**IN THE HIGH COURT OF THE UNITED REPUBIC OF TANZANIA**

**ARUSHA SUB REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 103 OF 2022**

*(Commencing from Application No 06 of 2020 in the District Land and Housing Tribunal for Babati at Babati)*

**ERRO MISHO ..... APPELLANT**

**VERSUS**

**SAFARI DOITA ..... RESPONDENT**

**JUDGMENT**

04th May & 12th June 2023

**KAMUZORA, J.**

The crux of the dispute leading to this appeal is a piece of land measuring 1½ acres located at Ngorongoro Sub-village, Madunga village and Ward within Babati District in Manyara Region (hereinafter "the suit land"). The Respondent herein sued the Appellant herein before the District Land and Housing Tribunal for Babati at Babati (hereinafter the trial Tribunal) claiming to be the lawful owner of the suit land and that the Appellant is a trespasser to the suit land. The Appellant also claimed to be the lawful owner of the suit land and denied to have trespassed in to the Respondent's land. The trial Tribunal after hearing the evidence

adduced by both sides delivered its judgment and decree in favour of the Respondent. The Appellant was dissatisfied by the decision hence preferred this appeal seeking to have that decision overturned. The following are the grounds of appeal: -

1) *That, the learned Chairman of the trial Tribunal misdirected himself, as he failed to evaluate properly the evidence of the parties before he delivered his judgment.*
2) *That, the learned Chairman of the trial Tribunal misdirected himself, as he departed from the assessors' opinion without advancing his reasons as required by the law.*
3) *That, the learned Chairman of the trial Tribunal misdirected himself in declaring the Respondent as the lawful owner of the suit land despite the fact that the records especially in the judgment, the Respondent did not indicate the size of the land that he claims against the Appellant.*
4) *That, the learned Chairman of the trial Tribunal misdirected himself in denying the Respondent to tender his document showing that he is the lawful owner of the suit land.*
5) *That, the learned Chairman of the trial Tribunal misdirected himself in deciding in favour of the Respondent without considering the fact that, it the Appellant who lives in the suit land for more than sixty years.*
6) *That, the learned Chairman of the trial Tribunal erred in law as he did not include in his judgment the evidence of the Appellant's witness one Eugene Amma.*

As a matter of legal representation, Dr. Mjema, learned advocate appeared for the Appellant while the Respondent engaged Mr. Ndonjekwa for drafting only. Parties opted to argue the appeal by way of written submissions and they both complied to the schedule.

In his submission the counsel for the Appellant argued jointly the 1st and 2nd grounds, the 3rd and 5th grounds and finalised with the 4th and 6th grounds of appeal. Submitting in support of the 1st and 2nd grounds the Appellant's counsel submitted that, the Tribunal Chairman failed to evaluate and consider evidence adduced by the Appellant's witnesses. That, the Chairman deliberately departed and rebuffed the assessors' opinion which appeared to be a preponderance of evidence and watertight after hearing from both parties.

On the 3rd and 5th grounds of appeal, it is the submission by the Appellant's counsel that, the trial Tribunal should have made a visit to the locus to view the demarcation of the suit land which the Respondent had not mentioned. That, in the course of the visit the trial Tribunal would have discovered that the Appellant lived in the suit land for more than 60 years and that there was Appellant's house and his mother's grave and the Respondent lived in another sub village far from Ngorongoro Sub-village. He insisted that the Chairman failed to consider

the evidence that the Appellant was given the suit land by his father who was born there, developed and peacefully occupied the land for many years. Referring the Limitation Act Cap 89 R.E 2019 part I of the Schedule, Colum 22, the counsel for the Appellant argued that, the trial Tribunal acted contrary to the requirement of the law as he ignored the evidence by Appellant's witness that the Appellant was born in the suit land over 60 years, that he lived and developed the suit land hence he ought to have declared the Appellant as the lawful owner of the suit land.

Expounding the 4th and 6th grounds, the counsel for the Appellant argued that the Tribunal Chairman refused to accept documentary evidence from the Appellant which were minutes of elders showing that the Appellant was the winner and was declared to be the lawful owner of the suit land. That, the trial Tribunal erred for rejecting evidence of Eugene Amma the Appellant's witness. Pointing at page 3 paragraph 5 of the trial Tribunal's judgment the counsel for the Appellant submitted that the trial Tribunal erred for deciding against his own conviction when he conceded with the facts that the Suitland belonged to the Appellant. The counsel reconned the doctrine of estoppel and insisted that based on the provision of section 123 of the Evidence Act Cap 6 R.E 2019, the

Chairman is estopped to decide contrary to his own conviction. To cement on this point, the counsel cited the case of **E A Development Bank Vs. Blueline Enterprises Ltd**, Civil Appeal No. 16 CAT (Unreported). The Appellant's counsel prayed for the appeal to be allowed with costs.

Responding to the 1st and 2nd grounds of appeal, the Respondent submitted that the trial Tribunal properly evaluated the evidence adduced by both parties and made a finding that the Respondent proved his case on balance of probabilities. He referred this court the case of **Hemed Said Vs. Mohamed Mbilu** (1984) TLR 133.

On the issue of visitation of the locus in quo, the Respondent submitted that visitation is not mandatory. That, the Tribunal may visit the locus on request of the parties and its purpose is not to collect new evidence rather to determine the controversy between parties where there is conflict on the size of the land, boundaries or any feature(s) to be identified by the Tribunal. He contended that the Respondent well described the size, boundary and location of the suit land then there was no any dispute on the same hence the trial Tribunal did not misdirect itself.

Regarding the issue of law of limitation, the Respondent submitted that the claim that the Appellant has been living in the suit land for more than 60 years is a lie as the land has been in the hands of the Respondent for more than 12 years. on the claim that the Appellant was denied an opportunity to tender documentary evidence, the Respondent submitted that each part was accorded with a fair and equally opportunity to adduce and produce documentary evidence intended to support its case.

On the claim that the Chairman acted contrary to his own conviction, the Respondent submitted that, the doctrine of estoppel applies to parties by stopping a party from denying what he had already said. That, the Chairman did not adduce any evidence but evaluated evidence of both parties hence the doctrine of estoppel is not applicable against the Chairman.

On the argument that the opinion of the assessors was disregarded, the Respondent submitted that under section 23 of the Land Disputes Courts Act, R.E 2019 the Chairman is not bound by assessors' opinion. That, the Chairman received assessors' opinion but disagreed with them and gave reasons for such disagreement. The Respondent invited this

court to dismiss the appeal and uphold the decision of the trial Tribunal with costs.

In a brief rejoinder the counsel for the Appellant reiterated his submission in chief and added that, the Chairman did not give reasons for departing with the opinion of assessors. That the Tribunal also disregarded clear evidence of Appellant's witness one Doita Ngaida which he prayed to be considered based on the decision in **Barella Karangirangi Vs. Asteria Nyarambwa,** Civil Appeal No. 237 of 2017 CAT (Unreported).

I have gone through the record of the trial Tribunal, the grounds of appeal and submissions for and against the appeal by both parties. Save for the 2nd ground which is related to procedural irregularity the rest of the grounds focuses on evaluation of evidence by the trial Tribunal. I will therefore start with the 2nd ground and I will then jointly deliberate on the 1, 3rd, 4th 5th and 6th grounds.

On 2nd ground it was contended that the trial Tribunal departed with the opinion of assessors without assigning reasons for the departure. Upon reading of the trial Tribunal's judgment specifically page 3, I noted that the Chairman disagreed with assessors' opinion and the reasons were so clear. The Tribunal Chairman started by capturing the assessors'

opinion before he made an evaluation contrary to that opinion as read here under: -

> *"Wajumbe wa baraza hili Maulidi Barie na Alibina Sulle wote wanasema kuwa "haki ni ya mjibu maombi kwa sababu alipewa na wazazi wake.*
>
> *Hata hivyo hakuna shahidi aliyenyoosha maelezo kama kweli shamba la mgogoro alipewa mjibu maombi. Shahidi wa mjibu maombi Doita Ng'aida ambaye ni baba mdogo wa mjibu maombi, yeye anasema shamba ni mali ya baba yake na kwamba yeye ndo alitumia alafu baadae akahama na kumwachia mjibu maombi.*
>
> *Huu ni ushahid wenye mashiko kwa sababu hapo sasa shahidi huyu anasema shamba ni lake. Wakati natofautiana na maoni ya wajumbe, nakubaliana na maombi ya mleta mambi"*

The above quoted phrase if construed wholly and not in isolation of any sentence, it clearly indicates that the Tribunal Chairman assigned his reasons for not agreeing with assessors' opinion. It is clear that the Chairman disagreed with the opinion of assessors that the suit land belonged to the Appellant while there was no direct evidence proving that the suit land was given to the Appellant by his parents. I therefore find no merit in the 2nd ground of appeal.

On the rest of the grounds, there are four issues in contention which are basically based on evaluation of evidence by the trial Tribunal; whether the Respondent failed to describe the suit land, whether the

Appellant was denied right to tender exhibits to support his ownership to the suit land, whether the trial Tribunal disregarded the evidence of Appellant's witness and whether the trial Tribunal disregarded evidence that the Appellant was in occupation of the suit land.

On the argument that the Appellant failed to describe the suit land, I find that both parties clearly described the suit land. At paragraph 3 of his application before the trial Tribunal as well as his evidence the Respondent herein described the size, location and demarcations of the suit land. The Appellant in his written statement of defence at paragraph 2 clearly stated that the contents of paragraph 3 as regards to the size and boundaries of the suit were not contested. Thus, the claim that the Respondent failed to describe the suit land is unfounded. On the argument that the trial Tribunal erred for failure to visit the locus in quo to view the demarcation of the suit land which the Respondent had not mentioned, I see this argument baseless. As noted above, there was no dispute over demarcations before the trial Tribunal. What was described as suit land in the Respondent's application was also not contested by the Appellant in his defence and the same was reproduced by the Respondent in his evidence. Thus, I do not see fact which could have triggered the trial Tribunal to visit the locus in quo. It must be noted

that, siting the locus in quo is not mandatory procedure but may be done where need arise to determine the fact in issue. In the case of **Kimonidimiri Mantheakis Vs. Ally Azim Dewij & 7 others,** Civil Appeal No. 4 of 2018 CAT at Dar es Salaam (Unreported) it was held that,

> *"Whereas the visit of the locus in quo is not mandatory, it is trite law that, it is done only in exceptional circumstances as by doing so a court may unconsciously take a role of witness rather than adjudicator. In this regard, where the court deems it warranted, then it is bound to carry it out properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because the visit is not for the purposes of filling gaps in evidence. Therefore, where it is necessary or appropriate to visit a locus in quo, the court should attend with the parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter."*

Being guided by the above decision and in considering that neither of the party moved the Tribunal to visit the locus in quo, no error was committed by the trial the Tribunal in not visiting the locus quo.

On the argument that the Appellant was denied opportunity to tender documentary evidence, the record speaks differently. In my perusal to the trial court proceedings, I did not encounter any prayer made by the Appellant to tender any exhibit in support of his case. The

trial Tribunal proceedings reveal that the Appellant and his witnesses testified on 13/06/2022 and thereafter the Appellant informed the Tribunal that he was closing his defence. No prayer for tendering exhibit was made by the Appellant thus, the allegation that he was denied opportunity to tender documentary evidence in unwarranted.

On the argument that the evidence of Eugene Amma was not considered by the trial Tribunal, the record is clear and support this argument. Apart from his testimony, the Appellant paraded three more witnesses before the trial Tribunal; PW2 Doita Ng'aida, RW3 Victoria Ng'aida and RW4 Ujeni Ama who I think is being referred to as Eugene Amma in this appeal. It is unfortunate that while analysing evidence from both parties, the trial Tribunal did not capture the evidence of Ujeni Ama/Eugene Amma. This suggest that there was no proper analysis of the evidence by the trial court. it must be noted that whether the evidence is of material importance or not, the Tribunal or court is duty bound to refer that evidence and state if the same is accorded weight or not and the reason there to. That duty was abrogated by the trial Tribunal by skipping evidence of RW4 without stating the reason. But since that error relate to the assessment of evidence, this court being

the first appellate court will take a lead and step into the shoes of the Tribunal to assess the evidence in totality.

The Respondent testified before the trial Tribunal that he was given the suit land by his father in 2006 and he has been using that land since then peacefully until 2019 when the Appellant trespassed and started cultivating the farm. His evidence was supported by his father SM2 Doita Amnaay who confirmed that he gave the suit land to his son, the Respondent. SM2 also testified that he got the suit land from his late grandfather. SM3 also supported that evidence by starting that he was jointly cultivating the suit land with the Respondent for a period of five years.

On the other hand, the Appellant testified before the trial Tribunal that he got the suit land from his parents and he has been using the same for long time. However, the evidence that his father died before he was born and the farm was handled to him by relatives whom he did not mention. He called three witnesses who contradicted his evidence and contracted themselves. RW2, is the Appellant's uncle and PW3 Appellant's aunt and they both claimed that the suit land belonged to their father one Mirisho Ng'aida. They never mentioned if their father gave the suit land to the Appellant. R2 only mentioned that he was living

in the suit land and after he left, the Appellant took possession of the same. However, RW4 denied the fact the suit land belonged to Ng'ada and never even mentioned if the suit land belonged to the Appellant. His testimony is on how the attended the alarm raised by the Appellant when the Respondent cultivated the farm and damaged the Appellant's crops. He also explained that they had elders meeting which ruled that the Respondent had no right over the suit land. It is unfortunate that minutes for the meeting was not presented as evidence for the Tribunal to assess the basis of the alleged conclusion.

The Appellant also alleged that when the dispute arose, he instituted a case before the primary court and he was declared a winner. It is unfortunate that the said decision was not made part of Appellant's defence. Based on the above analysis, the trial Tribunal was correct in finding the evidence by the Respondent proving the case on balance of probabilities as opposed to that of the Appellant. The Respondent presented the original owner of the suit land, his father. The Appellant was unable to cross examine him on how he acquired the suit land and SM2 insisted that the land belonged to him the grave at the suit land was his mother's grave. He made clear that he gave the suit land to the Respondent and was supported by SM3 who claimed that he was

cultivating the land jointly with the Respondent for the period of five years. Therefore, the totality of evidence suggests nothing but that the Respondent's evidence was strong proving the case on balance of probabilities as required in civil cases. The trial Tribunal was therefore correct to decide in favour of the Respondent.

On the argument that the Chairman decided contrary to his own conviction, I find that the counsel for the Appellant misdirected himself on this issue. While the counsel for the Appellant captured part of the trial Tribunal holding at page 3 of the judgement, for purpose of clarity, I will reproduce both the paragraph captured by the counsel for the Appellant and the paragraph above it.

> *"Hata hivyo hakuna shahidi aliyenyoosha maelezo ya kama kweli shamba la mgogoro alipewa mjibu maombi. Shahidi wa mjibu maombi Doita Ng'aida ambaye ni baba mdogo wa mjibu maombi, yeye anasema shamba ni mali ya baba yake na kwamba yeye ndo alitumia alafu baadae akahama na kumwachia mjibu maombi.*
>
> *"Huu ni Ushahidi wenye mashiko kwa sababu hapo sasa shahidi huyu anasema shamba ni lake. Wakati natofautiana na maoni ya wajumbe nakubaliana na maombi ya mleta maombi."*

The above two paragraph if read together, does not bring the interpretation suggested by the counsel for the Appellant that the Chairman declared the Appellant's evidence authentic and still diverted

and decided that the land belonged to the Respondent. To my understanding in the second paragraph was referring the qualifying the first paragraph. In fact, the Chairman was analysing the weakness in Appellant's evidence in which while the Appellant alleged to be the owner of the suit land his witness Doita Ng'ada testified to the contrary that the suit land belonged to his father. There is nowhere the Chairman acknowledged the Appellant as owner of the suit land rather. He captured what the Appellant's witness testified before the Tribunal. I therefore find this argument baseless.

Regarding the claim that the Chairman acted contrary to the provision of the law of Limitation Act Cap 89 R.E 2019. Item 22 of Part 1 clearly states that the time limit for suits to recover land is 12 years. I find this argument being baseless, much as the record reveals, the Respondent proved to be in possession of the suit land and for more than 12 years since 2006, time limitation could not have applied to the Respondent rather the Appellant. Therefore, the trial Tribunal acted pursuant to the law.

In light of what has been discussed above, I find that the trial Tribunal was correct in concluding that the Respondent proved to be the lawful owner of the suit land and the Appellant was a trespasser. This

appeal is therefore devoid of merit and the same stands dismissed with costs.

**DATED** at **ARUSHA** this 12th day of June 2023.


D.C. KAMUZORA

JUDGE