IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 34 OF 2019

(C/F Application No. 62 of 2016 District Land and Housing Tribunal of Moshi District at Moshi)

ZAHIRI HASSAN MWANGA (As Administrator of the Estate of the late Hassan Mtamba Mwanga) ..... APPELLANT

Versus

ADINANI ISMAIL SHOO ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The genesis of this appeal can be traced from the decision of the District Land and Housing Tribunal of Moshi at Moshi (trial tribunal) in respect of Land Application No. 62 of 2016 dated 11th April, 2019. Briefly the background being that, the appellant was appointed the administrator of the estate of his late father Hassan Mtamba Mwanga who died in 2009 leaving behind two wives, twelve children, several acres of land and 10 cows. It is alleged that prior to his death the deceased used to lease his pieces of land to villagers to cultivate seasonal crops. One of such leased land is 17 acres located at Kawaya Kati village, Masama,

within Hai district in Kilimanjaro region (the suit land) alleged to have been leased to the respondent and he has refused to let go of the same to date. Further, despite a number of mutual settlements attempted out of court, the respondent refused to return the said land thus the appellant moved on to lodge the dispute in the trial tribunal which ultimately decided in the respondent's favour. Aggrieved, the appellant through the window of appeal has preferred the following three grounds: -

1. That, the tribunal grossly erred in law and fact in failing to properly evaluate and analyse the evidence adduced at the trial instead it glossed over it.
2. That, the tribunal erred in law and fact in reaching into erroneous decision that the appellant failed to prove his case.
3. That the tribunal erred in law and fact in refusing to visit the locus in quo to determine the issue of boundaries.

This appeal was argued by way of written submissions, where the appellant was represented by Mr. Erasto Kamani, learned advocate, and the respondent represented by Mr. Chiduo Zayumba learned advocate.

Supporting the appeal Mr. Kamani submitted on 1st and 2nd grounds together that, the trial tribunal failed to properly

evaluate the evidence adduced a result reached at an erroneous decision. He added that, the appellant's dispute is premised on 17 acres found in Kawaya Village, Masama Rundungai ward, in Hai district given to his late father by the chief in 1948 and used to lease the same. The evidence is loud that the respondent was leased the suit land (2007) and upon the demise of the appellant's father (2009) the family continue to trust him up to 2015 when he refused to vacate from the suit land. To the contrary the respondent alleges he possesses 12 acres and 37 acres allocated to him by the Rundugai Village all totaling 49 acres situate at Chekimaji village while the land in dispute (17 acres) is in Kawaya village.

Further, it was submitted the Respondent had contradicted himself by first stating that he purchased 12 acres from Idd Makoroni but later changed that he purchased the same from one Juma Chakupewa. Be as it may it was the appellant's averment that the respondent failed to summon the crucial witness such as the one who sold him the 12 acres or the Rundugai village leaders (37 acres).

Mr. Kamani contended that, reading from the trial tribunal's judgment, after a brief summary of the parties' evidence and testimonies, the trial chairman went on

concluding that the appellant failed to prove his case without giving reasons thereof. He did not properly evaluate the evidence adduce hence came to a wrong decision.

On the 3rd ground of appeal, it was Mr. Kamani's submission that, the trial chairman failed to visit the *locus in quo* while it was evident that, there was confusion regarding the actual suit land alleged to have been trespassed upon by the respondent. He propounded further that, the appellant's claim is on 17 acres of land located at Kawaya village while the respondent's claim is on 49 acres situated at Cheki Maji village with boundaries which are also different. In view thereof it was necessary for the trial tribunal to visit the *locus in quo* so as to clear the confusion.

Mr. Kamani finally submitted that, apart from the grounds of appeal the appellant noted that the assessor's opinions were not taken as per **Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal Regulations) Regulations, 2003**. (District Land and Housing Tribunal Regulations) Further that, after the defence case was closed on 20th February, 2018, the trial chairman did not require the assessors to give their opinion but proceeded to pronounce judgment. To make matters

worse neither were these opinions read out before composing the same. He therefore prayed that this court does quash and nullify the trial tribunal's proceedings and decision and order a re-trial.

On the other side of the coin, Mr. Zayumba argued that, at the trial tribunal the appellant failed to prove that the suit land once belonged to his late father and the fact that he had been leasing it to various people including the respondent. He argued further that, the appellant and his witnesses failed to state when exactly was the respondent leased the suit land by his late father and whether there was an oral or written lease agreement. To support his words he cited the case of **Hemed Said V Mohamed Mbilu [1984] TLR 113 (HC)**.

It was Mr. Zayumba's further submission that, the respondent was in possession of the suit land for almost 31 years. His ownership began in 1987 even before the death of appellant's father and since the appellant has failed to prove ownership, it is undisputed that the suit land is owned by the respondent. To support this argument, Mr. Zayumba referred to **section 110 and 111 of the Evidence Act**, Cap 6, R.E. 2002 and cited the case of **Godfrey Sayi V Anna Siame (as legal representative of Late Mary Mndolwa), Civil**

Appeal No. 114 of 2014 where the Court of Appeal emphasis that in civil cases the burden of proof lies on the party who alleges anything in his favour and the appellant was thus duty bond to prove his late father's ownership over the suit land.

Contesting further, Mr. Zayumba submitted that, the respondent successfully tendered a Sale Agreement which was admitted as Exhibit D1 and Hand over Deed by the Village Government as Exhibit D2 which was enough to prove his title.

Further that, there was no need to visit the *locus in quo* since not in all circumstances the court has to visit the disputed land as it was held in the case of **Nizar MH Ladak V Gulamali Fazal Jan Mohamed [1980] TLR 29, Civil Appeal No. 09/1989 where the Court of Appeal** that: -

> *"It is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so a Court may unconsciously take the role of a witness rather that an adjudicator..."*

Mr. Zayumba argued that, since both appellant and respondent testified that the suit land was situate at Cheki Maji village (at page 15 and 26 of the typed proceeding

respectively), there is no confusion regarding the suit land that required the trial tribunal to visit the same.

On the added ground of appeal the respondent prayed the same be disregarded since it was not contained in the memorandum of appeal and no leave to add the same was obtained from the court as per **Order 39 Rule 2 of the Civil Procedure Code, Cap 33 R.E 2002**. He finally prayed that, the appeal be dismissed with cost.

In rejoinder, the appellant reiterated his submission in chief and maintained his stance that, this court should allow the appeal quash and nullify the tribunal's proceeding, decision and order a re-trial.

After I have painstakingly gone through the rival arguments from the parties, and trial tribunal's records, I find the following issues are to be determined by this court;

a. Whether the trial tribunal evaluated the evidence properly.
b. Whether it was necessary for the trial tribunal to visit the *locus in quo*.

Starting with the first issue, the appellant challenges the trial tribunal's decision as it lacked reasoning and proper analysis of evidence. On the other hand the respondent argued that the trial tribunal thoroughly evaluated the

evidence before it and reached a just decision. I however join hands with the appellant that the tribunal's judgment is wanting. **Regulation 20 (1) of the District Land and Housing Tribunal Regulations** provides that;

"20.-(1) The judgment of the Tribunal shall always be short, written in a simple language and shall consist of:

(a) a brief statement of facts;

(b) finding on issues;

(c) a decision; and

(d) a reason for the decision."

In the trial tribunal's judgment after a brief statement of the facts, at page 3 and 4 of the typed judgment, the chairman stated;

"The two assessors advised me to reject the application because the applicant failed to prove the claims. I do agree with the opinions, I have heard the suit and find out that the applicant has failed substantiate the claims.

Thus I hereby dismiss the entire application with cost

Sgd

Hon: J. Silas – Chairman

11/04/2018"

The chairman did not bother to expound on the evidence. What he did was a general observation. The court further makes a note that at page 2 of the same judgment the chairman stated: -

> *"The following are issued parties prayed the tribunal to have a look at the end of the trial in order to arrive at a fair decision. Whether the respondent used to leave the disputed land from the late HASSAN MTAMBO MWANGA. If the 1st issue is answered in affirmative whether the respondent refused to vacate thereon after the lease period elapsed. To what relief (s) are parties entitled."*

However, he also did not even bother to answer the issues he himself raised. In the case of **Hamisi Rajabu Dibagula Appellant V The Republic, Criminal Appeal N0. 53 Of 2001, CAT Dsm**, the Court of Appeal had this to say;

> *"We wish to draw attention to what this Court said in Lutter Symphorian Nelson v (i) The Hon. Attorney General. (2) Ibrahim Said Msabaha, Civil Appeal No. 24 of 1999 (unreported) on what a judgment should contain:*
>
> > *"...A judgment must convey some indication that the judge or magistrate has applied his mind to*

the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In Amirali Ismail V Regina, 1 T.L.R. 370, Abernethy, J., made some observations on the requirements of judgment. He said: 'A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how.'"

I fully subscribe to the position laid down above. In the instant appeal the learned chairman erred in not scrutinizing and applying his mind to the evidence thoroughly and reasons that justify his findings. He straight away jumped to the decision of dismissing the application albeit he did not give reason to the said decision. I therefore find the first issue answered affirmatively, which consequently answers the first two grounds of appeal hence I allow them.

Coming to the 2nd issue about visiting the *locus in quo*, the appellant submitted that it was necessary for the tribunal to visit the suit land due to the confusion that had emerged. The respondent argued that, there was no confusion thus there was no need for the suit land to be visited. To start with, the case of **Avit Thadeus Massawe V Isidory Assenga, Civil Appeal No. 6 of 2017, CAT at Arusha (unreported)**. The Apex court had this to say concerning visiting locus in quo;

> *"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. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the* locus in quo *so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located"*

"Such exceptional circumstances" are well elaborated in the case of **Nizar M. H. V Gulamali (supra)** where the court

is cautioned that a visit should be done only in exceptional circumstances by the trial court so as to ascertain the state, size, location of the premises in question.

In the appeal at hand as rightly submitted by the appellant there was contradicting evidence concerning the real piece of land in dispute as briefly submitted by each party. The appellant's dispute is on 17 acres found in Kawaya Village, Masama Rudungai ward, in Hai district while the respondent testified to have purchased 12 acres of land from Iddi Makaroni and Juma Chakupewa and was later given 37 acres by Rundugai village thus owning 49 acres in total with the suit land inclusive located at Cheki Maji village. It is my considered view therefore that, even though the visit to the *locus in quo* is not mandatory and is discouraged but under the given circumstances it was essential so as to clear such contradiction. The evidence was in conflict with other evidence and the boundaries were also at variance.

In light of the above authorities, the second issue is also answered affirmatively that there was a need to visit the *locus in quo*.

In passing the appellant submitted on a ground not

contained in the memorandum of appeal and without following the proper procedure for introducing the same. In the circumstances, I will not dwell on the same and is disregarded.

I therefore allow the appeal, consequently I hereby nullify the proceeding and judgment and order a retrial before another chairman with competent jurisdiction. Each party to bear own costs.

B. R. MUTUNGI
JUDGE
9/07/2020

Read this day of 9/7/2020 in presence of both parties.

B. R. MUTUNGI
JUDGE
9/7/2020

RIGHT OF APPEAL EXPLAINED.