amicably between the parties instead of restraining the appellants permanently from accessing the disputed land.

In respect to the issue of assessors which is the fourth ground, the learned counsel on the fourth ground of appeal faulted the trial Chairman for comping a judgment with the opinion of one assessor namely Mama Juma who was not part of hearing. I have perused the court records and found that Mama Juma was not part of the assessor who participated in hearing and reading the judgment I have noted that the one who gave his opinion was Mr. Lusato and at the end of his submission the trial Magistrate state that the judgment was signed by Mama Juma.

In my opinion, this is a minor defect, it is a slip of pen which does not go to the root of the case. The cited cases of Joseph **Labui** (supra), **Amer Mbaraka** (supra), and **Sikuzani Said** (supra) are distinguishable from the instant case, in the instant case the said assessor, Mama Juma did not give her opinion instead her name appeared at the end of the other assessor's opinion.

Regarding the issue of assessors' opinion not being reflected in the court proceedings, it was the concern of the learned counsel for the respondent that this issue is not part of the grounds of appeal, on his view, he thinks that the appellant ought to apply for a leave of the court before raising the same. I am in accord with the learned counsel for the respondent that this issue was not featured in the grounds of appeal therefore the same was fatal. Guided by the decision of the Court of Appeal of Tanzania in the case of **Adelina Koku Anifa & another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported), this court has a duty to take judicial notice of matter relevant to the case even when the matter is not raised in the memorandum of appeal. Therefore, for that reason, this court could, even in the absence of the grounds of appeal obliged to address the vivid defect. The Court of Appeal of Tanzanian in the case of **Adelina Koku Anifa** (supra) held that:-

*"...the court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals.."*

Based on the above authorities, I think it is forethought to address and determine this ground which contains a point of law as raised by the learned counsel for the appellant. Upon scrutiny of the records of the trial tribunal I have noted that the tribunal contravened the procedure as far as the issue of participation of assessors in the trial of the case concerned. Reading the tribunal's record, it is shown that the assessors took part in the hearing of the case.

However, the record reveals that on 30th July, 2019 the trial Chairman proceeded to call upon assessors to prepare their opinion which and set the same to be read over to the parties. On 12th September, 2019, the Chairman recorded that the assessor's opinion have been delivered in the presence of the parties. However, he did not record them. In the case of **Edina Adam Kinona v Absolom Swebe (sheli)**, Civil Appeal No. 286 of 2017 at Mbeya the Court of Appeal of Tanzania held that:-

*"...we are aware that the original record has the opinion of assessors in writing...However, the record does not show how the opinion found its way in the court records....The Chairman*

***must require every assessor present to give his opinion.*** *It may be Kiswahili.* ***That opinion must in the record*** *and must be read to the parties before the judgment is composed."* [Emphasis added].

Similarly, in the case of **Ameir Mbarak and Azania Bank Corporation Ltd v Edgar Kahwili**, Civil Appeal No. 154 of 2015, the Court of Appeal of Tanzania held that:-

" *In our considered view,* ***it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment of the Chairman in the judgment****. In the circumstances, we are of a considered view that, assessors did not give any opinion for the Tribunal's judgment and this was a serious irregularity."* [Emphasis added].

Based on the above authorities, it is clear that the records must contain the written opinion of assessors and must be recorded. In the instant case, the opinion of the assessor were not recorded as per the requirement of the law. The Chairman merely acknowledged the assessor's opinion which never existed. Failure to record the assessors' opinion on the original proceedings is fatal. This flagrant omission of

failure to comply with the requirement of the law, rendered the trial Tribunal's proceedings a nullity.

Addressing the fifth ground, the appellants' counsel faulted the trial Chairman for failure to visit *locus in quo*. I accede with both learned counsel that it is not mandatory to conduct locus in quo, however, after I have revisited the tribunal records and guided by the evidence adduced by parties as elaborated on the first ground, I have to say that in a situation where parties dispute the boundaries in particular in the circumstance like the case at hand where even the respondent's witness (PW2) admitted that the appellants had a portion of land which they were visiting and they were allowed to enter inside the respondent's premises.

In my view, the tribunal was faced with conflicting evidence of the parties whereas PW1 testified that the appellants trespassed their land while he admitted that the appellants were permitted to enter into the suit land since they had a portion of land. PW2 testified to the effect that the appellants had a portion of land within the suit land and the appellants testified to the effect that they still were attached in the suit plot. I think it was necessary for the trial court to visit the locus *in quo* since the matter involved the issue of boundaries/demarcation, to clear the doubts or ambiguity, assess the situation on the ground, and to verify the evidence

adduced by the parties during the trial. In the cited case of **Avit Thadeus Massawe** (supra) the Court of Appeal of Tanzania held that:-

> " *Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it.*"

I am in accord with the learned counsel for the appellant that with the evidence on record, documents tendered in court, nature, and circumstance of the case which involve the issue of boundaries it was important for the trial court to visit the locus *in quo* before issuing the orders. The trial tribunal ordered the appellant to vacate the suit premises while the appellants claimed that they own part of the disputed land that the appellants have trespassed and illegally entered the part of the respondent. Also, the trial tribunal permanently restrained the appellant from entering the disputed land.

In my considered view, these are serious orders issued by the trial tribunal which affects the appellants' rights over the piece of land on which they used to practice their rituals as agreed by both parties. The Chairman was required to satisfy himself by visiting the disputed piece of land. I am

saying so because the said order was to permanently restrain the appellants from entering the suit premises despite the evidence on record that the appellants had their own piece of land inside the respondent's land.

Additionally, in order to prove the first issue framed by the parties whether the applicant is a lawful owner of the suit land it was necessary for the tribunal to visit the locus in quo to ascertain the boundaries and find out whether the appellants have trespassed the suit land or otherwise to find a permanent solution. Short on that, I accede the learned counsel for the appellants' observation that it was this is was one of the exceptional cases where the evidence of parties during hearing required the trial Chairman to visit *locus in quo* to determine the issue of boundaries before reaching its final decision which had a permanent effect to the appellants.

Therefore, I differ with the learned counsel for the respondent submission that the illegality was not proved. On the contrary, the illegality is proved and it should be noted that since the illegality is drawn to the attention of the court, it overrides all matters and such illegality cannot be allowed to stand.

For the foregoing reasons, I find merit in the fifth ground of appeal. Having so done, I think, as already alluded above, this appeal can be disposed of on these grounds only. In the premises, I refrain from deciding on the sixth ground of appeal the same will be an academic endeavour.

Under the powers bestowed upon this Court under section 43 (1) the Land Dispute Courts Act, Cap. 216 [R.E 2019] , I hereby quash the judgment of the District Land and Housing Tribunal for Mwanza in Land Application No. 77 of 2015 and order the matter to be placed before another Chairman to visit *locus in quo* to clear doubts or ambiguity and assess the situation on the ground and proceed to compose a judgment. For the interest of justice I order, the matter be given priority, visiting *locus in quo* and composing judgment to end within 6 months from today.

Appeal allowed with costs.

Order accordingly.

Dated at Mwanza this date 18th November, 2020.


A.Z.MGEYEKWA

**JUDGE**

18.11.2020

Judgment delivered on 18th November, 2020 in the presence of Mr. Steven Malasha, learned counsel for appellant.


A.Z.MGEYEKWA

**JUDGE**

18.11.2020