IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 06 OF 2022

(Originating from judgment and decree of the District Land and Housing Tribunal for Kiteto, in Land Application No. 6 of 2022)

HABIBU MOHAMED FARAJI.....APPELLANT

VERSUS

MWANAHAWA SALIM (*The administratrix of the Estate of Selemani Salimu)*.....**RESPONDENT**

JUDGMENT

27th April & 25th May 2023

Kahyoza, J.:

Mwanahawa Salim SALIM (*The administratrix of the Estate of Selemani Salimu)* sued **Habibu Mohamed Faraji**, the appellant for trespassing to deceased's parcel of land, Plot No. 37 Block C Kibaya-Kiteto. **Habibu Mohamed Faraji** vehemently opposed the claim. The district land and housing tribunal (the tribunal) decided in favour of the administratrix. **Habibu Mohamed Faraji** appealed to this Court. **Habibu Mohamed Faraji** does not contest the tribunal's determination that the administratrix was the owner of Plot No 37 Block C Kibaya- Kiteto but its failure to hold that he has a right to easement.

The issues are-

1. does the appellant has a right to easement?
2. did the tribunal ignore to consider the appellant's evidence?

3. is the disputed land a public land?
4. did the tribunal declare the respondent owner of public land without hearing public authorities?

A brief background will suffice to clear cloud of mixed facts of the parties' dispute. Plot No 37 Block C Kibaya- Kiteto, the suit land belonged to Yusufu Mohamed Faraji from 1978 when he was issued with the Right of Occupancy. It was alleged that in 2005, Yusufu Mohamed Faraji surrendered the right of occupancy, which was issued to Seleman Salimu Kilemba. It is on record, from Yusufu Mohamed Faraji's son, Hussein Yusuf Faraji who gave evidence as a second defence witness that **Habibu Mohamed Faraji** is his uncle. Thus, **Habibu Mohamed Faraji** is a mere brother of Yusufu Mohamed Faraji, the owner of the suit land. Hussein Yusuf Faraji (Dw2) deposed that his father and his uncle, the appellant owned land and that the appellant has not trespassed to Plot No 37 Block C Kibaya- Kiteto.

Goodluck Kyando (**Pw2**), the land officer testified that Plot No 37 Block C Kibaya- Kiteto is the property of Seleman Salimu Kilemba. During cross-examination, Goodluck Kyando (**Pw2**) deposed that he had not visited the disputed land. The administratrix tendered a letter of over in the deceased's name as exhibit P.3, which Goodluck Kyando (**Pw2**) identified as being a genuine document from their office.

Habibu Mohamed Faraji is emphatic that he acquired the disputed land in 1953 by clearing a virgin land. He stated that Yusufu Mohamed Faraji, his brother had a land adjacent to his land and that it was Plot No 37 Block C Kibaya- Kiteto.

Given the evidence on record, there is no dispute that Plot No 37 Block C Kibaya- Kiteto was a property of the late Yusufu Mohamed Faraji. Further, there is no person other than **Mwanahawa Salim SALIM (***The administratrix of the Estate of Selemani Salimu)* who claims ownership Plot No 37 Block C Kibaya- Kiteto. Hussein Yusuf Faraji, the late Yusufu Mohamed Faraji's son gave evidence that Plot No 37 Block C Kibaya- Kiteto was the property of his father but showed no interest to claim ownership. It would be construed that he knew that title had passed to another person.

In addition, the facts show that the appellant's claim is for the land which is adjacent to Plot No 37 Block C Kibaya- Kiteto. Whether there exists land between Plot No 37 Block C Kibaya- Kiteto and Plot No 38 Block C Kibaya- Kiteto as **Habibu Mohamed Faraji** claimed, is a question of evidence. It is unfortunate that Goodluck Kyando (**Pw2**), the land officer testified that he did not visit the *locus in quo*, hence he could not tell if such land existed or not. Regrettably too, the tribunal did not visit the *locus in quo*. This case was a fit case for the tribunal to visit the *locus in quo*. In **Avit Thedeus Massawe v. Isidory Assenga** Civil Appeal No. 6/2017, the Court of Appeal explained the purpose of visiting the *locus in quo*. The purpose of visiting the locus in quo is **to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located**. The Court stated that-

> *"Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute*

needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of ***Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others,*** *Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the locus in quo. The factors include:*

1. Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see ***OthinielSheke V Victor Plankshak*** *(2008) NSCQRVol. 35, p.*

2. The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see ***Akosile Vs.Adeyeye*** *(2011) 17 NWLR(Pt. 1276) p.263.*

3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court

to visit the locus in quo (see ***Ezemonye Okwara Vs.dominie Okwara*** *(1997) 11 NWLR(Pt. 527) p. 1601).*

4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims.

Failure to visit the *locus in quo*, left doubts as to the issue whether there was land adjacent to Plot No 37 Block C Kibaya- Kiteto which belonged to the appellant. I am alive that the issue central to the tribunal was who owns Plot No 37 Block C Kibaya- Kiteto. This issue was determined and properly so by the tribunal. For that reason, I will desist to fault the tribunal for not visiting the *locus in quo* thought it was important to clear the dispute.

The above said, I now consider the issues raised by the grounds of appeal.

Does the appellant have a right of easement?

The appellant complained that the tribunal did not consider that he had a right of easement. The respondent refuted that the disputed land was surveyed, for that reason the appellant had no right of easement.

I wish to state at the outset that the complaint that the appellant had a right of easement is a new complaint. The appellant did not raise such a complaint before the trial tribunal for it to deliberate and determine. It is settled that an appellate court cannot consider or deal with issues which were not canvassed, pleaded and not raised at the lower court. See the

decision of the Court of Appeal in **Farida and Another v. Domina Kagaruki,** Civil Appeal No. 136/2006 CAT (unreported).

The complaint that the appellant had a right of easement was not raised before the trial tribunal, it cannot be raised before this Court. It was not an issue before the tribunal. Hence, I dismiss the first ground of appeal.

Did the tribunal ignore to consider the appellant's evidence?

The appellant complained that the tribunal did not consider his evidence. The appellant did not point out which evidence the tribunal omitted to consider.

On the respondent's part, she refuted that allegation that the tribunal ignored the appellant's evidence. She rather, submitted that the tribunal considered the appellant's evidence and found it to be weak.

I examined the record as shown above. There is no evidence which the appellant tendered and the tribunal omitted to consider, instead parties are not at issue. The respondent's claim was that her father the deceased owned Plot No 37 Block C Kibaya- Kiteto. The appellant did not claim ownership of Plot No 37 Block C Kibaya- Kiteto but he stated that Plot No 37 Block C Kibaya- Kiteto belonged to his late brother. The appellant's late brother's son testified and did not demonstrate interest in the said Plot No 37 Block C Kibaya- Kiteto. It seems, he knew that title to Plot No 37 Block C Kibaya- Kiteto had passed to another person. Thus, the appellant did not tender evidence, let alone establish that he had a title to Plot No 37 Block C Kibaya- Kiteto. For that reason, there was no evidence in favour of the appellant which the tribunal ignored.

I find no merit on the second ground of appeal and dismiss it accordingly.

Is the disputed land a public land?

The appellant complained that the tribunal declared the respondent owner of a public land without giving a right of hearing to the public authorities. The respondent opposed the third ground of appeal and contended that the appellant was given a right to be heard and failed to exercise.

The appellant's complaint in the third ground of appeal is baseless and misconceived. The appellant was not a public authority to complain that he was not given a right to be heard. He is not representing the public authority. The public authority will take action when it finds that its right was infringed. In addition, there is ample evidence that, Plot No 37 Block C Kibaya- Kiteto, which is subject of dispute was a property of the appellant's brother. It is therefore, not a public property. Furthermore, the respondent gave evidence that Plot No 37 Block C Kibaya- Kiteto was allocated to her late father, Seleman Salimu Kilemba. The respondent's evidence was not sufficiently contradicted.

In the end, I find that the appellant did not establish his complaint that the disputed land was a public land. I dismiss the complaint. I will not forge ahead to determine the issue whether the tribunal declare the respondent owner of a public land without hearing public authorities as the land is not public.

Before I pen off, I wish to state that, the appellant, if he thinks that his land is different from Plot No 37 Block C Kibaya- Kiteto and he owned it after he cleared a virgin land. He should cause Plot No 37 Block C Kibaya-Kiteto to be re-surveyed to establish its boundaries. If he is occupying any land which part of Plot No 37 Block C Kibaya- Kiteto, he is a trespasser.

In the upshot, I find the appeal without merit and dismiss it with costs in its entirety and uphold the tribunal's decision that the respondent is the owner of Plot No 37 Block C Kibaya- Kiteto.

It is ordered accordingly.

Dated at **Babati** this 25th day of May, 2023.

J. R. Kahyoza

JUDGE

25/05/2023

Court: Judgment delivered in the presence of the respondent and in the absence of the appellant. Ms. Fatina (RMA) is present.

J. R. Kahyoza

JUDGE

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