IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

LAND APPEAL NO. 70 OF 2020

(Originating from Land Application No. 145 of 2017 at the District Land and Housing Tribunal for Kagera at Bukoba)

JOFREY RWEBANGIRA----------1ST APPELLANT

MASHTWA ZUBAILI RUSHEKE----------2ND APPELLANT

DAUDA SADICK----------3RD APPELLANT

DAVID KABANDA KAMALA----------4TH APPELLANT

GELASE YUSTINE----------5TH APPELLANT

ONESTA JOFREY ----------6TH APPELLANT

VERSUS

CRISENCIA MWOMBEKI---------- RESPONDENT

JUDGEMENT

Date of Last Order: 21/09/2021

Date of Judgment: 11/10/2021

Hon. A. E. Mwipopo, J.

Jofrey Rwebangira, Mashtwa Zubaili Rusheke, Dauda Sadick, David Kabanda Kamala, Gelase Yustine and Onesta Jofrey who are Appellants herein were sued in Application No. 145 of 2017 at the District Land and Housing Tribunal for Kagera

at Bukoba by the Respondent namely Crisencia Mwombeki for encroaching into her land. She moved the Tribunal to declare that she is the lawful owner of suit land which measures two feet in width and 54 feet in length; to order the respondent to vacate and be restrained from encroaching into her land; and the Respondent to pay the cost of the suit.

The Tribunal did find that the application has merits and allowed it. The tribunal ordered the suit land to be restored to the Respondent, it issued permanent injunction against all Respondents from further trespass and it declared that the suit land is not an eilembo (pathway) but a mere passage.

Aggrieved by the Judgment of the Tribunal, the Appellants filed the petition of appeal containing 8 grounds of appeal. The Appellants grounds of appeal are as follows hereunder:-

1. *The trial Tribunal grossly erred in law to rely its judgment on visiting a locus in quo which was not legally conducted.*
2. *The trial Tribunal did not put into consideration the fact that the case was instituted first before the Respondent acquired the land in dispute.*
3. *That, the trial Tribunal erred in law and in fact to give judgment in favour of the Respondent relying on the untrustworthy evidence of the Respondent.*
4. *That, the documentary evidence by the Respondent case were untrustworthy as it were prepared before the dispute arose.*

5. *That, the trial Chairperson erred in law to grant the size of the disputed land different from the size which the Respondent claimed from the Appellants.*
6. *That, the trial tribunal chairperson lied in holding that from the "ebilamula" trees the road encroached into the Respondent's land.*
7. *That, the coffee tree which is said to have been destroyed by cars is not the same as that which is referred in the judgment as the coffee stump.*
8. *That, the trial Tribunal erred to equate the destruction of crops and ownership of the same land in dispute.*

When the matter came for hearing, Appellants were represented by Mr. Paul Rwechungura, Advocate, whereas the Respondent was represented by Mr. Kabunga, Advocate.

Mr. Paul Rwechungura submitted in brief that the trial Tribunal erred to deliver its judgment in favour of the Respondent who failed to prove that the Appellants encroached into her land. He said that the dispute is on the right of passage and the proceeding of the tribunal does not show at all if the Tribunal visited the locus in quo. The visit to the locus in quo is found in the Judgment of the tribunal and not in the proceedings. The judgment is supposed to reflects what transpired in tribunal according to the proceedings and not otherwise. There is no measurements of the disputed land was taken in the presence of the witnesses. Nothing was read to the parties after the court has re assembled in the court room

for their comments, amendments, Objection if any. The visitation of the locus in quo was not proper and the Court should not to consider it or according it any weight. To support the position he cited the case of **Nizar M.H. Ladak V. Gulamal Fazal Jahmohamed [1980] TLR 29** which was cited with approval the case of **Tanzania Fish Processors Ltd V. Christopher Lulanyula, Civil Appeal No. 21 of 2010,** Court of Appeal of Tanzania, at Mwanza, where the procedure of visiting locus in quo was provided.

The Counsel argued that the case was filed in court before the Respondent was given the land in dispute by the Administrator of deceased estate. The Land Case No. 145 of 2017 was filed at Tribunal on 03.07.2017 and it was mentioned for the first time on 05.08.2017. All the exhibit tendered by the Respondent shows that they were made from 16.10.2017. The decision of the court to appoint the administrator of deceased estate was delivered on 16.10.2017 and the document to distribute the deceased estate was made 08.11.2017. These exhibits were not reliable. This means that the Respondent instituted a case in the Tribunal before he was given part of deceased estate.

The Applicant Counsel went on to submit that the Tribunal granted the ›ndent with more than what he claimed in his application. In his amended :ation before the tribunal the Respondent in paragraph 6A (iv) was claiming ıe land which is 2 paces by 20 paces, but in the Judgment the Tribunal

awarded the Respondent with area of 2 feet by 54 feet. The tribunal did not provide the reason for awarding the Respondent with what was not claimed and it is not known where two feet by 54 feet came from. He said that the evidence adduced was about coffee tree was run over by a car but the Tribunal held that coffee tree stem was damaged by the motor vehicle. The coffee tree in issue was in land of appellants but its branches extended to the area of the Respondent. Thus, the Tribunal erred to hold that the damaged crops to with a coffee tree were in the land owned by the Respondent. The counsel concluded by stating that there is no evidence at all to prove that Appellants has encroached into the Respondent area. There is no such evidence at all.

In his response, Mr. Kabunga submitted that the Appeal by Appellants has no merits. He said that there was no issue of ownership between the parties in the case before the Tribunal. Even the 1st Appellant in his testimony which is found in page 73 of typed proceedings made it clear that the suit land is the property of the Respondent. The main issue in this dispute is the passage or eilembo. The 1st Appellant and the Respondent are neighbours. They lived together and shared a walking passage. 1st Appellant brought a Lorry to pass through that small passage and as a result it damaged crops owned by the Respondent. The Lorry damaged the coffee tree as result what remained is the stem of coffee tree.

The Respondent Counsel went on to state that the Respondent reported the incident at the village land committee for reconciliation. The Village land council know the area very well. The testimony of PW3 a member of village land council prove that the council was of the view that the 1st Appellant encroached into Respondents land and their effort to reconcile the parties failed. They ordered the 1st Appellant to pay 100,000/= shillings to the Respondent for damaging her crops. The 1st Appellant admits in his testimony that the village land council reconciled them, he admitted to commit the offence and apologized to the Respondent as per exhibit P6. What followed is the order of the Village Executive Officer to say that the 1st Appellant need not to pay the compensation and allowed the 1st Appellant to widen the passage as a result the Respondent instituted a case at the Tribunal.

Mr. Kabunga was of the opinion that even if the court will expunge all the exhibit of the Respondent, still the evidence is sufficient and proves that the 1st Appellant has encroached into Respondent's land.

On the issue of not recording the visit to the Locus in Quo, the Counsel for the Respondent said that the law is silent on the visitation of the locus in quo. It is for the interest of justice that the Tribunal visited the locus in quo. The Tribunal observed the presence of coffee tree in the suit land which means if there was a passage those coffee tree were not supposed to be there. The Appellant's counsel

have not stated how non recording of visit of the area in quo infringed appellants rights. He argued that even if the visitation in quo is quashed from the file, but still there is enough evidence to prove that the suit land belongs to the Respondent. The suit land belongs to Respondent's father and they are living there. Whether the procedure for giving the land was made later on it does not change the facts that the land belongs to them and they are still living in the area. There is no dispute at all on the ownership of the land. Even if the issue of measurement is expunged still the right of passage remains and the 1st Appellant has no right to encroach into Respondents land.

In his rejoinder. Mr. Paul Rwechungura retaliated his submission in chief and emphasized that 1st Appellant never admitted ownership of the suit land to the Respondent. The passage in dispute was not walking passage but it was a road/ eilembo as some cars were passing on the road. Bilamula /boarder trees were not damaged when the car passed because it was not in the boarder. This means that the Lorry passed on the eilembo/ road and not on Respondent's land.

After hearing the submissions from both parties and read the record and judgment of the trial Tribunal, I'm now in a position to determine the merits of this case.

It is not disputed that the Appellant and the Respondent are neighbours. This means that they own land in the area of dispute. Also, it is not disputed that

there was a passage in the suit land. The dispute in issue is the size of the said passage whether it was a passage used by the people walking on foot or the passage was wide enough for a motor vehicle to pass through. It is in record that the trial Tribunal in its judgment relied on its visitation to the locus in quo, testimony of PW1, PW2, PW3 and PW5 in reaching the verdict. The Applicants Counsel asserted that the procedure for visiting locus in quo was not followed and that the record of proceedings does not show at all if the Tribunal visited the locus in quo.

The record of proceedings shows that on 03.04.2020 the Chairman of the Tribunal ordered the visit to locus in quo to be on 14/05/2020. Unfortunately, the record is silent whether the visit to the locus in quo occurred or not. There is nothing recorded on the said visit. However, the judgment shows that the Tribunal visited locus in quo and made some observations which were relied together with other evidence on record to reach the decision. It is true that the law is silent on the visitation of the locus in quo, however after the Court or Tribunal have decided to visit the locus in quo, it is settled that there are mandatory procedures which has to be followed. In the cited case of **Nizar M. H. Vs. Gulamali Fazal Janmohamed** [1980] TLR 29, it was held that:-

> *"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, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. 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 the witnesses."

As the record of proceedings of the trial Tribunal is silent on the visitation of the locus in quo, it is not possible to know whether or not the Tribunal visited the locus in quo and followed the stated procedures. The remedy for this is for the Court to discard this evidence and to accord it no weight.

Turning to the issue that the Respondent instituted the land case in the Tribunal before she was given the land in dispute by the Administrator of deceased estate, the record shows that the Land Case No. 145 of 2017 was filed at Tribunal on 03.07.2017 and it was mentioned for the first time on 05.08.2017. The exhibit tendered by the Respondent were made from 16.10.2017 onwards. The Primary Court appointed the administrator of deceased estate on 16.10.2017 – Exhibit P1, letter of appointment of an Administrator – Exhibit P2, Inventory – Exhibit P3 and Account Form – Exhibit p4 were issued on the same date. The Minutes of the meeting for distributing the deceased estate shows that the meeting was

conducted on 08.11.2017 – Exhibit P5. This means that those documents were made after the case has already been instituted in the Tribunal. Those documents were for the purpose of proving the ownership of the Respondent over the land in dispute.

However, there is no dispute over the ownership of the land in the area as 1st Appellant and the Respondent are neighbours. The Respondent in her testimony she stated that she owns the land since 1958 when she was given the same by her late father. The distribution of the deceased estate was done in 1958 and it was only when the Respondent wanted to sue the Applicants she was told to institute the probate case. Thus, those documents were for the purpose of instituting a case. Those documents purpose was to prove the ownership of the area in dispute and to show the locus standi of the Respondent to institute a dispute at the Tribunal. This means that Exhibit P1, P2, P3, P4 and P5 which were made after the case was instituted have to be discarded. However, this does not affect the Respondent's right to institute the case before the Tribunal as there is no dispute over her ownership of the land she inherited from her father and she has lived in the area with the 1st Applicant for a long time.

After discarding the evidence of the visitation to the locus in quo and Exhibit P1, P2, P3, P4 and P5, the question is does the remaining evidence is still sufficient to prove that the passage in issue was a walking on foot passage and not eilembo/

road hence the Applicant encroached into Respondent's land? The Respondent Counsel in his submission argued that even after the evidence of the visit to the locus in quo and the Exhibits tendered by the Respondent are going to be expunged still the evidence is sufficient to prove that Applicants encroached in Respondent's land. On the other hand, the Counsel for the Applicants argued that the Respondent evidence is not sufficient to prove that the Respondent is the owner of the passage in issue which is a walking on foot passage.

Looking at the testimony of PW1, PW2, PW3, PW4 and PW5 together with Minutes of the Village Land Council dated 10.07.2017 – Exhibit P6 it shows that on 07.07.2017 the 1st Appellant passed a lorry in the passage in dispute as result the crops owned by the Respondent such as cassava, coffee and yams were destroyed. The dispute was taken to the Village Land Council on 10.07.2017 where the 1st Appellant admitted to cause the destruction and apologized as a result he was ordered to pay fine of shillings 100,000/=. However, on 27.07.2017 the 1st and 5th Appellant encroached in the land in dispute, shifted boundaries by installing it into Respondent's land and cleared the respective land. This evidence is sufficient to prove that the Appellants encroached into Respondent's land.

The Appellants evidence from DW1, DW2, DW3, DW4, DW5, DW6 and DW7 that the passage in dispute was 2.5 to 3 meters wide and that the cars used to pass on the land has no weight as the evidence proved that in the said passage

there was crops owned by the Respondent which was destroyed by the car which passed in the passage. If the passage was 2.5 to 3 meters wide as alleged there would have been no damages to the Respondent's crops. Further, the evidence proves that soon after the incident was taken to Village Land Council the 1st Appellant admitted to encroach into Respondent's land and destroy her crops. Moreover, after the dispute aroused the evidence shows that the Appellants cleaned the area in dispute and shifted the boundaries by planting bilamula trees. All of this prove that prior to the incident of the 1st Appellant passing the car in the passage there was crops of the Respondent in the area hence it was not possible for the car to pass. This means that the passage was for the people walking on foot. Thus, the Tribunal rightly held in its judgment that the land in dispute is owned by the Respondent and the passage was for the people walking on foot.

On the Tribunal order that the land which is 2 feet wide by 54 feet in lengthy be restored to the Respondent while in the pleadings she claimed for 2 paces by 20 paces, the testimony of PW1 shows that at the time she instituted the case at Tribunal the Applicants encroached into Respondent's land by 2 paces by 20. But, the Appellants continue to encroach into her land and by the time she was testifying the Applicants cleaned the area 20 times and the passage length was 54 feet in length by 2 feet in width. Thus, the Tribunal rightly ordered the Appellants to vacate on the encroached land.

Therefore, I find that the appeal is devoid of merits and I hereby dismiss it with cost. The decision of the trial tribunal is upheld accordingly.

A.E. MWIPOPO

JUDGE

11/10/2021

Court: The Judgment was delivered today this 11.10.2021 in chamber under the seal of this court in the presence of the 1st Appellant, the Respondent and Advocate Kalori for the Respondent.

A. E. MWIPOPO

JUDGE

11/10/2021