IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

(LAND DIVISION)

LAND APPEAL NO. 38 OF 2023

(Originating from the Judgment of the District Land and Housing Tribunal for Tunduru at Tunduru in Land Application No. 22 of 2019)

SHAIBU HAMIDU .... 1ST APPELLANT

YUSUFU RAJABU .... 2ND APPELLANT

VERSUS

HADIJA AFATI KILAFI .... RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2023

Date of Judgment: 17/10/2023

U. E. Madeha, J.

To begin with, at the District Land and Housing Tribunal for Tunduru, the Respondent sued the Appellants claiming ownership over six acres of land located at Napulo area in Angalia Village. The Respondent claimed to have bought the disputed land from Issa Mwinuka, who had died. On the other hand, the Appellants also claimed ownership over the same piece of land. The first Appellant claimed to have bought the land from the second Appellant in the year 2017 and the sale agreement was received as an exhibit. The second Respondent

claimed to be given the disputed land by his parents and he sold to the first Appellant.

After trial the trial Tribunal Chairman found the Respondent to have proved her claims and she was declared to be the lawful owner of the disputed land. The first Appellant was declared to be the trespasser and he was ordered to vacate on the disputed land.

Dissatisfied with that decision, the Appellants preferred this appeal on the following grounds of complaints:

i. *That, the trial Tribunal erred in law and facts for determining the matter in favour of the Respondent while she did not prove the ownership of the disputed land.*
ii. *That, the trial Tribunal erred in law and facts by determining the matter in favour of the Respondent relying on heresay evidence of the DW2.*
iii. *That, the trial Tribunal erred in law and facts for determining the matter without going to the locus in quo while there were two different places in the disputed land.*

In this appeal, the Appellants were represented by Mr. Hillary Ndumbaro and the Respondent was represented by Mr. Agrey Ajetu, both learned advocates. The appeal was argued by way of written

submissions and both parties filed their written submissions as scheduled by this Court.

Arguing in support of the appeal, the Appellants' advocate submitted that, the trial Tribunal erred in law and facts by determining the matter in favour of the Respondent who failed to prove ownership of the disputed land. He further submitted that the Respondent alleged to have bought the said land from Issa Mwinuka and the sale was in writing and was witnessed by the Ward Excecutive Officer and the sale agreement was lost but no Police Loss Report was tendered and even the Ward Excecutive Officer was not brought before the trial Tribunal to prove those allegations. He contended further that the evidence given by SM2, one Salum Hashim never corroborated with the evidence adduced by the Respondent during trial.

He averred that it is a trite law that he who alleges must prove as it was propounded in the case of **Alexander Aver Exavery v. Alistidia Godfrey,** Civil Appeal 37 of 2020 and **Barelia Karangirangi v. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (both unreported).

With regard to the second ground of appeal he stated that what was testified by SM2 was hearsay evidence and it has no evidential

value. He averred that it is a well developed principle of law that hearsay evidence is not admissible in law as stipulated under section 62 (1) (a) of the *Evidence Act* (Cap. 6, R. E. 2023). He contended further that SM2 failed even to ascertain neither the location nor the boundaries of the disputed land which leaves more doubt to his testimony. For more emphasis, he referred this Court to the decision of the Court of Appeal of Tanzania in the Case of **Ibrahimu Gabriel v. Chilohi Augustine**, Civil Appeal No. 14 of 2018, in which the Court held that:

> *"In this regard a person who was alleged to have been allocated a piece of land and who saw the fact was Ibrahim Gabriel (the appellant) and not Leodgar Ibrahim that it was just a hearsay evidence which cannot be admissible."*

To cement his argument, he referred this Court to the decision made in the case of **Khalfan Abdallah Hemed v. Juma Mahende Wang'anyi**, Civil Case No. 25 of 2017 (unreported) in which the Court made fererence to the case of **Hemed Said v. Mohamed Mbilu** (1984) T. L. R 113, where the Court held that:

> *"According to the law, both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".*

He contended that the evidence given by the Appellants and their witnesses was heavier than the evidence given by the Respondent and her witness and the trial Tribunal erred in law and in fact by declaring the Respondent to be the lawfull owner.

On the third ground of appeal that the trial Tribunal erred in law and facts in determining the matter without visiting *locus in quo* while the evidence given by the parties named two different places in which the disputed land is claimed to be located. He went on submitting that the boundaries of the disputed land which were stated by the Respondent are different from those stated by the Appellants in their sale agreement which was admitted as an Exhibit SH1. He contended that the differences in bounderies named by the parties indicated that, there are two different locations and there was a need for the trial Tribunal to visit the *locus in quo* so as to ascertain the location of the disputed land and he prayed for this appeal to be allowed with costs.

On the contrary, the Respondent advocate submitted that, during trial the Respondent clearly proved that she is the lawful owner of the land in dispute since she described on how she acquired the disputed land. He went on submittimng that the Respndent managed to describe even the location, size, and boundaries of the disputed land.

On the issue of the loss reports, the Respondent states that it is not mandatory to produce a loss report since the Resopondent testified on oath as to why she does not have a sale agreement and it was enough and there was no need to have a loss report and he invited this Court to be pursueded by the decision made in the case of **Jcdecaux Tanzania Ltd. v. Imperial Media Agencies Ltd. & Another,** Commercial Case No. 203 of 2017 (unreported), in which the Court had this to say:

> " ... *that the witness has stated on oath that the document was misplaced when they were moving the office. In my view, a statement given on oath constitutes evidence unless proved otherwise. If the counsel for the defendant has any evidence to the contrary, he could have provided it to disprove what is already stated by the witness on oath. Otherwise the witness has laid a foundation to explain why he does not have the original lease agreement."*

As much as the second ground of appeal is concerned, the the Respondent's advocate sumitted that the evidence given by SM2 at the trial was not hearsay evidence due to the fact that he testified on who is the lawful owner of the disputed land between the Respondent and the Appellants. He went on submitting that the land in dispute is the

property of the Respondent and he had sometimes used to cultivate the same with the Respondent.

With regards to the third ground of appeal, the Respondent's advocate submitted thay the dispute before the trial Tribunal was on land ownership of the land and not on the demarcation and there was no two locations of the disputed land as stated by the Appellant's advocate. He argued that, visiting the *locus in quo* is not necessary where the dispute is on ownership so, that is why the parties did not pray for the tria Tribunal to visit the *locus in quo*. To cement his stance he referred to the decision of this Court in the case of **Mhela Bakari v. Manoni Bakari and Another,** Land Appeal No. 23 of 2021 (unreported), in which the Court stated that, visiting the locus in quo is not mandatory and Courts strive to avoid.

He went on contending that in **Nizar M. H v. Gulamali Fazal Jarimohamed** (1980) T. L. R 29, the Court of Appeal of Tanzania stated that visiting the *locus in quo* can only be done in exception circumstances, as by doing so a Court may unconsiciously take on the role of witness rather than an adjudicator.

He argued that the Respondent in this appeal clearly proved her ownership on the disputed land and the trila Tibunal was satisfied with

her evidence that she is the lawful owner. Lastly, he submitted that this appeal is devoid of merit and ought to be dismissed with costs.

Having carefully considered the rival arguments advanced by the learned advocates from both sides in support and oppose of the grounds of appeal, I find it is proper to start with the third ground of appeal and if need arise, I will proceed with the other grounds of appeal.

The third ground of appeal states that the trial tribunal erred in law in determining the matter without visiting the *locus in quo*. In this ground of appeal. I find there are three issues which needs a carefully consideration by this Court. **One,** is on the size of the disputed land. Before the trial tribunal, while the Respondent's claim against the Appellants was on six acres, the Appellants testified on only three acres and the sale agreement tendered by the first Appellant shows that the size of land which the second Respondent sold to the first Respondent was three acres. **Two,** is on the bounderies over the disputed land. The Court records shows that the parties were disputing on th bounderies of the disputed land. Three is on the sale contracts. In this appeal I find there are two sale contract and the issue is whether they are all on the same piece of land or not.

These issues needed the Court's intervention by visit on the *locus in quo* to find whether the disputed land is the same or different in order to resolve them. Therefore, I agree with the Appellant's learned advocate that there was a need to visit the *locus in quo*, so as to be in a good position to ascertain the actual size of the disputed land, its location and boundaries.

In the case of **Avit Thadeus Massawe v. Isidory Assenga,** Civil Appeal No. 6 of 2017, the Court of Appeal of Tanzania had a similar scenario and ordered the Trial Court to take additional evidence by visiting the *locus in quo* so as to clear up the contradiction as to the location of the disputed land the Court went on explaining the procedure to be followed when visiting the *locus in quo.* it stated that:

> *"When visit to the locus in quo is necessary and appropriate .... The Court should attend with parties and their advocates, if any, and with much each witness as may have to testify in that particular matter in issue, and for instance if the size of the room or width of road is a matter in issue, have the room or road measured in the presence of parties, and not made thereof. When the Court re-assembles in the Court room, all such notes should be read out of parties and their advocated, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to*

give evidence of all those facts, if they are relevant and the Court only refer to the notes in order to understand or relate to the evidence in Court given by witnesses. We trust that this procedure will be adopted by the court in future."

As far as I am concerned, I am inclined to adopt the above decision in handling the case at hand because the situations are similar. I think it was important for the trial chairman to visit the *locus in quo*, by following the procedures set forth in the case of **Avit Thadeus Massawe v. Isidory Assenga** (supra), which has been elaborated above.

Similarly, in the case of **William Mrema v. Samson Kivuyo** (2002) T. L. R 291, the held that:

"In the exercise of its appellate jurisdiction under this part, the High Court shall have the power to take or order some other Courts to take and certify additional evidence ..."

Conclusively, in view of what has been stated above, I strongly agree with the Appellant's learned counsel's submission on the third ground of appeal that there was a need for the trial tribunal to visit the *locus in quo*.

Therefore, I quash the proceedings of the trial tribunal from 27th April, 2023, its judgement and order for retrial of the Application before the trial tribunal. The other proceedings are salvaged because they have not been affected by the omission made by the trial tribunal.

In such circumstances, I find there is no need to proceed discussing on the other grounds of appeal. The Appeal is partly allowed. I order for the case records in respect of Land Application No. 22 of 2019 be remitted to the District Land and Housing Tribunal for Tunduru at Tunduru to be determined on merit as directed above. I give no order as to the costs. Order accordingly.

DATED and **DELIVERED** at Songea this 17th day of October, 2023.

U. E. MADEHA

JUDGE

17/10/2023

COURT: Judgment delivered on this 17th day October, 2023 in the presence of Mr. Optatus Japhet holding brief for Mr. Hillary Ndumbaro, the learned advocate for the Appellant and in the absence of the

Respondent and her advocate. The Respondent to be notified. Right of appeal is explained.

U. E. MADEHA

JUDGE

17/10/2023