IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL No. 60 OF 2021

(Arising from the District Land and Housing Tribunal for Mara at Tarime in Land Application No. 1 of 2021)

WIKAMA NYABUSANI ..... **APPELLANT**

Versus

ROBERT KITUHO WAING'ARI ..... **RESPONDENT**

JUDGMENT

27th & 27th April 2022

Mtulya, F. H., J.:

On 19th April, 2021 the **District Land and Housing Tribunal for Mara at Tarime** (the tribunal) in **Land Application No. 1 of 2021** (the application) ordered a visitation of *locus in quo* on 22nd April 2021 and the parties participated in the event with some neighbours who were invited to witness the incident and gave their understanding of the disputed land.

However, the event and its associated proceedings were not recorded anywhere on the record of the application as per requirement of the directives provided in the precedent of the Court of Appeal in **Jovent Clavery Rushaka & Another v. Bibiana Chacha**, Civil Appeal No 236 of 2020 as depicted at page 19 and 20 of the judgment.

Following the fault, this court raised the matter *suo moto* and invited the parties to take the floor of this court in order to explain their understanding of the fault. Mr. Wikama Nyabusani (the appellant) had invited Mr. Samson Samo, learned counsel to speak for him as the matter was related to the point of law, whereas Mr. Robert Kituho Waing'ari (the respondent) appeared himself without any legal representation.

In cherishing the right to be heard right to be heard as enshrined under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and precedent in **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44, Mr. Samo submitted briefly that the fault is un-procedural which caused miscarriage of justice to the parties. In his opinion, the judgment and decree must be crushed for want of proper application of the laws regulating visitation of *locus in quo*.

In reply of the fault, the respondent stated that the tribunal had followed all legal steps in visiting the disputed land, but declined to record the proceedings hence the blame on absence of record of the events that took place at the *locus in quo* must be shouldered to the tribunal. To his opinion, he had stayed in the disputed land for seventeen (17) years without any interference until when the appellant retired from public service when the chaos stated.

I have perused the record of the present appeal and the decision of the Court of Appeal in **Jovent Clavery Rushaka & Another v. Bibiana Chacha** (supra). Record shows that on 19th April 2021, the learned chairman in the application ordered visitation of *locus in quo* to be conducted on 22nd April 2021 and parties confirmed their attendance and participation. However, the record is silent on what transpired at the scene of the dispute on 22nd April 2021. The record shows further that on 27th April 2021, the learned Chairman continued to receive and register opinion of assessors without the notes of the visitation of *locus in quo* and reading of the same to the parties during the proceedings in the tribunal.

The law in the precedent of **Jovent Clavery Rushaka & Another v. Bibiana Chacha** (supra) provides that:

> *When a visit to a locus in quo is necessary, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter...when the court re-assembles in the court room, all such notes should be read out to the parties and their advocates...witnesses then have to give evidence of all the facts...the court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses...we trust that this procedure will be adopted by the courts in future.*

In the present appeal, it is unfortunate that the proceedings during the visit at the *locus in quo* are not in the record of appeal. It is not clear as to what transpired during the visit. This court is in the dark and cannot be able to examine the notes. I have already explained the fault and position of the law, which also enjoys the support from the precedents in **Nizar M.H v. Gulamali Fazal Janmohamed** [1980] TLR 29 and **Kimonidimitri Mantheakis v. Ally Azim Dewji & 14 Others**, Civil Appeal No 4 of 2018.

The directives of the Court of Appeal at page 21 of the decision in **Jovent Clavery Rushaka & Another v. Bibiana Chacha** (supra) are to the effect that: *there was flouting of the procedure during the visit that occasioned a miscarriage of justice hence the trial court proceedings is a nullity.* Finally, the Court ordered that: *...we quash the judgment and set aside the decree and judgment. We further order for an expedited retrial of the Land Case No. 303 of 2016 before another Judge. The retrial should commence from the proceedings that ended on 26th November 2018.*

Having said so, I have decided to allow the appeal and declare the proceedings of the tribunal as from 27th April 2021 a nullity. Following this order, I hereby quash the judgment and set aside the decree in the application. I further order for an expedited retrial of the application before another learned chairman within three (3) months from the date of this order, 27th April 2022. Given to the circumstances

moto by this court and considering the dispute on the land was not resolved to its finality to determine the rightful owner of the land, I order no costs. Each party shall bear its own costs.

It is so ordered.

F. H. Mtulya

Judge

27.04.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Wikama Nyabusani and his learned counsel Mr. Samson Samo and in the presence of the Respondent, Mr. Robert Kituho Waing'ari.

THE HIGH COURT OF TANZANIA MUSOMA

F. H. Mtulya

Judge

27.04.2022