IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA

MOSHI REGISTRY

AT MOSHI

LAND CASE APPEAL No. 45/2020

(Originating from Moshi District Land and Housing Tribunal Application No. 205 of 2016)

DANLAND TEMU.....APPELLANT

VERSUS

THOMAS TEMU.....RESPONDENT

29th June & 6th August, 2021

JUDGMENT

MKAPA, J.

The appellant had successfully moved this Court seeking for extension of time to file appeal vide **Misc. Land Application No. 48 of 2020**, hence the present appeal challenging the decision of Moshi District Land and Housing Tribunal (the trial tribunal) delivered on 21st May, 2020.

The factual brief of the matter is that the respondent sued the appellant for trespassing over a piece of land measuring 1.87 acres located at Kitoto village, Kilema Pofo within Njiapanda

Ward, Himo in Moshi District (the suit land). At the trial tribunal, the respondent claimed that he was allocated the suit land by the Director of Moshi District Council since 1983 but he entrusted PW4, one August Focus Njuu as a caretaker and used to cultivate the suit land. While the appellant claimed that the suit land is measured 3 acres in total and belonged to their late father the late John Philipo Temu who died in 1995. Since then, his brother the late Rhodes John Temu occupied the suit land until he also passed away in 2004 and left the same to his wife Debora Rhodes Temu (DW4). In 2015 the respondent and PW4 August Focus Njuu, were served with injunction order issued by one Gilbert Nyamsha a Ward Executive Officer (WEO) in relation to the suit land.

According to the plaint, the claim was made by the appellant to WEO (who was sued as the 2nd respondent) that the respondent had trespassed into his land that made WEO to issue the said injunction order to bar the respondent and respondent's relatives from utilizing the suit land. Dissatisfied, the respondent filed **Application No. 205 of 2016.** The trial, ensued and in the end the tribunal decided in favour of the respondent hence the current appeal comprising of the following four (4) grounds;

1. That, the assessors who sat with the Chairman did not write and sign their opinion and incorporated them in the record of proceedings.
2. That, visiting *locus in quo* violated the established legal principles for purposes of identifying the subject matter at the site as the chairman became the witness in the proceedings instead of an impartial arbitrator in the dispute.
3. That, the chairman erred in passing the judgment against appellant in his own capacity instead of as an administrator of the estate of his late brother, Rhodes Temu.
4. That the entire judgment is wanting in judicial reasoning.

Hearing of the appeal proceeded by way of filing written submissions that were filed timely. The appellant was represented by Mr. Charles Mwanganyi, learned advocate while the respondent was represented by Mr. Martin Kilasara also learned advocate.

Supporting the appeal, Mr. Mwanganyi submitted on the first ground that, the trial tribunal decided the case without giving the assessors opportunity to give their opinion in writing, and the same to be read to parties before delivery of the judgment. That, section 23(1) and (2) of the Land Disputes Courts Act, Cap 2016 R.E 2019 (Land Disputes Court Act), together with Regulation 19(1) and (2) of GN No. 174/2003, provides that,

such omission renders the judgment and proceeding of the trial tribunal a nullity. In support of his argument he placed his reliance on the case of **Amair Mbarak and Azania Bank Corp. Ltd V Edgar Kahwii, Civil Appeal No 154 of 2015** which underscored the importance of assessors' opinion.

On the second ground of appeal, the learned counsel averred that, the *locus in quo* visitation did not follow the legal principles for purposes of identifying the subject matter at the site. He referred the Court to the case of **Sikuzani Said Magambo & Another V Mohamed Roble,** [1900] TLR 29, in which the guidelines for visiting locus in quo were underlined to the effect that visiting *locus in quo* is not a mandatory procedure but upon discretion of the Court. However, once that is done the guidelines ought to be followed. He went on arguing the fact that in the present appeal, there was violation of established legal principles, where the chairman became a witness in the proceedings instead of an impartial arbitrator in the dispute.

As to the third ground, Mr. Mwanganyi asserted that, the trial chairman composed the judgment against the appellant on his own capacity instead of as an administrator of the estate of his late brother Rhodes Temu. He thus prayed for the appeal be allowed with costs.

Responding Mr. Kilarasa argued against the first ground that, the law governing the proceedings at the District Land and Housing Tribunals, particularly on the issue of assessors is clear as per section 23(1) and (2) of the Land Disputes Courts Act. That, when the case commenced on 25th July, 2017, the trial tribunal was duly composed of the trial chairman with two assessors who were present throughout the proceedings. Further that, it is apparent on page 45-46 of the trial tribunal's typed proceedings that, the trial chairman read the assessors' opinion on 22nd April, 2020 before delivering the judgment on 21st May, 2020 in which he considered both opinions. Mr. Kilasara also argued that, the cases cited by the appellant's counsel are distinguishable and out of context since in one of the cited cases assessors did not take part in the whole proceedings but gave opinion, and in the other case the opinion was not read to parties prior to composition of the judgment.

Contesting the second ground of appeal Mr Kilasara averred that, it is discretion of the tribunal to visit *locus in quo*, and it was the Appellant who prayed for the same as shown at page 44-45 of the typed proceedings, whereby *locus in quo* took place on 3rd April, 2021 and both parties were availed equal rights to identify and describe the suit land. Additionally, there was a neutral witness named Alen James Maruma who gave details over the suit land, as well as the assessors were given opportunity to hear

and raise questions and finally a report of what had transpired during the visit was incorporated in the proceedings. He also argued that the case of **Sikuzani Magambo** (*supra*) is distinguishable in the appeal at hand as the trial chairman was impartial throughout the proceedings, thus there was no irregularity which could render the proceedings nullity.

On the third ground, respondent's counsel submitted that, the Appellant was sued in his personal capacity for trespassing into the suit land since he neither claimed to be the administrator of the estate of the late Rhodes Temu nor filed any counter claim. More so, throughout the trial, the appellant did not tender any document showing that he is the Administrator of the estate of the late Rhodes Temu.

He went on submitting that, since the appellant was sued in his personal capacity and he did not provide any evidence, trial tribunal's decision cannot be faulted for entering judgment against him. In cementing his argument he referred the court to the decision in the case of **Hotel Travertine Ltd V National Bank of Commerce Ltd** (2006) TLR 133, in which it was held inter alia that;

> *"As a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal."*

Mr. Kilasara fnally prayed for this Court find the appeal devoid of merits and dismiss it in its entirety with cost.

In his brief rejoinder, Mr. Mwanganyi reiterated his earlier submission and maintained that, the assessors' opinion was not recorded at the trial tribunal. Further that, if the trial tribunal bothered to analyse the evidence carefully it would have found that the suit land belongs to the late Rhodes Temu and not the respondent.

After I have gone through the trial tribunal's records and both parties' submissions and since the appellant opted to disregard the fourth, I will now proceed to determine the three grounds of appeal as submitted.

Starting with the first ground in which the appellant attempted to fault the trial tribunal's proceeding and decision by arguing that the assessors who sat with the chairman do not appear to have written and signed their opinions which were to be incorporated in the record of the proceedings. As rightly submitted by respondent's counsel the proceedings of the trial tribunal at page 45 clearly shows that on 3rd April, 2020, the case was scheduled for reading of the assessors' opinion on 22nd April, 2020. On the latter date, the records show that the same were read as there were written opinion of two assessors, to wit

assessor Sara J. Lukindo dated 9th April, 2020 and Sarah E. Mchau, dated 21st April, 2020

Section 23 (11) and (2) of the Land Disputes Court Act provides that;

> *(1) The Land District and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.*
>
> *(2) The District Land and Housing Tribunal shall dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before chairman reaches out their opinion before chairman reaches the judgment.*

The above recited provision read together with **Regulation 19(1) and (2) of GN. 174/2003** which read as follows;

> *(1) The tribunal may, after receiving evidence and submission under regulation 14 pronounce judgment on the spot or reserve judgment to be pronounced later,*
>
> *(2) Notwithstanding (1) the chairman shall, before making his judgment require every assessor present at the conclusion of hearing to give his opinion in writing and assessor may give his opinion in Kiswahili.*

From the above cited provisions it is crystal clear that, the laws requires that among others, opinion of assessors be taken before pronunciation of the judgment. The court of Appeal in number of its decisions, had elucidated position of the above cited provisions to mean the same. See **Tubone Mwambeta V Mbeya City Council**, Civil Appeal No. 286 of 2017, **Kiwengwa Stand Hotel V Abdallah Said Mussa**, Civil Appeal No. 13 of 2012, **Sikuzani Said Magambo** (Supra). In the latter case when maintaining the position in the case of **Tubone Mwambeta** (supra), the court held *inter alia* that;

> *"Likewise in **Tubone Mwambeta**(supra) in underscoring the need to require every assessor to give his opinion and same recorded and be part of the trial proceedings, this court observed that;"*
>
> *"In view of the settled position of the law, where the trial has been conducted with the aid of assessors....they must actively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ... since Regulation 19(2) of the Regulations requires every assessor hearing to give his opinion in writing, such opinion must be availed in the presence of the*

parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict"

In the instant appeal it is apparent that on 22nd April, 2020 the trial chairman read the assessors' opinion before the parties and recorded that;

"The matter is for reading the Assessors opinion. The same is here (sic) read to parties."

It is my considered view in respect of the above position of the law, the above remarks from the trial chairman show that the law was complied with as the assessors' opinion were written and read to the parties hence this ground is meritless and I proceed to dismiss it.

On the second ground, the appellant contended that, the trial chairman violated mandatory requirement by visiting locus in quo as a witness thereto. It is trite principle that in land matters, visiting *locus in quo* assist the court to resolve any controversy as to the size, actual location, physical features or otherwise in respect of the suit land. The rationale behind is for the trial court to satisfy itself on the accuracy of the evidence given in the course of the trial *vis-à-vis* what is physically seen in the suit land. In doing so the court or tribunal is urged to exercise such procedure with caution in order not to constitute itself as a

witness in the case. This position has been observed in a number of cases including the case of **Mukasa V Uganda** [1964] EA 698 at 700, where East African Court of Appeal had this to say;

> *"A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence particularly (sic) demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence.*

This position was further well elaborated in the case of **Nizar M.H. Ladak V Gulamali Fazal Jan Mohamed** [1980] TLR 29 where the Court of Appeal held that;

> *"It is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so a court may unconsciously take role of a witness rather than an adjudicator."*

In the appeal at hand, visiting *locus in quo* was done so as to ascertain ownership of the suit land in relation to the size, boundary and physical appearance of the suit land. I went

through the trial tribunal's proceeding specifically after visiting locus in quo and observed that the trial chairman did let both parties testify and identify their boundaries, he also let a passer by testify and even the assessors were given room to cross examine on any doubtful issue. That is observed at pages 44 and 45 of the trial tribunal's typed proceedings. The only observation that the trial chairman did was in the judgment where he wrote;

> *"The 1st Respondent and DW4 stated that in the said land there is a house which DW4 resides todate. This Tribunal managed to visit locus in quo where the tribunal asked the applicant to show the suitland. In the suitland there is no house of the DW4 this the fact that on the suitland there is a house of DW4 is not true. What the tribunal noted is that the disputed land and the land of DW4 shares boundary on one side."*

It is therefore my considered opinion that, such remarks do not turn the trial chairman into a witness but rather his impartial observation of what he saw when the tribunal physically visited the suit land. This ground is meritless and is hereby disallowed.

On the last ground the appellant challenged the trial tribunal for entering the judgment against the appellant in his personal capacity instead of as an administrator of his late brother, Rhodes Temu's estate. As briefly narrated on the background

leading to this appeal, the respondent claimed ownership of the suit land measuring 1.87 while the appellant claims that the suit land and other piece of land measuring 3 acres in total belonged to his father then to his brother the late Rhodes Temu. However, throughout the trial the respondent never testified to have sued the appellant as an administrator of the estate of the late Rhodes Temu. The appellant on the other hand together with his witnesses are the one who raised the matter of administration of the estate of the late Rhodes Temu, however, neither him nor his witnesses proved by bringing any documentation to substantiate such fact. In **Miller V Minister of Pensions** [1937] 2 ALL. ER 372 as quoted with approval in the case of **Paulina Samson Ndawavya V Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017, CAT at Mwanza (Unreported), Court of Appeal emphatically held that;

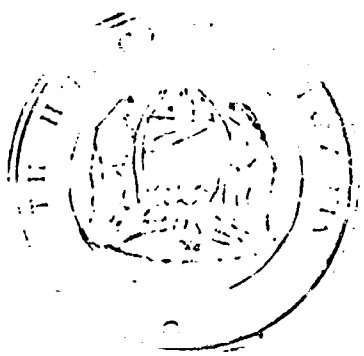
> *"It is a trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap 6 [R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than other on a particular fact to be proved..."*

The respondent sued the appellant in his personal capacity, if the latter had other status in relation to the suit land, he was the one under obligation to prove the same and not to cast that burden to the respondent or trial tribunal. This ground also fails.

In the light of the above analysis, I found no ground to fault the trial tribunal's decision. Appeal is hereby dismissed with cost and the trial tribunal's decision is upheld.

It is so ordered.

Dated and delivered in Moshi, this 6th day of August, 2021.



S.B. MKAPA
JUDGE
06/08/2021