IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 32 OF 2022

(C/F Application No. 02 of 2020 District Land and Housing Tribunal of Same at Same)

NYERERE KABORA..... APPELLANT

VERSUS

RASULI MBWAMBO..... RESPONDENT

JUDGMENT

Last Order: 21st June, 2023
Judgment: 27th July, 2023

MASABO, J.:-

The appellant herein has filed this appeal challenging the decision of the District Land and Housing Tribunal of Same at Same in Land Application No. 2 of 2020. The brief facts leading to this appeal are as follows: The appellant instituted Land Application No. 2 of 2020 before the District Land and Housing Tribunal of Same at Same (the trial tribunal) for recovery of one acre of land allegedly trespassed into by the respondent in 2020. The respondent denied the allegations and the case proceed to hearing to determine the lawful owner of the suit land.

To establish his claim, the appellant adduced his evidence as PW1 and called the following four witnesses; PW2, Bakari Omari, PW3, Ahadi Msuya, PW4 Rista Ivod and; PW5, Semboje Abdallah Mbwambo. Refuting the allegations, the respondent testified as DW1 and called the following 5

witnesses; DW2, Sifaeli Juma Msuya; DW3, Hamfrey Emmanuel; DW4, Msheri Salim and DW5, Juma Ally Msheri. After taking evidence of both parties, the trial tribunal visited the *locus in quo* whereas it interviewed two new witnesses; Richard Elieza Mchomvu and Halifa Hosen Mbwambo. In the end, the application was dismissed after the tribunal held that, since the one acre of land claimed allegedly formed party of the 17 acres which the applicant had won in a previous suit against the village, he ought to have proved that he lawfully executed the decree which granted him the 17 acres. Since there was no proof that he did, the suit was without merit. The suit land was consequently declared to belong to the respondent.

Aggrieved by this decision, the appellant has preferred this appeal on the following grounds;

1. The learned chairperson erred both in law and in fact when he failed analyze properly the evidence on record and as a result arrived at a wrong decision.
2. That the learned chairperson erred in law and in fact when he failed to note that the respondent is a mere trespasser to the land in dispute and instead decided that the respondent is the legal owner of the piece of land in dispute despite him having tendered no documentary proof to that effect.
3. That the learned chairperson erred both in law and in fact by not taking into consideration the material contradiction of the testimonies of the: respondent and his witnesses especially DW5 Juma Ally who still referred to the appellant as a trespasser despite knowing that the matter was taken to court and the court decided otherwise; and the learned chairperson ought to have disbelieved the evidence of the respondent who was a liar.

4. That the learned chairperson erred both in point of law and facts when he failed to consider that the sketch map and measurements of the disputed land was not drawn and presented to the tribunal which would have helped to ascertain as to whether the suit land was 17 acres handed to the appellant by the village council or not; as If was also opined by one of the assessors.
5. That the learned trial chairperson erred in law and in fact in insinuating that failure of the appellant to execute 1993 Judgment and decree for over 20 years granted the respondent right over the same land, the respondent whom had been on the suit Iand for less than a year Immediately after which the appellant preferred the suit before the district land and housing tribunal.
6. That the learned chairperson erred in law and in fact by not taking into account the fact that in absence of execution of the 1993 judgment, the appellant was and remained in the suit of land for over 45 years from 1974 while the respondent came to the suit land only for one year immediately after which the appellant preferred the suit.
7. That the learned trial chairperson erred in fact in deciding to ignore the evidence of all the appellants witnesses *namely PW2 Bakari Omari, PW3 Habiba Msuya, PW4 Rista Ivod Sumpa, PWS Abdallah Mbwambo.*

Hearing of appeal proceeded in writing. Both parties had representation. The appellant was represented by Ms. Lilian Mushemba Justus while the respondent enjoyed service of Mr. Philemon Shio, both learned counsels.

In support of the 1st ground of appeal, Ms. Justus submitted that the trial chairman stated in his judgment that the appellant inherited the land from his deceased father while the appellant had stated that, he too acquired it

from his farther who had obtained the same through clearing a virgin forest. She reasoned that in arriving at his conclusion, the chairman failed to analyze the evidence of the appellant in which he had proved that he too acquired the land from his father who acquired the same through clearing a virgin forest and for more than 46 years from 1974 until 2020 he peacefully enjoyed ownership of the suit land. The respondent trespassed into it in 2020 but before that, the suit land was subject to court action by which the appellant was declared the lawful owner of the 17 acres of land which includes the one acre. The judgment by the High court which declared him the lawful owner was not challenged. Besides, PW2, PW3 and PW4 and one Richard Elieza Mchomvu recognized the appellant as owner of the suit land and testified that they had handed over 17 acres of land to the appellant a fact that the respondent had admitted. Ms. Justus concluded that the chairman's decision in favour of the respondent despite the evidence adduced before him was an error in fact and in law and the same amounted to denying the appellant the right to be heard as held in **Pili Ernest vs Moshi Musani** Civil Appeal No. 39 of 2019 CAT (unreported).

On the 2nd ground, Ms. Justus submitted that according to section 110(1) and (2) of the Evidence Act Cap 6 RE 2022, the burden of proof normally lies on the plaintiff. As held in Paulina Samson **Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 CAT (unreported). The burden of proof shifts to the adverse party after the plaintiff has discharged his burden. That the appellant had discharged his burden by

parading four (4) witnesses and tendering three (3) exhibits to support his stance whereas the respondent was unable to prove that he is the lawful owner of the suit land and in the contrary, he proved that apart from the 3 acres he was given by his grandfather, he obtained the rest by encroaching into neighbouring lands so as to expand his land. To support her stance, she cited **Sunday Agrey Mseli and 4 others vs Nusa Bakari Nankuru,** Land Case No. 49 of 2109, HC (unreported) and **Bright Technical Systems and General Supplies Ltd vs Institute of Finance Management**, Civil Appeal No. 12 of 2020 (unreported).

Addressing the 3rd ground, Ms. Justus shed a light to the alleged contradictions in the respondent's evidence. She argued that, at first, the respondent admitted that the appellant owns 17 acres of land but changed later on and as seen in page 40-42 of the typed proceedings. On the inconsistencies between the evidence of the respondent and his witnesses, she argued that, the respondent testified that he was given 1 acre of land by his grandfather and that he obtained other 4 by himself, DW5 testified that the respondent was given 3 acres by his grandfather and that he is bordered with the respondent on the west and across the road is where one Mohamed Mlasimo was cultivating the same but the appellant had invaded the said land and the court later decided in favour of the appellant. Thus, in essence, DW5 admitted that the 17 acres belonged to the appellant. Ms. Justus argued further that, despite the fact that not all witnesses can recall facts the same way, the contradictions are material and the same should not be ignored. She supported her stance with

Mohamed Said Matula vs Republic [1995] TLR 3 and **Awadhi Abrahamani vs Republic**, Criminal Appeal No. 303 of 2014 (unreported).

Regarding the 4th ground, Ms. Justus argued that the trial tribunal ought to have cleared the ambiguity on the size of the land when it visited the *locus in quo.* Discussing the essence of visiting *Locus in quo*, she cited the case of **Avit Thadeus Massawe vs Isdory Assenga** (Civil Appeal No. 96 of 2017) [TZCA] 357 and argued that the trial tribunal failed to clear necessary doubts raised in course of adducing evidence and that the trial chairperson erred in law by failing to take the initiative to draw a sketch map and taking measurements which would have resolved the issue of ownership of the acre of land in dispute.

On the fifth ground, she submitted and argued that the appellant was declared the lawful owner of the disputed land in 1993 which although was unchallenged and unexecuted did not vest ownership to anyone else. Further that, since 1993 to 2020 when the appellant preferred the application against the respondent 27 years had lapsed but the respondent trespassed the same in less than a year, thus there can be no doubt that the suit land belongs to the appellant and no one else. On the 6thground of appeal, she maintained that the appellant was an adverse possessor as he had been in continued ownership of the land for about 45 years inclusive of the 27 years running from 1993. She supported her argument with **National Agriculture and Food Corporation vs Mulbadaw Village**

Council and Others [1985] TLR 88. Having submitted on these six grounds, she abandoned the 7th ground of appeal.

In reply to the 1st ground of appeal, Mr. Shio submitted that the counsel for the appellant misdirected herself by addressing the issue of the right to be heard. He argued that the right to be heard which is a constitutional right enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 was observed as the appellant was given an opportunity to give his testimony and parade his witnesses and after both parties being accorded the right to be heard. Thereafter, the tribunal analyzed the evidence of both parties on merit and assessed the credibility of witnesses and reached at a just decision. In support, he cited **Stanslaus Rugaba Kasusura and A.G vs Phares Kabuye** [1983] TLR 334 and **Nkungu vs Mohamed** [1984] TLR 46.

On the 2nd ground of appeal, Mr. Shio submitted that the appellant had the burden to prove the trespass by furnishing the tribunal with all ingredients of trespass so it could enter a judgment in his favour but he failed. He argued that although the appellant claimed ownership of 17 acres of land which were handed over to him by the Village Executive Officer and the Director of Mwanga District Council after winning his appeal before the Land Appeal Tribunal of Dar es Salaam in Case No. 1 of 1992, he failed to prove the trespass over the one acre of land. All his evidence revolves on his ownership of the 17 acres of land which was undisputed. Moreover, he argued that in spite of having many witnesses, the quality of the evidence

of the witnesses is what mattered most. In fortification of his argument, he cited the cases of **Hemed Said vs Mohamed Mbilu** (supra) and **Yohanis Msigwa vs Republic** [1990] TLR 148.

Regarding the 3rd ground on contradictions and inconsistencies on the defence witnesses, he submitted that such inconsistencies are unavoidable and can only vitiate the evidence of parties if they go to the root of the case which was not the case. In support, he cited **Dickson Elias Nsamba Shapwata and Another vs Republic** Criminal Appeal No. 92 of 2007 cited with approval in **Benard Cosmas vs Republic**, Criminal Appeal No. 49 of 2021, HC, Sumbawanga. He proceeded that, it was the appellant and his counsel that made contradictions in the matter as the appellant claimed one acre of land while his entire evidence was based on the 17 acres of land and thus showed that the appellant's claim was frivolous and unfounded.

On the 4th ground, Mr. Shio contended that the visit of *locus in quo* for measuring the same or drawing the sketch map is not mandatory and can only be done in exceptional circumstances to ascertain the state, the size and location of the suit land. He further stated that there was no dispute over the appellant owning 17 acres of land but the issue was that the appellant claimed that the respondent was not his neighbour but rather his mother and therefore he failed to persuade the trial tribunal that he had a claim against the respondent. He averred that if there was an issue on the boundaries, size of the suit lands and location the appellant could have prayed that the trial tribunal visits the suit land to ascertain the same.

Arguing that the court only visits the *locus in quo* in exceptional circumstances and that its role is that of a witness rather than adjudicator, he cited the case of **Nizar M. H vs Gulamali Fazal Jarimohamed** [1980] TLR 29 CAT.

Lastly, in regard to the 5th and 6th grounds of appeal, Mr. Shio contended that the trial tribunal correctly addressed the failure of the appellant to execute the 1993 judgment and that the same contributed in his failure to prove that the respondent trespassed one acre of his 17 acres. Mr. Shio cited the case of S**hell and BP Tanzania Limited vs University of Dar es Salaam** [2002] TLR where it was held that it is not necessary in all execution cases for a decree holder to resort to court for assistance and that assistance shall l only be sought where peaceful execution is forth coming. He further contended that the respondent had testified that he had been in the area since 1984 and since then he was able to acquire four acres which he used until 2020 when he was sued by the appellant.

I have dispassionately considered the submissions of both parties alongside the tribunal's record and I am now read to determine the appeal starting with the 4th ground of appeal. In this ground the appellant has alluded that there were improprieties in the visit paid by the tribunal to the *locus in quo*. Ms. Justus has passionately argued that the visitation to the *locus in quo*. ought to have resolved the ambiguity as to the size of the suit land and its location but left the same unresolved. On the contrary, Mr. Shio has maintained that the visit to the *locus in quo* was not necessary and that if the issue was on boundaries, size of the suit land and location, the

appellant could have gone further by asking the tribunal, before closure of his case, to visit the *locus in quo* to ascertain the such issues.

It is correct and I entirely agree with Mr. Shio that visitation to the *locus in quo* is not a mandatory requirement as there is no law that requires the court or tribunal to visit the *locus in quo*. There is plethora of authorities this issue and they include the decision of the Court of Appeal in **Nizar M.H vs Gulamali Fazal Jarimohamed** (supra); **Sikuzani Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal No. 197 of 2018) [2019] TZCA 322 and **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others** (Civil Appeal No. 4 of 2018) [2021] TZCA 663. In **Sikuzani Saidi Magambo & Another vs Mohamed Roble** (supra) the Court stated;

> "As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the *locus in quo*, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial."

This is not to say, the visitation of the locus in quo is useless exercise oe devoid of any value in the administration of justice. When done, it serves a legitimate purpose and has a valuable contribution in the justice chain. The essence of visiting the *locus in quo* was well articulated by the Court of Appeal in **Avit Thadeus Massawe v. Isidory Assenga (supra)** when it

cited with endorsement a Nigerian case of **Akosile vs. Adeye** (2011) 17 NWLR (Pt. 1276) p. 263 in which it was stated that;

> "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. 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 on the land and boundaries."

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It is this context that, the law holds that, when a court or tribunal finds it necessary to visit the *locus in quo*, it should adhere to certain procedures and guidelines. Such guidelines and procedures have been articulated and perfected by the Court of Appeal over the years as evident in **Nizar M.H vs Gulamali Fazal Jarimohamed**; **Avit Thadeus Massawe vs.**

Isidory Assenga (supra); **Sikuzani Saidi Magambo & Another vs Mohamed Roble** (supra) and; **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others** (supra) and **Avit Thadeus Massawe v. Isidory Assenga** (supra). In the later case, the Court once again cited a Nigerian 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 the following were articulated as factors that should be taken into consideration when the court or tribunal visits the *locus in quo*;

> 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 Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56.
> 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. dominic 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. (Emphasis added).

In **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others** (supra), the Court of Appeal having considered its previous decisions, advanced necessary requirements for the visit to the *locus in quo* to be meaningful. It stated;

> "In the light of the cited decisions, 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*; and **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"

In the present case, the dispute was on boundaries of the suit land. The appellant claimed that the one acre was part of the 17 acres owned by him from the year 1974 whereas the respondent contended that the said acre was part of the land bequeathed to him in 1984. To resolve this, the parties and the tribunal found it necessary to visit the *locus in quo.* The *Locus in quo* was visited. The parties were both present in the visit but the advocate for the appellant was absent and there is no reason accorded to

his absence. The witnesses of both parties were also absent. Weirdly, there appeared two new witnesses, one Richard Elieza Mchomvu and Halifa Hosen Mbwambo who volunteered to give evidence at the locus quo. Their evidence was taken on oath and parties had the opportunity to cross examine them.

This was a material irregularity. As I have stated earlier on, the essence of visit of the *locus in quo* is among others, to accord the court or tribunal the opportunity to verify the evidence already adduced by comparing it with what appears physically. Inviting new witnesses, whether or not they volunteered, amounted to accepting new evidence and hence an irregularity that vitiated the process. In **Bongole Geofrey & 4 Others v Agness Nakiwala** (Civil Appeal No. 0076 of 2015) [2018] UGCA 27, the Court of Appeal of Uganda dealt with a similar issue. Just as in the present case, the trail court while visiting the *locus in quo* proceeded to take evidence of two new witnesses who were absent in initial proceedings. When the matter went on appeal, the Court of Appeal found this to be a fatal irregularity which vitiate the proceedings of the trial court. It stated;

> "It was irregular for the trial court to have allowed persons who were not witnesses and had not testified in the Court to give evidence at the locus.
> While visit to the *locus in quo* is not a mandatory requirement, where the court deems it deserving, then it is bound to carry it out properly. The purpose is to find out whether the testimony given in respect of the impugned property is in tandem with what pertains physically on the ground. the visit is not

> intended and should not be applied to fill gaps in evidence."

The Court further held;

> "In the instant case, the visit to the *locus in quo* was necessary because in their testimony, the witnesses had referred to certain features of the land including boundaries, graves, a shrine and old structures of homesteads. It was prudent that he made the visit but the trial Judge acted irregularly when he allowed persons who had not testified in court to give evidence at the *locus in quo*.
>
> This in our view vitiated the proceedings at the *locus in quo* and any findings the trial Judge made based upon them."

Furthermore, and contrary to the requirement the court vising the locus in quo should record any observation, view, opinion or conclusion made by the trial tribunal concerning the *locus in quo* which must be known to the parties and advocates, the tribunal recorded no such observations, opinion or conclusion. All what the tribunal recorded is that it visited the locus in quo and two persons volunteered to give their evidence. After recording the evidence of such two witnesses, the tribunal recorded no view/opinion nor was there any sketch plan to describe what the tribunal saw during the visit. Looking at the record, it is obvious that the chairman clearly omitted to properly record the proceedings and in that, this court has been denied the full record of the proceedings of the trial tribunal. Without such record, this court can not properly analyze the entire evidence of the trial tribunal. The Court of Appeal in **Kimonidimitri Mantheakis vs Ally Azim Dewji**

& Others (supra) faced the same issue where the trial tribunal had not recorded the visit. It stated;

> "The said omission occasioned a miscarriage of justice as the Court sitting on first appeal cannot make a proper re- evaluation of the entire trial evidence including what had transpired at the visit in the *locus in quo*.
> In view of what we have endeavoured to discuss, we agree with learned counsel of either parties that, the trial was vitiated and as such, its proceedings and resulting judgment cannot be spared."

Similarly, in the present case, the foregoing irregularities in the visit of the *locus in quo* have vitiated the proceedings of the trial tribunal and as such there is no need for me to address the rest of the grounds of appeal. Consequently, I nullify the proceedings of the trial tribunal, quash and set aside its judgment and decree. I, subsequently, order the remission of the record to the trial tribunal for retrial of the case before a different coram. The appeal is allowed to such extent. Given that the error was occasioned by the trial chairman, the costs shall be shared by each party bearing its own costs.

Dated and delivered at Moshi this 27th day of July, 2023.

J. L MASABO

JUDGE