THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 103 OF 2022

(Arising from Land Application No. 30 of 2020 at the District Land and Housing Tribunal for Morogoro)

IDDI M. LUNG'OKWA .... APPELLANT

VERSUS

PROF. MARTIN NDABUKIZE.................................. RESPONDENT

JUDGMENT

Hearing date on: 07/10/2022

Judgment date on: 07/11/2022

NGWEMBE, J.

The appellant, upon being dissatisfied with the decision of the District Land and Housing Tribunal for Morogoro (the tribunal) in Land Application No. 30 of 2022 preferred to lodge an appeal in this house of justice.

It is on record that, the appellant herein was equally an applicant during trial before the district land and housing tribunal. Through the legal services of advocate Vallery Luanda, the appellant claims ownership of the disputed piece of land, situated at Lukonde village, Tomondo ward, in the district and region of Morogoro. The respondent enjoyed the legal representation of advocate Jovin Manyama.

The land in dispute comprises a total of thirty (30) acres. The appellant alleged that; he has been in occupation of the disputed land for more than twenty (20). That he started occupying that land from 10/02/1998 by way of purchase from one Elisamia Masamu. Further disclosed that he developed that land by planting both seasonal and permanent crops. He averred that, on 2019 the respondent went and invaded his land. The trespassed land was used for agricultural activities and did cut down trees. Again on 08/02/2021, the appellant was in preparation of his farm, but the respondent effected an arrest of the appellant and others who were in the suit land.

Having disclosed those facts, he *inter alia*, prayed before the tribunal for a declaration that he is the lawful owner of the disputed land and the respondent was a trespasser, general damages and permanent injunction.

After full trial, the tribunal dismissed the appellant's suit holding that the respondent was the rightful owner of the disputed land. It observed that the respondent purchased the land from Uluguru Tailors Cooperative Society held under Certificate of Occupancy No. 31329 (Exhibit D1) since 24/03/1986, while the appellant claimed to have acquired it from 1998. Relying on the Priority principle the tribunal ruled that the respondent's title is superior to that of the appellant. To challenge such decision, the appellant filed an appeal before this house of justice constituting the following grounds: -

1. The learned chairperson erred in law and facts by entertaining the matter marred with irregularities.
2. The learned chairperson erred in law and facts for failure to evaluate the evidence.

3. The learned chairperson erred in law and facts for relying on weak evidence of the respondent.
4. The learned chairperson erred in law and facts for failure to visit the *locus in quo*.

The above grounds were constructively argued by both learned counsels on 07/10/2022. The learned advocate Luanda strongly stood firm to address all grounds of appeal. In so doing he argued jointly the 2nd and 3rd grounds, while the 1st and 4th grounds were argued separately.

Submitting on the first ground, advocate Luanda highlighted on the requirements of judgment as provided for in Rule 20 (1)(b) and (d) of the **Land Disputes Courts Regulations.** Criticized the tribunal that the issues raised were not addressed, one after the other even findings were not made on each issue. Reasons for the decision were not disclosed as required by law in proper judgement writing. To strengthen his submission, he referred this court to the cases of **Shekhe Ahmad Said Vs. Registered Trustees of Manyema [2005] T.L.R. 61** and **Tanga Cement Co. Ltd Vs. Christopher Sango [2005] T.L.R. 190.** He rested on the first ground that the decision of the trial tribunal which contravened the law should be declared not a decision.

Arguing on the 2 and 3 grounds jointly, the learned counsel submitted that, the tribunal failed to evaluate the available evidences. Proceeded to point out that, exhibit D1 (certificate of title) had already expired and no renewal was secured. Hence the tribunal was erred to admit and rely on same. Insisted that the appellant purchased the suit land in year 1999 as proved by PW1, PW2 and PW3. Since then, to date he has been in effective occupation.

Contented that had the trial tribunal applied properly the required analysis of the evidence, it would have arrived into a different conclusion because the appellant had strong evidences than the respondent.

In respect of ground four, he submitted briefly that the tribunal failed to visit *locus in quo* with a view to verify boundaries of the suit land. He concluded by a prayer that this appeal be allowed with costs.

In turn advocate Jovin Manyama, contends the appellant's arguments by insisting that the record speaks itself that first the tribunal framed three issues prior to the hearing and in its judgement, it addressed them properly. Referred this court to pages 4 and 5 of the impugned judgment as no fault was made by the tribunal in its decision.

Proceeded to submit on grounds 3rd and 4th by observing that, the appellant's evidence did not attain the standard of proof on balance of probabilities as stated in the case of **Hemed Said Vs. Mohamed Mbilu [1994] TLR. 113.** He presented the sketch of the respondent's evidence that, exhibit D1 and D2 proved his ownership of the suit land, which is part of the surveyed land as Kidogo Farm No. 4 at Kikundi Village constituting 1080 hectors with Title No. 31329.

Argued that there was another case, Land Case No. 320 of 2013, where the Respondent was declared a rightful owner. He acquired the suit land prior to the appellant and thus his evidence was heavier than that of the appellant. Added that the appellant ought to be aware of the ownership prior to purchasing it.

His response to the fourth ground on the failure by the tribunal to visit *locus in quo*, was that visiting *locus in quo* is a discretionary powers

of the court, but the evidence before the tribunal was sufficient to determine the dispute without visiting *locus in quo.* Rested his reply by inviting this court to dismiss the appeal with costs.

In brief rejoinder advocate Luanda reiterated his submission in chief and added that in year 2013, when the land case No. 320 of 2013 was decided, the appellant was already in the case and the judgment so referred did not concern the appellant at all.

Due to the diverse nature of the grounds raised, I find proper to deal with the first ground on propriety of the impugned judgment, then I will proceed to determine on the rest. The appellant contended that, the judgment was illegal for failure to deal with all the issues and reasons for the decision were not given.

In the referred cases of **Shekhe Ahmad Said (Supra)** and **Tanga Cement Co. Ltd (Supra).** The holding in the first case was to the effect that, the court must determine all issues raised by the disputants. In the latter, Order XX of **the Civil Procedure Code [Cap 33 R.E 2019]** was referred and the court stated the contents of the judgment. As such it is undisputed the above two judgements held correct legal position of law on how a court judgement should look like.

In respect to this appeal, the question is whether the trial tribunal's judgment was irregular as rightly argued by the appellant and referenced to Order XX Rule 4 of **the Civil Procedure Code.** The rule is quoted herein as follows: -

"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

This rule is intertwined with the reasoning of the late Judge Buxton D. Chipeta in his book **Civil Procedure in Tanzania**, A **Student Manual**, at page 203 where he defined judgement in a civil suit including land to mean:-

"a reasoned account and exposition of the principles of law applicable to such facts and the decision to the rights and liabilities of the parties to the suit"

Moreover, the Court of Appeal in the case of **Hamis Rajabu Dibagula Vs. R, [2004] T.L.R. 196** emphasized by holding that: -

*"A judgement must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. A good judgement is **clear**, **systematic** and **straight forward.** Every judgement should state the **fact of the case**, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reason which justify the finding"*

From the above, it is settled in our jurisdiction that court/tribunal's judgement must be clear in respect of material facts and particulars of the issues in disputed; systematic, that is, flow of logical thinking up to the conclusion; straight forward; and clear in terms of its reasoned conclusion.

In this appeal, the trial tribunal framed three issues; - first, whether the applicant herein was the rightful owner of the disputed land; second, whether the respondent was a trespasser; and third, reliefs. In its judgment, held *inter alia* that, the respondent is the rightful owner of the suit land. The appellant had no better title than the respondent. In page 3 and 4 of the trial tribunal's judgement, assigned reasons for the decision. Among the reasons were that, the respondent's certificate of title was issued on 24/03/1986, the boundaries stated in the sale agreement named Waziri Bamangwa amongst the neighbours, unfortunate the said Waziri had no land around the place. Also, the tribunal followed priority principle, that the respondent had a better title over the land than the appellant who purported to have purchased it on year 1998.

In any standard, the contents comprised in the tribunal's judgment satisfied the legal requirement of properly composed judgment. Nothing expected in a judgement went missing as the learned appellant's counsel strived to challenge. I understand that Mr. Luanda may have felt uncomfortable with the style adopted by the tribunal in its judgment. Unfortunate this court cannot quash such decision only for being composed in a different style, unless it has contravened the law. This court in the case of **Issa Juma Magono Vs. Athwal's Transport & Timber Ltd, Civil Appeal No. 22 of 2018** held: -

> *"Generally speaking, judgment writing is an art and it differs from one judge/magistrate to another, there is no hard and fast rule on how judgments should be written, but the law gives the guidelines about the content of a judgment, I will be*

wrong to challenge the skills of other judge or magistrate just because her writing skill is different from mine"

In the same line of thinking, the Court of Appeal in **Chandrakant Joshubhai Patel Vs. R, [2004] T.L.R. 218,** when dealing with application for revision, made a highlight on the contents of judgment that: -

> *"No judgment can attain perfection but the most that Courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism"*

On the basis of the above legal provisions and the examination conducted on the tribunal's judgement, was compliant to the law, consequently the first ground must fail.

In dealing with ground 2 and 3, which invites this court to vary the trial tribunal's findings of fact, I am minded of the legal principles governing first appellate court. Generally, the first appellate court is entitled to re-evaluate or analyse the evidence for both sides, with a view to satisfy itself as to whether the findings of the trial court was justified. Perusing the old precedents, same principle was arrived in the case of **Peters Vs. Sunday Post Limited (1958) EA 424.** Thereafter the same principle was held in a good number of decisions by this court and the Court of Appeal, including in the cases of **Japan International Cooperation Agency (JICA) Vs. Khaki Complex Limited, Civil Appeal No. 107 of 2004, (CAT – Dar es Salaam); Registered Trustees of Joy In The Harvest Vs. Hamza K. Sungura, Civil Appeal 149 of 2017, (CAT-Tabora);** and **Tanzania Sewing**

Machine Co. Ltd Vs. Njake Enterprises Ltd, Civil Appeal 15 of 2016, (CAT – Arusha), these are few decided cases out of many decisions by the Court of Appeal. In the case of **Registered Trustees of Joy in The Harvest,** the Court discussed in details on the duties of the first appellate court as follows: -

> *"On our part, we are in agreement with both learned advocates that it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision"*

Prepared to test whether the first appellate court actually re-evaluated the evidence, the court proceeded to extend its explanation of how re-evaluation is expected to be done. Having referred to Rule 36 (1)(a) of **The Court of Appeal Rules** and **Cambridge Advanced Learners' Dictionary** stated that, reevaluation of evidence bears a literal meaning of examining and judging again or in a different way. Then proceeded: -

> *"The obligation imposed on the first appellate court in handling an appeal is not a light duty, it is a painstaking exercise involving rigorously testing of the reliability of the findings of the court below. For instance, the complaint of the appellant before the High Court in the 3rd ground of appeal was that there was no proof before the trial court that Mr. Desai authorized the respondent to surrender his property back to the Government. In our view, on appeal, such a clear complaint necessitated a deserved scrutiny by the High Court and a clear communication of the outcome in the judgment."*

Based on the above principles as amplified by several precedents, in line with this appeal, the main issue during trial was whether the appellant herein is the lawful owner of the suit land. The appellant claimed to have acquired 30 acres of land by purchased from one Elisamia Masamu way back to year 1998. At the same time, the respondent claimed to have purchased 1080 hectares in which the 30 acres are inclusive. That he purchased from Uluguru Tailors Cooperative Society, an entity which had the rightful ownership since 24/03/1986. The appellant's counsel persistently held a view that the said right of occupancy had already expired and therefore, the tribunal should not have relied upon it.

Having examined the records, I have realized that the entire case was based on the weight of evidence. The trial tribunal appreciated the evidence of both parties and found that, when the appellant was purchasing that suit land, such piece of land was already occupied as was allocated by the Commissioner for Lands to Uluguru Tailors Cooperative Society. In other words, the seller had nothing to sale to the appellant.

Paying regard to the principle elucidated above on the duty of the first appellate court, I now proceed to analyse those evidences adduced before the tribunal.

Commencing from the testimonies of PW1 who is the appellant herein, stated that, he purchased the land as a farm from one Elisamia Masamu for Tsh. 380,000/=. The payment of purchase price was paid on installment bases in year 1998. Tendered a sale agreement, which was executed before the Village Chairman and a Village Executive Officer, same was admitted marked exhibit P1.

Proceeded to testify that since then, he had occupied such land without any dispute. Admits that the land which belonged to Uluguru Tailors was sold to Martin Shem (the respondent), but he said the said land was neighbouring to his land. On 08/02/2021 at his farm, while undertaking the agricultural activities, some police officers arrived and arrested them on the accusation that they had trespassed to the respondent's land. After continued disturbance with the police he decided to institute a land dispute at the tribunal. He did not trespass over the respondent's land; that his farm is outside the respondent's area.

Added that there was a case over that land in which the respondent won, but the appellant was not a party because his farm is outside the respondent's land.

In Cross examination, he added that someone Waziri Bamangwe a member and supervisor of the Uluguru Tailors connected to the seller and when purchasing the same, even the village government leaders were present. He is aware that the Uluguru Tailors Farm is called Kidogo, but is not aware of its area. He treated the respondent as his neighbour and he recognized that the said land is owned under the certificate of occupancy. That when Uluguru was in occupation, there was no dispute.

PW2 one Mbagala Issa Mwene who was a Village Executive Officer of KIKUNDI village, testified that, he witnessed the sale of the land between the appellant and the seller. He identified exhibit P1 as he is amongst the Village officers who witnessed the sale and allocation of boundaries. He signed as a witness not as a leader, but other witnesses were just named but did not sign. There was no dispute between

Uluguru Tailors and the appellant and he did not know if Uluguru Tailors sold the said land to the appellant. In cross examination, he admitted that the sale agreement did not mention Uluguru as among the neighbouring boundaries.

The third witness (PW3) who testified *inter alia* to have witnessed the agreement when the appellant purchased that land, but he did not sign the same though was named as witness. He named the neighbouring boundaries, among them he mentioned Uluguru Tailors, which to him was on the east of the disputed land. He proceeded that in the agreement, Uluguru Tailors was not mentioned, but Waziri Bamangwa was living therein. After being cross examined, he did not confirm that, the said Waziri stood on behalf of Uluguru. He did not know the boundaries of the Uluguru farm.

PW4 Asheri Joseph's testimony was to the effect that he is amongst the residents of Tomondo, Lukonde Village. They had a dispute with the appellant so they filed a representative suit and listed their names after a meeting, but the appellant was not party to the case. The witness and his fellows lost the case against the respondent. He is aware that the respondent purchases that land from Uluguru Tailors.

On the defence side, DW1 Prof. Shem testified among others that he retired from SUA and now engaged in livestock and agriculture owning Kidobo Farm No. 4 at Lukonde Kikundi, Tomondo ward. He purchased the farm from Uluguru Tailors Cooperative Society, being 1080 hectors, equivalent to 2700 acres. His original certificate was at Tanzania Investment Bank (T.I.B) he tendered a certified copy of Certificate No. 313229 for Kidogo Farm No. 4 ad D1. He stated that, the certificate expired, but he had followed all the renewal procedures,

renewal was awaiting the appeal filed by the trespassers who lost the Case No. 320/2013 between **Ashery Joseph Bangawa and others Vs. Uluguru Tailors Cooperative Society and Martin Shem**. That at the time, the Land Commissioner was in the undertaking to renew the certificate after he won that case. Judgment and eviction order was tendered as D2 collectively. After eviction of the opponents by the court broker, the appellant trespassed therein. The respondent reported to the police. He stated that, he is the owner of the land, the appellant is the trespasser.

In cross examination he stated that he purchased the land in 2008, the certificate expired on 2018 and the said case was in 2013. From the above evidence, the following are established by evidence: -

1) That the Uluguru Tailors Cooperative Society was the rightful owner of the farm land comprising 1080 hectares, equivalent to 2700 acres at Kidogo Farm No. 4 held under Certificate of Title No. 31329 issued on 24/03/1986.
2) That the said farm was later on sold to the respondent Prof. Martin Shem in 2008 and a transfer was dully registered on 05/03/2010.
3) That he owned and operated agricultural activities undertaking thereon up to the year 2013 when Some 312 villagers of Kikundi, Kiloka Morogoro Rural District, trespassed the farm land and instituted Land Case No. 320 of 2013, High Court of Tanzania at Dar es Salaam.
4) In the said case, the respondent won and that decision has never been challenged, although the appellant herein was not a party to it.

5) That on 10/02/1998 the appellant entered into agreement purporting to purchase 30 acres farm land from one Elisamia Masamu, the said sale was conducted with aid and witness of the local government leaders, payment was made by installment up to 2019.
6) That according to the sale agreement by the appellant, the area is neither part nor neighbor of the Uluguru Tailors Cooperative Society.
7) That what the appellant claims to have bought from the said Elisamia is part and parcel of what the respondent purchased from Uluguru Tailors.

From the above, I have observed that the respondent's root of title is crystal clear, since the Uluguru Tailors who sold the land to the respondent were allocated by the Commissioner for Lands, the paramount Land lord on behalf of the President. But the appellant's root of title, I am convinced to say, was not clear. The said Elisamia Masamu's original occupation of the said 30 acres of farm land has not been established by any of the witnesses.

Equally important is the observation that, there was contradictory description of the boundaries of the disputed land. While the purported sale agreement did not mention the respondent's farm as demarcating the boundaries, the appellant and some of his witnesses stated that, the respondent's farm was neighbouring on the east.

Though the judgment in Land Case No. 320 of 2013 did not bind the appellant, but the declaration of ownership to the respondent comprised 1080 hectares including 30 acres subject to this appeal.

Lastly, though there is no dispute that, the appellant bought the said 30 acres of farmland from Elisamia Masamu, the title of Elisamia Masamu over that land was not established and proved by any witness. Above all, the appellant did not summon the seller one Elisamia Masamu to testify on same and the whereabout not disclosed during trial. Elisamia was a key witness to the appellant because he is the source of all conflicts between the appellant and the respondent. Thus, failure to call him as a witness to the appellant weakened his case.

From the above understanding, it goes like a day followed by night that, the respondent's title stands on a better position than that of the appellant. Not only because he had no certificate of title, but also it is not clear on his side, if the farmland he purchased was not part of the respondent's farm. Even by assumption and following the priority principle yet the appellant's position would not excel anyhow because the appellant purchased the suit land twelve (12) years after a certificate of title was issued to the respondent and the respondent had actualized effective occupation thereon. Then, the priority principle would apply as the tribunal rightly so applied.

Regarding the last ground of contention that, the tribunal did not visit *locus in quo*, I have made a serious reference to the relevant statutory provisions of the law and the authoritative precedents; generally, no visit of *locus in quo* can be unless there are compelling circumstances so to do. The rationale why should courts be hesitant to visit *locus in quo* except when it is necessary, is for maintenance of sobriety and impartiality. This is what was, among others, held in **Nizar M. H. Vs. Gulamali Fazal Janmohamed [1980] T.L.R 29**, the Court of Appeal held: -

"It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator. At the trial, we ourselves can see no reason why the magistrate thought it was necessary to make such a visit. Witnesses could have given evidence easily as to the state, size, location and so on of the premises in question. Such evidence could, if necessary, be challenged in cross-examination."

It is known to this court that among the circumstances necessitating visiting *locus in quo*, includes where there are conflicting evidences on the issues of size, location, boundaries and other relevant factors to the decisive issue. The Court of Appeal in the case of **Avit Thadeus Massawe Vs. Isidory Assenga, Civil Appeal No. 6 of 2017** which adopted the two Nigerian decisions of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017** and **Akosile Vs. Adeyeye (2011) 17 NWLR** on the factors to consider before the court can resort to visiting *locus in quo,* held: -

1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence.*
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****.*

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.*
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.*

And from **Akosile Vs. Adeyeye,** it was held: -

> *"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. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries."*

Having adopted the above respectively, the Court of Appeal proceeded to hold that: -

> *"We find the above principles very relevant not only to the present case but are also very relevant and crucial in providing general guidance to our courts in the event they, either on their own accord or upon request by either party, exercise their discretion to visit the locus in quo. We fully subscribe to them."*

In respect to this appeal, the tribunal, as alluded earlier, the land in question was very clear and by the evidence available, I am settled in my mind that there was no need to visit *locus in quo.* Rightly as advocate Manyama so submitted, visiting locus in quo was not necessary. The boundaries of the respondent's land are well specified in the Certificate, which includes the map and scope. This issue likewise, should follow others for lack of merits.

In totality and for the reasons so stated, this court cannot do more justice than to dismiss this appeal entirely with costs payable to the respondent.

Dated at Morogoro in Chambers this 7th day of November, 2022.

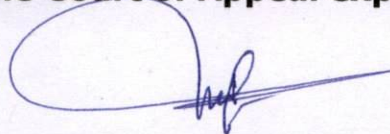
P. J. NGWEMBE

JUDGE

07/11/2022

Court: judgment delivered at Morogoro in Chambers on this 7th day of November, 2022, in the presence of Mr. Jovin Manyama, Advocate for Luanda Advocate for the Appellant and in the presence of Mr. Jovin Manyama, Advocate for the respondent.

Right to appeal to the Court of Appeal explained.



P. J. NGWEMBE

JUDGE

07/11/2022