IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 11 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 21 of 2020)

CHACHA NYAGEKO..... APPELLANT

VERSUS

BHOKE NENGA GAIBE..... 1ST RESPONDENT

BOROYE NKORORO.....2ND RESPONDENT

WEREMA MWITA SINGURI.....3RD RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This is an appeal against the judgment and decree of District Land and Housing Tribunal (DLHT) for Mara at Musoma in Application No. 21 of 2020.

The appellant, Chacha Nyageko sued the respondents, Bhoke Nenga Gaibe, Boroye Nkororo and Werema Mwita Singuri for trespassing into his land of about thirty (30) acres size located at Rung'abure village within Serengeti district. It is apposite to note that the matter proceeded *ex parte* against the 1st respondent from the trial Tribunal to this Court.

The appellant claimed that he acquired the suit land in 1960 through clearance of virgin land and that he has been using it peacefully until 2007 when the dispute arose. The appellant also called other witnesses namely, Mtongori Mahobe (PW2), Daniel Chacha (PW3) and Charles Kibona Kiserere (PW4). In addition, the appellant tendered seven (7) documentary exhibits.

On the contrary, the respondents strongly disputed the appellant's claims. The substance of their testimonies was to the effect that they got the suit premises from their parents. DW1 Boroye Nkororo said that his father was using the suit land from 1978 until 1998 when he passed away. Likewise, DW2 Werema Mwita testified that he got the suit land from his grandmother Mugusuli Wang'engi who lived in the said suit premises from 1978 to 2007 when she passed away. DW2 further said that his grandmother was buried in the suit premises. In addition, the respondents called other three witnesses namely, Makorere Mathayo (DW3), Mwita Boroye (DW4) and Ester Werema (DW5).

After hearing the evidence of both parties, the trial Tribunal visited the locus in quo on 7th December, 2021 and thereafter the matter was scheduled for delivery of opinion by assessors on 20th December, 2021.

According to the record, on 20th December, 2021 both assessors returned verdict against appellant/applicant henceforth the case was fixed for judgment on 1st February, 2022. The trial Tribunal, in its considered judgment, found that the appellant's claims had no basis hence it dismissed the case. It further ordered the appellant to pay costs of the suit

The appellant was aggrieved with the decision of the trial Tribunal hence he appealed to this court. He filed a petition of appeal containing the following grounds;

1. That, the trial tribunal erred in law and fact for failure to consider the heavier evidence adduced by the appellant and rely on weak evidence of the respondents.
2. That, the trial tribunal erred in law for misinterpreting the issue of adverse possession in the suit land
3. That, the trial tribunal erred in law and fact to deliver the judgment in favour of the 2nd and 3rd respondents without taking into account that the appellant has already won the case against the 2nd respondent and the 3rd respondent's father since 2007 in land application No. 27 of 2007

4. That, the trial court grossly erred in law and fact for delivering judgment in favour of the respondents without proper valuation (sic) of the entire evidence
5. That, the trial tribunal erred in disregarding the testimony of the appellant and his witnesses and weight of exhibits which clearly prove that the disputed land is the legal property of appellant.
6. That, the trial tribunal erred in law and fact for delivered (sic) judgment in favour of the respondents while the coram of the tribunal was not properly constituted as assessors did not participated (sic) in full trial
7. That, the trial tribunal erred in law and fact for failure to observe the procedure of visiting locus in quo as how the visit to the locus in quo was conducted and whether parties were asked to comment on the findings noted during the visit.

When the matter was called on for hearing, M/s Mary Joakim, learned advocate appeared for the appellant whereas the respondents fended for themselves.

In arguing the appeal, M/s Mary Joakim consolidated the 1st, 4th and 5th grounds and argued them conjointly while she abandoned the 2nd ground.

To start with 1st, 4th and 5th, the appellant's counsel submitted that the Tribunal erred in law and fact by failing to properly assess the evidence in that it did not take into account the appellant's evidence which was weightier than that of the respondents. The counsel said, the appellant clearly testified on how he acquired the land in dispute and produced exhibit P1, the judgment copy which shows that the appellant once litigated over the suit land and won the case. It was her submission that the appellant had documents which proved his ownership.

With regard to the 3rd ground, the counsel lamented that the Tribunal's decision was wrong because it failed to appreciate that the appellant had won the case with respect to the land in dispute.

Pertaining to the 6th ground, she submitted that the coram was not duly constituted because assessors did not participate throughout the trial. The counsel said that there were two assessors Matiko and Swagarya. She contended that on 06/05/2021, the matter was heard in the presence of assessors but from 17/08/2021 when the defence case started the assessors did not attend on the ground that their tenure had expired. The counsel submitted that however, the assessors were present when the Tribunal visited the locus in quo and at the end, they gave their opinion. The appellant

counsel submitted that it is a mandatory requirement under section 23 of the Land Disputes Courts Act that the matter should be heard with the aid of two assessors. Since the Chairman had decided to proceed without assessors, it was wrong to invite them again, Ms Mary Joakim submitted. As such, she argued that the decision of the trial Tribunal is a nullity. To fathom her position, Mary referred this court to the case of **Neema Upendo and two others vs Eliewaha M. Mfinanga**, Land Appeal No. 269 of 2019 HC at Dar es Salaam (Land Division).

With regard to the 7th ground, the appellant's counsel submitted that the trial Tribunal erred in law by failing to follow the procedure in visiting the Locus in quo. The counsel elaborated that after visiting the locus in quo, the trial Tribunal was supposed to summon the parties and give them a brief on the evidence obtained at the locus in quo. On this, she referred to the case of **Abdul Abdallah Mnola and another vs Joseph Simon Malima**, Land Appeal No. 39 of 2021 at Dar Es Salaam (Land Division).

In fine, the appellant's counsel prayed the court under section 43 of the Land Disputes Courts Act to review the whole proceedings, nullify and set aside the judgment of the trial tribunal. She also prayed for costs.

The respondents, on their part, had no much to tell the court. The 2nd respondent Boroye Nkororo simply indicated that he was opposing the appeal and insisted that the disputed land belongs to him as he inherited it from his late father in 1998. Similarly, the 3rd respondent, Werema Mwita Singuli resisted the appeal and recapitulated that he inherited the suit premises from his grandmother Mugusuli Wang'engi in 2007.

Having heard the submissions by the parties and upon scanning the grounds of appeal, I took time to go through the record in the trial Tribunal. According to the original record (handwritten), the hearing of the plaintiff's case took place on 06/05/2021, 14/06/2021 and 01/07/2021 whereas the defence hearing was conducted on 17/08/2021, 22/09/2021 and 25/09/2021. Further, on 24/11/2021 the Tribunal visited the locus in quo and on 20/12/2021 the assessors gave their opinion. On all these days, the assessors were present according to the court record. That being the case, the contention by the learned appellant's counsel that the assessors were not present during defence hearing is devoid of merits.

With regard to the complaint that trial Tribunal failed to properly assess the evidence, this being the first appellate court, I thoroughly reappraised and reevaluated evidence. The respondents were clear in their testimonies that

they got their respective pieces of land from their parents. DW1 Boroye Nkororo said that his father was using the suit land from 1978 until 1998 when he passed away. Likewise, DW2 Werema Mwita testified that he got the suit land from his grandmother Mugusuli Wang'engi. Their claims were supported by DW3 Makorere Mathayo who told the Tribunal that he is the village chairman since 1975. He said that in 1978 they allocated the suit premises to 2nd respondent's father and 3rd respondent's grandmother as well as the appellant's father. DW3 clarified that each of the party has his own land at the suit premises. Moreso, the Tribunal visited the suit premises and was satisfied that the suit land belongs to the respondents. Like the trial Tribunal, I am of the firm findings that on balance of probability, the respondents established that they are lawful owners of the suit premises.

In addition, the appellant's counsel attacked the trial tribunal proceedings on the ground that after visiting the locus in quo it was duty bound to summon the parties and give them a brief on the evidence obtained at the locus in quo but this was not done. She cited the case **Abdul Abdallah Mnola and another vs Joseph Simon Malima**, Land Appeal No. 39 of 2021 at Dar Es Salaam (Land Division) to augment her contention. I had perused the proceedings dated 07/12/2021. It is clear that the trial Tribunal visited the

locus in quo in the presence of two assessors and parties. Further, it drew a sketch map showing the suit premises together with respective pieces of land of the parties. Thereafter, the Tribunal summarized to the parties what it had observed at the locus in quo. More importantly, the parties signed on the summary/brief made by the Tribunal. The said brief is as follows;

> ***'Baraza limetembelea eneo lenye mgogoro na wadaawa kila mmoja kuonyesha eneo lake linavyoonekana kwenye mchoro. Wadaawa hawana cha kuongeza'***

Under these circumstances, I am of the considered opinion that the visit at the locus in quo was properly done to enable the Tribunal arrive at the informed decision. It should be noted that there is no law which clearly and exhaustively provides for procedures of visiting the locus in quo rather the procedure has been developed through court practice. This being the court practice, the most important issue is for the court or Tribunal to do whatever enables it get a true picture of the suit land and allow the parties to comment or ask questions, the underlying objective being to achieve substantive justice. It is not expected that the procedures for visiting the locus in quo will exactly be the same in all occasions. What is all required is for the court or tribunal to adhere to the basic requirements such as presence of parties at the locus in quo and availability of opportunity for the parties to ask

questions or make comments on the evidence obtained at the locus in quo. All the same, it is my considered views that not every imperfection or violation of the procedures necessarily vitiates the proceedings. In the premises, I am opined that the basic requirements for visiting the locus in quo were substantively complied.

That said and done, it is my considered findings that the appeal is without merits. Consequently, I dismiss it with costs.

It is so ordered

The right of appeal is explained.

A.A. Mbagwa

JUDGE

03/10/2022

Court: Judgment has been delivered in the presence of appellant and 2nd and 3rd respondents this 3rd October, 2022

A.A. Mbagwa

JUDGE

03/10/2022