IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 174 OF 2022

(C/F Land Application No. 80 of 2020 District Land and Housing Tribunal of Babati at Babati)

ABIDUNI ELIFURAHA ..... APPELLANT

VERSUS

YOHANA ARAY ..... 1ST RESPONDENT

BAKARI IDDI ..... 2ND RESPONDENT

ELIA KONKARA ..... 3RD RESPONDENT

JUDGMENT

19th June & 8th September, 2023

TIGANGA, J.

This appeal emanates from the decision of the District Land and Housing Tribunal of Babati at Babati (hereinafter, the trial tribunal) in Land Application No. 80 of 2020 in which the appellant filed a complaint against the respondents over the piece of land measuring 8 ½ acres located at Endanaghai Hamlet, Endakiso Village in Endakiso Ward which is within Babati District, Manyara Region (hereinafter, the suit land).

According to the evidence on records, at the trial tribunal, the appellant claimed that, he owned the suit land since 1998 after he was given the same by the Village Government Council of Endakiso Village. That, he co-owned the suit land with his brother one Ramadhani Elifuraha

and have been enjoying its use ever since until 2019 when the respondents trespassed therein. On the other side, the respondents claimed that, the suit area was allocated by the same Endakiso Village Government to the late Habiba Bakari who is the appellant's and the 3rd respondent's mother. That, she was allocated the same in 1997 and following her demise, the 2nd respondent was appointed to administer her estate vide Probate Cause No. 13 of 2020 filed at Babati Primary Court. The latter, distributed the suit land to all five children of the deceased including the appellant who was given 1.8 acres and closed the probate case. According to them, the appellant was not satisfied with the distribution, hence he decided to file this application at the tribunal claiming the whole suit property to be declared his.

At the end of the trial, the trial tribunal decided in favour of the respondents on the grounds that, **first,** there was a clear issue of double allocation, thus the first to be issued ownership to wit; the appellant's mother, was the lawful owner and because she is now deceased the 2nd respondent was right to distribute it to her all legal heirs. **Second**, the probate case had already been closed after all the deceased properties including the suit land were distributed to the lawful heirs including the appellant inclusive, who did not object such distribution.

The Appellant was not satisfied with the decision rendered by the trial tribunal, he consequently preferred this appeal with four (4) grounds of appeal as follows;

1. That, the trial tribunal erred in law and facts in failing to properly evaluate evidence and therefore reached at a wrong decision.
2. That, the trial tribunal erred in law and fact in failing to consider the weight of the applicant's evidence and testimonies from his witnesses.
3. That, the trial tribunal erred in law and in fact in relying on contradicting evidence deposed by the respondents and their witnesses.
4. That, the trial tribunal erred in law and in fact in deciding in favour of the respondents while they have failed to prove their case on balance of probabilities.

During hearing, the appellant and the 2nd respondent appeared in person and unrepresented while other respondents did not bother to make appearance hence the appeal proceeded in their absence.

In his submission, the appellant did not submit on the grounds of appeal in a particular order, he rather asserted that, the trial tribunal did not consider his evidence and exhibits tendered to prove that he was

allocated the suit land by the Village Government in 1998, a fact which is also known by the District Commissioner. That he enjoyed the suit land up to 2020 when the respondents trespassed. He also challenged the trial tribunal's defence proceedings as they were done in his absentia while he was mislead on the hearing date. In that regard, justice was not done on his part as he was not availed with the right to cross examine the defence witnesses. He prayed that this appeal to be allowed.

Opposing the appeal, the 2nd respondent submitted that, he was the administrator of the estate of the late Habiba Rajabu who was his aunt. That, the evidence from the Farm/Agricultural Extension Officer and other witnesses who gave testimonies that, the suit land belonged to his deceased aunt be believed and given weight. He prayed that, this appeal be dismissed for want of merit.

In her rejoinder the appellant insisted that, he was denied his right to cross examine the alleged respondent's witnesses. He prayed that the evidence from the village authorities be respected.

After I have gone through appellant's submission and the trial tribunal's records, this being the first appeal, the Court is inclined to re-assess and re-evaluate the entire evidence on record and come to its own conclusions. Before I proceed to determine the grounds of appeal, from

the appellant's submission he claimed that, he was not availed with the right to cross examine the respondent's evidence. Although, this is not among the grounds of appeal raised by the appellant, but since it touches the core element of natural justice, I took the liberty of going through the trial court's records. In doing so, I found that, it to be true that, the defence evidence was heard in the absence of the appellant herein. The record shows that, after he closed his evidence on 21st June, 2022, the matter was scheduled for hearing of the defence evidence on 30th June, 2022. However, on that date, the same was adjourned up to 26th July, 2022 on the ground that, the 1st respondents was bereaved. On the latter date, the respondents appeared but the appellant did not, and the matter proceeded in his absence. This fact was not controverted by the 2nd respondent when he submitted in reply to the submission in chief thus, impliedly he conceded to the fact that the appellant was prejudiced by not being present when the defence case was heard.

Considering the fact that, neither before nor after the defence case was heard, the appellant had no tendencies of non-appearance as he had never defaulted appearance before, it is my firm opinion that, in the spirit of substantive justice, prudence demanded the trial chairperson to adjourn the matter and afford the appellant the right to appear and cross examine the defence witnesses. On top of that, perusing the trial tribunal's

records, there is a copy of a letter dated 30th July, 2022 addressed to the Deputy Registrar, Arusha (received on 1st August, 2022) showing the appellant claims of unfairness on the on-going proceedings at the trial tribunal. In the letter the complainant alleged that on a number of occasions he was being mislead regarding the dates of the defence hearing as well as a date for the visit to the *locus in quo*. The record does not show if the complaint was dealt with. This on the other hand raises a question on his claims regarding unfairness.

Facing similar scenario in the case of **Sadru Mangalji vs. Abdul Aziz Lalani & Others,** Misc. Commercial Application No. 126 of 2016 High Court of Tanzania Commercial Division at Mwanza, Mwambegele, J. (as he then was) referred to the case of **Shocked and Another vs. Goldschmidt and Others** [1998] 1 ALL ER 372, which emphasised on the importance of substantive justice in considering applicant's conduct before dismissing or giving adverse order based on his/her non-appearance. It held that;

> *"I have also considered the fact that it is in the interest of justice and the practice of this Court that, unless there are special reasons to the contrary, suits are determined on merits.- see* ***Fredrick Selenge & Another vs. Agnes Masele*** *[1983] TLR 99 and* ***Mwanza Director M/S New Refrigeration Co. Ltd***

vs. Mwanza Regional Manager of TANESCO Ltd & Another *[2006] TLR 2006".*

I fully adopt the above position by my learned Senior brother that, since the appellant was always present since when the application was filed before the trial tribunal and had no tendencies of missing the proceedings, the trial tribunal should not have out rightly decided to proceed in the applicant's absence following his first non-appearance in the history of the case; but rather to give him time so that he can appear for hearing of the defence case where he would have cross- examined the respondents and their witnesses. In the case of **Pantaleo Teresphory vs. The Republic**, Criminal Appeal No. 515 of 2019, CAT at Mbeya, the Court of Appeal of Tanzania referred to the case of **Ex-D. 8656 CPL Senga Idd Nyembo and Seven Others vs. Republic,** Criminal Appeal No. 16 of 2018 (unreported) in which it was held that;

> *"We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony under oath or affirmation (as the case may be) or not. This right is a fundamental one to any Judicial proceedings and thus the denial of it will usually result in the decision in the case being overturned. Unless, a party has waived his right to cross-examine, he cannot be taken as legal evidence unless it is subject to cross examination.* ***Consequently, the testimony affecting a party cannot be the basis of decision of the***

court unless the party has been afforded the opportunity of testing the truthfulness by way of cross examination (See; Kabulofwa Mwakalile & 11 Others v. Republic *(1980) TLR 144" (Emphasis added).*

That being the position of the law, the trial chairman was not justified to proceed hearing of the defence case in the absence of the appellant because in doing so, he infringed the appellant's right to cross examine the defence witness on the evidence they gave, therefore, his right was prejudiced.

It also caught my attention that, the trial court visited the *locus in quo*, however, what transpired at the locus as to per record is lacking, as parties were not called to verify the facts gathered at the locus in quo. In the case of **Nizar M. H. V Gulamali Fazal Janmohamed** [1980] TLR 29 Court of Appeal had this to say regarding what should be done after visiting the *locus in quo:-*

"When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be done in exceptional cases, the court should attend with the parties and their advocate, if any, and with much each witness as may have to testify in that particular matter, and for instance if the size of a room or width of the road is the matter, have the room or road measured in the presence of parties, and a notes made thereof. When the court re-assembles in the court room, ***all such notes should be read out to the parties and their advocates, and***

comments, amendments or objections called for all if necessary incorporated. Witness 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 the witness. We trust that this procedure will be adopted by the courts in the future."

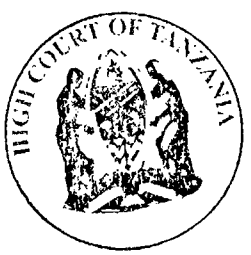
In my view, this is not only a principle in that case but also a directive for the court to adopt in future, therefore this being a principle to be followed, it was to be followed to the later. The rationale behind visiting *locus in quo* is to get a clear picture of the dispute in question for purpose of reaching to a just decision. From the record, it is not clear on what transpired at the *locus in quo*. There is no procedure showing verification of the facts collected therefrom, the omission which renders the whole procedure irregular.

In lieu of the above analysis, this appeal is merited to the extent explained herein above. I hereby quash the decision of the trial tribunal and nullify the proceedings starting from when the defence evidence was heard and recorded to the visiting the *locus in quo*. I thus order the case file to be remitted to the trial tribunal for hearing of the defence case in the presence and participation of both parties before the same chairperson and same set of assessors.

If need be that the trial tribunal should visit the *locus in quo*, then the procedure as stipulated in the cases cited herein above be complied with. Hearing and conclusion should be done expeditiously not in more than 60 (sixty) days from the date of remission of the case file to the trial tribunal. Since the ground upon which the appeal has been allowed, was raised by the appellant in the course of hearing of an appeal, I give no order as to the costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 08th day of September, 2023



J.C. TIGANGA

JUDGE