IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

IRINGA REGISTRY

AT IRINGA

LAND APPEAL NO. 57 OF 2022

(Originating from Land Application No. 95 of 2021 in the District Land and Housing Tribunal of Iringa at Iringa)

JUMA NJOLE .....APPELLANT

VERSUS

DICKSON NGAILE (Administrator of the Estate of the Late Emilyo Mgaimale Ngaile) .....RESPONDENT

JUDGMENT

Date of Last Order: 11.05.2023
Date of Judgment: 26.05.2023

A.E. Mwipopo, J.

Emilyo Mgaimale Ngaile sued Juma Njole, the appellant, before the District Land and Housing Tribunal for Iringa District at Iringa (herein referred to as DLHT) in Land Application No. 95 of 2021 for trespassing into the disputed land. Emilyo Mgaimale Ngaile died before the determination of the case. Mr. Dickson Ngaile, the respondent, was appointed administrator of the deceased estates and proceeded with the case. The case was heard in full,

and the trial Tribunal decided the case in the respondent's favour. The appellant was dissatisfied with the decision, and he preferred this appeal. The memorandum of appeal filed by the appellant contains three grounds of appeal as shown hereunder:-

i. *That, the trial tribunal erred in law and fact by deciding Application No. 95 of 2022 in favour of the respondent without considering the weight of the evidence of each party and relying on hearsay evidence from the respondent's side.*

ii. *That, the learned chairman erred in law and fact by introducing the respondent in Application No.95 of 2021 without following the proper procedures after the death of the former applicant in Application No. 95 of 2021.*

iii. *That, the trial tribunal erred in law and fact by deciding the claim without visiting the locus so as to get a clear picture and size of the disputed land.*

At the hearing, Mr. Gervas Semgabo, advocate, appeared for the appellant, whereas the respondent appeared in person. The Court invited both parties to make their submissions.

In his submission, the counsel for the appellant abandoned the 2nd ground of appeal and submitted on the 1st and 3rd grounds of appeal. With regard to the 1st ground of appeal, he submitted that the trial DLHT erred in deciding in favour of the respondent by relying on the hearsay evidence

adduced by the respondent. He submitted that the standard of proof in civil cases is on a balance of probabilities. Reliance to the point was made to the case of **Hemed Said vs. Mohamed Mbilu (1984) TLR 113**, where it was held that the person whose evidence is heavier than that of the other is the one who must win. The evidence in the record shows that the appellant's evidence is heavier than that of the respondent. The testimony of SM1 (Dickson Ngaile) contradicts itself by saying that the size of the land in dispute is 15 acres. From those 15 acres, seven (7) acres were given to village authority to build a school. The question is, what was the actual size of the land in dispute? Is it 15 acres or 8 acres? The respondent claims 15 acres without including the Primary School in the case. This raises doubt if the respondent (SM1) knew the suit premises.

The respondent and his witnesses failed to prove the size of the land in dispute. The counsel went on to submit that Fidelis Kove (SM2) testified that the school was built in 2012. This means the said seven acres had already been given to the village authority by 2012. Hence, the size of the land in dispute was not 15 acres. By the time the respondent instituted the dispute in the DLHT, the land which remained in his possession was eight acres and not 15 acres as they had stated in the application before DLHT.

The counsel said that the trial DLHT held that the appellant failed to prove his ownership of the land in dispute. The appellant's testimony at the trial DLHT is that the land in dispute belongs to him as the land was given to him by his father. SU2 testified that the land in dispute was given by his father to the appellant's father. Even SM2 testified that the father of SU2 owned the area before he gave the land to the respondent's father. SU2 testified that he was present when his father gave the land to the respondent's father, and he knows all boundaries of the area. This evidence is heavier than the respondent's, proving that the land belongs to the appellant.

Regarding the 3rd ground of appeal, it was submitted by the appellant that this Court, in the case of **Martin Mgando vs. Michael F. Mayanga**, Land Appeal No. 93 of 2019, High Court Land Division at DSM (unreported); and **Mariam F. Kalengela vs. Victoria Swai**, Land Appeal 290 of 2021, High Court Land Division at DSM, (unreported), stated the factors to be considered before the Court decide to visit the locus in quo. The Court, in these two cited cases, was of the view that although it is not mandatory to visit locus in quo, there are circumstances of the case where it is essential to visit the locus in quo to satisfy itself as to the size and boundaries of the land

in dispute. In this case, there was a dispute on the size of the disputed land between 15 acres, eight acres or 45 acres. The difference is significant, and the DLHT was supposed to visit the locus quo to ascertain the size of the disputed land.

Further, the parties had a dispute on things found in the disputed land. SM1 testified that the land is used for farming, and there are eucalyptus trees, bamboo trees and 12 houses inside the land in dispute. But, the appellant (SU1) testified that there is only a bush which is used for animal grazing. SU2 testified that the dispute was over border trespass or encroachment between the appellant and respondent. The respondent has an unfinished house in the area, which the village authority stopped its development after it found that the respondent had trespassed into the appellant's land. These circumstances made it essential for the trial DLHT to visit the locus in quo and satisfy itself as to evidence adduced by witnesses from both sides. The act of the trial DLHT to enter judgment without visiting the locus in quo has prejudiced the appellant as the dispute is on the boundaries between the appellant and respondent areas.

In his reply, the respondent submitted that the trial DLHT was correct to decide that the respondent lawfully owns the land in dispute. The dispute

commenced in 2016. The late Emilyo Ngaimale Ngaile was given land by her father, Ngaimale Ngaile, in 1994. Ngaimale Ngaile was given the land in the 1980s by Aloysi Kidava and Ngalifiliki Chuma. Ngaimale Ngaile used those land peacefully. In 2007, Ngaimale Ngaile gave seven acres to the village to build a school. The school was completed in 2012. The size of the remaining land, which the late Emilyo owned, was 15 acres. The land has bamboo trees, Eucalyptus trees, and fruit trees. The dispute emerged in 2016, and the village authority and District authority tried to resolve it. After those authorities failed to resolve the dispute, they asked not to develop the area until it was resolved. The size and boundaries of the land in dispute are well known. The land borders on two sides with the Mkuza area; one side borders Temilinga Mbelwa area; and Njole farm on the other side.

It was submitted further in response that there was no need to visit the locus in quo because the size of the land in dispute is well known, and the location of the disputed land is known. Witnesses have testified to see the buildings in the land in conflict. The evidence is sufficient, and there was no need for the trial DLHT to visit the locus in quo. In 2016 there was a dispute even in the seven acres given to the respondent to the village authority. The appellant even claimed the area given to build the school belonged to them.

But, the matter was resolved, and the school were handled with seven acres to build a Primary School. The remaining land to the respondent after seven acres were given to the Village Authority to build a school is approximately 15 acres. The land was not measured. The size is an approximation. Thus, there was no need for the trial Tribunal to visit locus in quo.

In a short rejoinder, the appellant said that what was testified by the respondent at the trial was hearsay as the respondent was still young to remember what transpired in the 1980s. The counsel for the appellant retaliated his submission in chief.

Having heard the respective submissions, the issue to be determined here is whether this appeal has merits.

The counsel for the appellant submitted on the 1st and 3rd grounds of appeal after abandoning the 2nd ground of appeal. In determining the appeal, I will consider issues on the ground of appeal number 1 and 3 which the appellant made his submission. In the first ground of appeal the appellant asserts that the weight of his evidence is heavier than that of the respondent. It was submitted that the respondent's evidence contradicts itself on the size of the land in dispute, and the evidence of SM1 (the respondent) is hearsay. In contention, the respondent said that the size and area of the disputed land

are known. The size of the land in dispute is 15 acres, and this does not include seven acres given to the village authority to build a school. He also named neighbours with whom they share boundaries in the land in dispute.

As the appellant submitted, the standard of proof in civil cases is on a balance of probabilities. The party with heavier evidence has to win the case. The standard of proof on a balance of probability requires the evidence to carry a reasonable degree of probability but not as high as needed in a criminal case. In **Mathias Erasto Manga vs. Ms. Simon Group (T) Limited**, Civil Appeal No. 43 of 2013, Court of Appeal of Tanzania at Arusha, (unreported), on page 9, it was held that:-

> *"The yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other."*

The appellant averred that his evidence was heavier and the respondent's evidence was hearsay. To determine this issue, I am briefly visiting all evidence available in the record. The respondent's (SM1) evidence shows that the land in dispute size is 15 acres, and the late Emilyo Mgaimale Ngaile owned it. The land borders land owned by Njole, Mkuza Company, and Temilinga Mbwelo. The late Emilyo Mgaimale Ngaile inherited the land from his father, Mgaimale Ngaile, and has lived in the disputed land since 1994.

The dispute over the ownership arose in 2016. SM2 testified that the size of the land in dispute is 15 acres, and the respondent inherited the land from his father, Mgaimale Ngaile. Mgaimale Ngaile got the land from Aloyce Kidava and Derifwila Chuma. The disputed land borders land owned by Njole, Mkuza Company and Temilinga Mbwelo. SM3 testified that the respondent owns the land in dispute; they have lived there and raised their families there. The size of the land is 15 acres. The land borders land owned by Njole, Mkuza Company and Temilinga Mbwelo.

The appellant evidence (SU1) shows that in 2008 he found 2 acres of his land had been cleared. The size of the whole land he own is 45 acres. He said his land borders school land, Aloyce Kidava, Gharifu Ngilachuma and Temilinge Mbelwa Kidava. SU1 said he is living closer to the disputed land. He didn't know if the area where the respondent was living belonged to him, but he knew that it was given to the respondent by Kidava. SU2 testified that he knew the boundaries of the land in dispute, but he didn't know how they got it. The appellant uses the land in dispute, and he doesn't know the size of the land in dispute. The respondent was erecting a building on the appellant's side. The school was built in the area owned by the respondent. The school area is a bordering area owned by Mkuza, Njole and Temilinge.

SU3 testified that he knew the land in dispute. The land in dispute was owned by his father (Aloyce Kidava), who handled it to the appellant's family. The respondent entered the appellant's land by six footsteps. The land in dispute belongs to the appellant. He knows where the respondent's land borders the appellant's land. The respondent was given the land by his father.

From the evidence available in the record, the respondent proved that the size of the area in dispute is 15 acres. This does not include the area of the school, as there is no dispute at all on the seven (7) acres owned by the school. The application shows the location and size of the suit land in paragraph 3 that the land is not surveyed and is approximately 15 acres located at Kibati Suburban at Lindamatwe Village, within Kilolo District and Iringa Region. In the north, the land boarders Emilyo Ngaile; in the South, it borders the Mkuza Company; in the East, it borders Mbwelo and Njole families; and in the West, it borders the Mpunza family. SM1, SM2 and SM3 evidence proved that the land in dispute is 15 acres and borders land owned by Njole, Mkuza Company, and Temilinga Mbwelo.

The appellant's evidence is not consistent with the boundaries of the suit land. SU1 testified that his land borders land owned by the school, Aloyce Kidava, Gharifu Ngilachuma and Temilinge Mbelwa Kidava. He said that the

size of his land is 45 acres. The respondent has cleared 2 acres of his land and has sold 3 acres. SU2 testified that the school area is a bordering area owned by Mkuza, Njole and Temilinge. SU2 stated on page 10 of the trial Tribunal's typed proceeding, when cross-examined, that the school area is not part of the dispute. SU3 said nothing about the borders in suit land. He said that the respondent had trespassed into the appellant's land for about six footsteps. Looking at this evidence available in record, the respondent's evidence proved the location and size of the suit land. The appellant's evidence was contradictory on the size of the suit land, and it is not clear on its boundaries.

Further, the evidence from SM1, SM2 and SM3 proved that the respondent inherited the suit land from his father and has lived there since 1994. In 2007 respondent gave seven acres to the village to build a school. The respondent's father obtained that land in the 1980s from Aloyce Kidava (SU3 father) and Derifwila Chuma. On the other side, the appellant's evidence shows that the dispute arose in 2008 after he found his 2 acres were cleared. The evidence from SU3 shows the appellant family obtained land from SU3's father. There is no evidence showing how the appellant got the land from his family and when. Thus, I'm of the same position as the trial DLHT that the

respondent evidence on the ownership of the suit land is heavier than that of the appellant.

In the 3rd ground of appeal, the appellant submitted that the trial Tribunal erred in deciding the matter without visiting the locus so as to get a clear picture and size of the disputed land. The counsel for the appellant said that as there was a dispute between the parties on the size and things found in the disputed land, it was important for the trial Tribunal to visit locus in quo and satisfy itself as to the evidence adduced by witnesses from both sides. The respondent said in response that there was no need to visit the locus in quo because the size and the location of the disputed land are clearly known. He said the evidence before the DLHT was sufficient to make the Tribunal determine the matter justly, and there was no need to visit locus in quo.

In determination of this issue of visiting the locus in quo, the law is settled that it is not mandatory to visit the locus in quo. The visit to locus in quo is available only in exceptional circumstances. Where the evidence adduced suffice to dispose of the matter, there is no need to visit locus in quo. In the case of **Dar Es Salaam Water and Sewerage Authority vs. Didas Kareka and 17 Others**, Civil Appeal No. 233 OF 2019, Court of Appeal of

Tanzania at Dar Es Salaam, (unreported), it was held on page 29 of the judgment that:-

> *"We are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to inspect a locus in quo, as the same is done at the discretion of the court or tribunal, particularly when it is necessary to verify evidence adduced by the parties during trial."*

In the case of **Avit Thadeus Massawe vs. Isdory Assenga**, Civil Appeal No. 6 of 2017, Court of Appeal of Tanzania at Arusha, (unreported), it was held on page 16 that:-

> *"We have observed above that the evidence on record was insufficient for the Court to determine the appeal justly, with clarity and certainty because of the conflicting evidence regarding the location of the suit property. We are of the view that this is a fit case for the trial court to exercise its discretion to visit the locus in quo. Had the trial court done so, the question regarding where the suit property is located would have either not arisen or would have been easily determined."*

From the above-cited cases, the trial Court has to exercise its discretion to visit the locus in quo where the evidence in the record was insufficient to make the Court or Tribunal determine the matter justly with clarity and certainty. In the instant case, the evidence in the record has proved that the

size of the suit land is 15 acres. SM1, SM2 and SM3 stated the size, location and boundaries of the suit land. The appellant (SU1) testified that there is a natural forest in his area, and there is no house or planted trees. However, SU2 testified that in the land in dispute there is an unfinished house of the respondent, and the appellant was cultivating millet and grazing. SU3 also testified that in the suit land respondent was growing crops. I'm satisfied that the evidence in the record was sufficient for the trial Tribunal to determine the matter justly with clarity and certainty. The evidence was sufficient for the Court to determine whose evidence is credible. In the instant case, the evidence in the record has proved that the size of the suit land is 15 acres, and the location and boundaries of the suit land were stated. The properties and usage of the suit land were declared. Although SU1 (appellant) evidence showed different sizes and borders of the suit land, there are contradictions in his supporting evidence concerning the size and boundaries of the suit land. The same makes the appellant evidence to be unreliable. Thus, the evidence on record sufficed the trial Tribunal to decide the matter without visiting the locus in quo. The 3rd ground of appeal is devoid of merits.

Therefore, as both grounds of appeal were found to be devoid of merits, the appeal is dismissed for want of merits with costs. The decision of the trial Tribunal is upheld accordingly.

A.E. MWIPOPO

JUDGE

26/05/2023