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

AT SHINYANGA

LAND APPEAL NO. 32 OF 2020

(Arising from Land Application No. 22 of 2018 of the Kahama District Land & Housing Tribunal)

APRONIA JOHN..... APPELLANT

VERSUS

MBANO OMARI KANGETA .....1ST RESPONDENT

JACOB KAPELA.....2ND RESPONDENT

JUDGMENT

Date: 13th April & 28th May, 2021

MKWIZU,J:

This appeal arises from the decision of the District Land and Housing Tribunal for Kahama in Land Application No. 22 of 2018 where the appellant lost the case hence this appeal.

The dispute between the parties arose in the year 2013. The facts gathered from the records reveals that second respondent sold the disputed land to the appellant with consideration of Tshs. 800,000/= after suspecting that the said land would be taken by the Council without

compensation. After purchasing the land, the appellant developed it by building a house therein.

On his party, 1st respondent told the trial tribunal that, the disputed land is his. He was allocated by Kahama Town Council on 20.05.1996 and he was handled with an offer where he erected a foundation thereon before he went to school. On coming back from the school he realized that his foundation was demolished by the 2nd respondent alleging to be the owner of the suit plot before selling it to the appellant who then erected her house therein.

First respondent filed a suit before the tribunal against the second respondent and the appellant for *inter alia* declaration that he is a lawful owner of the suit premise situated at Majengo Street, Majengo Ward in Kahama Urban area, Plot No. 507 Block A, 2nd respondent and the appellant are the trespassers and for a permanent injunction restraining the appellant and the second respondent their agent and/or workmen from any interference with the 1st respondent's peaceful enjoyment of the suit premises.

The trial tribunal determine the merit of the dispute and found that the 1st respondent is the lawful owner of the disputed plot and the 2nd and the appellant were declared trespassers. Further the tribunal ordered the appellant and the 2nd respondent herein to demolish any development made on the disputed land and the second respondent to compensated the appellant with equal Plot to the plot in dispute. The appellant was dissatisfied, he preferred this appeal on the following grounds of appeal.

1. *"That, by the evidence on record, the Trial Tribunal erred in law and in facts for declaring the 1st Respondent lawful owner of the suit property without considering the evidence adduced and time factor for acquisition of the said property.*

2. *That, the Trial Tribunal erred in law and facts for nullifying visitation without reasonable cause as to the cause of boundaries being given an issue for determination hence un-procedural for the whole proceeding.*

3. *That, the trial Tribunal erred in law and in facts in deciding the matter in favor of the 1st Respondent while throwing away the opinion of the assessors without giving reasons.*

4. *That the trial tribunal erred in law and in facts for failure to evaluate and critically analysis the evidence in records hence reached to this decision."*

At the hearing of this appeal, appellant was represented by Mr. Wilson Magoti (Advocate) and the 1st and 2nd respondents appeared in person. Mr. Magoti submitted that, the Land Tribunal erred in law and facts to declare 1st respondent lawful owner without justification as there was enough evidence on the records on how 2nd respondent owned the suit plot for long before he sold it to the appellant.

Mr. Wilson submitted further that a letter from Kahama Town Council did not say that the plot is owned by 1st respondent it advised the 1st respondent to wait for compensation. He faulted the tribunal for concluding that the plot was the lawful property of the 1st respondent without evidence on the records.

On the second ground submitted Mr Magoti, the tribunal misdirected itself in vacating the order for visiting the *locus in quo* without cogent reason. He cited the case of **Juma Mohamed Juma Vs. Sara Ibrahim**, (2002) TLR 45 where the court gave material facts on when the court should visit the locus in quo. He said, one of the issues in this matter was the size of the plot. While appellant and 2nd respondent were talking of unsurvey plot, 1st respondent spoke of the surveyed plot. Mr. Magoti insisted that at page 18

of the proceedings, the trial tribunal gave an order for visiting the locus in quo and summons were issued to the land officer, however on 27.4.2020 at page 20 trial tribunal cancelled its previous order for visiting the locus in quo without justification.

On the third issue, counsel for the appellant submitted that the trial chairman gave no reasons why he differed with with the opinion of the assessors and lastly that trial tribunal failed to properly evaluate the evidence on the record that the 1st respondent was allocated the plot by the Kahama town Council which later proposed for compensation, and there was no plot legally allocated to the 1st respondent.

In reply, the 1st respondent submitted that, the reasons for visiting the locus in quo were given. He negated the arguments that he was advised by the kahama town council to wait for compensation.

Second respondent supported the appeal. He argued that he acquired the suit plot in 1984 as an unsurvey plot.

After a thorough analysis of the records and the appeal, I find three issues for this court's determination. The **first** issue is *whether 1st respondent*

proved that he is the lawful owner of the suit property. ***Secondly****, whether the trial Tribunal committed procedural irregularities which vitiated the trial and occasioned a miscarriage of justice to the parties* and **thirdly**, *whether the trial tribunal failed to properly evaluate the evidence on the records.*

I will tackle the issues starting with the 2nd issue touching on the competence or otherwise of the proceedings. I will begin with the complaint that the Trial tribunal Chairperson cancelled the order for visiting the locus in quo without justification. The legal position in relation to visiting the locus in quo, is well settled. In **Nizar M.H vs. Gulamali Fazal Johnmohamed,** [1980] TLR 29 [1980] TLR 29, the Court stressed that it was only in exceptional circumstances that the Court should inspect a locus in quo, or else the Court unconsciously will take a role of the witness than adjudicator.

It is evident on the records that on 5/9/2019 at page 18 of the records, the trial chairperson ordered for visiting the locus in quo but the order was vacated after consultation with the parties on the necessity of visiting the locus in quo. The tribunal had this to say at page 20 of the proceedings:

"Upon went through evidence on record I learn that, as the description of the disputed land is known. No need of visiting, I do invite the parties to address whether or not visiting is necessary."

In their reply, 2nd respondent, Jacob Kapela had no comments, 1st respondent said he finds no reason for such a visiting while the present appellant insisted on visiting the locus in quo on the reasons that land officers were required to described the suit land.

As stated herein above, a visit to the locus in quo is not automatic, there must be compelling circumstances otherwise the court or the tribunal is restricted to take such an action. In explaining the reasons/ circumstances on which a visit to the locus in quo can be done, Court of appeal in **Avit Thadeus Massawe v. Isidory Assenga, Civil Appeal No. 6 of 2017** (unreported) quoted with approval the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others,** Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which

various factors to be considered before the courts decide to visit the *locus in quo were given thus:*

> *"1. Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56.*
>
> *2. The essence of a visit to locus in quo in land matters includes* ***location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land*** *(see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*
>
> *3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see Ezemonye Okwara Vs. dominic Okwara (1997) 11 NWLR (Pt. 527) p. 1601).*
>
> *4.The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (Emphasis added)".*

The evidence by parties in this appeal left no doubts on the location, size and boundaries of the land in dispute. The evidence by both parties was pointing to the same land except that the 1st respondent had it after it was surveyed while the appellant bought it from the 2nd respondent as unsurvey land.

The trial tribunal order vacating the visiting to the locus in quo was arrived at after having heard the parties on merit and learning that the suit land was well described. I find nothing to fault the tribunals order. Since nothing was intricate on the location, size or boundaries, and since no exceptional circumstances was depicted by the appellant, compelling for such a move, I think, the trial tribunal was justified in vacating its order of visiting the locus in quo. This ground of complaints have no merit.

Another complained procedural issue is that the tribunal chairperson disagreed with the opinion of the assessors without giving reasons. I think this ground is a pure misconception of the trial tribunals decision. At page 5 and 6 of its decision, the tribunal considered the opinion and gave reasons why it differed with their opinion.

Next for consideration is whether the 1st respondent proved his ownership over the suit land to the required standard. Before I venture into that process, I wish to point at the outset that, this is a civil matter in which onus of proof is on the party who alleges anything in his favour. This principle is stipulated under section 110(1) and (2) of the Law of Evidence Act, [CAP 6 R.E.2019]. The section reads:

> *"110. Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist*
>
> *111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."*

Again, in **Salum Mateyo vs. Mohamed Mateyo** [1987] TLR 111 the court held that;

> *"proof of ownership is by one whose name is registered. The onus of proof of ownership lies on the plaintiff who has alleged this fact."*

The principle is extended such that, that burden do not shift unless a person upon whom the burden lies has been able to discharge his burden. This was said in the case of Paulina **Samson Ndawavya v. Theresia**

Thomasi Madaha, Civil Appeal No. 45 of 2017 (unreported) where Court of Appeal quoted with approval part of the text at page 1896 of Sarkar's Law of Evidence, 18th Edition, M.C. Sarkar, S. C. Sakar and P. C. Sarkar published by Nexis Lexis that:

> *"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weaknesses of the other party...".*

In this case, the onus of proof was on the 1st respondent who alleged to be the owner of the suit plot. His responsibility so to say was to establish / prove with evidence the ownership of the disputed plot. The question arising here, is whether this duty was discharged. I am aware that this is a first appeal where the court is entitled to subject the entire evidence on record to an exhaustive examination in order to determine whether the

findings and conclusions reached by the trial court stand. See the decision in **Standard Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 (unreported).

Now, to answer the question whether 1st respondent proved his claimed at the trial tribunal, the records of proceedings will be of assistance. 1st respondent gave evidence at the trial tribunal as AW1.His evidence was short, he testified that he was allocated the suit land by the Kahama Town Council on 20/05/1996 and was handled the offer letter. He erected the foundation but the same was demolished by the 2nd respondent who later sold the land to the appellant. The complaints were registered with the Street chairperson (AW2) but without a solution. Evidence by AW2 supports this evidence.

In its decision the trial tribunal stated that 1st respondent was legally allocated the disputed plot by the Kahama Town Council. The said judgment at page 5 states that;

> *"...upon went (sic) through the pleadings with annextures therein, there is no dispute that on the 20th day of May 1996 the applicant herein was allocated Plot No. 507 Block*

"A" HD via letter of Offer bearing reference No 8787 and that applicant went on paying land rent as evidenced by Exchequer Receipt No. 06333823 dated 2/11/1998 and exchequer Receipt No. 102773671 dated 03/02/2000

....there is no dispute that the second respondent purchased the disputed land from the 1st respondent.... No dispute that on the 17th day of 2018 via letter dated KTC L.20/01/358 the Kahama Town Council agreed to compensate the applicant herein...

The findings above elaborated indicates that the applicant was legally allocated the disputed Plot by the Kahama District Council and that the letter date 17/03/2018 bearing reference No. KTC L. 20/1/38 reveals that the applicant was allocated the disputed land but the Plot given (Plot No. 507 Block A HD) was the Number given during demarcated survey."

At Page 6 paragraph 2 states that;

"It is my considered opinion that, the issuing of a plot No. prior to approved survey does not deprive the right of the applicant as far the Plot given to him in 1996, consequently the first issue is answered affirmative that the applicant is the lawful owner of the disputed plot."

The decision above was grounded on the letter dated 17/03/2018 by the Kahama Town Council, the offer letter as well as the exchequer receipt mentioned therein. I have revisited the records, in paragraph 6 (ix) (b) of his application 1st respondent had listed two documents to be relied upon, one is the right of occupancy issued by the Kahama Town Council and the Land rent Receipts. And in their joint Written Statement of Defence appellant together with the 2nd respondent attached a copy of a letter from the Land Office of Kahama Town Council date 13th January, 2018 (W-01). However, none of the mentioned documents above was tendered in evidence. Trial tribunal choose to use the letter dated 17/03/2015 by Land Office of Kahama Town Council attached in the WSD and documents attached in the application as evidence to prove that the owner of the land was the 1st respondent. It is settled law that, documents reflected in the pleadings which are intended to be used as evidence, must be tendered and admitted by the court at the trial. Annexing documents alone in the pleadings do not necessarily make them part of the evidence. This is the import of **Order XIII Rule 7 (2) of the Civil Procedure Cap 33 R:E 2019** which provides that:

(2)- Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

In the case of **M/S SDV Trasami (Tanzania) Limited vs M/S STE DATCO,** Civil Appeal No. 16 of 2011 (Unreported), the Court of appeal at page 9 stated that:

> *".....it is mandatory that for a document to form part of the record of the suit it must first be admitted in evidence. Therefore, the proper procedure is that, the document must first be cleared for admission before it is used in the evidence. In the case of* ***Robinson Mwanjisi and 3 Others v. Republic [****2003] TLR 218 at page226, the Court observed with respect to the document used by the trial Judge without being properly admitted in evidence- that: -*
>
> > ***"Where it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted ..."***

Guided by the above provision, I am convincingly of the view that by considering unadmitted letter dated on 17/03/2018 by the Kahama Town Council, the trial tribunal was in error since the said letter formed no party of evidence adduced.

Even assuming that the letter referred to above was properly tendered and admitted, still its content do not reflect the findings of the trial tribunal. That letter was addressed to the 1st respondent Mbano Omary Kangeta, saying *inter alia* that:

> *"... Baada ya kupitia nyaraka zako na kufanya ukaguzi wa eneo unalolalamikia ilibainika kuwa barua ya toleo iliyotolewa kwa kiwanja hicho hailingani na eneo linalolalamikiwa kwa kuwa viwanja hivyo vilitolewa kabla ya upimaji kamili kutokana na kuwepo kwa utata huo unastahili kiwanja mbadala kwa barua hii tunakujulisha kuna upimaji wa viwanja vya fidia unaendelea pindi utakapokamilika utapatiwa kiwanja chako cha fidia"*

The contents of the above letter relied upon by the trial tribunal do not derive into the conclusion that 1st respondent is the legal owner of the plot in dispute. It in fact, advised the 1st respondent to wait for compensation.

Generally, the records is short of evidence to the effect that 1st respondent a lawful owner of the suit plot. 1st respondent failed to discharge his duty of proving as to his ownership over the suit plot.

To that conclusion, I am without doubt that trial tribunal failed to evaluate the evidence on the records leading to a wrong and unjustifiable decision.

That being the case, the appeal is allowed, with costs.

Ordered accordingly.

E.Y MKWIZU
JUDGE
28/5/2021

COURT: Right of appeal explained.

E.Y MKWIZU
JUDGE
28/5/2021