MWANZA DISTICT REGISTRY

AT MWANZA

LAND APPEAL No. 18 OF 2020

(Appeal from the Judgment and Decree of the District Land and Housing Tribunal for Geita at Geita Application No. 25 of 2018)

ORE-CORP TANZANIA LTD---------- APPELLANT

VERSUS

KAIJI CELESTINE ATHANAS---------- RESPONDENT

JUDGMENT

22nd February & 21st April 2021

TIGANGA, J

This appeal fetches' its origin from the decision of Land Dispute No. 25 of 2018 which was filed before District Land and Housing Tribunal for Geita, at Geita, in which the current respondent, Kaiji Celestine Athanas, sued the appellant Ore Corp Tanzania Limited for recovery of land estimated to be valued at Tsh.20,000,000/= (twenty millions Tanzanian Shillings). The facts of the case are that, the respondent blamed the appellant for trespass in his three acres out of 45 acres situated at Nyanzaga area within Sengerema District. According to the plaint, the

trespass occasioned enormous loss to the respondent equivalent to Tshs. 200,000,000/= which resulted from the destruction of various plants and trees planted by the respondent.

After hearing the dispute, the trial tribunal gave the following orders,

a) That the applicant now the respondent was declared the lawful owner of 45 acres of land,

b) That the current appellant was restrained from interfering or entering the applicant's land without applicant's consent,

c) That the appellant was ordered to pay Tshs. 20,000,000/= to the applicant as compensation to the destroyed plants,

d) That the appellant was condemned to pay the costs of the case.

That decision aggrieved the appellant, who decided to appeal to this court on the following grounds:

i) That the trial Chairperson erred in law and in fact by finding that the respondent is the lawful owner of the alleged 45 acres when there was no proof to that effect,

ii) The trial Chairperson erred in law and in fact by relying on a valuation report prepared by unqualified valuer,

iii) In the alternative and without prejudice to ground Number 2 above the trial chairperson erred in law and in fact by relying on a valuation that was prepared after two months of the alleged destruction of crops,

iv) The trial Chairperson erred in law and in fact by disregarding the Appellant's evidence adduced during trial without justification, and

v) The learned Chairperson erred in law and in fact by awarding the respondent Tshs. 20,000,000/= as compensation for destroyed plant without proof.

The appellant asked for the following orders in this appeal:-

i) The Appeal be allowed with costs,

ii) The decision of the District Land and Housing Tribunal for Geita at Geita be set aside, and

iii) Any other relief to the appellant that this Honourable Court deem fit to grant.

At the hearing, the appellant was being represented by Mr. Libent Rwazo assisted by Mr. Kyariga N. Kyariga- Advocates, from IMMMA

Advocates, while the respondent was represented by Mr. Laurent F. Bugoti of Rafiki Attorney & Co. Advocates.

By consent of the parties and leave of the court, the appeal was argued by way of written submissions. In their submission in chief, the counsel for the appellant reminded this court that being the first appellate court, under the authority in the case of **Makubi Dogani vs Ngodongo Maganga,** Civil Appeal No. 78 of 2019 CAT, at Shinyanga, is entitled to re evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision. He also invited the court to determine the matter by upholding the overriding objective hence preventing parties from incurring extra costs and to save time.

Submitting in support of the first ground of appeal, the counsel for the applicant, invited the court to be guided by the provision of section 110(1) and (2) and section 115 of the Evidence Act [Cap 6. R.E 2019] as interpreted in the decision in the case of **Barelia Karangirangi vs Asteria Nyalwambwa,** Civil Appeal No.237 of 2017 CAT-Mwanza, that the burden of proof in this case lies on the plaintiff to prove that, the land 45 acres belongs to him.

He submitted that, the burden does not shift to the adverse party unless the party on whom the burden lies discharged his burden and the respondent cannot rely on point of weakness of the defence case to prove his claim. To buttress that position, he cited the authority in the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No.45 of 2017CAT-Mwanza. He submitted that the respondent pleaded that his land was 45 acres, bought from Sadiki Ngelela Wasotta, and that out of that, only three acres were trespassed into by the appellant. However in proving the ownership the respondent tendered exhibit P1 which exhibited the purchased land to be 9 acres.

He submitted that it is a common practice to vary the terms of contract by subsequent agreement orally or in writings depending on the nature of the contract, See **Umico Limited vs Salu Limited**, Civil Appeal No.91 of 2015, CAT-Iringa. He insisted that oral evidence cannot defeat documentary evidence in proving a particular fact. He submitted further that, the respondent tendered exhibit P1 the sale agreement showing that he purchased only 9 acres thus no oral evidence that his land was 45 acres can be accepted to vary the terms of the sale agreement.

He also submitted that the respondent's evidence had contradictions and inconsistencies, whereas the oral evidence alleges that the land is 45 acres, the exhibit P1 shows that he purchased 9 acres making the contradiction and inconsistencies between the two sets of evidence. According to him, that makes the evidence unreliable and entitles the judge to reject them. He cited the case of **Emmanuel Abrahamu Nanyaro vs Peniel Ole Saitabau** [1987] TLR 47 and on that bases, he invited the court to reject the evidence for being inconsistent.

Citing further weakness of the respondent's case, he submitted that the respondent did not call as a witness the person who sold him the land, relying on the authority of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 he asked the court to draw adverse inference against him.

Further discrediting exhibit P1, he said that, the said exhibit is illegal as it has never been approved by the Village Council contrary to section 30(2)(a) of the Village Land Act, [Cap 114 R.E 2019] he cited the case of **Bakari Muhando Swanga vs Mzee Mohamed Bakari Shelukindo and Others,** Civil Appeal No. 389 of 2019, CAT- Tanga which held that for the agreement to be valid, it needed to be approved by the village council, and since the agreement was not approved then, the same is not valid.

On the second and third grounds of appeal which raise the complaints that the trial Chairperson erred in law and in fact by relying on a valuation report prepared by unqualified valuer. He submitted that the valuation report was prepared by an agricultural officer and after two months of the alleged destruction of crops. This is contrary to item 2 and 3 of the second schedule of the **Valuation and Valuers Registration Act, 2016** which requires the valuation to be done by the registered valuer and approved by the Chief Valuer under item sections 4, 6(1)(h) and 7 **Valuation and Valuers Registration Act, 2016.** He cited the authority in the case of **Ore Corp Tanzania Ltd vs Mathias Shileka**, Land Appeal No.19 of 2020 HC-Mwanza Hon. Mgeyekwa J.

Further to that, the fact that the valuation was conducted two months after the incident create the possibility of speculations which has no room in civil litigations, as there was no reality on the ground, he referred this court on the case of **Sandhu Construction Company Limited vs Peter E. M. Shayo** [1984] TLR 127.

Regarding the 4th ground of appeal which raises the complaint that, the trial Chairperson erred in law and in fact by disregarding the Appellant's evidence adduced during trial without justification. He

submitted that, despite the fact that the appellant at trial called two witnesses to prove the case, his evidence was not considered as the same does not reflect in the judgment. To support that contention he cited the case of **Ndesamburo vs Attorney General**, [1997] T.L.R 137 HC, on the importance of considering the party's defence before making decision and that according to the decision of **Daniel Severine and Others vs The Republic**, Criminal Appeal No.431 of 2018, failure to consider defence is fatal irregularities to the decision and the proceedings.

Further more, the appellant submitted that, DW1 testified that, there was no alleged crops, and was not cross examined by the respondent, he cited the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 which held to the effect that, failure to cross examine a witness on a particular important point, is taken to be acceptance of the said evidence. He asked this court to find the ground to be meritorious.

On the last ground of appeal which raises the complaint that, the learned Chairperson erred in law and in fact by awarding the respondent Tshs. 20,000,000/= as compensation for destroyed plant without proof. He submitted that in the civil cases the standard of proof is on the balance

of probabilities, and that, in this case, there was no evidence lead to prove the award of Tshs. 20,000,000/=. According to him, specific damage needs more than that as the law requires it to be specifically pleaded and strictly proved. He referred the case of **Reliance Insurance Company Limited & 2 Others vs Festo Mgomapayo,** Civil Appeal No.23 of 2019, CAT-Dodoma. He said the award of Tshs. 20,000,000/= based on the valuation report which falls short of the legal requirement as it was prepared by a person who is not an expert and the valuation conducted 2 months after the incident, and as the valuation report alleged the crops so destroyed to be valued Tshs. 200,000,000/= but the trial tribunal reduced the amount to Tshs. 20,000,000/= without concrete reasons. In the end he asked the appeal to be allowed for the reasons given.

In reply to the submission in chief, the counsel for the respondent submitted that, what was in dispute was three acres which were trespassed into, not the whole 45 acres he owned, and it was not disputed that he purchased the said land from Mr. Sadiki Ngelela, the fact which he proved by tendering the sale agreement between them as exhibit P1. Further to that, he submitted that, throughout their defence, the appellant had never pleaded nor said or even suggested through DW1 on how they

came into possession of the disputed land. Therefore in the circumstances of the case, he would not have called a witness to prove what was not in dispute.

On the second ground of appeal regarding the valuation report and the competence of PW2 an agricultural officer who was working at Igalula ward in Sengerema District, he submitted that that witness testified as an agricultural officer not as a valuer and he was very categorical on that aspect.

He also submitted that even the report which was tendered as exhibit P3 was not valuation report within the meaning of section 6(1)(h) of the **Valuation and Valuers Registration Act**, 2016. As the exhibit P3 was pegged at Tshs. 200,000,000/= but in the final verdict the respondent was only awarded Tshs. 20,000,000/=, therefore it can not be said that the trial tribunal relied on the exhibit P3 and the chairperson cannot be faulted on that. He therefore prayed the second and third grounds to be dismissed for want of merits.

Coming to the fourth ground of appeal, in which the trial tribunal is criticized to disregard the appellants evidence, the counsel for the

respondent submitted that, going by the record of the trial tribunal, where the judgment seems not to refer to the evidence by the defence, he submitted that writing of judgment is a personal style of each and every individual judicial officer as long as the important elementary principle of what the judgment must contain is complied with. He submitted that passing through the judgment, it goes without saying that the judgment complied with the requirement.

However, he in essence admits that the trial chairperson partially referred to what was adduced by the PW1 and PW2 and immediately thereafter, she entered the verdict on the case without analysis of the evidence adduced by the parties and no reasons for the decision were given as to why he agree with the applicant's case and why she disagree with the respondent's case.

The counsel admitted that to be a serious misdirection on the part of the trial tribunal, which in his opinion vitiates the whole trial, and the only remedy which is available is to nullify the proceedings and order the retrial before another chairperson of the tribunal. Therefore, the counsel submitted that, the fourth and fifth grounds of appeal have merits, they be allowed. However, the counsel prayed this court to order trial *de novo* on

the ground that the issue of failure by the trial chairperson is not the fault of respondent and that the interest of justice requires that the matter be properly tried by the trial tribunal by another chairperson. He also asked for an order that, each party bears its own costs.

In his rejoinder, the counsel for the appellant while replying to the submission in reply in relation to the first ground of appeal, he submitted that, it was important for the respondent to call Sadiki Ngelela to resolve the issue of how many acres he sold to the respondent. More cementing on the point, he reiterated what he submitted in chief in respect of that point.

He insisted that the evidence of DW1 and DW2 shows that, the exploration was done in the village land not the one owned by the respondent. He also reminded the court of the facts that the burden never shift to the adverse party, it was therefore the duty of the respondent to prove his case especially that he owns the land, he can not rely on the weakness of the appellant. He lastly submitted that, the trial tribunal was wrong when it held that the 45 acres belongs to the respondent without proof.

He said he has noted the admission by the counsel for the respondent that, exhibit P3 is not a valuation report to entitle the respondent to compensation.

He also noted the admission by the respondent that there was non consideration of the of the evidence in the judgment, and the respondent's plea of trial *de novo*, he reminded the court that, retrial may only be ordered if it causes no injustice to any of the parties, and where the interest of justice so requires he cited the case of **Fatehali Manji vs The Republic,** [1966] 1 EA 343 in support of his arguments.

He reminded the court that this being the first appellate court, it can, under the authority of the case of **Makubi Dogani vs Ngodongo Maganga**, (supra), evaluate the evidence and come up with its own conclusion. He asked the court to uphold the overriding objective principle, and re evaluate the evidence and decide the dispute, he urged that for the interest of the parties, the court should not order retrial, but instead to decide the case on merits.

He asked the court to allow the appeal for being meritorious, and proceed to quash and set aside the judgment and decree of the District

Land and Housing Tribunal for Geita and substitute the same with an order dismissing the claim with costs.

Having summarised the content of the records, the documents instituting the appeal, as well as the submissions filed in support and in opposition of the appeal, I will, just like the counsel for the appellant did in his submission, discuss and resolve the grounds of appeal in the manner adopted by the appellant counsel in the argument of this appeal.

Now, starting with the first ground of appeal, without unnecessarily repeating what the content of the ground is all about, the main issue for determination in this ground is, whether the trial tribunal was justified in law and in fact by finding that the respondent is the lawful owner of the alleged 45 acres basing on the evidence submitted. The answer to this question can be best found in the record, the pleading and the evidence. According to the pleadings, the cause of action in this case as presented before the trial tribunal is rooted on the information contained in paragraphs 6(a)(ii) and (iii) of the application made before the trial tribunal in which the respondent pleaded that, he owns 45 acres, and out of that land only three acres were trespassed into by the appellant, thereby causing loss of the properties enumerated in that paragraph.

This means, the land in dispute or suit land was three acres not the whole 45 acres, this is because the rest 42 acres were not trespassed into and therefore not subject to the proceedings in this case. Therefore an order for declaration of ownership asked for in the application, was supposed to be directed to the suit land or a land which is three acres only.

To the contrary in this case the order was directed to the whole of 45 acres allegedly owned by the respondent; it means it covered even 42 acres which have never been in dispute.

By way of passing, looking at the nature if the dispute, it is instructive to find that, there was no need of the respondent to call the person who sold him the land and the fact that he purchased the said land and whether the same was approved by the Village Council or not were not at issue. That said, therefore there was no legal and factual justification of the trial tribunal to make an order regarding the whole of 45 acres instead of concentrating to three acres which is the land actually in dispute.

Regarding the complaint in the second ground of appeal, the issue for determination is whether the trial tribunal was justified in law and in fact by relying on a valuation report prepared by unqualified valuer. On

that, I entirely agree with the counsel for the appellant as also conceded by the counsel for the respondent that the person who allegedly conducted valuation was not a valuer within the meaning of the **Valuation and Valuers Registration Act,** (supra). This is because valuation and of real estate and any interest, exhausted and unexhausted improvement interest on the land which includes crops and plants grown on the land is to be conducted by the registered valuer as directed by part V of the Act. That said, the said exhibit P3 purported to be valuation conducted and prepared by the Agricultural Officer, is hereby declared to be not valuation report, it is thus expunged from the record.

The second ground of appeal is therefore found meritorious and allowed with the consequences already mentioned above, this automatically resolves the third ground which was in the alternative to the second ground.

Regarding the fourth ground of appeal, the issue which needs to be resolved in this ground is whether the trial tribunal was justified in law and in fact by disregarding the Appellant's evidence adduced during trial without justification, the respondent has not only conceded this ground but also gave an input that the tribunal did not only disregard the evidence of

the appellant, but also did not evaluate the evidence of both sides in its judgment, this means even on how the trial tribunal awarded Tshs. 20,000,000/= what factors did it consider are not made clear in the decision.

On what should be the aftermath after that findings, parties are at variance, while the respondent asked the court to make an order for retrial so that the matter can be heard on merits by another chairperson and a set of assessors, the counsel for the appellant asked from the outset, that this court being the first appellate court, can step into shoes of the trial tribunal and evaluate the evidence on record and come up with its own findings. He cited the case of **Makubi Dogani vs Ngodongo Maganga,** Civil Appeal No. 78 of 2019 CAT, I am entirely in agreement with the counsel that this court, being the first appellate court has such powers, however it has such powers, where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence. In **Peters V. Sunday Post Ltd.** (1958) E.A. 424, quoted with approaval by the Court of Appeal of Tanzania in the case of **Deemay Daati and 2 Others vs The Republic,** Criminal Appeal No. 80 of 1994 CAT –Arusha, The Court of East Africa set

out the principles in which an appellate court can act in appreciating and evaluating the evidence as follows:

> *Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.*

In the case of **Salum Mhando V. Republic** (1993) T.L.R. 170, the Court observed that re evaluation can be done where there are misdirection and non direction on the evidence by the trial court. It means that, for the appellate court to reevaluate the evidence where the evidence was properly recorded or admitted in court, but misapplied by the court before which it was given by misdirecting or non directing the same.

In this case the evidence recorded is not very much clear to assist this court to evaluate the same and come up with the findings. Looking at the evidence, what has been mentioned to be in dispute is a land measuring three acres, the evidence does not indicate its exact location, it does not clearly show on which part of the land owned by the respondent,

the description throughout the evidence has been of 45 acres instead of three acres which were actually in dispute.

In the circumstances, with that deficiency in evidence, the tribunal was expected to have taken steps to visit the locus in quo and ascertained exactly what part of the land was actually in dispute. That was not done, I thus find myself unable to proceed to evaluate the said evidence in the circumstances in which the evidence itself is wanting. I can not step into shoes of the trial tribunal to collect the evidence especially of ascertaining what is on the ground. This can be best done by the same tribunal not this court. That said, that calls for a need for retrial. That said, and while guided by the principle in the case of **Rashid Kazimoto and Masudi Hamisi Vs Republic**, Criminal Appeal No. 458 of 2016 CAT (unreported) which quoted with approval the authority in the case of **Sultan Mohamed Vs Republic Criminal Appeal No. 176 of 2003** (unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which stated that:-

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of in sufficiency of evidence or*

for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of Justice require it"

Also see **Paschal Clement Braganza versus Republic** (1957) EA 152

But it should be made if the following conditions exist:

i) When the original trial was illegal or defective;

ii) Where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.

iii) Where the circumstances so demand

iv) Where the interest of Justice require it"

This means, if the court finds that the circumstances described in the above authorities do exists and in my considered view, the interest of justice requires this case to be tried de novo.

As pointed out, in this case the error was committed by the trial tribunal, by failure to ascertain the exact land in dispute, and evaluate the evidence in its judgment, I therefore find this to be a fit case for ordering retrial. That said, I order that the case be tried de novo, before the District

Land and Housing Tribunal for Geita, at Geita by another Chairperson, and a new set of assessors.

It is so ordered.

DATED at **MWANZA**, this 21st day of April, 2021

J. C. Tiganga

Judge

21/04/2021

Judgment delivered in open chambers in the presence of the presence of Mr. Kyariga, Advocate, for the appellant, and Mr. Makwega, Advocate, for the respondent on line. Right of Appeal explained and fully guaranteed.

J. C. TIGANGA

JUDGE

21/04/2021