THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LAND APPEAL NO. 3 OF 2022

(Arising from Land Application No. 14 of 2020 in the District Land and Housing Tribunal of Mtwara at Mtwara)

FATU NAKAHWE .....1ST APPELLANT

SALUMU MOHAMED NAMAITE.....2ND APPELLANT

VERSUS

ATHUMANI SHAIBU LISUMA.....RESPONDENT

Date of last order: 31/05/2022
Date of Judgment: 30/06/2022

JUDGMENT

MURUKE, J.

Appellants being aggrieved by the decision of Mtwara District Land and Housing Tribunal in Land Application No. 14 of 2022 preferred present appeal raising four grounds, articulated in the petition of appeal.

On the date set for hearing, both parties appeared in persons. On ground one, ground two and four 2nd appellant submitted that, the land was owned by Fatu Nakahwe (1st appellant) with his husband Chivaku Chivaku more than 50 years. In 2012 respondent started to cultivate the shamba in dispute. Second appellant reported dispute to Amor Mwadili respondent uncle, but he did not stop. The village land committee visited the shamba, heard both of them, then declare that Fatu Nakahwe is the rightfully owner. Second appellant's witnesses testified that; Fatu Nakahwe was the

original owner who cultivated the shamba with her husband. He insisted that, valuation report and letter by Agricultural Officer was used as evidence, while no Agricultural Officer or Valuer of land who testified. Generally, there are neighbors who knows the disputed land. Respondent does not know the origin of the shamba. Even her own daughter Zuhura who testified did not know the area. Respondent trespassed in the land on 2012. Respondent was convicted in criminal case having trespassed into the land in dispute. Ownership of land is not proved by staying close or far from the land. On ground 4 he submitted that; trial tribunal failed to visit the disputed area for unjustifiable reasons.

First appellant adopted the submission made by 2nd respondent, then she further submitted that, respondent trespassed into the shamba. He was convicted by District Court of Tandahimba and sentenced to conditional discharge. Respondent is a problematic person; he is disturbing her in the disputed plot.

In reply, on ground one, respondent submitted that, in1995 his father handled him the bush, which he cleared in 2001, then cultivated food and cashew nuts tree. In 2017, the dispute arose. 1st appellant land was sold by his grandson. Ground two, submitted that, he has been in the disputed area since 2001. So, it is true that, he was not disturbed for long time. Ground three he submitted that; it is true Mwajuma Chivalu Chivalu gave evidence on behalf of her old mother Fatu Nakahwe at trial tribunal. She is too old he knows her. So, trial tribunal by saying that Fatu Nakahwe was not present it was not proper. Ground 4 respondent submitted that; it is true that trial chairman did not visit the disputed area after having satisfied with evidence. There was no need to visit the disputed shamba. It is true that, he was convicted and sentenced to serve conditional discharge for term of 2 months. When rejoining, 2nd appellant submitted

that, the shamba has not been sold by anyone. They are still having the same shamba in which respondent has encroached the disputed piece of shamba. The disputed plot is 1 1/2 acres, in total they have 41/2 acres.

Having gone through the grounds of appeal, evidence on records and both parties' submission, the issue to be considered by this court is whether the decision of trial court was properly and fairly reached? This being the first appellate court, re-assessment of the evidence adduced before the trial tribunal is mandatory. The main complaint by 2nd appellant among others is the failure by the trial tribunal to visit the disputed land *(locus in quo)* which is a corner stone of this dispute. It is a settled principle of law that, failure to visit the disputed land does not render the proceedings and decision thereof invalid if there are sufficient evidence to prove the applicant's case. Visiting the *locus in quo* is only relevant where the tribunal need supplementary information and understanding the nature of the dispute to ascertain the land being contested. Respondent was therefore supposed to prove his case at the trial tribunal to the required standard by calling important witnesses. Under section 3(2) of the Evidence Act, Cap 6. R.E 2019 provides that;

> *"3(2) a fact is said to be proved when-*
> *(b) in civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability."*

It is clear that, the trial tribunal failed to visit the disputed area for unjustifiable reasons. There are situations that necessitate to visit the disputed area. In the case of **Avit Thadeus Massawe Vs. Isdory Assenga, Civil Appeal No. 6 of 2017**(unreported) provides factors to be considered before the court decide to visit the locus in quo.

> ***First*** *court should undertake a visit to the locus in quo where such a visit will clear doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence,* ***second*** *the essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundaries neighbors and physical features on land,* ***third*** *in a land dispute where it is manifest that there is a conflict in 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,* ***fourth*** *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.*

The principles hereinabove have been explained by the Court of Appeal of Tanzania to be very relevant and crucial in providing general guidance to our courts. Courts of law/tribunal on their own accord or upon request by either party, exercise their discretion to visit the disputed area. I have carefully reviewed the evidence on record, there was contradiction as to the actual size of land in dispute. While PW1(Athumani Shaibu Lisuma) now respondent testified that the land in dispute measures six (6) acres in size, and the disputed plot measures one quarter (1 1/4) acres. At the same time, he testified that, the disputed land measures seven (7) acres in size. At page 15 of the typed proceeding reads as hereunder: -

> **Shamba lenye mgogoro lina ekari sita, lakini kipande chenye mgogoro ni kama ekari moja na robo hivi. ..... marehemu baba yangu alinipa kipande cha eneo la msitu kama hekari saba za Pamoja mwaka 1995 nikaanza kulima kwenye msitu huo mwaka 2001.**

DW1(Salumu Mohamed Namai) now 2nd appellant testified that, the disputed land is less than six acres and the disputed plot measures one

acres or one half (1 or $1^1/_2$) acres size. At page 27 of the typed proceedings reads as follows: -

> **Shamba letu halifiki ekari sita. Eneo lenye mgogoro ni kipande cha shamba chenye ukubwa wa ekari 1 au $1^1/_2$.**

PW1 testified further that, DW1(Fatuma Nakahwe) sold her farm through grandson, while DW2 testified that, PW1 farther had already sold his plot to another person. For clarity the testimonies of PW1 at page 15 and DW1 at page 27 of the typed proceeding reproduced below.

> PW1- **shamba la Fatu Nakahwe (mama wa Namaite) lina pakana na shamba langu na shamba hilo lilishauzwa na Fatu Nakahwe ambae alimtuma mjukuu wake Bakari Hussein kwa sasa ni marehemu ndiye alitumwa na Fatu Nakahwe kuliuza shamba lake.**
>
> DW1- **Amri Mwadili(PW1s farther) alishauza eneo lake. Ninamuona mtu mpya ndie analifanyia kazi eneo lilikuwa lina milikiwa na Amri Mwadili.**

That is not all, the names of boundary neighbours mentioned by PW1 is different to the names of neighbours mentioned by DW1 and other witnesses as reflected at page 21 and 26 of the typed proceeding of the trial tribunal. The trial tribunal abdicated its obligation of visiting the disputed shamba in order to clear this contradiction and to satisfy itself as the actual size of the disputed land, as reflected at page 36 and 37 of the typed proceeding. On 18/10/2021 it was recorded as follow: -

> **AMRI**
>
> - **Kutembelea kwenye ardhi yenye mgogoro tarehe 06/11/2021 Luagala- Tandahimba.**
>
> **BARAZA**
>
> - **Shauri linakuja kwa ajili ya kutembelea ardhi yenye mgogoro. Lakini kulingana na Ushahidi uliotolewa; kutembelea ardhi yenye mgogoro siyo muhimu sana.**

Hivyo basi; amri ya kutembelea ardhi yenye mgogoro imeondolewa.

AMRI
Amri ya kutembelea ardhi yenye mgogoro imeondolewa kutokana na mazingira ya shauri hili.

Trial tribunal did not explain the reasons for not visit the disputed land. Failure to visit the disputed land while there is contradiction in the **actual size**, **location**, and **boundaries** left questions an answered. In the case of **Abisai Ntele Temba Vs. Amour Lutego Lubinza, Misc. Land Appeal No. 141 of 2015** (unreported) at Dar es salaam at page 6 -7 where it was held that: -

"From the evidence of both sides, it appears that there is no certainty on the description of the disputed land in terms of the size and boundaries. However, the record does not indicate that the trial tribunal visited the locus in quo in order to satisfy itself as to the disputed land because it is being referred to by the respondent. Given the nature of the case; therefore, I think it was incumbent for the ward tribunal to visit the locus in quo in order to ascertain boundaries and the size as well as the location of the disputed plot so that it comes up with a clear and just decision. That was not done. Under the circumstances, therefore, I have no option than to nullify the proceedings of the lower tribunal and order that the matter be remitted to the ward tribunal for the same to be heard de novo and enable the tribunal to visit the locus in order to satisfy itself as to the description and boundaries as well as the size of the disputed land."

It is my opinion and as correctly submitted by appellant with the principles of the law cited in the case of **Avit Thadeus Massawe** (supra), this was a fit case for a visiting disputed land.

More so, valuation report and letter by Agricultural Officer was used as evidence, while no Agricultural Officer or valuer of land called to testify at the trial tribunal. At page 18 of the typed proceedings reads as follows: -

USHAHIDI WA SM1 UNAENDELEA KUTOLEWA

- **Nimekosa nyaraka halisi nahisi zimepotea. Ninaomba nitoe nakala zake ziwe sehemu ya Ushahidi wangu. Nazo ni barua ya ofisa kilimo na taarifa ya uthamini wa shamba lenye mgogoro.....**

BARAZA

- **Barua ya ofisa kilimo Luagala imepokelewa kuwa kielelezo D1, na taarifa ya utathmini wa shamba lenye mgogoro imepokelewa kuwa kielelezo D2.**

I have no doubt that, the law allows admissibility of secondary evidence as provided under section 67(1)(c) of the Evidence Act, Cap 6 R.E 2019 that: -

> *"Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases-*
> *(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."*

Trial tribunal admitted Annexure D1(letter by agricultural officer) and Annexure D2(valuation report) without any clarifications from respondent (then appellant) as to why those two witnesses did not appear to testify. Valuation report is an expert document which need to be tendered by a person having knowledge and understanding the contents of the document. Same case to the letter by agricultural officer. Agricultural officer was important witness who supposed to be called to testify and clarify the contents of his letter. But the trial chairman admitted the two documents tendered by respondent who was not a maker without any justifiable reasons contrary to the requirement of law. Section 34 of the Evidence Act, Cap 6 R.E 2019, provides circumstances under which the evidence made by another witness can be tendered by a person who was not a maker and be admitted. Relevant section as follows: -

"Statements, written, electronic or oral, of relevant facts made by a person who is dead or unknown, or who cannot be found, or who cannot be summoned owing to his entitlement to diplomatic immunity, privilege or other similar reason, or who can be summoned but refuses voluntarily to appear before the court as a witness, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court to be unreasonable……."

Respondent (then applicant) in his testimony never explained whether the Agricultural Officer or Valuer who prepared annexure D1 and D2 refused or were incapable of giving their evidences. Thus, it is unprocedural and unfair for the trial tribunal to admit documents tendered by respondent who was not a maker without any explanation. In totality, parties were denied their right of being heard fully. The right of a party to be heard before an adverse action is taken against such a party is so basic that a decision taken in violation of such a right is considered to be a breach of natural justice. In the case of **Mbeya- Rukwa Auto Parts & Transport Limited Vs. Jestina Mwakyoma, Civil Appeal No. 45 of 2000** (unreported) Court of Appeal, when considered the principle of natural justice, the court had this to say: -

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of equality before the law"

In the circumstances, judgment of the trial tribunal in Land Application No. 14 of 2020 is quashed and set aside. Case file to be remitted to trial tribunal for hearing the case fresh within 90 days from 1st July 2022. Appeal allowed.

Z.G. Muruke

Judge

30/06/2022

Judgement delivered in the presence of first appellant, second appellant and respondent both in persons.

Z.G. Muruke

Judge

30/06/2022