THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 33 OF 2021

(Originating from Application No. 37 of 2028 of the District Land and Housing Tribunal for Mbeya)

Between

HAMIS MLOWEA .....APPELLANT

VERSUS

KAPUNGA VILLAGE COUNCIL .....1ST RESPONDENT

SANGALALI MSHISHANGA .....2ND RESPONDENT

JUDGMENT

2nd & 29th March, 2022

NGUNYALE J.

The appellant is aggrieved with the whole judgment of the District Land and Housing Tribunal for Mbeya in Application No. 37 of 2018 in which

the appellant sought a declaration that the respondent wrongfully trespassed his farm, declaration as the lawful owner, permanent injunction against the respondent from trespassing the suit land, general damages, costs of the suit and any other relief the tribunal could deem just.

Briefly, the appellant sued the 2nd respondent for trespass of 30 hectors of land situated at Lwanjili Hamlet Kapunga village within Mbarali District in Mbeya region. It was alleged that the appellant was allocated 50 hectors of land in 1993 by the Matebete Village Council. In 2008 the 2nd respondent trespassed 30 acres alleging to be allocated by Kapunga Village Council the 1st respondent. He tendered a letter requiring the 2nd respondent to vacate the area and the letter in which the 2nd respondent participated to resolve the dispute between the appellant and another person which were admitted as Exhibit P1 collectively. PW2(Kelima Atupakisye Mwinuka) stated that they allocated the appellant the land measuring 125 with condition to set up the irrigation intake. PW3(Zuberi Hamadi) stated that in the year 2004 – 2005 he used part of the farm to cultivate after being given by the appellant and was once employed to ferry stone for intake. PW4(Saad Musa Mwanjonjo) testified that in 2007 he hired a farm from the appellant and the disputed arose with the 2nd

respondent after blocking water, it is when now he learned that even the 2nd respondent was a licensee to the appellant farm.

In defence the 2nd respondent testified that he was allocated 30 acres subject of the disputed in 2008 by the Kapunga Village Council. He tendered stakabadhi and the letter kuidhinisha kumpa ardhi dated 12/9/2008 which were admitted as Exhibit D1 collectively. His evidence was supported by DW2(Sevelagha Sandube) DW3(Andrew Said), and DW4(Raphael Daniel Mollel) who all testified that the appellant was allocated the suit land by the Kapunga Village Council.

On 14/1/2019 the tribunal ordered the amended application to be filed and written statement of defence thereto. When the matter was ripe for hearing the tribunal framed three issue. Upon hearing both parties the tribunal dismissed the application by declaring the 2nd respondent the lawful owner. Aggrieved the appellant filed this appeal containing five grounds of appeal namely; -

1. *That, the trial Tribunal erred both in law and fact by admitting the documents exhibit D1 collectively contrary to the law.*
2. *That, the trial Tribunal erred both in law and facts by leaving a legal issue undetermined, which is as to whether the 30 acres in dispute are within 125 acres allocated to the appellant.*

3. *That, the trial Tribunal erred both in law and facts by neglecting, avoiding and ignoring to visit locus in quo contrary to the guidelines and principles.*
4. *That, the trial Tribunal erred in law and facts for deciding the case in favour of the 2nd respondent's evidence which the same was contradicting itself.*
5. *That, the learned Chairperson miserably failed to make analysis of the evidence on record, hence arrived to a grave unjust decision.*

When the appeal was called for hearing, the appellant had legal representation of Iman Mbwiga, learned advocate while the respondents did not appear. Upon being satisfied that the respondents were properly served I ordered the matter to proceed *ex - parte* against them. The appeal was disposed by way of written submission.

In support of the grounds of appeal the appellant submitted in respect of the first ground of appeal that exhibit D1 as tendered by the 2nd respondent was admitted contrary to Regulation 10 (3) (a) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174. The relevant provision provides; -

> *"... The Tribunal shall before admitting any document under subsection (2) (a) ensure that a copy of the document is served to the other party."*

In his further submission the appellant submitted that the said exhibit was not attached to the pleadings after amendment of the pleadings. Therefore, it cannot be lawful admitted. At page 56 of the proceedings

the trial chairperson is admitting that, the pleadings were amended and the 2nd respondent never served the appellant the tendered documents as the law requires. He prayed the said documents to be expunged from the records.

On the second ground of appeal the appellant submitted that the trial Tribunal erred by leaving a legal issue as to whether the 30 acres in dispute are within 125 acres allocated to the appellant. The appellant is his testimony testified that he was allocated 125 acres after the payment of Tshs 500,000/= to the VEO, and further stated that , the disputed land is measured 30 acres which the same is bordered with Kapunga small holders, that means 30 acres in dispute is within the 125 acres the appellant granted by the Village since 1993. The appellant testified to have welcomed the 2nd respondent on the disputed land to stay there for a while with other fellows. The fact that he was welcome is not disputed by the second respondent in his testimony at page 59 and 60 of the proceedings. He admits to have happened to be a tenant of the appellant, and he is admitting that, after the appellant served him a copy of eviction order from the village council, he agreed and left to the other place. He moved to another piece of land within the same land.

He went on submitting that the 2nd respondent after being cross examined by the counsel of the applicant at page 61 of the proceedings so as to ascertain to the distinction of the suit land and the one once surrendered, the 2nd respondent replied that;

> *"there are eye witness who know that the suit land is different from the applicant's land which I surrendered"*

The third ground of appeal that it was necessary to visit locus in quo the appellant submitted that the omission made the Tribunal not to ascertain that the land in dispute is part of the 125 acres of the appellant. He submitted further that the law if very clear that on the circumstances were the land in dispute is not properly described or wrongly misinterpreted by the parties and eventually the court be in limbo as to real lad in dispute between the parties locus in quo is important. He referred the Court to the case **of Bomu Mohamed vs. Hamisi Amiri**, Civil Appeal No. 99 of 2018 Court of Appeal of Tanzania (unreported) where it was held: -

> *"...We come now to the issue of locus in quo. In the first place we would like to put it clear that a visit to the locus in quo is purely on the discretion of the court. It is done by the trial court when it is necessary to verify evidence adduced by the parties during trial. There is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo. (See Sikuzani Said Magambo and Kirioni Richard v. Mohamed Roble, Civil*

Appeal No. 197 of 2018 (unreported). The complaint of the appellant is that the High Court Judge erred in law by failing to physically locate and measure the suit land in the locus in quo/ so as to make a proper finding on the contested fact in issue. With respect, the High Court in the exercise of its appellate jurisdiction is not mandated to visit the locus in quo and make its own finding. If for example it finds that the procedure in the trial tribunal was faulted, then it will order for a fresh visit. It is possible that the intention of the appellant in this ground of appeal was to challenge the whole procedure in the locus in quo but on our side, we are satisfied that the procedure was proper."

He was of the view that from the above circumstance of the case the trial Tribunal was supposed to visit locus in quo to ascertain as to whether the 30 acres in dispute are within the 125 acres the appellant was allocated.

On the fourth ground of appeal the appellant alleged that the 2nd respondent's evidence was contradicting each other. He submitted that in looking the evidence by the 2nd respondent at first he testified that he is not bordered with the appellant in any direction but while cross examined he admitted that on the right he is bordered with the appellant and DW2, Dw3 and DW4 at page 65 and 80 of the proceedings stated that he 2nd respondent and others after their homes were demolished by the investor, they shifted to the appellants land. The 2nd respondent is admitting that the appellant once forwarded to him a complaint letter to the village

council so that the 2nd respondent and others may be ordered to vacate from his land. But surprisingly the same DW2 after cross examined by the counsel for the appellant he stated tat the appellant has no any land at Kapunga village.

Regarding the fifth ground of appeal which is to the effect that, the learned Chairperson miserably failed to make analysis of the evidence on record, hence arrived to a grave un just decision. As already stated the evidence was very clear that the 30 acres in dispute were part of 125 acres of the appellant as granted in 1993. The trial Tribunal could not evaluate well the evidence before it.

In considering the first ground of appeal I read thorough the ruling of the Tribunal dated 5th February 2020 where he admitted exhibit D1 the documents which were not pleaded. In the very ruling the Chairperson as correctly submitted by the appellant, he was satisfied that in the new pleadings after amendment the alleged documents were not annexed. The regulation quoted by the appellant is very clear that no document will be admitted before being served to the other party. In the present scenario it means the appellant was taken by surprise when the Tribunal admitted the document contrary to legal procedure. It is obvious that the legal procedures were not followed as laid in Regulation 10 (3) (a) of The

Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN no. 174.

From that end, the said exhibits are worth of being expunged as I hereby expunge them from the Court records.

I wish to respond to the second and fifth grounds of appeal together because both are answered by evidence on record. The appellant allege that he was allocated 125 acres in 1993 and the suit land which is 30 acres is within 125 acres of his farm. The point is strongly disputed by the 2nd respondent who also allege that he was allocated such land by the Village Counsel in 2008.

The appellant has stated in part in his evidence: -

> *"The suit land portion is at the centre. On the east and north it is bordered by myself. To the west likewise. On the south is as organization known as kapunga small holders... "*

In his evidence the 2nd respondent said that he is not bordering with the appellant by any means. During cross examination he said that he is bordering with the appellant. In the other side the appellant said that he happened to be mediated by the 2nd respondent in a dispute which involved the whole farm including the suit portion. By then the 2nd respondent was a member of the Kapunga village counsel. The second respondent did not cross examined on these critical points about

bordering or mediation on the disputed plot. In the case of **SADRACK BALINAGO vs. FIKIRI MOHAMED @ HAMZA, TANZANIA NATIONAL ROADS AGENCY (TANROADS) and ATTORNEY GENERAL,** Civil Appeal No. 223 of 2017 (unreported) where the Court said that failure to cross examine on material issue amounts to acceptance of the truthfulness of the other parties account.

Guided by this settled law and the testimony of PW2, PW3 and PW4 it is obvious that the disputed land is the property of the appellant. PW3 who was a casual labourer of the appellant testified to the effect that the 2nd respondent grabbed 30 acres of the appellant. The 2nd respondent who alleged that he was allocated the dispute land later around 2007 could not prove his allegations instead he relied on the contradictions noted. During cross examination he said that he has the application letters which he used to requested the said land from the village counsel but he never tendered the same. He also said that there are eye witnesses but he could not bring them to testify. I agree with the appellant that the trial Tribunal could not evaluate properly the evidence on record, re-evaluation made comes with the proper finding that the trial Tribunal erred to find that the 2nd respondent was a lawful owner of the suit land.

The first appellate Court has legal authority to invoke re- evaluation of evidence. In **Standard Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 (unreported) on the same subject, this Court held that;

> *"The law is well settled that on first appeal the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (Peters v Sunday Post, 1958 EA 424; William Diamonds Limited and Another v R,1970 EA 1; Okeno v R, 1972 EA 32)".*

The third ground of appeal the appellant complaint is that visit locus in quo was necessary. I buy the findings from the case he had quoted that visit locus in quo is the discretion of the Court. The trial Tribunal correctly exercised its discretion because the evidence on record clearly resolved the issue in dispute as noted in the re-evaluation of evidence made.

As a whole then, and for the reasons so advance herein above the trial Tribunal erred to rule that the 2nd respondent was a lawful owner of the suit land. Appeal allowed; the appellant is the lawful owner of the suit land measured thirty acres.

Dated at Mbeya this 29th March 2022

D. P. Ngunyale

Judge

29/03/2022

Judgment delivered in presence of the appellant in person.

D. P. Ngunyale

Judge

29/03/2022