

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**LAND APPEAL NO. 03 OF 2019**

*(Arising from Land Application No. 50 of 2017 of the Kahama District Land & Housing Tribunal)*

**MOSHI HUSSEIN..... APPELLANT**

**VERSUS**

**MAZIKU ANDREA..... RESPONDENT**

**JUDGMENT**

*Date: 12/03/2020 & 8/5/2020*

**MKWIZU, J.:**

This appeal arises from the decision of the District Land and Housing Tribunal for Kahama in Land Application No. 50 of 2017 where the appellant lost the case hence this appeal. The following eight grounds of appeal was filed in a memorandum of appeal filed on 22/2/2019.

- 1. "The Honorable Trial Chairman erred in law when he allowed the respondent and his witnesses to testify on unleded facts and consider them in his judgment*
- 2. That the Honorable Tribunal Chairman erred in law to give the respondent a right to be heard while he filed his written statement of defence out of time*

3. *That the Honorable trial Chairman did not follow the law and/or procedure when he visited the locus in quo*
4. *That the Honourable trial Tribunal Chairman erred in law in according weight to tribunal witness, one Maziku Mbushi, WEO for Malunga Ward*
5. *That the Honorable trial Tribunal Chairman heard the said Maziku Mbusiri at the locus in quo contrary to the law.*
6. *That the honorable trial Tribunal Chairman erred in law for admitting in evidence exhibits R1 and R2 respectively contrary to the mandatory provisions of Order X111 RULE 4 (1) (a)-(d) of the Civil Procedure Code [Cap 33 RE 200]*
7. *That the Honourable trial Tribunal Chairman erred in law and fact in holding that the appellant was claiming the same land which AW2, Juma Chaupele was handed over by TW, Maziku Mbusiri*
8. *That the Honourable trial Tribunal Chairman erred for not holding that the appellant is a lawful owner of the disputed land."*

As it can be gathered from the records, the appellant claims to be a lawful owner of the suit land since 1975. She was given the said land by her late uncle Maige Maganga who is a father to Nalimi Maige, Makoye Maige, Nyamizi Maige, Ngake Maige, Chaupele Maige and Manyanda Maige . Appellant is said to have been developing the suit land since then to the year 2017 when respondent trespassed on the suit land followed by the

filing of an application at the District Land and Housing Tribunal for a declaration that appellant is the lawful owner of the land in dispute .

Respondent on the other hand, claimed to be the owner of the suit land given to him by a clan meeting and handed to him by one Patrick Nalimi who was the administrator of the estate of the late Nalimi Maige. The respondent's claim is based on the fact that, the land initially belonged to their grandfather Maige Maganga and distributed to his children one of them being Nalimi Maige whose estate was being administered by Patrick Maige. The District Tribunal dismiss the application. It is from this background that the dispute has reached this court through an appeal.

When the appeal was called for hearing, the Appellant had the services of Mr. Audax Constantine, Advocate and the Respondent appeared in person, unrepresented.

Mr Audax outrightly, prayed to abandon 1<sup>st</sup> ground of appeal and in the course of his submission he abandoned the 2<sup>nd</sup> grounds. He essentially argued 3, 4, 5 and 6 grounds of appeal.

On grounds 3 and 5 which he opted to argue them in consolidation. Mr. Audax complained of the Tribunal's visit to the *locus in quo*. His complaint

was two folds, **one**, that the record is silent on why the tribunal visited the locus in quo and **second**, that the procedures for the visit were not followed as instructed in the case of **Nizar MH. Ladack V. Golomah Fazal Janmohamed (1980) TLR**. On this point the appellant's counsel submitted that, the trial Chairman recorded the evidence of one person called Maziku Mbusiri at the *locus in quo* while he was not among the witnesses called by the parties and his evidence was not subjected to cross examination. Mr Audax, clarified that, the procedure adopted prejudiced the appellant. He said, it is a trite law that each party is to build his case unless under very special circumstances where the court may call an independent witness to clarify certain issues but again the called witness should not be used to help any party in the case. He referred the court to the case **Baraka Said Salim Vs. Mohamed Said** HCD (1970) 95. Mr. Audax concluded that the evidence of Maziku Mbusiri was in favour of the respondent.

On 6<sup>th</sup> ground of appeal, counsel for the appellant argued that exhibit R1, a decision in Land Case No. 32 of 2013 between Patrick Nalimi (Msimamizi wa Mirathi ya Marehemu Maige Mganga) and Manganda Maige

and Exhibit R2, a decision in Land Appeal No. 103 of 2016 between Manganda Maige @ Mangambo Maige Vs Parick Nalim (Msimamizi wa Mirathi ya Marehemu Maige), were admitted contrary to Order X111 rule 4 (2) (a), (b), (c) and (d) as no endorsement was done and therefore should not have formed part of the record. He cited the decision of the Court of Appeal in the case of **Japan International Agency (Jaica) V. Khaki Complex Ltd (2006) TLR 343** to bolster his argument.

The appellant's counsel requested the court to quash the tribunal's decision and declare the appellant a rightful owner of the suit land.

In response, the Respondent opposed the appeal. He was very brief. He claimed ownership of the suit land and supported trial Tribunal's decision.

Having considered the grounds of appeal presented, parties submission and the trial tribunal's records, it is certainly that the trial tribunal's decision is being challenged on both procedural and substantive grounds.

I will start determining the procedural issues first. As hinted above, ground's two of the appeal which was challenging how the written

statement of defence got into the trial tribunal's records was dropped by the appellant's counsel. I now remain with the issue whether the tribunal observed the procedures of conduction a visit in *locus in quo* raised in grounds 3,4 and 5 of the appellant's memorandum of appeal.

Mr Audax, faults the tribunal for not stating the reasons for visiting the *locus in quo* and for its failure to follow the stipulated procedures. He was of the submission that, failure to observe the procedure prejudiced the appellant in this matter as the tribunal appeared to have helped the respondent's case.

In the case of **Nizar M.H V Gulamali Fazar Jonmohamed (Supra)** the court of appeal dealt in length with the issue of visiting a *locus in quo* and provided a guideline to be followed by trial courts .The court stated *inter alia* 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 much each witnesses as may have to testify in a particular*

*matter...When the court re-assembles in the court room, all such notes should 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 witnesses. We trust that this procedure will be adopted by the courts in future "*

The records in our case show that on 29/6/2018, the tribunal chairperson had ordered for the conduct of the visit in *locus in quo*. The reasons for the visit was stated to be "for interest of justice". On 30/11/2018 the court record reads:-

***"Coram: LEKAMOI PLS***

***Assessors: Julius Kasema-Present***

*Petronilla Julius*

***Applicant: Muyengi Advocate***

***Respondent: Present***

***Muyengi Advocate:*** *this matter is coming up for visiting, parties are here we are ready for visiting*

***Order: Visiting***

*TW- Maziku Mbusiri, Ward executive Officer Mhongolo, aged 58 years, resident of Malunga, Christian, take oath and state.*

*I handed are on 21 december, 2016, via order dated 15<sup>th</sup>*

*December, 2016 bearing reference No Misc. Land No.*

*142/2016. There were boundaries...*

*This is the land we handed*

*Clarification from the parties*

*NIL*

*Order: Judgement 21<sup>st</sup> December, 2018*

***Signature: Paulo L.S. Lekamoi***

***Chairman***

***30/11/2018"***

As indicated above, though the record reflects presence of the parties on the date when the visit in *locus in quo* was to be conducted, it is not clear as who exactly participated in the said visit, whether witnesses were recalled to testify or whether the trial chairperson took any notes of what transpired in the said visit. Again, Maziku Mbusiri, the Tribunal's witness who testified at the *locus in quo* was not cross examined. And after the visit the tribunal did not reconvene in the tribunal's room to consider the evidence obtained from the visit, it proceeded to schedule a judgement date.

As correctly stated by Mr Audax, the trial tribunal contravened the basic principles guiding the visit in *locus in quo* the consequences of which is to



vitiates the proceedings. This position was also taken by the Court of Appeal in the case of **Sikuzan Said Makambo Vs Mohamed Roble Court of Appeal Land Appeal No. 197 of 2018 at Dodoma** (Unreported). In this case, the tribunals records indicated only the date when the Tribunal conducted a visit in *locus in quo* without more. The court of Appeal had this to say at page 7 of the typed judgement:

*"We are therefore in agreement with both parties that the tribunal's visit in this matter was done contrary to the procedure and guidelines issued by this case court in **NIZAR M.H LADAK** (supra). It is therefore our considered view that, this was a procedural irregularities on the face of the record which had vitiated the trial and occasioned a miscarriage of justice of the parties."*


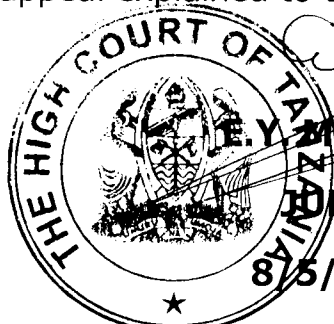
Guided by the above authorities, it is beyond hesitation that the tribunal's proceedings are tainted with fundamental procedural irregularities which vitiates the proceedings. This ground has merit, and because the determined ground is capable of disposing off the appeal, I restrain myself from deciding the rest of the grounds.

In the event, the appeal is allowed, the District Land and Housing Tribunal's entire proceedings in Land application No 50 of 2017 is nullified, the decision is hereby quashed and set aside. The record is remitted back to the trial District Land and Housing Tribunal for a retrial before another Chairman and another set of assessors. Costs to follow the events.

**Date at Shinyanga** this 8<sup>th</sup> day of **May**, 2020

  
  
**E.Y. MKWIZU**  
**JUDGE**  
**8/5/2020**

**Court:** Right of appeal explained to the parties.

  
  
**E.Y. MKWIZU**  
**JUDGE**  
**8/5/2020**