

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

LAND APPEAL NO. 60 OF 2021

*(Arising from Application No. 08 of 2018 of the District Land and Housing Tribunal for Ngara at Ngara
(R. Mteti- Chairman)*

THOMAS RWAGAKINGA.....APPELLANT

VERSUS

FELICIAN ZACHARIA.....1ST RESPONDENT

DAMIAN B.NGEZE.....2ND RESPONDENT

PIUS B. NGEZE.....3RD RESPONDENT

ODAS BWANDAYE.....4TH RESPONDENT

SELESTINE BWANDAYE.....5TH RESPONDENT

MIBURO MICHAEL NGEZE.....6TH RESPONDENT

BURCHARD NGEZE..... 7TH RESPONDENT

JUDGMENT

*15/02/2023 & 20/02/2023
E. L. NGIGWANA, J.*

This appeal emanates from the decision of the District Land and Housing Tribunal for Ngara at Ngara in Land Application No.08 of 2018 whereby the respondents herein sued the appellant and one Ladislaus Nguruka Luhembe (not a party to this appeal) on allegation that the appellant and the said Ladislaus Nhguruka Luhembe had encroached into their land allocated to them in 1984 by Rulenge Village Council within Ngara District in Kagera

Region. The said land whose size is estimated to be 50 acres valued at **Tshs. 10, 000, 000/=** situates at Semugunzu area within Rulenge Village in Ngara District. It is further alleged that, in 2012, Rulenge Village Council trespassed into the disputed land, but on 26/03/2013, the DLHT for Chato at Chato vide Land Application No.16 of 2012, declared the respondents as the lawful owners of the Suit land.

On the other hand, the appellant herein and the said Ladisluas Nguruka Luhembe denied the respondents' claims. Upon trial, the DLHT decided the matter in favour of the respondents. In other words, the respondents were declared the lawful owners of the disputed land therefore, the appellant and any other person were ordered to give vacant possession of the disputed land.

The appellant, being aggrieved by the decision of the DLHT, appealed to this court armed with four (4) grounds of appeal, however, on 21/11/2022, the appellant vide his advocate Mr. Raymond Laurent sought leave of this court to file one additional ground of appeal and the prayer was duly granted. When the this appeal was called on for hearing on 15 02/2023, the appellant vide his advocate abandoned the 1st, 2nd, 3rd and 4th grounds of appeal which I see no reasons to reproduce them here. Therefore, remained with one ground of appeal to wit; additional ground which reads as follows;

"That, the trial tribunal erred in law by deciding in favour of the respondents while the proceedings were tainted with illegality and procedural irregularities ".

At the hearing of this appeal, the appellant had the legal services of Mr. Raymond Laurent, learned advocate whereas the respondents had the legal services of Mr. Alli Chaman, learned advocate.

Arguing the herein above ground, Mr. Raymond briefly submitted that in the trial tribunal, there was failure to effectively involve assessors in the hearing and determination of the matter. He referred this court to the typed proceedings of the DLHT dated 28/03/2019 whereby issues were framed in the absence of assessors, and for that matter, it is obvious the trial tribunal commenced the hearing while it was not properly constituted as required under section 23 of the Land Disputes Courts Act, [Cap.216 R. E 2019] read together with Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003.

Mr. Raymond went on submitting that the proceedings of the trial tribunal revealed 18/12/2020, the trial tribunal visited the *locus in quo*, but the proceedings taken in the *locus in quo* did not form part and parcel of the tribunal proceedings, however, what transpired therein formed the basis of

the trial tribunal decision. He added that the two omissions suffice to vitiate the proceedings of the DLHT.

He referred this court to the case of **Kimnidimitri Mantheakis versus Ally Azim Dewji & 7 Others**, Civil Appeal No.4 of 2018 where the Court of Appeal stated the procedure to be observed at the *locus in quo*. He also made reference to the case of **Prof. T. L. Maliyamkono versus Wilhelm Sirivester Erio**, Civil Appeal No. 93 of 2021 CAT (unreported) whereby the proceedings in relation to visitation of the locus in quo were nullified owing to the reason that the required procedures were not followed at the *locus in quo*.

He added that considering what has transpired in the instant matter, the interest of justice demands for the nullification of the whole proceedings, quash and set aside the resultant judgment and orders of the DLHT and order a re-trial.

In reply, Mr. Chamani conceded to the submission made by Mr. Raymond learned counsel for the appellant but urged the court to order each party to bear its own costs because the noted irregularities were caused by the trial tribunal itself.

Having considered oral submissions advanced by the learned advocates and upon gone through the proceedings of the DLHT, the issue for determination is whether this appeal is meritorious.

Section 23 (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], provides that;

*"The District Land and Housing Tribunal **shall be constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment.**"*

In the instant matter, Part of the typed judgment of the DLHT dated 26/02/2021 at page 11 reads;

*" Kabla ya kuanza Mambo yote bishaniwa niwakumbushe **kwamba hakuna maoni ya wazee kwa kuwa wazee walionza kusikiliza shauri hili ambao ni Justine na Helena muda wao wa kuhudumia uliisha hivyo shauri liliendelea chini ya kifungu 23 (3) cha sheria ya Mahakama za Migogoro ya Ardhi Sura 216 R.E 2019** kama kumbukumbu za baraza hili za tarehe 28/10/2019 zinavyoonesha."*

At the same time, part of the decree extracted from the said judgment reads;

"Na kwa kuwa maombi haya yanakuja kwa ajili ya hukumu mbele ya Mhe Mtei Mwenyekiti akisaidiwa na na Charles Mbeikya na Christina Mugasha wajumbe wa Baraza hili".

Reading the quoted parts of the judgment and the decree, it is not clear as to whether the Hon. Chairman (R. Mtei) proceeded and determined the matter in absence of assessors. Apart from that confusion, the crucial question in this matter is whether at the first date of the commencement of the hearing, the tribunal was properly constituted.

The hearing of the case starts on the date of framing issues. Regulation 12 (1) and 3 (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation of 2003 stipulates that the Chairman at the commencement of the hearing read and explain the contents of the application to the respondent and that, the tribunal shall, where the respondent does not admit the claim or part of the claim, lead the parties with their advocates (if any) to frame issues.

The stage of framing issues is an important one in as much as on that date the scope of the trial is determined by laying the path on which a trial should proceed excluding diversions and departures therefrom. In other words, the trial proceedings are guided by issues framed before commencement of the

hearing. It is the primary duty of the court to do so after it has applied its mind to the pleadings of the parties.

It is my considered view that, since this is a very important stage as per Regulation 12 (1) and 3 (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation of 2003, the Chairman cannot sit without assessors. In other words, the hearing cannot commence without assessors though the Chairman may not finish the proceedings with the assessors see section 23 (3) of the Land Disputes Courts Act, [Cap 216 R: E 2019.

As submitted by Mr. Raymond and conceded by Mr. Chamani, the hearing of Application No. 08 of 2018 commenced on 27/03/2019 before R. E. Assey (Chairman) in absence of assessors and since assessors were not present, it goes without saying that the tribunal was not properly constituted. Unless properly constituted, the DLHT has no Jurisdiction to determine the matter before it. Since in the instant matter, the DLHT was not properly constituted, it is apparent that it had no jurisdiction to commence the hearing of Application No.08 of 2018.

It should always be noted that the question of jurisdiction is so fundamental that a court must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial because it is risky and unsafe for the court to proceed with the trial of the

case on the assumption that the court has jurisdiction to adjudicate upon the case. See the case of **Fanueli Mantiri Ng'unda versus Herman Mantiri Ng'unda and 20 others**, Civil Appeal No. 8 of 1995 CAT (Unreported).

Even if we assume for the purposes of argument that the tribunal was properly constituted, still the proceedings of the trial tribunal cannot stand owing to the reason that the procedures in relation to the visit at the locus in quo were violated. As submitted by Mr. Raymond and conceded by Mr. Chamani, it is apparent that the trial tribunal visited the *Locus in quo* on 18/12/2020 but the proceedings as to what transpired on the *locus in quo* did not form part of the proceedings of the trial tribunal but formed the base of the decision. Since the said proceedings are missing this court as a first appellate court cannot make a proper re-evaluation of the entire evidence including what had transpired at the *locus in quo*.

It is common understanding that a visit to the *locus in quo* is purely at the discretion of the court but when the court or tribunal opts to exercise such discretion, the duty of recording what transpired there is no longer discretionary.

In the case of **Sikuzani Said** (Supra) the Court of Appeal of Tanzania held among other things that;

"There is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo, as the same is done in the discretion of the court or the tribunal particularly when it is necessary to verify the evidence adduced by the parties during trial. However, when the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed."

In the case **Nizar H. Ladak versus Gulamali Janmohamed** [1980] TLR 29 the Court of Appeal of Tanzania has laid down some of the guidelines or procedures which a court or a tribunal visiting the locus in quo has to observe. The Court held that;

"A visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witness as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in

order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future."

The herein above decisions shows that, a court or tribunal visiting the locus in quo has to make note or record, invite parties to call their witnesses who can give evidence in relation to location of the disputed land, the extent, identify the boundaries and physical features on the land. The witnesses may also point out objects and places referred to in evidence physically and in order to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries.

In the current decision of the Court of Appeal in **Kimonidimitri Mantheakis versus Ally Azim Dewji & 7 Others (Supra)** emphasized that at the locus in quo the Judge or Magistrate or Chairperson must; **One**, ensure that all parties, their witnesses and advocates (if any) are present. **Two**, allow the parties and their witnesses to adduce evidence on oath at the locus in quo. **Three**, allow cross examination by either party, or his counsel. **Four**, record all the proceedings at the locus in quo; and **five**, record any observation, view, opinion or conclusion of the court including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any.

In our case, the trial tribunal had miserably failed to keep the necessary records when visited the locus in quo, hence it is not known what transpired there. As per the case of **Prof. T. L. Maliyamkono versus Wilhelm Sirivester Erio (Supra)**, where the appellate court finds that the procedure in relation to the visit at the locus in quo was not complied with, it may order for fresh visit.

In the present matter, since hearing of the matter started while tribunal was not properly constituted, its proceedings are nullity, thus a fresh visit of *locus in quo* cannot cure the defect. In the event, I am constrained to invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Courts Act, [Cap 216 R.E 2019] to nullify the proceedings of the DLHT, quash and set aside the judgment and orders thereto. For avoidance of doubt, Application (Plaint) and the Written Statement of Defence (W.S.D) in respect of Land Application No. 08 of 2018 remain intact.

For the interest of justice, I remit the case file to the DLHT for an expedited retrial before another Chairman/Chairperson sitting with a new set of assessors. Having considered the fact that the anomaly was caused by the Tribunal, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 20th day February, 2023



E. L. NGIGWANA

JUDGE

20/02/2023

Court: Judgment delivered this 20th day February, 2023 in the presence of Mr. Raymond Laurent for the Appellant, Mr. Alli Chamani, learned advocate for the respondent's, Hon. E. M. Kamaleki, Judge's Law Assistant ad Ms. Sophia Fimbo, B/C.



E. L. NGIGWANA

JUDGE

20/02/2023