IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND CASE APPEAL NO. 45 OF 2022

(Originating from Land Application No. 199 of 2016 of the District Land and Housing Tribunal for Moshi at Moshi).

MANASEH JASON MEELA.....APPELLANT

VERSUS

ANNA MSUYA..... RESPONDENT

JUDGMENT

31/03/2023 & 25/05/2023

SIMFUKWE, J

This appeal emanates from **Application No. 199 of 2016** of the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal). In a nutshell, the appellant sued the respondent herein before the trial tribunal on allegation that he had encroached his land measuring 75 meters paces long and 80 meters wide, located at Samanga village, Koniko B', in Moshi district within Kilimanjaro Region. The appellant alleged that the suit land was given to him by his late father in 1991.On the other hand, the respondent herein alleged that she purchased the disputed land in 1997 and 2005 from John Ulimari Minja and Wilfred Minja respectively. The trial tribunal visited the locus in quo and after considering evidence of both

parties, decided in favour of the respondent herein. Hence, this appeal in which the appellant has raised five grounds of appeal:

1. *That, the District Land and Housing Tribunal erred for failure to observe procedures and principles governing visiting "Locus in quo" when it visited the land in dispute something which prejudiced the appellant and which as a result vitiates its proceedings. (sic)*
2. *That, the trial chairman erred in law and facts for avoiding to consider necessary evidence which was produced by the appellant.*
3. *That, the trial chairman erred in both law and facts for holding that the evidence of the appellant and his wife was weak simply because he did not bring his neighbours to testify for him instead of weighing credibility of evidence which they adduced.*
4. *That, the learned trial chairman did not exhaustively evaluate and weigh the evidence before him in reaching the decision.*
5. *That, the trial tribunal erred for deciding to proceed with hearing after changing the chairman without consulting the parties whether they wanted the hearing to continue from where the new chairman found it or to start afresh with that another chairman.*

Hearing of the appeal proceeded orally. Mr. Erasto Kamani, learned counsel argued the appeal for the appellant while Mr. Tumaini Materu, the learned counsel, opposed the appeal for the respondent.

Mr. Kamani on the outset abandoned the 5th ground of appeal and he opted to argue the 3rd and 4th grounds of appeal jointly.

On the first ground of appeal, the learned counsel faulted the trial tribunal for failure to observe procedures and principles governing visiting of *locus in quo*. He submitted to the effect that during the hearing, the trial tribunal faced conflicting evidence on the boundaries of the suit land since the appellant told the Tribunal that the boundary of his land is a big and old tree while the respondent said that the boundary of her land was traditional trees commonly known as *'Masale'*. That, each party expressed the size of his/her land. Therefore, in order to clear out this confusion, the trial tribunal found it necessary to visit the locus in quo. He argued that there were two reasons for visiting the locus in quo; ***one***, to see the boundaries which had been mentioned by the parties and ***second***, to measure the size of the land of each party so as to understand whether the suit land was within the boundaries of the land of the appellant or the respondent.

Mr. Kamani was of the view that the said visit was not properly conducted because the procedures and principles which govern visiting *locus in quo* were violated. He cited the case of **Nizar M.H vs Gulamal Fazal Jan Mohamed [1980] TLR 29** where the Court of Appeal established principles to be observed by the court when visiting locus in quo. That, when the trial court finds it necessary and appropriate to visit the locus in quo *firstly,* it must attend with all the parties, their witnesses and the advocates if any. *Secondly,* the witnesses should testify at the locus in quo and their testimonies should be given on oath. *Thirdly,* parties or the advocates should be allowed to cross examine at the locus in quo.

Fourthly, if the matter in dispute requires measurement, the subject matter should be measured in the presence of the parties. *Fifthly,* the visiting court should record proceedings of what took place at the locus in quo. After that, the court should assemble and when the court assembles, the trial magistrate or chairman or judge should read out the notice and call for objections, opinions and questions from the parties. Thereafter, he should prepare his observations in relation to such a visit.

Mr. Kamani contended that in the present case, save for the fact that the tribunal arrived at the locus in quo with parties and the advocates, the rest requirements were not observed. That, witnesses were not allowed to testify, parties or the advocates were not allowed to cross examine, no notices were prepared to show what had been observed at the locus in quo and no measurements were made so as to ascertain whether the suit land was falling within the boundaries of the appellant or the land of the respondent.

He asserted that in the cited case, it was concluded that failure to observe these principles and procedures, vitiates the trial and its remedy is to nullify, quash and set aside the trial court's proceedings and judgment.

Mr. Kamani referred to another case of **Kimonidimitri Mantheakis vs Ally Azim Dewji and 7 Others, Civil Appeal No. 4 of 2018,** CAT (unreported) in which the Court of Appeal emphasized that trial courts should observe principles when visiting locus in quo. Otherwise, the proceedings would be nullified, quashed and set aside. The learned counsel quoted page 8 of the cited decision where the above noted principles and procedures for visiting locus in quo were re-stated

The learned counsel for the appellant reiterated that the trial tribunal rejected or ignored the principles and procedures for visiting the *locus in quo*. He said in the cited case, the Court of Appeal held that this omission/failure to observe the principles occasioned a miscarriage of justice and it subsequently allowed the appeal which was challenging a visit of a *locus in quo*. Mr. Kamani was of the view that since the trial tribunal omitted to observe the principles guiding visiting of *locus in quo*, such omission occasioned miscarriage of justice and the only remedy available is to nullify the proceedings and judgment of the trial tribunal.

On the second ground of appeal which is to the effect that the trial chairman erred both in law and fact for failure to consider the necessary evidence tendered by the appellant; Mr. Kamani explained that according to the appellant's application which was filed in the tribunal on 21st September 2016, the cause of action as per paragraph 6(a)(xv) to sub paragraph xix was shifting the boundary which separated the appellant's land from that of the respondent. That, in order to prove that event, the appellant tendered an exhibit which was received by the trial tribunal and marked as exhibit P1. That, in the said exhibit the respondent herein together with her colleagues had acknowledged that she adjusted the existing boundaries pretending that there were measuring a land which had been bought by the respondent. Thus, had the trial tribunal considered or even looked at this exhibit it could have been easy for it to understand that the respondent shifted the boundary from the original boundary to the new one. And it could have learnt that the same was trespass into appellant's land. Despite of admitting this exhibit, which in their view was very important, there is nowhere in the judgment where it

was mentioned. Thus, such omission by the trial tribunal to consider this important document resulted in a miscarriage of justice.

In respect of the 3rd and 4th grounds of appeal, Mr. Kamani submitted that the trial tribunal made a gross error for failure to evaluate the parties' evidence, thus reaching at unjust and wrong decision. That, according to its judgment, there is nowhere where the trial chairman evaluated evidence of the parties. That, after summarizing the evidence of both parties, the trial chairman rushed to conclude that evidence of the appellant/applicant is weak.

Mr. Kamani averred that it has been decided in a number of cases that summarizing evidence of the parties is different from evaluating such evidence. He referred to the case of **Leonard Mwanashoka vs Republic, Criminal Appeal No. 226 of 2014,** CAT (unreported), at page 5 where the Court held that:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation, and another thing not to consider the evidence at all in evaluation or analysis."*

The learned counsel pointed out that, in the present case the trial chairman just summarized evidence without evaluating the same. Concerning evidence of the appellant, the trial chairman stated clearly that his evidence was weak simply because he had brought his wife as witness and not his neighbours. Mr. Kamani opined that the trial chairman deliberately avoided to consider evidence which had been produced by

the appellant. He referred to the case of **Leonard Mwanasoka** (supra) at page 6 last paragraph, from the 2nd line where the Court of Appeal explained the impact of failure to evaluate evidence of the parties in a case and its consequences to the effect that:

> *"The appellant defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or improper evaluation of the evidence inevitably leads to wrong/or biased conclusions or inferences resulting in miscarriages of justice."*

In view of the above authority, the learned counsel submitted that since the trial chairman failed to evaluate evidence of the parties, particularly evidence of the appellant, he made a wrong and a biased conclusion and the same lead to miscarriage of justice. That, in the cited case, the Court of Appeal, though it was criminal, allowed the appeal, quashed the conviction and set aside the prison sentence. Similarly, he prayed that this court be pleased to find that failure to evaluate the parties' evidence is a serious issue which cannot leave the decision of the trial tribunal to stand. Thus, he called upon this court to nullify the proceedings and decision of the trial tribunal.

In conclusion, Mr. Kamani prayed the court to allow the appeal with costs, the proceedings and judgment of the trial tribunal be nullified and set aside and this court be pleased to order retrial of the case.

In his rebuttal to the submission in chief, Mr. Tumaini Materu the learned counsel for the respondent submitted that the procedures governing visiting of *locus in quo* were properly observed in Land Application No.

199/2016 at the trial tribunal because it was true that the trial tribunal visited the *locus in quo*. That, both parties together with their advocates were present, assessors were present and were allowed to ask questions. That, both parties were allowed to cross examine. The trial chairman asked various questions for the purpose of verifying boundaries and size of the land alleged to had been trespassed by the respondent. Moreover, the trial chairman observed that the boundaries which separate the appellant's land and respondent's land were traditional trees known as *'masale'* and other trees. After visiting the *locus in quo*, the trial chairman observed that the respondent's house was constructed two paces far away from the boundaries which separate the appellant's land and respondent's land.

Mr. Materu continued to submit that when the trial chairman allowed comments from the parties and their advocates, the appellant said that the respondent's house was constructed within eight meters from the boundary which separate the appellant's land and respondent' s land. The trial chairman observed that such comment lack merit because the respondent's house was constructed in 1998. That, the boundaries which separate the appellant's land and respondent's land were in line with big trees and *'Masale'.*

Mr. Materu insisted that the procedures for visiting *locus in quo* were properly followed and the record of the trial tribunal reveals the same. He stated further that, it is a settled principle of law that every case has to be decided on its own merit basing on the circumstances of each particular case. He cited the case of **January S. Mkumba and Another vs A.G,**

Civil Application No. 240/01 of 2019, Court of Appeal of Tanzania at Dsm**,** at page 15 to cement his point.

In the circumstances, Mr. Materu was of the opinion that procedures governing visiting *locus in quo* vary from each case depending on the circumstances of that case and it is not necessary to comply to all procedures governing visiting *locus in quo*. He argued that the purpose of visiting *locus in quo* is to verify the evidence adduced during the trial with the available evidence at the *locus in quo*. He supported his argument with the case of **Chacha Nyangeko vs Bhoke Nenga Gaibe and 2 Others, Land Appeal No. 11 of 2022**, where this court at page 9 and 10 observed that:

> *"Under the circumstances, I am of considered opinion that the visit at the locus in quo was properly done to enable the Tribunal arrive at the informed decision. It should be noted that there is no law which clearly and exhaustively provides for procedures of visiting the locus in quo rather the procedure has been developed through court practice. This being the court practice, the most important issue is for the court or Tribunal to do whatever enables it to get a true picture of the suit land and allow the parties to comment or ask questions, the underlying objective being to achieve substantive justice. It is not expected that the procedures for visiting the locus in quo will be exactly the same in all occasions. What is all required is for the court or tribunal to adhere to the basic requirements such as presence of parties at the locus in quo and availability of*

opportunity for the parties to ask questions or make comments on the evidence obtained at the locus in quo. All the same, it is my considered views that not every imperfection or violation of the procedures necessarily vitiates the proceedings. In the premises, I am opined that the basic requirement for visiting the locus in quo were substantively complied."

It was the opinion of Mr. Materu that not all violations of procedures of visiting *locus in quo* vitiates proceedings. Thus, since the trial chairman complied with basic principles of visiting *locus in quo*, the judgment and proceedings cannot be vitiated. He implored the court to find that the basic requirements of visiting *locus in quo* were complied with. That, it is obvious the tribunal, parties together with their advocates were aware of what transpired at the *locus in quo* and that is the purpose of visiting the *locus in quo*.

The learned counsel submitted further that even if the court will find that some of the principles were violated in visiting *locus in quo*, the proper remedy is to order fresh visit and not to nullify proceedings and judgment and order retrial as it was held in the case of **Bomu Mohamed vs Hamis Amiri, Civil Appeal No. 99 of 2018** at page 11 that:

"If for example it finds that the procedure in the trial tribunal was faulted, then it will order for a fresh visit."

Furthermore, Mr. Materu asserted that the proceedings of the trial tribunal were tainted with irregularity as the seller (DW2) of the disputed land was not joined as a necessary party. In the circumstances, the appellant was aware that the seller was using the said land before he had sold it, but

the appellant decided to sue the purchaser alone and not the seller. That was against the requirement of law expounded in various cases including the case of **Juma B. Kandalala vs Laurent Muikande [1983] TLR 103** in which the High Court at Tanga had this to say:

> *"In a suit for recovery of land sold to a third party, the buyer should be joined with the seller."*

The learned counsel was of the view that retrial is not the appropriate remedy, the appropriate remedy is to quash the proceedings and judgment

Mr. Materu combined the 2nd, 3rd and 4th grounds of appeal which concern evaluation of evidence. He supported the decision of the trial tribunal on the reason that the tribunal considered evidence of both parties, evaluated it and arrived at correct conclusion. In his evidence the appellant alleged that the disputed land measured 80x75 while the disputed land was smaller than that. He supported the findings of the trial chairman that the appellant had weak evidence because he did not tender a sale agreement.

It was submitted further that this court is empowered to re-evaluate evidence and come up with its own conclusion. Also, the remedy of failure to evaluate the evidence is not to nullify proceedings but to re-evaluate evidence. The learned counsel supported his argument with the case of **Peters vs Sunday Pos Ltd (1958) EA 424**. He prayed this court to re-evaluate evidence on record and satisfy itself whether there was sufficient evidence.

The learned counsel referred another case of **Said vs Mohamed Mbilu [1984] T.L.R 113** which held that:

"According to the law, the person whose evidence is heavier than the other is the one who must win. In considering the weight of evidence things necessary to be considered is quality of evidence."

Mr. Materu prayed this court to re-evaluate evidence and find that the respondent deserved to be the winner of this case. He also prayed the appeal to be dismissed with costs.

In his rejoinder on the first ground of appeal, Mr. Kamani reiterated his submission in chief that, save for the fact that the parties and their advocates attended the *locus in quo*, other requirements were not observed. That, witnesses who could tell the truth about the suit land were not present at the *locus in quo*, even few witnesses who happened to be at the *locus in quo* were not allowed to testify. That, it was true that the appellant and the respondent were allowed to give explanation. However, they did not give their testimonies on oath as required by the law. The learned counsel said that, under the circumstances, they could even tell lies to the trial chairman. That, even the words which were alleged to be said by the trial chairman at the *locus in quo* are not included in the record.

Mr. Kamani stated further that it was not true that parties were allowed to ask questions. That, neither of the parties nor their advocates were allowed to cross examine. Also, nothing was read to them at the *locus in quo* in order to make the parties and the advocates understand what had been observed by the trial chairman and no comments and questions were called for from the parties and the advocates. That, if the trial

chairman had read to them his observations, they could have asked why he had not included in his observations what was said by the appellant.

Concerning the case of **Chacha Nyangeko** (supra) which has been cited by the learned counsel for the respondent, Mr. Kamani submitted inter alia that the same is a High Court decision which apart from the fact that it does not bind this court, the same was decided par incuriam because it contradicted the decision of the Court of Appeal on the principles which should be observed and the remedy available when the court finds that visiting of *locus in quo* was improperly conducted. He reiterated the two authorities cited in their submission in chief, (the cases of **Nizar** and **Kimonidimitri**) in which the Court of Appeal after finding that the visiting of locus in quo was improperly conducted, the proceedings were nullified and ordered retrial of the case.

On the question that the application was incompetent for non-joinder of the seller, Mr. Kamani agreed with the respondent's advocate that if the court finds that it was necessary to join the seller, the remedy is to nullify the judgment and proceedings and make a necessary order. However, he alleged that they were sure that there was no such a thing.

On the issue of evaluation of evidence, Mr. Kamani reiterated his submission in chief. Also, he reiterated his prayer of allowing the appeal with costs and order retrial before another Chairman.

Having summarized submissions of both parties, the issue for determination is whether this appeal has merit.

It is settled law that, the first appellate court is obliged to re- evaluate evidence on the record and come up with its own conclusions in case the trial court failed to evaluate the same.

On the first ground of appeal, the learned counsel for the appellant alleged that the trial tribunal failed to adhere to the procedures and principles of visiting the *locus in quo*. He cited different authorities which expound principles and procedures of visiting the *locus in quo* and argued that save for the fact that the parties and their advocates visited the *locus in quo*, the rest of the requirements were not complied with. He contended that in the present case, the reasons for visiting the *locus in quo* were to see the boundaries and measure the size of land of each party so as to understand whether the suit land is within the boundaries of the land of the appellant or the respondent.

On his part, the learned counsel for the respondent had different ideas. He stated that the trial tribunal visited the *locus in quo* together with the parties and their advocates and the assessors and that each party was allowed to cross examine. The trial chairman observed the boundaries which separated the parties. Mr. Materu argued that each case should be determined on its own circumstances. That, the procedures of visiting the *locus in quo* are not expected to be exactly the same in all occasions.

I wish to state at this juncture that visiting *locus in quo* is not mandatory. What is required when visiting *locus in quo* has been elaborated in numerous decisions as cited by the learned counsel for the appellant including the case of **Kimonidimitri Mantheakis** (supra).

The purpose of visiting the *locus in quo* was elaborated in the case of **Kimonidimitri Mantheakis** (supra) where at page 8 the Court of Appeal referred to the Nigerian case of **AKOSILE VS ADEYE (2011) 17 NNWLR (Pt 1276) p.263** which held that:

"The essence of a visit in locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbour, and physical features on the land. ***The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects.****" Emphasis supplied*

In the instant matter, before determining whether the procedures and principles of visiting *locus in quo* were observed or not, it is prudent to know whether it was necessary to visit the *locus in quo* according to the nature of the dispute.

Looking at the trial tribunal's records; the dispute concerned the boundaries whereby the appellant alleged that the respondent crossed the boundaries and trespassed to his land to the extent of 8 metres. On the other hand, the respondent averred that the disputed land belonged to her since she bought from one John Minja a land measured 74 paces x 12 paces.

Before commencement of trial, the trial tribunal raised the following issues; first, who is the lawful owner of the suit land between the parties; second, whether the respondent trespassed the suit land

From the nature of the dispute as well as the issues raised, I am convinced that though it is not mandatory to visit the *locus in quo*, in this case it was necessary to visit the *locus in quo* in order to ascertain whether the disputed piece of land was within the respondent's land or the appellant's land. To ascertain such fact, it was prudent for the trial tribunal to measure

the appellant's land as well as the respondent's land as suggested in the Nigerian case of **Akosile vs Adeye** (supra) which emphasized that among the purpose of visiting the *locus in quo* is to clear doubts arising from conflicting evidence if any about physical objects.

As rightly submitted by learned counsel for the appellant, in the instant matter since there was boundary dispute between the parties, it was necessary to measure the size of the land of each party so as to ascertain whether the suit land was within the boundaries of the land of the appellant or the respondent. Otherwise, the doubt in respect of the boundary dispute will remain unsolved. One cannot determine the dispute on boundaries without visiting the *locus in quo.*

Moreover, I have noted that even the parties' evidence adduced at the *locus in quo* was not taken under oath as envisaged in the case of **Kimonidimitri Mantheakis** (supra). I am of considered opinion that the noted irregularities are fatal.

Having found such irregularities in respect of the visit to the *locus in quo*, the next question is what is the remedy of the noted irregularities? Mr. Kamani for the appellant opined that the remedy is to nullify the judgment and proceedings of the trial tribunal and order retrial. Mr. Materu for the respondent was of the view that the remedy is to order fresh visit and not to nullify the proceedings and judgment and order retrial.

I subscribe to the case of **Kimonidimitri** (supra) in which the Court of Appeal having found that the procedures and principles of visiting the locus in quo were not complied with, it nullified the whole proceedings and the judgment and ordered retrial of the matter. On the basis of such decision of the Court of Appeal, which is binding to this court, I hereby

nullify the trial tribunal's proceedings and judgment and order an expeditious retrial before another Chairman.

In addition, I concur with the learned counsel for the respondent that the seller of the disputed land should have been joined as a necessary party in order to avoid multiplicity of disputes. Although the issue of nonjoinder of necessary party was not among the raised issues, due to the fact that both parties had an opportunity to submit on it, I employ the revisionary powers of this court and order that before proceeding with retrial of the matter, the seller(s) of the suit land should be joined as necessary party.

Having found as such, I do not see any reason of discussing the remaining grounds of appeal. Thus, I allow the appeal with costs to the extent explained herein above.

It is so ordered.

Dated and delivered at Moshi, this 25th day of May 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

25/05/2023