IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 14 OF 2021

AUMA NYITAMBE ..... 1ST APPELLANT

DAVID NYITAMBE ..... 2ND APPELLANT

SALIMON NYITAMBE ..... 3RD APPELLANT

VERSUS

DIONIZI MASINI WANGOKO (Administrator

Of the Estate of the Late Masini Wangoko) ..... RESPONDENT

(Arising from the decision of the District Land and Housing Tribunal for Tarime at Tarime in Application No. 48 of 2019)

JUDGMENT

13th July and 20th August, 2021

KISANYA, J.:

The respondent sued the appellants herein and one, Faraja Nyitambe before the District Land and Housing Tribunal for Tarime at Tarime (trial tribunal). He claimed that they had trespassed into the land of the late Masini Wangoko located at Sidika Hamlet within Sota Village within Rorya District. The appellants contested his claim. They also claimed to be the lawful owner of the suitland. At the end of trial, the trial tribunal was satisfied that the disputed land was legally owned by the late Masini Wangoko and thus, the respondent was entitled to administer the disputed land.

Aggrieved by the decision of the trial tribunal, the appellants and Faraja Nyitambe appealed to this Court. Their appeal was premised on the following grounds of appeal, in verbatim:

1. *The trial tribunal grossly erred in law and facts for failure to show how the visit to the locus in quo was conducted and whether parties were asked to comment on the findings noted during the visit locus in quo.*
2. *The trial Tribunal erred in law for failure to show members of the trial tribunal who were present at the visit to the locus in quo whether parties to the case were also present.*
3. *That the trial tribunal failed to evaluate properly the evidence of the appellants.*
4. *The trial tribunal erred in law for misinterpreting the issue of adverse possession in the Suitland.*

Therefore, the appellants prayed that the appeal be allowed with costs by declaring them as the lawful owners of the suitland.

When this matter was called on for hearing on 13th July, 2021, Faraja Nyitambe, the then 2nd appellant defaulted to appear. Therefore, his appeal was dismissed for want of prosecution. As a result, the hearing proceeded in the presence of the above named appellants and the respondents. Both parties appeared in persons, unrepresented.

The appellants prayed to adopt the petition of appeal. The first appellant went on to submit that her evidence was not analyzed by the trial tribunal. She contended that the trial tribunal refused to admit her evidence. This contention

was also supported by the 2nd appellant (David) who submitted that the trial tribunal refused to receive a letter from Tai Ward Tribunal which had decided the matter between them and the respondent. It was 2nd appellant's submission that the respondent did not appeal against the said decision. When asked by the Court whether the evidence on that contention was adduced before the trial tribunal, the 2nd appellant contended that it was given by DW1 (first appellant).

The 2nd appellant went on to challenge the procedure on the visit at the locus in quo. He contended that the visit at the locus in quo was conducted without aid of assessors and that, both parties were not asked to give evidence during the visit at the locus in quo. The 2nd appellant was of the firm view that the trial tribunal's decision was, among others, based on evidence gathered during the visit at the locus in quo.

On his part, the 3rd applicant (Salimon) submitted that the respondent conceded that the suitland belongs to Mzee Nyitambe. He further submitted that the appellant paraded witness who gave evidence on how they were related to Mzee Nyitambe.

In the light of the above submission, the appellants prayed the Court to allow their appeal with costs.

The respondent resisted the appeal. He submitted that the suitland belonged to the late Masini Wangoko whom he administers his estates and that, the appellants were given a land for temporary use.

On the issue that this matter had been decided by the Ward Tribunal, the respondent submitted the said decision which was given in favour of the appellants was nullified by the District Land and Housing Tribunal because the parties had no locus to institute the case.

With regard to the procedure of visiting at the locus in quo, the respondent contended that the required procedures were complied with. He submitted the appellants were present and that the trial chairperson and assessors made their respective observations during the visit at the locus in quo. He contended further that the witnesses were not called during the visit at the locus in quo.

That said, the respondent asked the Court to dismiss the appeal. He was of firm view that he proved his case on the balance of probabilities.

Save for the 1st appellant, the appellants had nothing to rejoin. On her part, the 1st respondent submitted that the suitland belonged to her father in law and not the late Masini Wangoko.

I have carefully considered the petition of appeal, reply to the petition of appeal, submission by both parties and evidence on record. In my considered view, the first and second grounds on non-compliance with the procedure on the visit at the locus in quo is sufficient to dispose of the appeal.

However, before considering the said ground, I wish to comment on the issue raised by the 2nd appellant that the dispute between the appellants and the respondent had been determined by the Ward Tribunal and decided in their favour. As rightly argued by the respondent, the decision of the Ward Tribunal which had ordered that the suitland be divided between the appellants and respondent was nullified by the District Land and Housing Tribunal. This fact is also reflected in the evidence of Faraja Nyitambe (DW3) who deposed as follows:

> *"We sued him in the Ward Tribunal, tribunal ordered us to divide the land. Dionizi appeal (sic) to this Tribunal. This Tribunal ruled that I had no locus stand together with applicant. Later on the applicant filed this case."*

In view of the above evidence, the 2nd appellant's contention that the matter subject to this appeal had been decided by the ward tribunal lacks merit. This is because the decision which relied upon by the 2nd appellant was nullified on appeal.

Reverting to the first and second grounds, parties do not dispute that the trial tribunal visited at the locus in quo. The appellants faults the trial tribunal for failure to comply with the procedure governing the visit at the locus in quo. The law does not require the tribunal or court to conduct a visit at the *locus in quo*. The issue whether or not to visit at the locus in quo depends on the nature of each case. One of the objectives of visiting at the locus in quo

may be to confirm the evidence including, boundaries or fixtures on the suitland, that was given during trial.

Now, in the event the trial court or tribunal finds it apposite to visit at the locus in quo, it is required to comply with the guidelines and procedures set out by case law as follows. *One,* the parties and their advocates, if any, must be present. *Two*, allow the parties to parade witness to testify in that particular matter. *Three,* upon re-assembling in the court or tribunal room, read out the notes to the parties and their advocates, and cause them to comment, amend, or object and where possible incorporate the comments or amendments by the parties. *Four,* allow witnesses to give evidence of the relevant facts. *Five*, the trial court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses. The above guidelines were propounded in **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29, when the Court of Appeal had this to say on the issue under discussion:-

> *"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 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."

In the instant case, when the appellants (the then respondents) closed their defence on 28/07/2020, the trial tribunal made the following order:

"i. Respondent's case marked closed.
ii. Visit locus in quo 21/09/2020.

SGD
Chairman
28/07/2020"

Now, what transpired on 21/09/2020 fixed for visiting at the locus in quo is reproduced hereunder:

21/09/2020
Coram
Ngukulile N.O. .....Chairman
Mwanga N.....Member
Monge G.....Member
Present .....Applicant
All present .....Respondent
Anold. K. CC
Court: *Applicant and the respondent are present*

SGD
Chairman
21/09/2020

Order;

i. Assessors opinion 29/09/2020

SGD
Chairman
21/09/2020"

Therefore, reading from the record, there is nothing suggesting that the trial tribunal visited at the locus in quo on 21/09/2020. However, as indicated earlier, parties are not at issue that the trial tribunal visited at the locus in quo. Thus, if the visit at locus in quo was conducted, it is not known whether the witnesses were re-called to testify, examined and or cross examined because the proceedings is not clear as to whether the notes were taken and the trial tribunal never reconvened in the court room to consider the evidence gathered from the said visit. In the case of **Sikuzani Said Magambo and Another vs Mohamed Roble,** Civil Appeal No. 197 of 2018, the Court of Appeal faced akin situation to the case at hand and held as follows:

> *"We are therefore in agreement with both parties that the Tribunal's visit in this matter was done contrary to the procedures and guidelines issued by this Court in* ***Nizar M.H. Ladak****, (supra). It is therefore our considered view that, this was a procedural irregularity on the face of record which had vitiated the trial and occasioned a miscarriage of justice to the parties."*

Guided by the above position, this Court finds that the irregularity on the visit at the locus in quo vitiated the trial. It also occasioned a miscarriage of justice to the parties, the appellants in particular because the opinions of the assessors who sat with the trail chairman was, among others, premised on the evidence gathered from the visit at the locus in quo and were agreed upon by the Hon. Chairman. In my considered view, this issue is by itself sufficient to

dispose of the appeal. For the foregoing, I will not discuss the remaining grounds based on the judgment of the trial tribunal.

In the final analysis, I allow the appeal basing on the first and second grounds. In the exercise of revisional powers vested in this Court by section 43(1)(b) and (2) of the Land Disputes Courts Act (Cap. 216, R.E. 2019), the proceedings of the trial tribunal is hereby nullified and the judgment and decree thereon quashed and set aside. The case is remitted to the trial tribunal for retrial. For the interest of justice, it is ordered that, the matter be heard by another chairperson and new set of assessors. Considering the circumstances of the case, I order each party to bear its own costs. Ordered accordingly.

DATED at MUSOMA this 20th day of August, 2021.

E. S. Kisanya
JUDGE

Court: Judgment delivered this 20th day of August, 2021 in presence of the 1st and 3rd appellants and in the absence of the 2nd appellant and the respondent. B/C Kelvin present.

Right of appeal further appeal to the Court of Appeal explained.

E. S. Kisanya
JUDGE
20/08/2021