IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT MOROGORO

MISC. LAND APPEAL NO. 15 OF 2021

(Arising from the Decision of the District Land and Housing Tribunal for Kilosa, at Kilosa in Land Application No. 51 of 2017)

ISDORY FRANCIS MALATA ..... 1ST APPELLANT

HASSANI SALUM BOMBWE ..... 2ND APPELLANT

SELEMANI SALUMU (The Administrator of the Estate of the Late Salumu Nassoro Bombwe) ..... 3rd APPELLANT

VERSUS

KASSIMU MOHAMMED HIMBAHIMBA (The Administrator of the Estate of the late Mohammed HimbaHimba) ..... RESPONDENT

JUDGMENT

11th August, 2023

CHABA, J.

This appeal traces its roots from the decision of the District Land and Housing Tribunal for Kilosa, at Kilosa (the trial Tribunal) in Land Application No. 51 of 2021 whereby the respondent herein sued the appellants for recovery of a parcel of land allegedly trespassed by the appellants.

At the culmination of the trial, the trial Tribunal decided the matter in favour of the respondent and declared that, the disputed parcel of land

belonged to the late Mohammed Himbahimba, hence forming part of his estates.

Dissatisfied, the appellants filed this appeal couched on eight (8) grounds of appeal as follows: -

1. That, the District Land and Housing Tribunal erred in law and facts by entertaining a matter that was hopelessly time barred.
2. That, the trial District Land and housing Tribunal erred in Law and facts by presiding on a matter that was instituted by a fictitious person.
3. That, the trial District Land and Housing Tribunal erred in law and facts by deciding in favour of the Applicant (the respondent herein) who had contradictory evidence.
4. That, the trial District Land and Housing Tribunal erred in law and facts by not considering the evidence of the appellant herein.
5. That, the trial District Land and Housing Tribunal erred in law and facts by not evaluating the evidences tendered before it.
6. That, the trial District Land and Housing Tribunal erred both in law and facts by not visiting the disputed land to establish the actual size of the disputed land.
7. That, the trial District Land and Housing Tribunal erred in law by continuing/proceeding with the hearing of the suit without being properly constituted.
8. That, the trial District Land and Housing Tribunal erred in law by entering a judgment which is discriminatory in respect of orders entered.

Based on the above eight grounds of appeal, the appellants are now praying the Court to quash the decision of the DLHT for Kilosa, at Kilosa and issue any other orders as the Court deems fit and just to grant, and costs be borne by the respondent.

At the hearing of the appeal, the appellants enjoyed the legal services of Mr. Asifiwe Alinanuswe, Learned Counsel while the respondent appeared in person, and unrepresented. The appeal was canvassed by way of written submissions and the timeline set by the Court was complied with by the parties in accordance with the Court's scheduling orders. Both parties submitted at length. Thus, for avoidance of repetition, I will be making reference to the respective written submissions in due course where necessary. I will however not therefore, reproduce such written submissions, instead, I have decided to go straight to determine the grounds of appeal.

Before arguing the appeal, the learned Counsel for the appellants, Mr. Alinanuswe prayed to abandon the 2nd and 7th grounds of appeal and opted to argue grounds 3, 4 and 5 collectively. In this regard, the Counsel elected to argue grounds 1 and 6 separately. As the main complaint is based on the 1st ground of appeal which has been premised on a point of law, I will dwell on this ground of appeal and afterwards I will deal with the 3rd, 4th and 5th grounds of appeal without even touching the rest grounds of appeal, that is 6 and 8 as I believe that grounds 1, 3, 4, and 5 are capable of disposing of the entire appeal.

On the 1st ground of appeal, the appellants' complaint is that, the trial Tribunal committed an error by continuing to determine the matter that was hopelessly time barred contrary to the provision of section 9 (2) and item 22 to the Schedule of the Law of Limitation Act [CAP. 89 R. E, 2019]. Mr. Alinanuswe contended that, the law stresses twelve (12) years limitation period within which to institute an action for claiming back the land reckoned from the date the claimant was dispossessed the same. According to him, from the Court records and proceedings of the trial Tribunal, it was DW.2's testimony at page 11 of the typed copy of proceedings that, the respondent and his family have been un-interruptedly using the disputed suit land from 1982 to 2011, which is almost (exactly) 29 years before the first interference took place in the year 2011.

He concluded that, the appellants herein have been in occupation and use of the land in dispute even before the demise of the widow of the late Himbahimba, hence had they invaded the land, she could not keep quiet. He said, she could have filed a case against the trespassers.

Based on the above submission, the Court is now being invited to determine whether or not the respondent herein was still in time to file and pursue his case vide an Application No. 51 of 2021 before the DLHT for Kilosa, at Kilosa.

Looking at the parties' pleadings before the trial Tribunal, the late Mohammed Himbahimba occupied the suit land uninterruptedly from 1961 to

1982 when he died. The records reveal further that, after his demise, his wife, Asha Mponda used the disputed land up to the year 2010 when she passed away, and consequently one Mwajuma Kaniki allegedly trespassed thereon by selling the disputed land to the 1st appellant herein, Isdory Francis @ Malata. When the respondent was appointed by the Court to stand as an administrator of the estate of the late Mohammed Himbahimba on 17/04/2013, sometimes later on 19th day of December, 2017 he filed an application subject of this appeal.

As far as the 1st ground of appeal is concerned, I wish to start by stating, right away that, in my understanding of the law, and upon going through the judgment of the trial Tribunal and all authorities cited by the learned trial Chairperson, I have no flicker of doubt that the same expounds the correct position of the law on accrual of cause of action of the deceased's estate as provided by the law under sections 9 (2) and 35 of the Law of Limitation Act, [CAP. 89, R. E, 2019], which provides that:-

> *"Section 9 (2) - Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession of and has, while entitled to the land, been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."*

The provision of section 33 (1) of the Law of Limitation Act (supra) clarifies further the implication of the above provision of the law, thus:

> *"33 (1) A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the right of action to recover any land accrues and no person is in adverse possession of the land, a right of action shall not accrue unless and until some person takes adverse possession of the land."*

This position of the law was restated by the Court of Appeal of Tanzania in the case of **Barelia Karangirangi vs. Asteria Nyalambwa (Civil Appeal No. 237 of 2015) [2019] TZCA 51 (1 April 2019),** extracted from tanzlii.go.tz., where it was stated that: -

> *"The right of action in this present case, accrued when the respondent claimed to have found the appellant and her children cultivating the suit land which according to the record, it was in 2007. The respondent had then immediately instituted the suit in the Ward Tribunal. The suit was hence instituted within the prescribed time of twelve years. In the premises, we*

find that the appellant's contention that the suit was time barred has no merit".

See also the case of **Maigu E. M. Magenda vs. Arbogast Maugo Magenda,** Civil Appeal No. 218 of 2017, CAT - Mwanza (unreported).

Guided by the above principle of law, one may ask as to when did the right to sue accrue to the estate of the late Mohammed Himbahimba? The prompt answer is that, the right of action accrued on the date of the encroachment of the disputed suit land, since there is no any evidence showing that, there was a dispute on a disputed farm land before the death of the said Mohammed Himbahimba. By applying this principle in the matter under consideration, when the 1st appellant occupied the suit land, time accrued from the date of occupation. From the records of the trial Tribunal, DW.1 (Isidory Fancis Malata) stated that, he started using the disputed land in the year 2007 by clearing the virgin land/shamba, and continued using it until in the year 2010 when he bought the disputed farm land from Mwajuma Kaniki. This means therefore that, as correctly observed by the DLHT, the cause of action arose in 2010 when the respondent was aware of the sale contract of the disputed land between the 1st appellant and Mwajuma Kaniki. The suit was instituted at the trial Tribunal in 2017, so the application before the tribunal was within the time.

As regards to the third, fourth and fifth grounds which touched on the issue of failure by the trial Tribunal to evaluate the evidence tendered before it,

the learned Counsel for appellants contended that, the DLHT failed to evaluate the evidence in respects of the place in which the landed property is situated, and further that the trial Tribunal failed to determine the size of the disputed parcel of land and the weight of the evidence tendered. He added that, since there were anomalies regarding the description of the disputed land, the learned Chairperson was supposed to visit the locus in quo with the view to ascertain cumulatively, the actual location of the disputed parcel of land, the size of the land, who were (are) the neighbours to the land in dispute and weight of the testimonies tendered at trial, as alluded to above.

Before I determine whether the visit to the locus in quo was indispensable in this case, at this juncture, I think in my view that, there is a need to define the aspects and purpose of the visit to the locus in quo as part of hearing and/or taking or recording of evidence during trial.

In the case of **Said Hassan Shehoza vs. The Chairperson CCM Branch and The Registered Board of Trustees of Chama Cha Mapinduzi,** Land Appeal No. 147 of 2019, High Court of Tanzania, at Dar Es Salam (unreported), this Court (Maghimbi. J.) had this to say: -

> "In land matters, the visit to the locus in quo, in cases which fits for one, assist the court to resolve any ambiguities in the case including issues of ascertaining the size of the land, the actual location of the disputed land in cases where there is a controversy about the existence and location of a

particular feature thereon. It is also useful in cases where there is a material variation on the evidence adduced requiring ascertainment by physical visit. This may assist the court to resolve what it heard with what it could see by visiting the locus."

In emphasizing on the importance of visiting the locus in quo, the Court of Appeal of Tanzania in **Avit Thadeus Massawe vs. Isdory Assega (Civil Appeal No. 6 of 2017) [2018] TZCA 357 (13 December 2018),** observed that:

"Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the 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 various factors to be

considered before the courts decide to visit the locus in quo. The factors include:

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) ....."***
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. N/A

4. N/A". [Emphasis Added].

Reverting back to the matter under consideration, and upon perusing the trial Tribunal records, I am in agreement with the learned Counsel for the appellants that when DW.2 (Hassan Salum Bombwe) was cross-examined by the applicants, he testified that, the land in dispute is situated at Tindiga Ward, within Maluwi Village in Mwembechai Hamlet, whereas DW.3 (Mwishehe Yusufu) on the other hand, upon being cross-examined, testified that the parcel

of land in dispute is located at Kidago Hamlet, whilst DW.8 (Yasini Mustapha Likokonjala) told the trial Tribunal that, the disputed land is located at Kilangali area.

With the above pieces of evidence, it is my considered view that, given the variation of oral evidence on the location of the disputed suit land as noted above, it was vital for the trial Tribunal to visit the locus in quo with a view to ascertain not only the size of the land, but also to see physically location of the disputed land, the extent, boundaries and boundary neighbours, and physical features on the land so as to be able to resolve the issue in controversy before it fairly and justly.

As indicated above, the ascertainment of the locus in quo had to be done or conducted to ensure that, the trial Tribunal was better placed to determine the controversy between contending parties over the disputed landed property effectively by dealing with a specific and definite parcel of land land so as to afford the trial Tribunal itself and the appellate Courts (if any) to evaluate the evidence available and finally be able to issue orders which are certain and capable of being executable without any ambiguities. It follows therefore that, where the description of the land in dispute is uncertain and ambiguous, it will not be possible for the Court or Tribunal to make any definite order or orders and execute it.

From the above deliberation, the next question to be revolved is what are the legal remedy for the omission to visit the locus in quo in case such a visit

was inevitable? In my view, the answer is not far-fetched. In the circumstance, the only remedy is for the Court issue an order to the trial Tribunal to exercise its discretion by visiting the locus in quo as it was expounded by the Court of Appeal of Tanzania in the case of **Avit Thadeus Massawe vs. Isdory Assega** (supra), where the Court stressed that: -

> *"We have observed above that the evidence on record was insufficient for the Court to determine the appeal justly, with clarity and certainty in view of the conflicting evidence in respect of the location of the suit property. We are of the view that this is a fit case for the trial court to exercise its discretion to visit the locus in quo. Had the trial court done so the question regarding where the suit property is located would have either not arisen or would have been easily determined."*

Guided by the principles of law observed herein above, I am of the view that, the appropriate order to issue is to set aside the Judgment of the trial Tribunal, gthe subsequent Decree and Orders that stemmed from the trial Tribunal's proceedings. Suffice (it) to say that, this particular finding, makes it unnecessary in law to test the remaining grounds of appeal, as grounds 1, 2, 3, 4, and 5 are sufficient to partly dispose of the instant appeal.

Having so found, and considering the surrounding circumstance of the matter at hand, justice demand that, I should order and direct the learned trial chairperson to take additional evidence in respect of the issue of encroachment / trespass of the disputed suit land by visiting locus in quo where the parties will be able to point out and ascertain the physical location of the disputed land, the size of the land, the extent, boundaries and boundary neighbours, and physical features on the land in dispute so that it can make more informed decision and finally compose a new Judgment comprising of the above details.

In the final event, and for avoidance of doubt, I allow the appeal to the extent that the Judgment, Decree and Orders emanating from the trial Tribunal's proceedings are set aside. In other words, Judgment, Decree and Orders that stemmed from the proceedings of the trial Tribunal are expunged from the records. All other records to remain undisturbed. Each party shall bear its own costs. Order accordingly.

DATED at **MOROGORO** this 11th day of August, 2023.

THE HIGH COURT OF TANZANIA MOROGORO

M. J. CHABA

JUDGE

11/08/2023

Court:

Judgment delivered under my hand and Seal of this Court in Chamber's this 11th day of August, 2023 in the presence of the appellants and their advocate, Mr. Asifiwe Alinanuswe, the learned counsel who appeared for the Appellants and in the absence of the Respondent.

A. W. MMBANDO

DEPUTY REGISTRAR

11/08/2023

Court:

Rights of Appeal to the parties fully explained.

A. W. MMBANDO

DEPUTY REGISTRAR

11/08/2023