IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND CASE APPEAL NO. 06 OF 2023

(Originating from Land Application No. 17 of 2019, Songea District Land and Housing Tribunal)

KELVIN MKUNGA ..... APPELLANT

VERSUS

M/S BELU PARTNERS ..... RESPONDENT

JUDGEMENT

12/05/2023 & 15/06/2023

E.B LUVANDA, J.

The Respondent above mentioned instituted the case before Songea District Land and Housing Tribunal (herein after referred as the Tribunal) against the Appellant and another parson (one Halima Mohamed) who is not a party to this appeal, for reliefs among others declaration that the Appellants have encroached onto the suit land Plot No. 116 Industrial Area, Ruhuwiko Songea Municipality. The Tribunal decreed in favour of the Respondent, which upset the Appellant hence he filed a petition of appeal which comprises four grounds of appeal, thus; One, the Tribunal erred in law and in fact in holding that the Appellant was liable to the Respondent partnership whereas there was no proof of such partnership neither the position of PW1 in the alleged partnership; Two,

the Tribunal misdirected itself in law and in fact in holding that the sale of plot of land from DW2 (Second Respondent before the Tribunal) to the Appellant was unlawful for want of description; Three, the Tribunal erred in law and fact for flouting procedures for visiting *locus in quo* and incorporating its findings in the judgement which irregularity resulted in miscarriage of justice; Four, the Tribunal erred in law and fact in not holding that the suit (land application) before it was time barred.

The appeal was argued by way of written submission. Both parties were represented respectively. Mr. E.O. Mbogoro learned Advocate represented the Appellant while the Respondent was represented by Mr. Vicent P. Kassale learned Advocate. It is to be noted that the learned Counsel for the Appellant abandoned the fourth ground of appeal and submitted all the remaining grounds as hereunder.

The learned Counsel for the Appellant submitted that before the Tribunal the Respondent sued the Appellant by the name of partnership hence fell under category of special suit as specified under Order XXVII to Order XXXV of the Civil Procedure Code [Cap 33 Revised Edition 2022 (sic, 2019)]. According to him, the suit before the Tribunal was governed by Order XXIX of Cap 33 (*supra*), and Part XI of the Law of Contract Act [Cap 345 Revised Edition 2022 (sic, 2019)].

In relation to the first ground of appeal, the learned Counsel submitted that, the existence of a partnership is proved by production of a partnership deed which would also establish that at the time the cause of action accrued the partnership was in existence. He submitted that, PW1 tendered before the Tribunal a copy of a letter of offer issued in 1982 in the name of Belu Partners, who introduced them by a single name each as Joshua, Clara and Cosmas (which the learned Counsel believed was improper) and he said after 1982 the founding partners died. The learned Counsel submitted that section 213(1) Cap 345 (*supra*) provides that a death of a single partner result into the dissolution of the partnership, that means even the letter of offer issued in 1982 relating to the partnership become defunct after the death of all partners. Thereafter it was a new partnership which decided to adopt the name of defunct partnership.

The learned Counsel for the Appellant submitted that proof of the existence of a partnership at the time when the cause of action accrued is a matter of great importance in partnership cases, he referred this court to Order XXIV rule 2(1) Cap 33 (*supra*). It is the Counsel opinion that no one can be properly identified with a single name, otherwise amount to no identification at all. Also, he added that the proof of

existence of a partnership when the cause of action accrued was necessary taking into consideration that all founding partners were died. That, the said proof would have been by production of a partnership deed, but non was tendered. It was his contention therefore that, the facts of existence of Belu Partners was not established, existence of partnership was not established to the required standard which is denied a partnership cannot own land in its firm name but will remain to be personal property of individual partner and hence not heritable (referred to section 195 (3) of Cap 345 (*supra*).

As for the second ground, the learned Counsel for the Appellant submitted that the Tribunal did not cite any provision of the law in declaring the agreement between the Appellant as being unlawful. The learned Counsel submitted that the contracts are governed by Cap 345 (*supra*) whereby Part III of the same law headed "violable (sic, voidable) contract and void agreements" he cited section 10 of Cap 345 (*supra*) to support his argument. The Counsel submitted that from section 11 to 30 are instances of agreement which the law will not enforce. It is the learned Counsel view that, probably the Tribunal was referring to the provisions of section 29 Cap 345 (*supra*).

The learned Counsel submitted that the contract was made between the parties in presence of each other therefore, the subject matter and its location was known to both parties when the contract was made hence it cannot be said that the said contract was unlawful for want of description of the land. He submitted that a need for description of the land sold could be a problem to the third parties, strangers to the contract who are not privy and cannot sue upon it. It was his contention that what matters was the intention of the parties when they made the contract. He submitted that the Tribunal misdirected itself in law and in fact in declaring the said agreement unlawful for want of description.

Ground number three, the learned Counsel submitted that the Tribunal visited the *locus in quo* twice, however there is no records as regard what actually transpire at the said *locus in quo*, what parties and or their witnesses said, questions put to them etc. He submitted that the proceedings taken at *locus in quo* must subsequently be read out in court when the court/Tribunal re assembles. He cited the case of **Jovent Clavery Rushaka and Another v. Bibiana Chacha,** Civil Appeal No. 236 of 2020 (unreported) from page 19 to 21. He prayed this appeal be allowed with cost.

In response, the Counsel for the Respondent submitted that, the issue of the existence of the Respondent styled Belu Partners was not one among the issues which was discussed and determined by the Tribunal, arguing that, matters which did not arise in lower court cannot be entertained at appeal. He cited the case of **Frola Christopher v. Violet Maglan**, Land Appeal No. 65 of 2019, HCT at Arusha in which the court cited the case of **Remigious Muganga v. Barrick Bulyanhulu Gold Mine**, Civil Appeal No. 47 of 2017, CAT at Mwanza, also cited **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015, to support his submission.

It is the learned Counsel for the Respondent opinion that this issue cannot be determined at this stage as it was not raised at the Tribunal, He submitted even the Appellant in his written statement of defence to the amended application did not dispute the existence of the Respondent, arguing that even if it can be determined it cannot give right to the Appellant to be declared the owner of the suit land as the seller who was the Second Respondent at the trial Tribunal, testified that she did not sell the land in dispute to the Appellant, and there was no any proof that the suit land was sold to the Appellant by the said seller as will be discussed in the second ground of appeal.

In relation to the second ground, the learned Counsel for the Respondent submitted that the trial Tribunal was determining the second issue which was to the effect that, whether the sale of the land by the Second Respondent to the First Respondent was lawful. The learned Counsel was a view that this issue was determined after the first issue was correctly answered in the affirmative that the Respondent herein who was the Applicant at the Tribunal is the lawful owner of the suit land. He submitted that having so found that the suit land Plot No. 116 Industrial Area, Ruhuwiko within Songea Municipal to be the property of the Respondent herein, the trial Tribunal was thereafter correct to find and declared any sale of the suit land or part of it by Second Respondent therein to the Appellant, unlawful.

Ground number three, the learned Counsel submitted that, when a court or Tribunal deems necessary to visit the *locus in quo*, it is bound to do it properly and the record of the court of (sic, or) Tribunal should reflect what had transpired there, the purpose of which is to enable the court sitting on first appeal to make a proper re-evaluation of the entire trial evidence including as to what had transpired at the visit in the *locus in quo.*

The learned Counsel submitted that all which transpired during the visiting of the *locus in quo* by the trial Tribunal was well described and incorporated by the trial Tribunal and all the finding were well stated and explained by the Tribunal in its judgement as shown in the page 9 where the trial Tribunal well explained on its visiting at the locus and what transpired therein. the Counsel submitted that the case of **Jovent Clavery Rushaka** (*supra*) cited by the Appellant is therefore distinguishable. The learned Counsel for the Respondent proposed that the proper remedy in case this court will find the record of Tribunal missing some material during the visiting *locus in quo* which is to quash the decision but he pleaded the court to regard the overriding principle. Also he submitted that since the Tribunal was correct from the evidence in its record that the Respondent herein is the lawful owner there is no need for such order as it could serve no purpose, since the result of visiting the *locus in quo* were not used as a determinant factor for the decision of the trial tribunal, he referred this court at pages 6,7,8 and 9 of the judgement which reflects the reasoning of the trial Tribunal in determining the issues framed. He prayed this appeal to be dismissed with cost.

It is a cardinal law that re evaluation of the evidence is the domain of the first appellate court. In the case of **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2012, Court of Appeal of Tanzania, the court of Appeal stated that:

> *'We understand that it is settled law that a first appeal is in the form of a rehearing, as such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary'*

For ground number one, the same cannot detain me much. It is in record of the Tribunal that the Respondent who testified as PW1, asserted under oath that the founding partners were Robert Mchangura, Clara Mchangura, Lenzian Chele and Lucy Kanyosa. DW1 stated that after the demise of majority partners, remained Robert Mchangura who invited them (new partners) in the partnership and it was rebranded and re-registered in 2006. PW1 tendered an extract from register (BRELA) exhibit P1, depict date of registration on 15/11/2006, proprietor partners Luicy Komba Mahangulwa, Clare Mwaipela, Joshua George and Cosmas Komba. As such the argument that there was no proof of partnership, or position of PW1 was unknown or that, Ms Belu Partner is a defunct or PW1 merely mentioned single names of fellow partners, all melt away in view of the adumbration made above.

Ground number two, this also cannot detain me. The position of section 29 Cap 345 (*supra*) cited by the learned Counsel for the Appellant speaks louder, I quote for easy referencing:

> *'An* ***agreement the meaning of which is not certain or capable of being made certain is void'***

Herein the Appellant who testified as DW1 at the Tribunal, tendered two agreements for sale of land dated 21/1/2004 purporting to show that Halima Mohamed to had sold a farm of half acre to the Appellant for a consideration of TZs 27,000/= (exhibit JM1). Halima Mohamed (DW2) tendered a second agreement dated 31/1/2005 purporting to show that Tamasha d/o Swalehe to have vended a piece of farm to the Appellant for consideration of TZs 130,000/= (exhibit HM1). The two exhibits (JM1 and HM1) does not depict description of the land subject for disposition, to wit there is no location, direction, boundaries or neighbours, any mark, or any physical feature, or any permanent mark is not reflected therein. As such the trial chairman was justified to rule that the two agreements are of no legal effect. Actually, the two agreements are unenforceable in law.

Ground three, the learned Counsel for the Appellant faulted the visit to a *locus in quo* done by the trial Tribunal arguing that it flouted procedures. It is true that the proceedings conducted at the *locus in quo* are

problematic; the trial Tribunal did not indicate a location or destination where a visit was made, merely recorded a disputed area, is like he was repeating the same mistake committed in JM1 and HM1 above; the demonstration was recorded in a manner which portray that it was a mere observation of the trial chairman instead of a witness; the proceedings reflect the Applicant (Appellant herein) and the First Respondent made a demo at a *locus in quo*, but nowhere reflected if they were recalled for further examination in chief, nor re-sworn, bearing in mind that after testifying in the court room, the duo were formerly discharged. The alleged land officer from Songea Municipal remained anonymous, neither took oath. Parties or their respective lawyers were not accorded a chance to cross examine at the *locus in quo*. No sketch map was made at the scene to depict the extent of encroachment committed, if any. In the case of **Jovent Clavery** (*supra*) at pages 20 and 21 the apex Court made the following directions to be followed in a letter by the visiting officer, at the *locus in quo*, I quote,

> *"... for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: 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,*

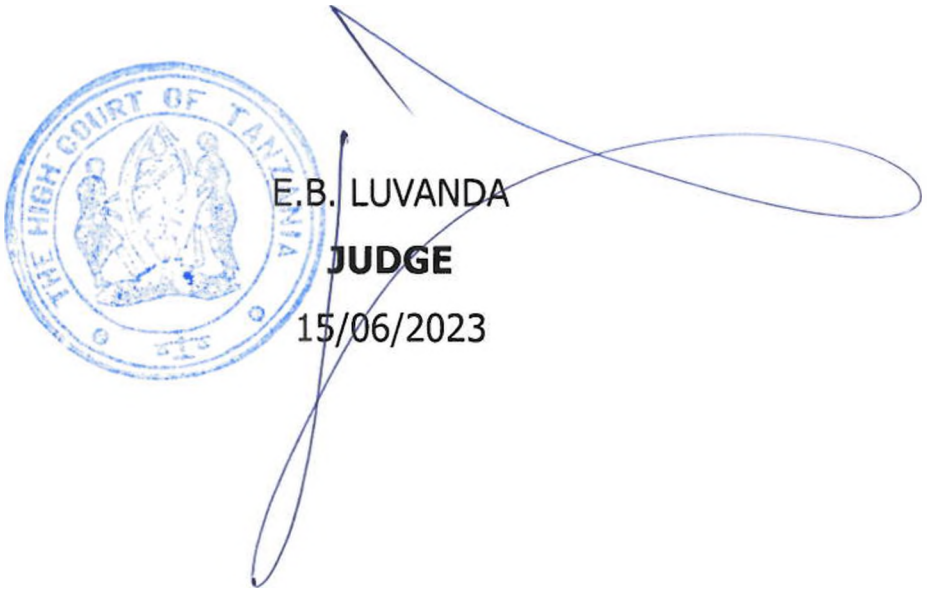
or his counsel. Four, record all the proceedings at the locus in quo. Five, record any observation, view, opinion or conclusion of the court including drawing, a sketch plan, if necessary, which must be made known to the parties and advocates, if any."

So far this directive was not abided at all, the proceedings at the *locus in quo* cannot be sustained. The learned Counsel for the Appellant did not say the way forward on these proceedings. The learned Counsel for the Respondent invited the court to salvage it under the doctrine of overriding objective, arguing that the oral testimony of PW1, PW2, PW3, DW2 and DW3 could save a purpose. I agree with a proposal of the learned Counsel for Respondent that what was done or demonstrated at the *locus in quo* is a replica of what was testified in the court room by PW1, PW2 (hamlet chairman), PW3 (Land Officer), DW2 and DW3 regarding ownership of the Respondent over Plot No. 116 Industrial Area Ruhuwiko, tenure (99 years) size 14,800 squire metres, surveyed with beacon erected, including the extent of encroachment committed by the Appellant. To this end, I discard and expunge the proceedings on the *locus in quo* a coram of 27/10/2022. Meanwhile I retain a finding of the trial Tribunal on the extent of encroachment committed by the Appellant on the suit land. For avoidance of doubt, a finding to the effect that a business or hut and a portion of a house of the Appellant erected on the

area of the Respondent to be demolished to the extent of encroachment including other developments carried out on the impugned land to be removed at the expense of the Appellant. The finding by the trial Tribunal is upheld.

Save for ground number two which have been partially allowed, in totality the appeal is devoid of merit.

The Appeal is dismissed with costs.



E.B. LUVANDA

JUDGE

15/06/2023