IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND APPEAL NO. 11 OF 2022

RAMADHANI LISSU.....APPELLANT

VERSUS

KITIKU MUNA.....RESPONDENT

(Appeal from the Judgment of Singida District Land and Housing Tribunal)

(B. C. Ndambo – Chairman)

Dated 24th January, 2022

In

Land Application No. 56 of 2019

JUDGMENT

26th September & 04th November,2022

MDEMU, J:.

In the District Land and Housing Tribunal (DLHT), the Respondent herein sued the Appellant for alleged trespassing to his land located at Makuro Village within Singida Region. The application was decided in favour of the Respondent. This was on 24th of January, 2022. Aggrieved by the said decision, the Appellant lodged this appeal on the following grounds:-

1. *That, the Trial Tribunal erred in law and in fact for relying on exhibit D1 and holding that, the land in dispute is the property of the Respondent for the reason that he had been handed it by the village Council of Makuro while the said exhibit is invalid.*

2. *That, the trial Tribunal erred in law and fact for holding that the land in dispute is the property of the Respondent and disregarding that the same is the property of the Appellant's father.*

3. *That, the trial tribunal erred in law and fact for denying the Appellant's witness to adduce evidence which rendered the Appellant his right to be heard to be denied.*

4. *That, the trial Tribunal erred in law and fact for holding that the land in dispute is the property of Respondent without visiting the land in dispute (locus in quo) as there was a boundary contradiction over the land in dispute.*

5. *That, the trial tribunal erred in law and fact for holding that the Appellant's father is still alive and that the Appellant was at his default for not bringing his father to testify*

before the Tribunal while the Appellant's father disappeared since 2008.

6. *That, the trial Tribunal erred in law and fact for failure to evaluate, analyze and examine properly the evidence adduced by both parties and hence reached to the erraneous decision.*

On 26th September, 2022, the appeal was heard. Both parties appeared in person.

The Appellant adopted his grounds of appeal to form part of his submissions and then added that, at the trial Tribunal, his witness Athuman Senge was denied to testify. He prayed thrice but the DLHT closed his case. He added further that, the trial Tribunal didn't visit the suit land which measures 75 acres out of which, 14 acres were encroached by the Respondent and sold 6 acres out of 14.

In reply, the Respondent submitted among other things that, he was allocated the suit land by village Government on 18th May, 1990. He used the suit land to June, 2018 when the Appellant encroached it. He argued further that, in June, 2022, the tribunal declared him the owner of the suit land. Thus, he prayed the appeal be dismissed.

I have heard the parties herein in their submissions and have also gone through the record of the DLHT. The main issue is whether this appeal has merits.

Starting with the first ground of appeal; exhibit P1, a letter from Makuro Village Council indicates that, the Respondent was allocated the land by the Village Council. The said exhibit is a photocopy (certified one). Section 66 of the Evidence Act, Cap. 6 require documents to be proved by primary evidence except as otherwise provided in the Act. Therefore, secondary evidence is acceptable in Court only after one has complied with certain conditions itemized under section 67 of the Evidence Act.

Back to the case at hand, I have perused the trial Tribunal's typed proceeding at page 5 where the trial Chairman laboured to comply with conditions in admission of the said exhibit (secondary evidence). What is seen in the record is that, the trial Chairman admitted the said copy after seeing the original copy. Let the record speak in itself: -

"I got the suit land on 1990 upon being allocated by Makuro Village Council. I got the suit land on 18/05/1990. I was allocated twelve and a half (12 ½) acres for cultivation. I use to cultivate maize, sunflower and other crops. I have allocation letter which proves that I was allocated the suit land by Makuro village

Council. I pray the allocation letter to be admitted as exhibit.

Respondent: I object because it is not genuine document.

Tribunal: since the allocation letter has all required ingredients as it has been signed and stamped with stamp seal of the village Council of Makuro the same is hereby admitted as exhibit. Copy of the allocation letter admitted as exhibit P1 after the original one has been seen by this tribunal."

With due respect, the procedure was to admit the original document. Mere stating that the document has been seen is not correct as it raises doubt as to whether it was really tendered. Furthermore, the said document was not read out in the tribunal so that the Appellant can know the contents of it. Under the premises, I find the first ground to have merits and the said exhibit P1 is expunged from the records.

After expunging from the record exhibit P1, the issue is whether the remaining evidence proved the Respondent to be the owner of the suit land. This answers the second and six grounds of appeal. The Respondent testified to the effect that, he was given the suit land by Makuro Village Council in 1990 and PW2 one Shaban Ahmed who was the member of the said Council during that time supported the assertion that the Respondent was allocated the suit land by the village Council. On his

part, the Appellant said the suit land belongs to his father who is nowhere to be seen since 2008 and no any other witnesses testified to support his case. In this testimony, the Appellant also mentioned neighbours bordering his father's land namely Abdi Farrah, Jimbu, Augustino Limu and Issa Mdangaya but all these were not called to testify. The effect is to draw adverse inference against the Appellant's case. I find therefore that, the Respondent proved his case against the Appellant because his evidence has more weight compared to that of the Appellant. Thus, the second and sixth grounds have no merits.

On the third ground of appeal, the complaint is that, Appellant's witnesses were not given right to be heard. Looking at page 8 of the typed proceedings, on 01st of April, 2020 the application was scheduled for defence hearing. On that date, the Appellant was ready for hearing and was heard. Thereafter, the application was adjourned till 08th of May, 2020 with an order that, the Appellant should call his witnesses who never showed up. The case was adjourned to 19/06/2020; 03/08/2020; 18/09/2020; 5/11/2020; 27/1/2021 and 29/4/2021; On this latter, the Counsel for Respondent one Salma Musa addressed the Tribunal that the matter was for defence hearing. In essence, the Appellant was always giving excuses. Later, the trial Tribunal granted last adjournment to 27th

of July, 2021. On that date again, the Appellant stated that his witnesses had an emergency, he prayed for adjournment. Ms. Salma Musa appearing for the Respondent objected the prayer in which it was ruled out that, the defence case be closed.

Looking at the sequence of events and several adjournments which was done almost seven times requiring the Appellant to bring his witnesses, one cannot say afterwards that the Appellant and his witness were not given right to be heard. It was upon him to ensure that his witnesses appear in Court. He was given opportunity but used delaying tactics. Therefore, I find this ground to have no merits.

Regarding the fourth ground, the complaint is on the tribunal's failure to visit the *locus in quo*. Conduct of these visits is usually at the discretion of the Court. In land matters, visits to the *locus in quo* assist the Court to resolve any ambiguities in the case including issues of ascertaining the size of the land, the actual location of the disputed land in cases where there is a controversy about the existence and location of a particular feature thereon. It is also useful in cases where there is material variation on the evidence adduced requiring ascertainment by physical visits. In the case of **John Chuma vs. Pastoli Lubatula and Others, Land Appeal No. 9 of 2019** (unreported) it was held that: -

"These visits are intended to get a visual appreciation of the area in contention and check the accuracy of the evidence given in the course of the trial. Invariably, this happens after the parties have closed their cases. The legal holdings are to the effect that, the Court or tribunal must exercise great caution when doing that, in order not to constitutes itself as witness in the case."

The above position was also stated in the case of **Thadeus Massawe vs. Isidory Assega, Civil Appeal No. 6 of 2017** (unreported) and also in the case of **Nizar M.H.Ladak vs. Gulamali Fazal Jan Mohamed [1980] T.L.R. 29.** In this latter, the Court of Appeal held that:-

"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."

See also the case of **Mukasa vs. Uganda [1964] EA 698**, where it was held that: -

"A view of a locus in quo out to be, I think, to check on the evidence already given and where necessary, and possible, to have such evidence particularly(sic) demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It

is essential that after a view, a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence. That the trial Tribunal didn't visit the land in dispute.

It must be noted further that, visit to the *locus in quo* should not however be a substitute of the party's obligation to adduce sufficient evidence to prove his case. For the Court to visit *locus in quo*, parties must, in their respective cases, establish sufficient evidence showing controversy or conflicting evidence or uncertainty of the existences of the issues elaborated above where the visit is inevitable.

Having elaborated so, I now have to determine whether the case at hand was fit one for the visit. In my view, there was no need to visit the *locus in quo* since there were no issues to be ascertained such as size of the land, actual location and particular feature found in the suit land. Furthermore, the Appellant was to raise this issue after closure of his case. Raising it now is an afterthought.

On the fifth ground, I find it to have no merits too taking into account that, it was the Appellant who alleged that his father is nowhere to be seen since 2008. He was supposed to prove the same as required under Section 110(1) of the Evidence Act, Cap. 6. This was to be done by

even tendering document showing that he has reported the matter to relevant authorities like Police on the whereabouts of his father. Since he didn't prove then, I find it right for the trial Tribunal to hold that his father is alive.

That said and done, this Court finds no merit in the appeal warranting any faulting to the findings of the trial Tribunal. In the end, the appeal is hereby dismissed with costs.

It is so ordered.

Gerson J. Mdemu

JUDGE

04/11/2022

DATED at **DODOMA** this 04th day of November, 2022

Gerson J. Mdemu

JUDGE

04/11/2022