

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA**

AT MUSOMA

LAND APPEAL NO. 30 OF 2021

ALBINUS JOSHWA PONGE APPELLANT

VERSUS

MAGOIGA SASI RESPONDENT

***(Appeal from the decision of the District Land and Housing Tribunal
for Tarime at Tarime in Land Application No. 27 of 2015)***

JUDGMENT

1st and 24th November, 2021

KISANYA, J.:

The appellant was sued in the District Land and Housing Tribunal of Tarime at Tarime (hereinafter referred to as “the trial tribunal”). He was alleged to have unlawfully entered into the respondent’s piece of land located at Surubu Village within Tarime District and declared himself the lawful owner of that land. Basing on the evidence adduced by both sides, the trial tribunal was satisfied that the respondent had proved his case. It went on to declare him the lawful owner of the disputed land. Furthermore, the appellant was ordered to vacate the disputed land.

That decision is being challenged by the appellant on five grounds. One of the grounds of appeal was to the effect that the trial tribunal erred

by deciding in favour of the respondent in absence of proof of inheritance of the suit land from his deceased father.

I heard the appeal in the presence of the appellant in person and in the absence of the respondent. In the midway of composing the judgment, two issues clicked my mind. These were whether the respondent had *locus standi* to institute the case at hand and whether the visit at the *locus in quo* was conducted according to the law. I was then inclined to summon the parties to address the Court on the said two issues. I also found it just to allow the respondent's counsel, Mr. Onyango Otieno to address the Court on the said issues.

Given the fact that both issues go to the root of the case, I will address them before considering the grounds raised in the memorandum of appeal.

Responding to the issue of *locus standi*, the appellant was of the view that the respondent lacked locus standi. On the other hand, Mr. Otieno submitted that the respondent had *locus standi*. He contended that the disputed land belonged to the respondent's father who had three wives and that the respondent built three houses thereon.

With regard to the second issue, the respondent and Mr. Otieno were at one that the visit to the *locus in quo* was conducted contrary to the law.

While the appellant stated that his witnesses were not heard during the visit at the *locus in quo*, Mr. Otieno contended that the evidence adduced during the visit at the locus in quo is not reflected in the proceedings. Therefore, the learned counsel moved the Court to nullify the proceedings and judgment of the trial tribunal.

Having examined the record and considered the submissions made by both parties, I am satisfied that this appeal can be disposed of by considering the issues raised *suo mottu* by the Court.

Starting with the second issue, it is settled position that a visit at the locus in quo is conducted at the discretion of the trial court. However, in the event the trial court finds it necessary to conduct a visit at the *locus in quo*, there are guidelines which must be observed. These guidelines were stated in the case of **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29, in which the Court of Appeal 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... 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 another case of **Kimondimitri Mantheakis vs Ally Azim Dewji and 7 Others**, Civil Appeal No. 4 of 2018, CAT at DSM (tanzlii), the Court of Appeal held as follows:-

"In the light of the cited decisions, for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: one, ensure that all parties, their witnesses, and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo; three, allow cross-examination by either party, or his counsel, four, record all the proceedings at the locus in quo; and five record any observation, view, opinion or conclusion of the court including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any."

It is also settled law that failure to comply with the guidelines on the visit at the locus in quo vitiates the proceedings. This position was reiterated by the Court of Appeal in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble**, Civil Appeal No. 197 of 2018, CAT at Dodoma (tanzlii) 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.

As indicated earlier, the trial tribunal conducted a visit at the locus in quo. In terms of the record, the visit at the *locus in quo* was conducted on 11th January, 2021. However, it was not recorded whether the witnesses were called by the parties during the visit at the *locus in quo*. It is also not known whether the witnesses were re-called to testify, examined and/or cross examined and whether the trial tribunal reconvened in the trial tribunal to deliberate the evidence gathered from the visit at the *locus in quo*.

Therefore, guided by the above position of law, I agree with Mr. Onyango that the proceedings of the trial tribunal were vitiated. This Court is not in a position of re-assessing or re-examining the evidence gathered during the visit at the locus and considered by the trial tribunal.

Reverting to the first issue, I need to start by stating that, in a civil case, the plaintiff is duty bound to demonstrate facts constituting the cause of action. This is pursuant to Order VII Rule 1 (e) of the Civil Procedure Code [Cap 33, R.E. 2019]. In the case of **Lujuna Shubi Balonzi, Senior vs Registered Trustees of Chama cha Mapinduzi**

[1986] TLR 203 this Court had this to say on the issue of under consideration: -

"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court".

In terms of the record, one of the issue framed for determination of the case was "who is the lawful owner of the disputed land between the applicant and the respondent". Although the respondent had pleaded that he was the lawful owner of the disputed land, his evidence suggests that the disputed land belonged to his late father. For instance, he testified as follows in his evidence in chief:

"Since I was born the suitland belongs (sic) to my father and after my father passed away I build (sic) three houses on the suit (sic) and divided the land to all my witness and my two sons."

The respondent reiterated that position when cross-examined by the appellant. He stated as follows:

"Yes the suit land was previous my father's land but after my father passed away in 1995 I build my house and lived on the suit land."

However, responding to the question put to him by one of the assessors, the respondent told the trial tribunal that his father gave the disputed land to his mother. His evidence went as follows:-

"... the suit land belongs to my father and he gave to my mother, my father was having five wives."

From the above excerpt of the evidence adduced by the respondent, it is apparent that the disputed land belonged his late father. As rightly stated by the appellant, it was not established that the respondent inherited the disputed land from his late father. That being the case, it is not known as to how the disputed passed to him. If it is considered that the disputed land belonged to the respondent's father, the *locus standi* to sue on that that land is vested in the administrator of the estate of the deceased. This is provided for under sections 71 and 100 of the Probate and Administration of Estates Act, Cap. 352, R.E. 2002.

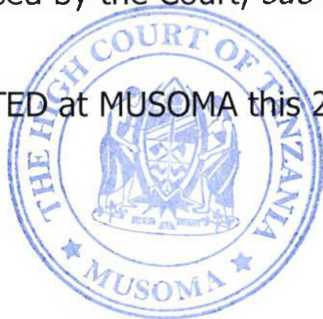
On the other hand, if it is taken that the disputed land passed to the respondent's mother, the *locus standi* to institute a suit over the said land is vested on the latter or her legal representative or heir.


Having considered that the respondent sued over the disputed land allegedly owned by his late father, and it was not established how the disputed land passed to him from his late father or his mother, I am of the view that he could not initiate the proceedings in her own capacity. It

follows, therefore, that the proceedings of the trial tribunal are a nullity. The proper recourse is to quash the said proceedings and the judgment and decree made thereon. For the foresaid reasons, I will not dwell into considering other grounds of appeal.

In the event, I have no option but to exercise the powers of revision vested in this Court by section 43 (1) (b) of the Land Courts Disputes Court Act [Cap. 216, R.E. 2019] to quash the proceedings of the trial tribunal. In consequence, the judgment and decree of the trial tribunal are set aside. Either party is at liberty to institute the case in accordance with the law. I make no order as to costs because the matter is determined basing on the issues raised by the Court, *suo mottu*.


DATED at MUSOMA this 24th day of November, 2021.




E.S. Kisanya
JUDGE

COURT: Judgment delivered through teleconference this 24th day of November, 2021 in the appearance of the appellant and Mr. Samson Samo learned advocate holding brief for Mr. Onyango Otieno for the respondent. B/C Mr. Jovian present.

Right of appeal explained.


E. S. Kisanya
JUDGE
24/11/2021