IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT TANGA

LAND CASE APPEAL No. 28 OF 2020

(Arising from the decision of the District Land and Housing Tribunal for Lushoto at Lushoto in Land Application No. 13 of 2017)

SWAIBU S/O HASSANI ---------- APPELLANT

Versus

SERIKALI YA KIJIJI CHA WANGA ---------- RESPONDENT

JUDGMENT

19.07.2021 & 19.07.2021
F.H. Mtulya, J.:

Section 66 of the **Advocates Act** [Cap. 341 R.E. 2019] (the Act) read together with new enactment of section 3A & 3B in the **Civil Procedure Code** [Cap.33 R.E. 2019] (the Code) were invited today morning in this court to resolve the real dispute which brought the parties up to this court. I will explain for purposes of appreciation of the cited sections and understanding of the present contest.

In 2017, before insertion of sections 3A & 3B in the Code on overriding objective principle (*the oxygen principle*), the duty of this court in determining disputes expeditiously, and learned counsels & parties to uphold the *oxygen principle*, Mr. Swaibu Hassani (the Appellant) had already approached the **District Land and Housing**

Tribunal for Lushoto at Lushoto (the Tribunal) and preferred **Land Application No. 13 of 2017** (the Application). In the Application, the Appellant claimed that *Serikali ya Kijiji cha Wanga in Lushoto* (the Respondent) encroached his land sized one point five (1.5) acres from ten (10) acres inherited from his father in 1995, namely Mr. Hassan Kaniki (Mr. Kaniki). The base of his claim was the prior determination of the **Lushoto Land Tribunal** (*Baraza la Ardhi la Lushoto*) in **Land Application No. 9 of 1982** (*Mgogoro wa Ardhi*) between Mr. Kaniki and Mr. Salimu Mtangi (Mr. Mtangi) which was resolved in favour of Mr. Kaniki on ten (10) acres land located at Wanga Village in Lushoto District.

After full hearing of the Application, the Tribunal decided in favour of the Respondent. The reasoning of the Tribunal is partly found at page 7 & 8 of the judgment in the following words:

> *The Tribunal during the visit to the locus in quo found that the disputed land is not more than an acre. There were older Kabela trees which remark the former boundary and the small Kabela trees planted in the new boundary. The sisal plants used as boundary had been thrown lose to the new purported boundary. This shows that the boundary had been extended every now and then...At this juncture,*

it is crystal clear that the respondent's evidence goes without saying that the disputed land belongs to the respondent and it has been used for community activities by the villagers including the applicant...since the applicant has failed to prove the case, this tribunal therefore dismiss the application.

This reasoning of the tribunal irritated the Appellant hence approached legal services of learned counsel Mr. Henry Njowoka to prefer five (5) grounds of appeal in **Land Case Appeal No. 28 of 2020** (the Appeal) in this court. When the Appeal was scheduled for mention today morning, Mr. Njowoka prayed to amend ground number three (3) of the Appeal in the Memorandum of Appeal to read: the trial tribunal failed to conduct a visit of *locus in quo* in the manner that would have determined the matter successfully and justifiably. The prayer was not protested by learned Senior State Attorney, Mr. Denis Emmanuel Kamala, for the Respondent.

Following the amendment in ground number three (3), a short consultation took it course between the learned minds and at the conclusion, the dual entered into an agreement that to successfully resolve the dispute between the parties, the ten (10) acres determined to finality in *Baraza la Ardhi la Lushoto* in *Mgogoro wa*

Ardhi between Mr. Kaniki and Mr. Mtangi be measured and demarcations be resolved.

In his brief submission in this court, Mr. Njowoka submitted that the Appellant in paragraph 6 (ii) of his application form registered in the Tribunal in the Application stated and registered the decision of the *Baraza la Ardhi la Lushoto* in *Mgogoro wa Ardhi* between Mr. Kaniki and Mr. Mtangi and was exhibited P.2, but during proceedings in the Tribunal, the Tribunal did not take any efforts to identify the ten (10) acres land secured by Mr. Kaniki.

To bolster his argument, Mr. Njowoka submitted that Tribunal failed to conduct a visit of *locus in quo* in the manner that would have determined the matter successfully and justifiably. Finally Mr. Njowoka prayed this court to order the Tribunal to go back to the land in dispute to ascertain the disputed land and identify the ten (10) acres of land which are not in dispute. This prayer was not protested by Mr. Kamala as he thought of sections 66 of the Act & 3B (2) of the Code.

On my part, I have gone through the record of this appeal and found out that the judgment of the Tribunal in the Application, and its associated holding and reasoning, and think that the statement at the third paragraph of page 7 invites more details and involvement

of both parties and experts in land size measurement. The paragraph also validates the Appellant's complaint in amended ground number three (3) in the Memorandum of Appeal. The statement shows that the Tribunal is trying to resolve land boundaries without first determining exact land size of each party for want of certainty of the lands not in dispute.

My understanding in land disputes tells me that land disputes concern descriptions of land in terms of size, location and surrounding neighbours. That is the requirement of the law regulating conduct of the Tribunal in Regulation 3 (2) (b) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations**, 2003 GN. No. 174 of 2003 (the Regulations).

It is fortunate that Regulation 3 (2) (b) of the Regulations has been receiving interpretations of this court and precedents are abundant (see: **Daniel D. Kaluga v. Masaka Ibeho & Four Others**, Land Appeal No. 26 of 2015; **Rev. Francis Paul v. Bukoba Municipal Director & 17 Others**, Land Case No. 7 of 2014; **Aron Bimbona v. Alex Kamihanda**, Misc. Land Case Appeal No. 63 of 2018; **Ponsian Kadagu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018; and **Simeo Rushuku Kabale v. Athonia Simeo Kabale**, Civil Appeal No. 6 of 2019).

It is unfortunate that in the present appeal, the record shows that there are no record registered in the Application displaying the proceedings during the *locus in quo* to have been conducted according the established practice of this court in the precedent of **Fatuma H. Mbawanje & Four Others v. Shaibu Hassan Kioze**, Land Case No. 28 of 2018 and Court of Appeal in **Nizar M.H. V. Gulamali Fazal JanMohamed** [1980] TLR 29 and **Sikuzani Said Magambo and Another V. Mohamed Roble,** Civil Appeal No. 197 of 2018.

In appreciating the precedent in this country in **Nizar M.H. V. Gulamali Fazal JanMohamed** (supra) and commonwealth practice in Botswana in the decision of **Yeseri Waibi v. Edisa Byandal** [1982] HCB, Uganda in the decision of **Yowasi Kabiguruka v. Samuel Byarutu**, Civil Appeal No. 18 of 2008 (CAU) and Nigeria in **Evelyn Even Gardens NIC Ltd & the Hon. Minister, Federal Capital Territory & Two Others**, Suit No. FCT/HC/CV/1036/2014, this court in the precedent of **Fatuma H. Mbawanje & Four Others v. Shaibu Hassan Kioze**, (supra) stated that:

> *...it is not clear from the party's testimonies whether they are referring to one and the same land with regard to the location, size and its boundaries. Hence, it is*

necessary before determining the dispute on merit, to first resolve the issue as to exact identify of the land in dispute...this should have been done by visiting the locus in quo... the Court of Appeal [provided] useful guidelines on the circumstances where a visit to the locus in quo will become necessary...the procedure outlined in ***Nizar M.H. V. Gulamali Fazal JanMohamed*** *[1980] TLR 29 on how the visit should be conducted... [must be abided].*

In the precedent of **Nizar M.H. V. Gulamali Fazal JanMohamed** (supra), the Court stated the guidelines and procedures in the commonly cited text in our courts when determining land disputes which reads:

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 witness as may have to testify in that particular matter...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 witnesses. We trust that this procedure will be adopted by the courts in future...

The guidelines and procedures have been repeatedly stated by our superior court and most recent decisions are displayed in **Avit Thadeus Massawe v. Isidory Assenga**, Civil Appeal No. 6 of 2017 and **Sikuzani Said Magambo and Another V. Mohamed Roble** (supra). Now, in the present appeal, as it is vividly shown in the record, the Tribunal visited the *locus in quo* without abiding with the guidelines and procedures set in the precedent of **Nizar M.H. V. Gulamali Fazal JanMohamed** (supra), which raised the amended third ground of appeal. It is therefore my considered view that there was procedural irregularity on the face of record which vitiated the proceedings from when the visitation to *locus in quo* started. This fault occasioned a miscarriage of justice to the parties.

In order to put record straight and for want of fair proceedings, this court will quash the proceedings from when the visitation started. This court and Court of Appeal, as the courts of record,

have additional duties of ensuring proper application of the laws in lower courts and tribunals. The courts of record cannot justifiably close their eyes to let vivid irregularities exist in our courts' or tribunals' records (see: **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017 and **The Principal Secretary, Ministry of Defence & National Service v. Devram P. Valambia** [1992] TLR 185).

Having said so, and noting the irregularity committed by the Tribunal in the Application was only during the visitation of *locus in quo*, and considering there is currently enactment of section 3A (1) on expeditious justice, and recognizing that the parties were battling in courts since 2017, I will only quash the judgment of the Tribunal and proceedings which started during the visitation of *locus in quo*.

I therefore order the Tribunal to conduct its business in visitation of *locus in quo* in accordance to the requirement of the law established by the precedents in **Nizar M.H. v. Gulamali Fazal Jan Mohamed** (supra). I further order an independent surveyor or expert in land demarcations issues be appointed in agreement of both parties in order to ascertain land demarcations of the ten (10) acres already determined to the finality by *Baraza la Ardhi la Lushoto* in *Mgogoro wa Ardhi* between Mr. Kaniki and Mr. Mtangi. Both

parties shall share costs of the appointed independent surveyor or expert in land demarcations matters. I award no costs in this appeal as the dispute is yet be determined to the finality to identify a rightful owner of the disputed land and in any case, the parties' learned minds acted as officers of this court.

Ordered accordingly.

F. H. Mtulya

Judge

19.07.2021

This judgment was delivered in Chambers under the seal of this court in the presence of the parties' learned counsels, Mr. Henry Njowoka for the Appellant and Mr. Denis Emmanuel Kamala for the Respondent

F. H. Mtulya

Judge

19.07.2021