IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 7 OF 2021

(Originating from Maswa District Land and Housing Tribunal in Land Application No. 40 of 2019)

AMOSI SAYI KALULUMILA.....APPELLANT

VERSUS

MADUHU MANG'OMBE..... RESPONDENT

JUDGMENT

8th Feb & 13th May 2022

MKWIZU, J:

In 2019, respondent herein filed a land dispute before the DLHT claiming inter alia for ownership of the suit property estimated at 35 acres worth 28,000,000/= located at Sagida hamlet, Ikungulip Village within Luguru ward Itilima District in Simiyu Region acquired in 1972 from the appellants brother in law named Ng'wali Sinda for 10 heads of cattle and that the handing over process was attended by Kalulumila Kabundi (Respondent's father- deceased), Mkorany Kabundi(respondent paternal unlce- deceased)Bujiki Gogo (neigbour), Ng'ingo Ndogo(sumbantale; Manija Nga'nga and Lobya Nsuka,- neigbours. He said, he peacefully occupied the suitland to 1991 when a boundary dispute was created by Yamila Makambi by cutting down a boundary tree commonly known as Mbhono .That dispute, stated respondent, was referred to the village council, primary court and later to the district court where the respondent arose a winner and went on enjoying the use of the land thereafter.

According to the records, the dispute between the parties herein arose in 2005 after the appellant had trespassed into the suit land culminating into referring the matter to the DLHT for resolution. All the claims were denied by the appellant. After a full hearing, the trial tribunal concluded in favour of the respondent. It declared him a rightful owner.

Discontented, appellant has appealed to this court with four grounds of appeal which can safely be summed up into two complaints namely.

1. That trial tribunal failed to evaluate the evidence properly
2. That the claim by the respondent was not proved

The hearing was conducted by way of written submissions and both parties did comply with the filing schedules. Supporting the appeal, Mr. Jacob Somi learned advocate for the appellant submitted that the trial tribunal failed to properly evaluate the evidence and the exhibits tendered before it which disclosed the source of the dispute in 1991 between the respondent and appellant's father Sayi Kalulumila which was resolved in both Luguru Primary Court in Civil Case No 12 of 1991, Bariadi District Court Civil Appeal No 1 of 1992 followed by the District Court decision in DC Civil case No 172 of 2005(exhibit P4) in which the appellant father arose a winner. Mr Somi contended that, the trial tribunals disregarded the documentary evidence without any justification. He on that basis prayed for the court to allow the appeal with costs.

On the other hand, respondent's advocate Zawadi Lazaro Masebu, submitted that the evidence was properly evaluated. She said the appellants evidence was properly disregarded for two reasons that the evidence by the appellant was contradictory and inconsistence. She on

this cited the decision of **Awadhi Abrahamani Waziri V The Republic**, Criminal Appeal No 303 of 2014 to the effect that inconsistent and contradictory evidence cannot be relied upon by the court. And secondly that the exhibits D1, D2 and D3 tendered were in respect of matters of civil nature and criminal adjudicated by ordinary courts other than the tribunal vested with the jurisdiction to hear land disputes .

The rejoinder submissions by Mr. Somi concentrated into answering the two issues raised by the respondents advocate that the appellant evidence was contradictory and inconsistent and that the exhibits tendered were of civil nature and criminal adjudicated by ordinary courts other than the tribunal vested with the jurisdiction to hear land disputes.Submitting on the issue of inconsistence and contradictions, Mr. Somi said, the tribunal had a duty to evaluate the inconsistencies and try to resolve them where possible to see whether they are a minor or major ones affecting the root of the matter. He said the pointed-out inconsistences between Dw1 and Dw2 were very minor and did not go to the issue of ownership of the suit land.

On whether the documentary evidence tendered were a result of the proceedings by the courts without jurisdiction, Mr. Somi was of the submissions that the appellants evidence was trying to show the genesis of the dispute and that the decisions tendered were given in 1991 and 1992 well before the coming into force of the Land Disputes Court Act Cap 216 which came into operation in October, 2003 vide GN No 223 and therefore the arguments that the decisions tendered were by the courts

without jurisdiction is a misconception and should be disregarded. He reiterated his earlier on position that the appeal be allowed with costs.

This appeal is based on evidence and being the first appeal, this court will, as mandatorily required, reevaluate the evidence on the records and arrive into its own decision if need be. I will on this be guided by the decision of the Court in **Peters V. Sunday Post Ltd.** (1958) E.A. 424, where the Court of Appeal for East Africa set out the principles in which an appellate court can act in appreciating and evaluating the evidence: Among other things, it was held:

> Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.

I have prudently and devotedly evaluated the evidence adduced by the parties before the trial tribunal. Applicant (now respondent) gave evidence as PW1 alleging to have purchased the suit land from Mwana Sinda in 1972. The sale agreement was oral with a number of witnesses including neighbors' and the village leaders but only two of them remained alive at the time of trial namely Saguda Sayi and Ngassa

Bujeka.He also relied upon exhibits P1, P2, P3 and P4. The above evidence was in a way supported by PW2, PW3, PW4 and PW5.

Exhibit P1 is a decision of the District Court in Civil appeal No 72 of 1991 dated 11/7/1991 originating from Civil Case No 26 of 1991- Luguru Primary Court, between respondent Maduhu Ng'ombe and Yahilia Makambi by Bariadi District Court. Five acres of Shamba were in dispute each of the parties in that suit claiming ownership. The primary court decision was set aside, and the matter was remitted back to Ikungulipu Village Council to be solved before any referral to the primary court.

The second exhibit (Exh P2) is the minutes of Village Public Meeting dated 18/12/1991 and exhibit P3 is a *muktasari was makabidhiano ya Shamba dated 26/10/2004* where in both meetings, respondent was confirmed owner and the land measuring 35 acres was handled to him by the Village Council.

It seems, after the above handing over of the land by the Village authority to the respondent, a complaint was lodged to the Resident Magistrate Court. This is evidenced by exhibit D3 relied upon by the appellant, a letter by the Resident magistrate Shinyanga dated 29/10/2004, directing the WEO Ikukulip Village to handle the land to the appellant's father, Sayi Kalulumila with a warning to the Village authority that it has no authority to overrule court's decisions. This letter came just three days after the alleged handing over note via Exhibit P3 executed on 26/10/2004.

Exhibit P4 is the decision in Criminal case No 172 of 2005 dated 5/9/2006 where respondent was charged for criminal trespass and was accordingly convicted. In that decision, the District Court Magistrate said:

> *"Having gone through I have observed that there is no doubt that there was a civil case between the accused (now respondent) and the said Sayi Kaluiumila before Luguru Primary Court (CC12.1991) and that it was decided in favour of Sayi s/o Kalulumila. It is also observed that the accused made no application seeking Court order to allow him appeal out of time, but application was dismissed. In our case the accused is found stating that he was allocated or rather granted to him by ward land tribunal.*
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> *This court is of a humble view that the ward tribunal had no jurisdiction over the matter previously adjudicated by a court of law and before enactment of Act No 2 of 2002 which came into force since 1/10/2003..."*

The above decision puts to light two main issues, ***one***, that, the handing over of the suit land to the respondent in 2004 vial exhibit P4 was without jurisdiction and ***secondly,*** that the decision by the primary court in Civil Case No 12 of 1991 remained valid as far as it was not appealed against. Unfortunately, the decision, in Civil Case No 12 of 1991 was not availed to the tribunal. Instead, the appellant tendered exhibit D1, the decision in Civil Appeal No 1 of 1992 dated 19/3/1992 originating from Civil Case No 12 of 1991 by Luguru Primary Court where the respondent's application for extension of time to appeal against the decision in Civil Case No 12 of 1991 was dismissed for failure to adduce sufficient cause.

Going by the above decision, the decision in Civil Case No 12 of 1991 is still intact.

In discounting the above exhibits, the trial tribunal said the documentary evidence tendered by the parties were not relevant to the matter at hand.The decision at page 12 says:

> *"Sambamba na hilo Ushahidi wa shahidi wa kwanza na shahidi was pili wote wameeleza Zaidi juu ya mashauri mablimbali yaliyofunguliwa katika mahakama ya Mwanzao na Wilaya kitu ambacho naona hakina msingi kwani mgogoro siyo juu ya mashauri hayo bali ni mgogoro wa ardhi husika..."*

And in page 13 the trial tribunal held thus:

> *"Pia natambua kuwa katika shauri hili pande zote zimetoa ushahidi wa nyaraka lakini Baraza hili halijaipa uzito nyaraka hizo zote kwa kuwa Baraza limeona hazina uhusiano wa moja kwamoja na shauri hili hivyo ushahidi uliotiliwa maanani ni Ushahidi wa masahidi wenyewe"*

As rightly submitted by Mr. Somi advocate for the appellant, Civil Case No 12 of 1991 resolved the dispute between the parties herein and no appeal was preferred against it as demonstrated by exhibit D1. And as also correctly argued, the said decisions were rendered well before the enactment and coming into force of Land Disputes Court Act No. 2 of 2002.In short, the land tribunals were established for the first time by section 167 of the Land Act 1999 followed by the enactment of the Land Disputes Courts Act, No. 2/2002 Cap 216 which came into force in October 2003 vide GN No. 223. Before that, all ordinary courts had jurisdiction to

determine land matters. It is for that reason, the Civil Case No 12 of 1991 was determined by the Luguru primary court through the District Court. Thus, the assertion by the respondent's counsels that the courts that decided the dispute between the parties herein in 1991 and 1992 had no jurisdiction is without justification.

In addition to that, evaluation of the discounted evidence on the records exposes a genuine issue on whether the subject matter of the dispute between the parties is the same subject matter in dispute conclusively determined by the Courts in 1991 and 1992. The documentary evidence tendered by the parties reveals a close relationship between the matter that was dealt with by the ordinary courts in 1991 and the matter at hand. Both parties, kept on referring to the suit land as part of the former disputes between the appellants father, Kalulumila and the respondent. Looking for instance at exhibit P3 and P6 the respondent was handed over the land covering 35 acres. The evidence however does not answer the issue whether the 35 acres of land subject of this appeal is the same land decreed by the court in Civil Case No 12 of 1991 or even part of it.

The absence of the evidence identifying the suit land from the one dealt with by the primary court in Civil case No 12 of 1991 necessitated the visiting to the locus in quo by the tribunal to ascertain the actual land in dispute different from the one decreed in the former case between the parties. This is because, the evidence available could not assist the tribunal to resolve the dispute between the parties and had to some extent created a confusion on what exactly parties are up to since 1991 to date.

Iam aware that the visiting to the locus in quo is restricted. In **Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed** [1980] TLR 29 the Court of Appeal held:

> *"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."*

And in **Avit Thadeus Massawe Vs. Isdory Assega** ,Appeal No. 6 of 2017) [2018] TZCA 357; (13 December 2018) while citing the Nigerian Case of Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory & Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 the Court explained the essence of a visit to a locus in quo and factors to be taken into account before the courts decide to visit the locus in quo.

> *"The factors include:*
>
> *1. Courts should undertake a visit to the locus in quo where such a visit will dear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56*
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> *2. The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*

3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see Ezemonye Okwara Vs. dominie Okwara (1997) 11 NWLR (Pt. 527) p. 1601).

4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims."

It is my view that, given the nature of the dispute and the variety of suits by the parties since 1991 and to avoid confusion of decreeing the same land twice, the trial tribunal ought to have investigated the matter by visiting the locus in quo to establish with certainty the claimed 35 acres and the land involved in Civil Case No 12 of 1991 so as to establish their similarities or otherwise for purposes of determining the extent of the tribunal's jurisdiction over the matter, if any so as to appropriately resolve the dispute between the parties. This exercise was evaded by the tribunal leading to the present confusion on the parties' rights over the suit land.

It is for this reason, I under section 43 of the Land Dispute Act, invoke my revisional powers and set aside the judgment of the tribunal and the resultant decree. The file is remitted back to the tribunal with instruction to take additional evidence in respect of the identification of the suit land measuring 35 and the land subject to the decree of the Luguru Primary Court in Civil Case No 12 of 1991 by visiting the locus in quo to have

parties ascertain its physical location and make a specific finding thereon. Consequently, the appeal is allowed to the extent explained above. Costs to follow the outcome of the subsequent judgment of the tribunal after the visit to the locus in quo.

Order accordingly.

DATED at **Shinyanga** this **13th** day of **May, 2022**.

E.Y. MKWIZU
JUDGE
13/05/2022