IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODMA
MISCELENEOUS LAND CASE APPEAL NO. 31 OF 2022

(C/F Land Case Appeal No. 161 of 2020 before the District Land and Housing Tribunal for Dodoma at Dodoma)

OBEID RAIS LYAFUNYILE..... APPELLANT

VERSUS

ERNEST CHIMANDI MGANGA.....RESPONDENT

JUDGMENT

Last Order: 14th August, 2023
Judgment: 08th September, 2023

MASABO, J.:-

At Chipogoro Ward Tribunal, Dodoma District in Dodoma Region, the respondent herein unsuccessfully sued the appellant for trespass into his land measuring 280 ft. length and 240 ft. width. Aggrieved by the decision of the trial tribunal the respondent appealed to the District Land and Housing Tribunal (the appellate tribunal) where the decision of the trial tribunal was reversed and the respondent was declared the lawful owner of the suit land. Aggrieved by the decision of the first appellate tribunal, the appellant has filed this appeal on the following grounds-

1. That, the first appellate tribunal erred both in law and fact by making a finding that the appellant's evidence at the trial tribunal contradicted itself while the same is not true henceforth decided that the respondent has proved his case basing on such erroneous finding.
2. That, the first appellate tribunal erred in law and fact by misdirecting itself in making its decision, by considering extraneous matters which were not testified during the trial tribunal and are not in the trial tribunal's record of proceeding of the trial tribunal.

3. That, the first appellate tribunal erred in law and in fact by disregarding the fact that the appellant occupied the disputed land for more than 12 years without any interference, since 2001.
4. That, the first appellate tribunal misdirected itself by failing to consider the fact that respondent's evidence in the trial tribunal was inconsistent by failing to identify his boundaries and size of the disputed land, something which was also highlighted by the trial tribunal in its judgment.

Hearing of appeal proceeded by way of written submissions. Submissions by the appellant were drawn and filed by Ms. Neema Ahmed, learned counsel whilst those of the respondent were drawn and filed the respondent himself.

Before I delve into the submissions, the abbreviated facts of the case from which the kennel of the dispute is deciphered are that, when the respondent instituted Land Case No. 40 of 2020 before Chipogoro Ward tribunal, he alleged that the appellant trespassed into his land. Vindicating his ownership, he asserted that the land was allocated to him by the Village Council in 1995. In 2001 the appellant approached him and leased the suit property for keeping his cattle. He stayed into the suit land up to 2012 and returned it back to the respondent. In 2019 he went back to the suit land and wanted to sell it claiming to be his and because of this, the dispute arose. The respondent evidence was corroborated with the following two witnesses namely, Allan Malingumu and Agness Mandoma Makali. On his part, the appellant asserted that the land is his. He cleared it and started using it in 2001. He stated that, the suit land boarders the respondent and it was the respondent who showed him the boundaries of his land. Surprisingly, when he wanted to sell it, a dispute ensured as the

respondent claimed that he cannot sell it and get the money alone. His evidence was corroborated with the evidence of the following witnesses; Wilson Elieza Manemu, Paskari Lyafunyile, Nelson Lenadi Masunga and Rista Willian Mganga.

Submitting on the first, second and fourth grounds of appeal, Ms Ahmed, learned counsel, argued that the appellate tribunal misdirected itself by considering that the land allocated to the respondent in 1995 is the disputed land. She argued that in the course of hearing, it was credibly established that the appellant was shown the disputed land neighbouring the respondent's land when it was a forest and after being shown the boundaries by the respondent, he cleared the land, a fact which was admitted by the respondent during trial. It was his further submission that the appellant had four witnesses namely Wilson Elieza Manemu(DW2), Paskal Lyafunyile (DW3), Nelson Lenadi(DW4) and Rista William Mganga (DW5). The first three witnesses testified that the appellant was given the suit land in 2001 to keep his livestock and there is nowhere in their testimonies where it was shown that the appellant acquired the disputed land in 2018 as held by the first appellate tribunal. To the contrary, the respondent's evidence was contradictory. When the trial tribunal visited the *locus in quo* found that the land claimed by respondent did not match with the one he was given by the village council in 1995. Hence, different from the suit land.

On the third ground, it was submitted that the appellate tribunal erred in fact and law to disregard the fact that the appellant had occupied the suit land undisturbed since 2001 to 2019 when the dispute arose. Therefore,

the respondent was precluded by the Law of Limitation Act, Cap. 89 R.E 2019 from filling the suit as 12 years had already lapsed. Moreover, she argued that even though the respondent alleged that in 2012 the appellant returned the suit land to him, no proof was tendered to substantiate this fact and no witnesses testified on the same. This implicitly confirmed that he is the one who gave the land to the appellant, a fact he purported to dispute. In conclusion, it was submitted and prayed that this court be pleased to find the appeal meritorious and set aside the decision of the appellate tribunal and restore the decision of the trial tribunal.

In reply, the respondent submitted that the appellant's evidence was contradictory because he testified that he occupied the suit land uninterruptedly and never vacated it or shifted from it at any material time whereas DW3 testified that they lived on the suit land for a period of seven years after which they moved to other areas and his uncle was the last person to live on such land in 2018. He argued further that, the appellant did not prove ownership of the suit land as he tendered no documentary proof of ownership as according to PW2, Allan Malingumu who was then the acting Village Executive Officer, the village council was issuing documents (certificates) evidencing allocation of land. It was further argued that, it is cardinal law that, when deciding a matter, a court or tribunal should be guided by the weight of evidence adduced by the parties which should be thoroughly evaluated. He cited the case of **Hamad Said vs. Hemed Mbilu** [1984] TLR 113 to bolster his submission and argued that, looking at the evidence on record, his evidence was heavier compared to that of the appellant.

On the second ground of appeal, he argued that the first appellate tribunal did not refer to the year 1995 as the year when the respondent was allocated the disputed land rather, it considered evidence given by both parties and found that the evidence of the respondent was self-sufficient to establish his right of ownership over the land in dispute. Regarding the third ground of appeal, it was submitted that through his evidence as corroborated by his witnesses, the respondent ably proved that he owned the suit land and that in 2001, the appellant asked him for a piece of land for keeping his livestock which he obliged and allocated him an area. The respondent remained in that area until 2012 when he decided to leave and returned the said land to the respondent. It was also proved that, in 2019 the appellant resurfaced and wanted to sell the area and this was the kernel of the dispute. Therefore, the argument that the appellant occupied the land for 12 years uninterrupted is baseless as he did not attain such an interrupted occupation. Also, he was not an adverse possessor as the respondent had permitted him to use the land for keeping his livestock, not otherwise. Lastly, on the fourth ground, he replied that it has no merit both in law and fact as the courts always make decision upon evaluation of testimonies and exhibits tendered before it not on mere allegations and this is what was done by the appellate tribunal and after the evaluation, it found that the respondent adduced heavier evidence. Resting his submission, he prayed that the appeal be dismissed with costs.

Upon a thorough perusal of the record and dispassionate consideration of the submission by both parties, I will now proceed to determine the appeal

starting with the first and the second ground of appeal in which it has been argued that, the appellate tribunal erred in reversing the trial tribunal's finding as the appellant had not proved his case. His evidence was contradictory and ought not to have been accorded weight. Thus, there was no reason for faulting the trial court. It has also been complained in the second ground that the decision of the appellate tribunal was based on extraneous matters.

As the tribunals had different views on weight of the evidence adduced by both parties, I feel obliged to reflect on the evidence. As intimated earlier on, the respondent alleged that he acquired suit land by the Village Council in 1995. In 2001 he welcomed the appellant and gave him a parcel of his land for keeping his livestock. The respondent stayed there up to 2012 when he returned the land back to the respondent and moved on to another area. Unexpectedly, in 2019 the respondent came back and wanted to sell the land, an attempt which gave birth to the dispute subject to this appeal. His evidence, was corroborated by PW1, Alani Malingumu, a former Village Executive Officer who stated that when the respondent acquired the suit land he was still in service and he is the one who allocated the appellant the suit land and he did so in corroboration with other members of the village council including PW2, Agness Mondama Makali who corroborated this story further. In addition, he produced two documents, a letter from Chipogoro village council showing that he was allocated the suit land in 1995. At the backside of this letter is a sketch map showing the land allocated to the respondent. The second document is a receipt acknowledging payment of Tshs 500/= to the village council in the consideration of the plot.

On his part, the appellant stated to have acquired the suit land in 2001 when it was virgin. He testified that, when he asked the village authorities for a piece of land for keeping his livestocks, he was instructed to see the respondent who was neighbouring a virgin land and after approaching the respondent he gladly allocated him a piece of land which was virgin and he thereafter cleared it and started living there and keeping his livestock. Corroborating his version, were four witnesses namely Wilson Elieza Manemu (DW2), Paskali Lyafunyile (DW3), Nelson Lenadi Kaswaga (DW4) and Rista William Mganga (DW5). Save for DW5, who had no clue on the acquisition of the suit land by the appellant, all the 4 witnesses said that when the appellant acquired the suit land it was virgin and that it was the respondent who show the appellant the virgin land as it was just next to his land. In addition, DW2 who appears to be part of the appellant's family stated that they occupied the land but later on relocated to another place.

Further revelations from the record are that the respondent's and the appellant's witnesses testified on 27/7/2020 and on 28/8/202020, the trial tribunal delivered its decision. Interestingly, the decision of the trial tribunal which the appellant has passionately prayed it be restored, appears to have been overwhelmingly based on a visit to the *locus in quo* purportedly made by the tribunal on an undisclosed date and it was accompanied by a sketch map purportedly drawn at the *locus in quo*.

I am aware that, visiting the *locus in quo* is not a mandatory legal requirement and it is sparingly done in exceptional circumstances.

However, when the court or tribunal visits a locus in quo, it must comply with certain principles as articulated in the case of **Sikudhani Said Mgambo & Kirioni Richard vs. Mohamed Roble,** Civil Appeal No. 197 of 2018 [2019] CAT (unreported) where it cited with approval the case of **Nizar M.H vs. Gulamali Fazal Janmohamed** [1980] TLR 29, where it was stated that:-

> When a visit to a locus is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates if any, and with much each witness as may have to testify in that particular matter. When the court resembles in the court room, all such notes should be read out to the parties and their advocates and comments, amendments or objections called for and if necessary incorporate witnesses, then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses.

See also the recent decision of the Court of Appeal in **Avit Thadeus Massawe vs. Isidory Assenga,** Civil Appeal No. 6 of 2017 [2020] 365 and **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others** Civil Appeal No. 4 of 2018 [2021] TZCA 663 both reported in TANZLII.

From the authorities above, among the mandatory requirements of the visit to the *locus in quo* is that, it must be done when the parties, their witness and their advocates (if any) are present and that the evidence obtained at the *locus in quo* must be taken properly and recorded. In other words, what transpires at the *locus in quo* must form part of the

tribunal's record. For such evidence to be considered and used in deciding the case, it must form part of the record otherwise, it would be tantamount to extraneous matters.

Back to the case at hand, as stated earlier on, the trial tribunal's record is silent on whether and when the trial tribunal visited the *locus in quo*. The persons present during the visit and the evidence obtained therefrom is also uncertain as none is available save for the observation made in the judgment and the sketch map attached to the judgment, which in the absence of record for the visit, appears to have been plunked from the air. Faced with the same situation in the case of **Kimonidimitri Mantheakis** (supra), the court held that, failure to properly record what was transacted during the visit is fatal irregularity as it occasioned the miscarriage of justice. Simirally in case, an injustice has been occasioned because, the appellate tribunal as well as this court cannot make proper evaluation on the entire trial evidence in the absence of the *locus in quo* proceedings.

In the circumstance, I nullify and quash the judgment and proceedings of the appellate court for being predicated on a nullity decision of the trial tribunal which was wholly based on the evidence purportedly gathered during the visit to the *locus in quo* which proceeded in total contravention of the law hence vitiated both, the proceedings and decision of the trial tribunal which are similarly quashed and set aside. As the ward tribunal no longer enjoys adjudicative powers, the parties are at liberty if they so wish to reinstitute the matter in the appropriate forum. Accordingly, and to the extent above, I allow the appeal. Based on the circumstances of

the appeal, I find it just and fair that the costs be shared by each of the parties bearing its respective costs.

DATED and **DELIVERED** at Dodoma this 8th day of September, 2023

J. L. MASABO

JUDGE