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

**SONGEA DISTRICT REGISTRY**

**(LAND DIVISION)**

**AT SONGEA**

**LAND APPEAL NO. 10 OF 2023**

*(Originating from the District Land and Housing Tribunal for Songea at Songea in Land Application No. 119 of 2018)*

**OLAPH BARTAZAR MWAGENI ..... APPELLANT**

**VERSUS**

**ISSA KIZITO ..... 1ST RESPONDENT**

**HENRICK LUAMBANO ..... 2ND RESPONDENT**

**JOSEPH MLILO ..... 3RD RESPONDENT**

## JUDGMENT

Date of Last Order: 09/06/2023

Date of Judgment: 30/06/2023

**U. E. Madeha, J.**

This appeal originates from the decision of the District Land and Housing Tribunal for Songea (henceforth "the DLHT"), whereby the Appellant herein sued the Respondents for trespass on the land measured thirty acres of land (henceforth "the disputed land").

As far as I am concerned, I am summarizing these facts shortly because of the results of the appeal that will follow below;

From the original records and the submissions made by the learned advocates from both parties, the brief facts of this appeal are as follows. Before the DLHT the Appellant instituted a claim, claiming to be the legal owner of the disputed land which is located at Mgohola in Mtyangingole Village at Madaba District Council in Ruvuma Region. He claimed that the disputed land measured thirty acres was invaded by the Respondents who also destroyed trees knowing that the disputed land was the property of the Appellant.

It is worth considering that, the Appellant testified that the disputed land was allocated to him in the year 2006. The Appellant added that together with his family he was allocated seventy acres and out of the thirty acres. The boundaries of the disputed land are marked by using colour marked on the trees and stones around the disputed land.

In 2017 the Appellant discovered that the land was invaded by the Respondent by clearing the land. The Appellant tried to settle their dispute but the efforts proved failure. The Appellant prayed to be

declared to be the lawful owner of the disputed land, paid compensation as well as the cost of the case.

After a full trial the DLHT found the disputed land is not the property of the Appellant and the application was dismissed. Being displeased by such a finding, the Appellant sought an appeal before this court. His main grounds of grievance are:

i. *That, the DLHT erred in law and in fact in holding that the first Respondent was the lawful owner of the suit land relying on a dubious document (Exhibit ISKI) which was vigorously contested by the Appellant even when the dispute was referred to Mtyangimbole Village Executive Officer before being lodged in the Tribunal.*
ii. *That, from the circumstances of the case before it the District Land and Housing Tribunal, misdirected itself in law and facts in not visiting the locus in que thereby occasioned the miscarriage of justice.*
iii. *That, the District land and Housing Tribunal erred in law and facts in misconstruing the customary rights of occupancy of the Appellant's children's (Exhibit K1) thereby misdirecting itself on the true boundaries of the suit land.*

Basing on the above grounds, the Appellant requested this Court to allow the appeal by setting aside both judgement and decree of the DLHT and declared that he is the lawful owner of the disputed land.

This Court ordered this appeal to be argued by way of written submissions. The Appellant was represented by none other than; the learned advocate Mr. Edson Mbogoro, while on the contrary, the Respondents enjoyed the services of Mr. Vicenti Kasale the learned advocate.

Arguing in support of the appeal Mr. Edson Mbogoro submitted that in his petition of appeal the Appellant has three grounds of appeal and he prayed to argue them consecutively. He contended that the first ground of appeal is to the effect that the District Tribunal erred in law and in fact when it held that the first Respondent is the lawful owner of the suit land, relying on a dubious document (exhibit "ISK1"), which was being vigorously contested by the appellant even when the dispute was referred to the Mtyangimbole village executive officer before lodging an application at the DLHT.

On the same note, he added that in proving the ownership of the suit land, the first Respondent tendered exhibit "ISKI" but its authenticity is doubtful since it was forged.

It is worth considering that, the Appellant questioned the authenticity of the said document not only in his pleadings and before

the district Tribunal but also when the dispute was referred before Mtyangimbole Village Executive Officer.

In particular, the said exhibit is in the form of a letter bearing the address of Mtyangimbole Village Office. Similarly, the said letter had no addressee, as it is usual and common to all letters or documents in the form of letters and it has no name of the village official who signed it.

To add to it, he stated that in his testimony DW3 that is; Herbert Martin Luambano testified that he was the Village Chairman of Mtyangimbole Village on 17th August, 2010, when exhibit SK1 was written and he delegated the power of signing it to the Village Treasurer. Moreover, he further stated that in signing the exhibit the Village Treasurer didn't indicate that he was signing the "letter of offer," as it was on behalf of another authority but signed it as if he or she was the one who issued it.

To add to it, he submitted that exhibit ISKI was so dubious in form and content that it could not have been trusted to have conferred ownership of the suit land to the first Respondent since its credibility was to be obtained from the minutes of Mtyangimbole Village Assembly, which would have shown that the first Respondent indeed applied for

ownership of the thirty-five acres of land from the Village Counsel and the Village Assembly approved his application.

Notably, he added that in his testimony DW3 testified that first Respondent application for land allotment was approved by the Village general Assembly but the minutes of the said assembly were not tendered before the DLHT. For more emphasize he cited section 32 (5) of *The Village Land Act (Cap. 114, R. E. 2019*) and stated that since the first Respondent was granted only thirty acres of land, such "derivative grant" it was to be granted by the Village Council, subject to the Village Assembly's approval and not by other authority. Section 32 (9) of the Village Land Act (supra) which states that:

> *"32 (9) A A grant of a derivative right shall be;*
>
> *a) In the prescribed form.*
> *b) Signed by the chairman and secretary of the village council*
> *c) Acompanied by a demand for any premium, rent, fees, taxes and dues which are prescribed or which may be determined by the village council".*

In addition, he further submitted that in the instant appeal, the purported grant was neither signed by the chairman nor the secretary but by the Village Treasurer that is why the purported grant was not

only highly dubious but also invalid as it was contrary to the provisions of law and the DLHT wrongly relied on it.

On the second ground of appeal is concerned, he submitted that in the circumstances of this appeal, the DLHT misdirected itself in law and in fact by not visiting the locus in quo, a failure that occasioned miscarriage of justice. He contended that the Appellant is aware that visiting or not visiting the locus in quo was the discretion of the DLHT. On the same note, the first Respondent claimed that the suit land is not bordered by the Appellant's children's land and there is a distance of about 212 acres from the Appellant's children's land to the suit land. He argued that he is sharing a boundary with the Appellant's children and not the Appellant. Basing of those testimonies, one of the issues was on the boundaries of the suit land which was to be solved by visiting the locus in quo and failure to visit the locus in quo and ascertain which is which and that failure to do so occasioned a miscarriage of justice.

On the third ground of appeal, he submitted to the effect that the DLHT erred in law and in fact in misconstruing exhibit L-1 (the Appellant's children Customary Right of Occupancy, thereby misdirecting itself on the true boundaries of the suit land. He contended that further that the DLHT stated that the Appellant's evidence was contradictory on

the issue of boundaries but the Customary Right of Occupancy tendered by the Appellant shows the boundaries that in the Northern side the Appellant's children's land is bordered by the village land.

He submitted that the DLHT observation was a misconstruction and added that it would be correct if the suit land was owned through the right of occupancy granted under *The Land Act* (Cap. 113, R. E. 2019) and not under *The Village Land Act* (supra). He contended that under *The Land Act* (supra), if one owns a piece of registered land, usually the boundaries will be neighbouring land identified by its plot number and block. He emphasized that the situation is different under The Village Land Act in which if a holder of The Right of Occupancy under a customary title deed is bordered by another owner who is owning the land under a derivative right, the boundaries of such a customary title deed will continue to depict its boundaries as the village land until such occupier or owner also registers his land under a Customary Right of Occupancy.

He argued that when the Appellant stated that in the Northern side the suit land is bordered by the registered land of his children, he was correct since the Appellant's land is unregistered, and all unregistered lands in villages are termed as the "village land," although

they are owned by individuals under derivative rights. Finally, he prayed for this appeal to be allowed with costs and the Appellant be declared to be the lawful owner of the suit land.

On the other hand, Mr. Vicent Kassale replying to the submission made by the Appellant's advocate, submitted that it is not in dispute that in civil cases whoever's evidence is heavier than the other is the one who must win the case. He contended that the DLHT analysed the evidence presented before and reached into a correct decision and reasons for such a decision. He further stated that, it should be borne in mind that from the very beginning that, the suit land was previously owned by Mtyangimbole Village Council, and the Appellant had alleged to have been allocated the said land in the year 2006 under the leadership of Hurbet Luambano, who testified as DW3 and denied to have allocated the suit land to the Appellant.

He emphasized that the second Respondent is said to have been involved in the allocation of the suit land in the year 2006 to the Appellant and his family and in the year 2010 to the first Respondent. However, the second Respondent testified that the suit land was allocated to the first Respondent in the year 2010. He was of the view that from this kind of evidence, it is crystal clear in law and in fact that

the first Respondent had a stronger and heavier evidence than the Appellant. He emphasized that the Appellant challenged on the authenticity of Exhibit ISKI, however, considering the evidence of DW3, it is very clear that its existence was well known to the witness, who was the chairman of the Village Council by then. He added that the exhibit is genuine and it is legally recognized in its form and content. He further averred that even if the exhibit would be expunged, the evidence of the first Respondent remains stronger and heavier than that of the Appellant.

On the issue of visiting a *locus in quo*, he submitted that it should be known that the law does not mandatorily require the Court or Tribunal to visit the locus in quo, but it is only done at the discretion of the Court or Tribunal when it is necessary depending on the nature of the evidence given by the parties during trial. He submitted further that the dispute between the parties in this appeal was not on the boundaries as submitted by the Appellant but it was on ownership. He further argued that a visit to the *locus in quo* should be done only in exceptional circumstances by the Trial Tribunal to ascertain the state, size, and location of the premises in question. He stated that it is very clear that the parties in this matter were not disputing on the size, state

or location of the disputed land, thus there was no need to visit the *locus in quo.* On the same note, he emphasized that visiting the *locus in quo* is not mandatory and the Court or Tribunal should strive to avoid it where necessary. He made reference by citing the case of **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29, in which the Court of Appeal of Tanzania held that:

> *"It is only in exceptional circumstances that a court inspects a* ***locus in quo****, as by doing so, a court may unconsciously take on the role of a witness rather than an adjudicator."*

Therefore, he contended that the circumstances in the instant appeal, in which the location, size and boundaries were so clear, the chairman of the DLHT was justified in avoiding to visit the *locus in quo.* Finally, he prayed for dismissal of this appeal in its entirety for lack of merit and the Appellant be condemned to pay the costs.

From the grounds of appeal and submissions made by the learned advocates for both parties, I will start with the second ground of appeal which is on the issue of visiting the *locus in quo* and if need will arise, I will discuss on the other grounds of appeal.

Notably, Mr. Mbogoro the Appellant's learned counsel submitted that the District Tribunal misdirected itself in law and in fact by not visiting the *locus in quo*, a failure that occasioned to miscarriage of justice.

In that regard, he contended that the Appellant is aware that visiting or not visiting the *locus in quo* is at the discretion of the Court or Tribunal. However, he stated that when one recalls the facts of this case, one of the contentious issue was the boundaries of the suit land on the Northern side whereas the Appellant contended that the suit land bordered with the land of his children.

Additionally, in the year 2014 his four children were granted Customary Rights of Occupancy, which was admitted by the DLHT during trial. The first Respondent claimed that the suit land is not bordered by the Appellant's children's land as there is a distance of about 212 acres from the Appellant's children's land to the suit land and the first Respondent is sharing a boundary with the Appellant's children and not the Appellant himself. He stated that it was incumbent for the DLHT to visit the *locus in quo* and failure to do so occasioned to miscarriage of justice.

Mr. Vincent Kassale submitted that it should be known that the law does not mandatorily require the Court or Tribunal to visit the *locus in quo*, but it is only done at its discretion when it is necessary depending on the nature of the evidence adduced by the parties during the trial. He stated that contrary to what was submitted by the Appellant, the issue in this appeal was not on the boundaries of the suit land but the centre of the dispute was on ownership. He further argued that a visit to the *locus in quo* should be done only under exceptional circumstances to ascertain the state, size and location but in the matter at hand it is crystal clear that the parties were not disputing the size, state or location of the disputed land, thus there was no need to visit the *locus in quo.*

According to the submissions made by the learned advocates from both sides, I find the Appellant's learned advocate is challenging as to why the DLHT didn't visit the *locus in quo* whereas on the part of the Respondents' learned advocate he is on the view that there was no need of visit the *locus in quo.*

As far as I am concerned, I strongly agree with the submissions made by the Appellant's learned advocate on the following grounds. First, from the testimonies of the parties and their witnesses' it is clear

that the area has been measured and the Appellant already has the Customary Rights of Occupancy over that land measuring thirty acres and he has put demarcation marks. The DLHT was supposed to visit the *locus in quo* to look whether there are marks and determine the size of the disputed land things which would have enabled the Trial Tribunal to do justice.

Section 81 of The Village Land Act (supra) states that a Customary Right of Occupancy is in every respect of equal status and effect to a Granted Right of Occupancy. The provision reds as follows;

> *"18 (1) A customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy and shall, subject to the provision of this Act, be– (a) capable of being allocated by a village council to a citizen, a family of citizens a group of two or more citizens whether associated together under any law or not, a partnership or a corporate body the majority of whose members or shareholders are citizens; (b) in village land, general land or reserved land; (c) capable of being of indefinite duration; (d) governed by customary law in respect of any dealings, including intestate succession between persons residing in or occupying and using land– (i) within the village having jurisdiction over that land; or (ii) where the customary*

*right of occupancy has been granted in land other than village land, contiguous to or surrounding the land which has been granted for a customary right of occupancy; (e) subject to any conditions which are set out in section 29 or as may be prescribed and to any other conditions which the village council having jurisdiction over that land shall determine; (f) may be granted subject to a premium and an annual rent, which may be varied from time to time; (g) capable of being assigned to a citizen or a group of citizens, having a residence or place of business in the village where the land is situate, or a body corporate the majority of whose shareholders or members are citizens having a place of business in that village; (h) inheritable and transmissible by will; (i) liable, subject to the prompt payment of full and fair compensation, to acquisition by the State for public purposes in accordance with any law making provision for that action."*

Moreover, if Customary Right of Occupancy have the same force to the Granted Right of Occupancy, the DLHT Chairman was required to visit the *locus in quo.* Since the disputed land has the Customary Right of Occupancy, evidence from the Village Land Council was of vital importance in order to know who is the lawful owner of the disputed land. For justice to be seen to be done, visiting the *locus in quo* was very necessary.

The Court of Appeal of Tanzania in the case of **Avit Thadeus Massawe v. Isidory Asenga,** Civil Appeal No. 6 of 2017, gave the guidelines on the issue of visiting the *locus in quo.* In its decision the Court had this to state;

> *"When visit to the **locus in quo** is necessary and appropriate, the Court should attend with parties and their advocates, if any, and with much each witness as may have to testify in that particular matter in issue, and for instance if the size of the room or width of road is a matter in issue, have the room or road measured in the presence of parties, and not made thereof. When the Court re-assembles in the Court room, all such notes should be read out of parties and their advocated, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant and the Court only refer to the notes in order to understand or relate to the evidence in Court given by witnesses. We trust that this procedure will be adopted by the court in future."*

As much as I am concerned, I am inclined to adopt the above decision in deciding the matter at hand. Therefore, I concur with the Appellant's learned advocate and disagree with the Respondent's learned advocate submissions in this appeal. In is important to visit the

*locus in quo* and Mtyangimbole Village Land Council must be involved and additional evidence be recorded. The DLHT had to acquire more evidence to satisfy itself on the boundaries and the owner of the suit land from the members of Village Land Council who allocated the land to the parties. Evidence from the members of the Village Land Council who allocated the land is very important for justice to be seen to be done. See the case of **William Mrema v. Samson Kivuyo** (2002) T.L.R 291, It was held that:

> *"In the exercise of its appellate jurisdiction under this part, the High Court shall have the power to take or order some other courts to take and certify additional evidence ..."*

In the final analysis, I find in the instant appeal an order for additional evidence is more important for justice to be seen to be done. By the power conferred on this court under section 42 of *The Land Disputes Courts Act*, (Cap. 216, R. E. 2019), I remit the case records to the District Land and Housing Tribunal for Songea for taking additional evidence and visiting at the *locus in quo*. In that regard, I order the additional evidence should be taken immediately as possible.

On the premises the second and third grounds of appeal have merit. The appeal is allowed. The judgment and decree of the DLHT are set aside. I give no order on costs since the mischief is caused by the DLHT. Ordered accordingly.

**DATED** and **DELIVERED** at Songea this 30th day of June, 2023.

**U. E. MADEHA**

**JUDGE**

**30/06/2023**

**COURT:** Judgment delivered on this 30th day of June, 2023 in the presence of the Appellant's advocate and the Respondents advocate. Right of appeal is explained.

**U. E. MADEHA**

**JUDGE**

**30/06/2023**