IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 40 OF 2019

(Originating from the decision of the District Land and Housing Tribunal for Karatu in Land Application No. 18 of 2018)

AKHAY TARMO ..... APPELLANT

VERSUS

MATLE BURA ..... RESPONDENT

JUDGMENT

17th February & 19th March, 2021

Masara, J.

The Appellant herein is appealing against the decision of the District Land and Housing Tribunal for Karatu (the trial Tribunal) which decided against his favour in Land Application No. 18 of 2018. The Respondent sued the Appellant at the Trial Tribunal claiming a piece of land measuring ½ acres located at Gwandu Mehhi Hamlet, Bassodawish Village, within Karatu District (the suit land).

Before delving into what was submitted by the parties in respect of the appeal under consideration, it is trite to recount the facts leading to this appeal, albeit briefly. The Appellant claimed to have been allocated the suit land by inheritance from his ancestors and the same was owned by his grandfather way back from 1974. According to the evidence at the trial Tribunal, the Respondent invaded the suit land in 2014 whereby he built a house therein. The claim was referred to Karatu Primary Court which directed them to the Endamarariek Ward Tribunal. In the Ward Tribunal, the Appellant was declared the lawful owner of the suit land. The Respondent appealed to the District Land and Housing Tribunal vide Land Appeal No. 7 of 2015. The District Land and Housing Tribunal in its

judgment delivered on 9/9/2015 nullified the proceedings of the Ward Tribunal ordering trial *de novo.*

On 19/3/2018, the Respondent filed an Application before the trial Tribunal seeking a declaration that he is the lawful owner of the suit land. In his defence, the Appellant claimed to have been allocated the suit land by his father and one Bura Amii, the Appellant's father, in 1989. He further stated that he built a house at the suit land in 1989 and 2014, but in 2018 the Respondent uprooted the sisal fence that marked their border. The trial Tribunal, having heard evidence on both sides, delivered its judgment on 5/8/2019 declaring the Respondent the lawful owner of the suit land and ordered the Appellant to give vacant possession forthwith. The Appellant was aggrieved; he has preferred this appeal seeking to challenge the decision of the trial Tribunal on the following grounds:

a) *That, the trial Chairperson erred in law and in fact in analysing evidence on record and thereby arriving to erroneous decision; and*
b) *That, the Respondent's case before the trial Tribunal had not been proved to the standard required by the law.*

The Appellant therefore prays that this Court allows the appeal by declaring him the lawful owner of the suit land. At the hearing of this appeal, both the Appellant and Respondent appeared in Court in person unrepresented. The appeal was argued orally.

Submitting in support of the appeal, the Appellant stated that judgment was delivered in the absence of evidence from both sides. He added that the Tribunal did not properly look into the land at the *locus in quo* therefore it could not ascertain the dispute and what was at issue. That there was no evidence that the Respondent had trespassed into the suit

land, insisting that the land was allocated to him by inheritance, and he has been in occupation of the land since 1989. The Appellant maintained that the Respondent did not testify in the Tribunal, he only called witnesses.

The Appellant expounded that the dispute arose in 2014 when the Respondent trespassed into that land. After that trespass he complained and was declared the lawful owner of the suit land by the Ward Tribunal and even in the District Land and Housing Tribunal they were told each to go into his land of which he did. He was surprised when in 2018 the Respondent filed the dispute in the trial Tribunal. The Appellant amplified that the Respondent destroyed and invaded his properties. He was of a strong view that the trial Tribunal was not fair as it did not give him the right to challenge the Respondent's evidence or visit the *locus in quo* as there were no measurements taken at the *locus in quo,* it was only estimated. He was surprised to be told to demolish his house that he had built in 1989, condemning the trial Tribunal decision for being unfair.

Contesting the appeal, the Respondent submitted that he testified before the trial Tribunal and called witnesses. He added that the suit land is not the area that the Appellant was given by his father, he trespassed the Respondent's land. He maintained that the trial Tribunal visited the *locus in quo* and decided in his favour. The Appellant was ordered to demolish his house, insisting that it is not true that the said house was constructed in 1989, it is rather a recent one.

In a rejoinder submission, the Appellant reiterated that it is not possible for him to move from one part to another considering the shape of the plot. He fortified that in 1971 he did not construct a house as he was still young, he constructed it in 1989. He maintained that the farm was given to him by his father and the Appellants' father when his child died and was considered unfit to live at his father's land. He added that the Appellant's father never complained until when he died it is when the Appellant came up with the claim of the suit land.

I have carefully considered the trial Tribunal's record, the grounds of appeal and the arguments by the parties in support and against the appeal. I will determine the two grounds of appeal simultaneously as they all refer to the analysis of evidence by the trial Tribunal.

The Appellant's complaint is that the Respondent did not testify in the trial Tribunal; hence, he was not given a chance to cross examine him. He also complains that he was not given a chance to challenge his evidence at the *locus in quo*, and there were no measurements taken. The Respondent, on the other hand, countered those arguments stating that he testified at the trial Tribunal and that there was nothing wrong with the *locus in quo* visit.

I have revisited the trial Tribunal records. Both in the hand written and in the typed proceedings, there is no record showing that the Respondent testified at the trial Tribunal. The Appellant's contention that he was denied the right to challenge the Respondent's evidence does not therefore arise as he did not testify. The Respondent could have proved

his ownership over the suit land in the absence of his evidence as it appears from the record that all the witnesses who testified on his behalf laid down material evidence upon which his ownership could be proved. The fact that the Respondent did not testify is not in itself an error. What appears to be strange is that although the record does not contain his testimony, still his evidence features in the trial Tribunal's judgment. This is reflected at page 3 of the typed judgment and page 5 of the handwritten judgment where the trial Chairman made the following analysis:

> *"The PW1 [Matle Bura] take oath (sic) and state that the suit land belongs to him, it has shaped with triangle (sic) and that the Respondent (now the Appellant) did trespassed it in 2014 (sic), that the suit land was given by their father in 1977 prior of his death (sic) and Respondent invaded into it in 2014, after he decided to shift his house into the land in dispute. When the Respondent was given a chance (sic) to cross-examine the Applicant's (sic) he testified that your father's land was on north side of the suit land, you have a house into your father land, and all times there is no dispute, the dispute arose after shifted (sic) your house into the suit land."*

Despite the grammatical challenges in the above exposition, the contextual implication is that the Respondent testified in the Tribunal and the Appellant cross examined him. It is unfortunate and unexplainable that such piece of evidence is not part of the proceedings in the trial Tribunal. It does not appear in the handwritten or typed proceedings. It could be argued that the trial Chairman stepped into the shoes of the Respondent and testified on his behalf. If the Respondent did in fact testify, the record of his testimony should have been reflected in the proceedings. Resurfacing of the evidence in the judgment appear to me to be a serious error which vitiates the proceedings and judgment of the trial Tribunal.

There is yet another anomaly in the trial Tribunal records. As pointed out by the Appellant, the record shows that on 10/6/2019 the trial Tribunal visited the *locus in quo*. At the *locus in quo* the record shows that it was only the parties who were present. There is nothing on record indicating that there were witnesses who were called at the *locus in quo*. Further, the procedure mandates that after visiting *locus in quo*, the Tribunal Chairman and the parties as well as the available witnesses assemble in the Tribunal so that the Chairman prepares the report of what has transpired at the *locus in quo*. That was skipped without any explanation. The record does not contain a sketch map of the land in dispute or any other indication proving that there were measurements taken so as to be assured of the size of the disputed piece of land. Further there is no record in the proceeding to show what transpired in there. The only indication that a visit was made is obtained from the Tribunal's judgement. In ***Nizar M. H. Vs. Gulamali Fazal Janmohamed*** [1980] TLR 29, the Court of Appeal discussed *in extenso*, the essence, compelling factors and procedures of visiting *locus in quo*. It stated *inter alia*:

> *"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 each witnesses as may have to testify in that particular matter; and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be 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 the witnesses. We trust that this procedure will be adopted by the courts in future."*

From the above exposition, and considering what I have endeavoured to discuss above, this Court is at one with the Appellant's contention that the visiting of *locus in quo* did not adhere to the laid down principles.

A further anomaly worth considering, although it was not pleaded or canvassed by the parties, is that the record does not reveal whether the opinions of the assessors were read over to the parties before the Chairman prepared the judgment. The record does contain written opinions, what is missing is whether such opinion was solicited and later read to the parties before composing the judgment. Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, G.N 174 of 2003 calls upon the Tribunal Chairman to read the opinion of the assessors to the parties prior to composing the judgment. I am guided by the Court of Appeal decision in ***Sikuzani Saldi Magambo and Another Vs. Mohamed Roble***, Civil Appeal No. 197 of 2018 (unreported), where it was held:

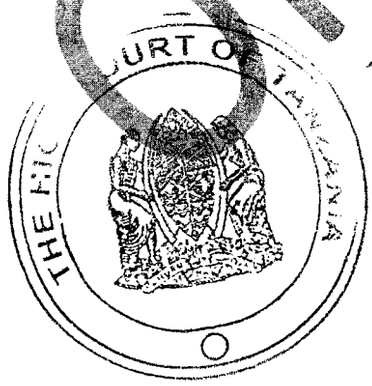
> *"In the matter at hand, as we have vividly demonstrated above and also alluded to by both counsel for the parties, when the chairperson of the Tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgement It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgement was composed."*

This irregularity, likewise, vitiates the proceedings and judgment of the trial Tribunal. The record shows that after visiting the *locus in quo* on

10/6/2019, nothing was done, until 5/8/2019 when the judgment was delivered. Therefore, the opinions of the assessors were not read to the parties before composing the judgment. Since the trial Chairman omitted the mandatory requirement of the law, his decision cannot safely be left to stand. It is a nullity.

Basing on the above analysis and findings, the decision of the trial Tribunal is a nullity due to the irregularities above highlighted. In exercise of revisionary powers bestowed to me by the provisions of Section 43(1) (b) and (2) of the Land Disputes Courts Act, Cap 216 [R.E. 2019] I do hereby quash and set aside the judgment and proceedings of the trial Tribunal. I remit the file back to the trial Tribunal for an expedited afresh hearing before another Chairman and a new set of assessors. Considering the fact that the ailments herein are not attributed to any of the parties, I make no order as to costs.

Order accordingly.



Y. B. Masara
JUDGE
19th March, 2021