

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MTWARA
AT MTWARA**

LAND APPEAL NO. 10 OF 2023

(Arising from Land Application No. 23 of 2022 at the DLHT for Mtwara at Mtwara)

HAMIDU FELI SALUMU ----- APPELLANT

VERSUS

SHARAFI HAMIS KANJI ----- RESPONDENT

JUDGEMENT

Date of last Order: 04.05.2023

Date of Judgment: 21.07.2023

Ebrahim, J.

The appellants herein have filed the instant appeal raising six grounds of appeal as follows:

- i. Kwamba, Baraza la Ardhi na Nyumba la Wilaya ya Mtwara, lililopo Mtwara imekosea kisheria na kimantiki kwa kumpa tunzo Mrufaniwa bila kwenda kwenye eneo la Mgogoro ili kupata uhalisia wa eneo Linalogombaniwa (visiting at the locus in quo);
- ii. Kwamba, Baraza la Ardhi na Nyumba la Wilaya ya Mtwara, lililopo Mtwara imekosea kisheria na kimantiki kwa kumpa

tunzo Mrufaniwa bila kuchambua vizuri ushahidi uliotolewa na Mrufani na shahidi wake na kufanya kufikia katika maamuzi yasiyo ya haki;

- iii. Kwamba, Baraza la Ardhi na Nyumba la Wilaya ya Mtwara, lililopo Mtwara imekosea kisheria na kimantiki kwa kumpa tunzo Mrufaniwa wakati mrufani aliweza kuthibitisha madai yake katika viwango vinavyotakiwa kwenye mashauri ya madai; na
- iv. Kwamba, Baraza la Ardhi na Nyumba la Wilaya ya Mtwara, lililopo Mtwara imekosea kisheria na kimantiki kwa kumpa tunzo Mrufaniwa kwa kujikita katika kielelezo D1, D2, na D3 ambavyo kimsingi ni vielelezo vya maeneo mengine na kwamba havina uhusiano wowote na eneo lenye Mgogoro.

Basing on the foregone grounds of appeal the appellant prayed for this court to reverse the decision of the tribunal, allow the appeal with costs; and declare that the suit land belongs to the appellant.

Briefly, facts raising to the instant appeal are as follows; before the Land and Housing Tribunal for Mtwara (Trial Tribunal) the appellant sued the respondent for trespassing into his piece of land. The measurements of which were not specified. It was only described

that the land is located at Mndumbwe Ward within Tandahimba District. Upon hearing the evidence of the parties, the trial Tribunal pronounced judgment in favour of the respondent. It declared the appellant as unlawful owner of the suit land, the respondent thus, was declared the rightful owner of the suit land. The decision of the trial Tribunal did not amuse the appellant. He thus preferred the instant appeal.

When the case was called for hearing, the appellant appeared in person unrepresented; and the respondent had the representation of advocate Ally Kasian Mkali. Submitting in support of the appeal, the appellant firstly adopted her grounds of appeal. He then added that the trial Chairman denied his right to narrate the basis of his case. He said he was sick when the respondent invaded his land and the Chairman did not visit locus in quo of which he would have ascertained boundaries of the suit land.

In reply, advocate Mkali, prayed to the court to adopt their reply to the grounds of appeal, and to make amendment on the reply no. 1. The prayer was granted. Submitting on the 1st ground of appeal, he argued that the Tribunal does not visit locus without the prayer of the

parties, and there was no any issue which required the tribunal to visit locus in quo. He further argued that the appellant sold the suit land to the respondent and exhibit D1, D2 and D3 was received by the Tribunal as sale agreements. He referred to **Section 100 (1) of the Evidence Act, Cap 6 R.E 2022** which gives weight to written evidence vis a vis oral evidence, which was also the basis of the Tribunal decision. He added that it is the position of the law that **“who alleges must prove”** as per **Section 110 of the Evidence Act, Cap 6 R.E 2022**. He stated that the appellant failed to prove his case, and he prayed for the appeal to be dismissed with costs.

In brief rejoinder, the appellant commented that he is not contesting on exhibits D1, D2 and D2 but he is contesting on a different suit land. I have carefully examined the grounds of appeal and the reply thereto. I will consider the grounds of appeal as presented by the appellant. However, I shall merge the 2, 3 and 4 grounds of appeal and discuss them together as they are interrelated.

Regarding ground one on the complaint that the DLHT erred when it failed to visit a locus in quo; I state at the outset that visiting a locus in quo is at the discretion of the Tribunal. There is no law which compels the court/tribunal to visit a locus in quo. The visit depends on the

evidence adduced by the parties necessitating the visit for just adjudication of the matter. In the cases of **Sikuzani Said Magambo and Another v. Mohamed Roble**, Civil Appeal No. 197 of 2018; and **Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed** (1980) TLR 29, it was observed that the court should only in exceptional circumstances, inspect a locus in quo or else it would unconsciously take the role of a witness than of an adjudicator.

The issue here is whether the evidence on record would have necessitated Tribunal to visit locus in quo.

As to the 2nd, 3rd and 4th grounds of appeal, essentially the appellant complains that the trial Chairman did not properly evaluate the appellant's evidence and that the tribunal based on exhibit D1, D2 and D3 to prove ownership of the suit land is of the respondent, which was not in relation with the disputed pieces of land.

Clearly, the bone of contention in this case is who is the lawful owner of the disputed pieces of land following the complaint by the appellant that he is not disputing sold pieces of land as per exhibit D1, D2 and D3 but is disputing on the pieces of land which was issued as a security and 4 acres of suit land. I have gone through the record

and visited the proceedings of the Tribunal. At page 6 to 7 of the typed proceedings, the appellant told the Tribunal that when he was sick, he asked the respondent for Tzs 600,000/= and he issued the disputed pieces as security. While at the hospital the respondent trespassed to his disputed pieces of land of 4 acres and the disputed pieces of land issued as security. The respondent contended that the same were sold to him. When the appellant was cross-examined, he testified that he is not claiming on the pieces of land which he had sold to the respondent but he is disputing on the pieces of land which was issued as security and four (4) acres of suit land which the respondent has encroached while he was at the hospital.

There was no dispute on the sale of the disputed pieces of land. The only issue was that whether the respondent had encroached at the appellants' piece of suit land which was issued as security and 4 acres of the suit land. The issue which was to be determined by the trial Tribunal but unfortunately failed to do it.

DW1, who was the respondent at page 13 of the typed proceedings testified that the appellant sold to him three pieces of land, and tendered exhibit D1, D2 and D3 which were not disputed by the appellant.

Further to that, PW2 Saidi Lada Mtimbo testified at the trial Tribunal that he was the witness who witnessed the purchase of the two pieces of land (exhibit D2 and D3). He further testified that the appellant disputed piece of land was issued as security for TZS 570,000/= and when the appellant wanted to refund the respondent, DW1 refused and argued that the whole disputed pieces of land were sold to him.

Counsel for the Respondent argued that the Appellant is claiming on the pieces of land that he had already sold to the Respondent as exhibited by exhibits D1, D2 and D3. On the other hand, the Appellant while acknowledging to sale the pieces of land to the Respondent as per the above mentioned exhibits said it is another land which he gave the Respondent as collateral for money borrowed from him.

At this juncture, I see that since the Appellant claims that the disputed land has nothing to do with the ones that he admits to have sold to the Respondent, the trial Tribunal ought to have collected more concrete evidence on which exactly is the disputed land. If at all, this is one of the exceptional case referred in the cited case of

Nizar M.H.Ladak (supra) among other things would have required the trial Chairman to visit locus so as to justly adjudicate as to whether the disputed piece of land does not fall within the exhibited pieces of land in exhibit D1, D2 and D3. Thus, I find the rationale of the Appellant's claim.

In case the trial Tribunal finds that there is another piece of land in controversy, automatically both parties shall be required to prove how they obtained the ownership of the same.

In the circumstances therefore, I find that the trial Tribunal abdicated its duty for failure to visit the locus in quo and collect more evidence concerning the other piece of land as claimed by the Appellant which is distinct with the ones claimed to be exhibited by exhibits D1, D2 and D3.

Deriving from the above observation, I implore the powers of this court under **section of 42 of the Land Disputes Court. Act, Cap 216, RE 2019** and remit the file to the trial Tribunal with the directives to visit locus in quo so as to physically ascertain if there exist the so called another disputed land. Again, the trial Tribunal should collect evidence pertaining to the ownership of the said claimed land by the

Appellant. The visiting of the locus in quo should abide to the set rules of procedure and justice.

This appeal is therefore allowed and costs of this appeal shall follow the event following the decision of the trial Tribunal after collecting additional evidence.

Accordingly ordered.



A handwritten signature in black ink, appearing to read "R.A Ebrahim", is written over the seal.

R.A Ebrahim
Judge.

21.07.2023
Mtwara.