

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOKA DISTRICT REGISTRY
AT BUKOKA**

CIVIL APPEAL NO. 15 OF 2021

(Arising from Civil Case No.13 Of 2020 of the Resident Magistrate Court. of Bukoba at Bukoba (A. A. W. Kabuka - RM)

YONATHAN MUTAGWABA.....1ST APPELLANT

BELINA MUTAGWABA.....2ND APPELLANT

VERSUS

SAJIDU SADICK.....RESPONDENT

RULING

22 /02/2023 & 24/02/2023
E. L. NGIGWANA, J.

This appeal stems from the decision of the Resident Magistrates' Court of Bukoba at Bukoba in Civil Case No.13 of 2020 whereby the respondent herein sued the appellants herein for breach of contract. The said contract was entered on 07/06/2017 whereby the respondent was to construct a dwelling house with twelve (12) rooms for the appellants. In turn, the appellants were to hand over their two farms of trees to the respondent as consideration.

The construction was to be accomplished within the period of three years, however, the respondent, in the course of performing his contractual obligations, he was suspended and prevented by appellants herein to access the site on allegation that the terms of the contract were violated. They did so vide a letter dated 19/10/2019 titled "**Taarifa ya Kusitisha Mkataba wa Ujenzi**

wa nyumba kwa kubadilishana na mashamba ya miti". The step taken by the appellants provoked the respondent, thus instituted a case in the trial court against the appellants seeking for the following reliefs;

- (a) An order compelling the appellants to honour and comply accordingly with the contract by permitting the respondent to perform part of his contract without obstruction with exclusion of all days May, 2019.*
- (b) An order declaring the letter with reference Number LJE/DN/VOL.1/2019 dated 19th day of October, 2019 as being void with no any legal effect.*
- (c) Payment of **Tshs 79, 025,300/=** being specific damages incurred by the respondent in the construction of the appellants' house and exhausted improvement of the land exchanged in due consideration of the construction of the appellants' house in case the appellants' are unwilling to allow the respondent to accomplish the contract.*
- (d) Interest at a tune of 12% from the date of the judgment to the date of final settlement.*
- (e) Payment of general damages.*
- (f) Costs of the suit.*
- (g) Any other relief at the court discretion.*

Upon trial, the trial court decided the matter in favour of the respondent, by issuing an order compelling the appellants to honour the contract, and declaring the letter date 19/10/2019 to be of no legal effect. The trial court further ordered and decreed that the respondent should be allowed to complete the construction as per contract. Furthermore, the period from 19/10/2019 when the respondent was suspended was excluded, and finally, appellants were condemned to pay costs of the suit.

The said decision triggered the discontented appellants to lodge an appeal to this court armed with five (5) grounds of appeal which for the purposes of this ruling, I find no compelling reasons to reproduce them.

At the hearing of this appeal, the appellants had the legal services of Mr. Dastan Mujaki, learned advocate whereas the respondent had the legal services of Mr. Peter Matete, learned advocate. The appeal was orally argued.

In the course of composing the judgment, I re-visited the trial court proceedings and discovered that there is a crucial legal issue which needs to be addressed. The issue arose from the fact that the trial court as per page 9 of its judgment stated clearly that it visited the *locus in quo*. Page 61 of the trial court proceedings revealed that the locus in quo was to be visited on 28/02/2022 but the proceedings at the locus in quo were not recorded. However, on 4/03/2022,

advocates for both parties appeared in court and made submission on what they have observed at the locus in quo.

In that circumstance, and being guided by the Court of Appeal of Tanzania in the cases; **Zaid Sozy Mziba versus Director of Broad casting, Radio Tanzania Dsm and Another**, Civil Appeal No.4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import and Export Co. Ltd**, Civil reference No.20 of 2006 (Both unreported), I re-opened the proceedings by directing the parties to address me on this issue;

"Whether the mandatory procedures in relation to the visit at the locus in quo were complied with by the trial court."

Submitting on this issue, Mr. Matete stated that reading the trial court proceedings, it goes without saying that the mandatory procedure in relation to the visit at the *locus in quo* were not observed. He added, is not even clear whether the visit was done on 28/02/2022, however, on 4/03/2022 advocates made their submission on what they observed at the *locus in quo*. The learned counsel supported his stance with the decision of the court of Appeal in **Kimonidimitri Mantheakis versus Ally Azim Dewji & 7 Others**, Civil Appeal No. 4 of 2018 where the Court of appeal enumerated the procedures to be observed at the *locus at quo*. He added that since the proceedings before the visit order have no problem, and since the trial Magistrate is available, the

remedy, after nullification of the proceedings in relation to the visit at the locus in quo and after quashing and setting aside the resultant judgment and orders thereto, is to order a fresh visit. He ended up his submission urging the court to waive costs owing to the reason that this fatal irregularity was caused by the court itself.

On his side, Mr. Mujaki, outrightly supported the submission by Mr. Matete that there was non-compliance of mandatory procedures pertaining the visit at the locus in quo. He also supported submission by Mr. Matete on the proposed way forward for the interest of justice.

Having heard submission by both advocates, the issue for determination is whether the issue raised by the court *suo motu* is meritorious. Reading the trial court judgment and its proceedings, it is apparent that the trial tribunal visited the Locus in quo (though the date is not certain) but the proceedings as to what transpired at the locus in quo did not form part and parcel of the proceedings of the trial tribunal but formed the base of the decision.

For that matter, this court as first appellate court cannot make a proper re-evaluation of the entire evidence including what had transpired at the visit in the locus in quo.

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

In the case of **Sikuzani Saidi Magambo & Another versus Mohamed Roble, Civil Appeal No. 197 of 2018 CAT (Unreported)** 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 of **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."

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 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 the case of **Prof. T. L. Maliyamkono versus Wilhelm Sirivester Erio, Civil Appeal No. 93 of 2021**, the Court of Appeal stressed that where an appellate court finds that the procedure in relation to the visit at the locus in

quo was not complied with the court has to order for fresh visit where practicable.

In the instant matter, as correctly submitted by both advocates, the trial court had miserably failed to keep the necessary records when visited the locus in quo, hence it is not known what transpired there.

I therefore proceed to nullify the proceedings of the court from page 61 of the typed proceedings up to page 68, quash and set aside the resultant judgment and decree thereto. For avoidance of doubt, other proceedings remain intact.

I remit the file to the trial court for an expedited fresh visit at the locus in quo.

I further direct that the laid down procedures should be complied with and thereafter, the judgment should be composed by the same Magistrate (A. W. Kabuka) according to law. However, where it is impracticable, the visit may be done by another competent Magistrate who also will compose the judgment according to law. Having considered the fact that the anomaly was caused by the Trial court, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 24th day February, 2023.



E.L. NGIGWANA

JUDGE

24/02/2023

Ruling delivered this 24th day of February, 2023 in the presence of the 2nd appellant in person, Mr. Raymond Laurent, learned advocate holding brief for Mr. Dastan Mujaki, Advocate for the appellants, also holding brief for Mr. Projestustus Mulokozi, advocate for the respondent, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Sophia Fimbo, B/C.




E.L. NGIGWANA

JUDGE

24/02/2023