IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

LAND APPEAL NO. 25 OF 2022

(Originating from Land Application N. 5/2021, in the District Land and Housing Tribunal for Katavi at Mpanda)

HUSSEIN KASOMELA ..... 1ST APPELLANT
ABDALLAH KASOMELA..... 2ND APPELLANT

VERSUS

ANITA BONIFACE MAPULE ..... RESPONDENT

JUDGMENT

MWENEMPAZI, J.

The appellants are aggrieved by the judgment and decree of the District Land and Housing Tribunal for Katavi at Mpanda dated 29/7/2022 Hon. G.K. Rugelema (chairperson). They have raised five (5) grounds of appeal as follows:

1. That, the Trial Tribunal erred in law by visiting *locus in quo* without following the procedures governing *locus in quo* visit.

2. That, the Trial Tribunal erred in law and fact by holding that the suitland belongs to the Respondent while she contradicted herself in her testimony by claiming that she suitland was owned jointly with her husband, who was not the applicant before the Tribunal.
3. That, the Trial Tribunal erred in law and fact by holding that the suitland belongs to respondent without giving a clear description and specification of the suitland which could distinguish it from other lands.
4. That, the Trial Tribunal erred in law agreeing with the opinion of assessor B. Mlundwa which was contradictory and ambiguous.
5. That the Trial Tribunal erred in law and facts by granting the respondent $1^{3}/_{4}$ acres while in her application she claimed a total of acres, that was enough to say that the respondent didn't prove her case on balance of probabilities.

They are praying that the appeal be allowed with costs; that the judgment and decree of the trial tribunal be quashed and set aside and also for any other relief this Court shall deem it fit and just to grant.

The respondent approached the District Land and Housing Tribunal and sued the appellants claiming for a piece of land, which according to paragraph 3

of the application it is at "*Tulieni Area, Kazima Ward Mpanda Municipality: Kusini Magharibi Abdalla Kasomela; Mashariki: Kapala na Mke wake and Kaskazini:* Haji" estimated to be worthy Tshs. 4,800,000/=; according to paragraph 6(a) of the application form its size is six (6) acres.

In the claims it was averred by the applicant that the respondents (appellants herein) have invaded on the boundaries and claim to own the farm which the applicant (respondent herein) bought it with her late husband one John Kasangala in 1988 and they were cultivating it she prayed for a declaration that the dispute area is her property, vacant possession and costs.

The trial tribunal decided in favour of the applicant (Respondent in this appeal) that the area in dispute which is $1^{3}/_{4}$ acre is a property of the applicant. Costs also costs were awarded. The appellants are thus appealing with intention that the decision is quashed.

At the appeal the appellants were being represented by Mr. Laurence John, learned advocate and the respondent was unrepresented. Parties sought for leave to proceed by way of written submission. The prayer was granted and a scheduling order was issued.

Mr. Laurence John, learned advocate submitted on the 1st ground of appeal that the trial tribunal erred in law by visiting *locus in quo* without following the procedures governing *locus in quo* visit. He submitted that normally it is not mandatory for the Court to visit *locus in quo* but whenever the Court does so, there are certain guidelines and procedures which has to be followed to ensure fair trial. He cited the case of **Sikuzani Saidi Magambo and Another Versus Mohamed Roble,** Civil Appeal No. 197/2018, Court of Appeal of Tanzania at Dodoma.

The guidelines were pronounced in the case of **Nizar M.H. Versus Gulamali Fazal Janmohamed [1980] T.L.R 29** where the Court held:

> *"When a visit to a locus in quo 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 many have to testify in that particular matter...* ***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 and if necessary*** *incorporated. 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****. We trust that this procedure will be adopted by the Courts in future".*

The counsel has submitted that was not done; after *locus in quo* visit the tribunal never read out to the parties the notes obtained at *locus in quo,* never invited the parties to comment make amendments of the notes obtained at *locus in quo.* Worse enough witnesses who testified at *locus in quo* were not in attendance the date the tribunal made re-assembly after a *locus in quo.*

The counsel had as a conclusion that failure to follow the procedure is a fatal irregularity and invited this Court to so find.

On the 2nd ground of appeal, the appellants argue that the trial tribunal erred in law and fact by holding that the suitland belongs to the Respondent while she contradicted herself in her testimony by claiming that the suitland was owned jointly with her husband who was not the applicant before the tribunal.

The counsel for appellants has submitted that the evidence by the applicant was contradictory. She testified on oath that she bought the suitland jointly

with her late husband. The trial tribunal granted the respondent the whole land without confirming that she was the administratrix of the estates of her late husband.

He has argued that her husband was a necessary party in the suit, and if he was dead as claimed, then his administrator/administratrix ought to have been joined. He cited the case of **Ramadhani Omary Mbuguni Versus Ally Ramadhani and Another,** Civil Application No. 173/12 of 2021 Court of Appeal of Tanzania at Tanga (unreported).

Because of lack of proof of respondent fending for interests of her late husband and even her evidence of acquisition of the land remains contradictory and unreliable since her witnesses namely Zakayo Samson (SM2) and Godfrey Peter Kasangala (SM3) testified that the suit land belongs to the late husband. These contradictions in the evidence have made the evidence of the

Respondent unreliable. The counsel has cited the case of **Bakari Hamis Ling'ambe Versus Republic [2014] T.L.R 85 (CA):**

> *"The law on this point is now sailed. Not every inconsistency and or contradiction will make a prosecution case to flop. It is only*

where the gist of evidence is contradictory then the prosecution's case will be dismantled".

On the 3rd ground of appeal, the appellants complain that the trial tribunal erred in law and fact by holding that the suitland belongs to respondent without giving a clear description and specifications of the suitland which could distinguish it from other lands.

The appellants argue that the respondent's application in the trial tribunal didn't comply with Regulation 3(2) (b) of the Land Disputes Courts (District Land and Housing) Regulation GN No. 173 of 2003 which require the applications at the tribunal to provide sufficient identification of the suitland. The purpose of proper description was stated in the case of **Twapasyagha Yotam Kasalwike Versus Esili Kasanga,** Land Appeal No. 68 of 2022, High Court of Tanzania at Mbeya at page 4 – 5. Insufficient description is fatal irregularity

The counsel opined that in the present case the suitland was not sufficiently identified.

On the 4th ground of appeal, the appellants have complained that the trial tribunal erred in law agreeing with the opinion of assessors B. Mlundwa which was contradictory and ambiguous.

He has submitted that it is the requirement of law that assessors have to be given an opportunity to give opinion in writing which shall be read out to the parties before the judgment is pronounced. The chairman in his judgment, has to indicate if he agrees with the assessors and if he differs, he should give reasons. He referred the case of **Sikudhani Said Magambo and Another Versus Mohamed Roble** (Supra).

In the case at hand the chairperson agreed with the opinion of assessors B. Mlundwa who gave the following opinion:

> *"...alikuwa na maoni kuwa kwa kuwa shahidi Yolam Samson mdogo anakubali kuwa marehemu baba yake aliuza eneo kwa mleta maombi akiwa hayupo, hivyo hajui baba yake..."*

This opinion never gave rights to the appellant nor respondent. It was very contradictory for the tribunal to agree with opinion which is itself ambiguous.

On the 5th ground of appeal, the appellants complain that the tribunal erred in law facts by granting the respondent $1^3/_4$ acres while in her application

she claimed a total of 6 acres; that was enough to say that the respondent didn't prove her case on balance of probabilities.

The counsel for the plaintiffs submitted that in Civil Cases, the case is decided on balance of probabilities. He cited the case of **Anthony Msanga Versus Penina Kitira and Lucia Maiko [2015] T.L.R 46 (CA)**. also, the case of **Export Trading Co. Ltd Versus Mzartc Trading Co Ltd [2014] T.L.R 242 (HC)** which held that:

> *"It is a matter of well-established principle that in civil suits the burden of establishing a case on balance of probability lies on a person who would fail if no evidence at all was offered on either side and this case it is the plaintiff..."*

The counsel had the opinion that since the respondent alleged to have bought the suit land jointly with her husband, she ought to have substantiated the allegations. She failed even to recognize the exact year she bought the land. She even failed to call material witnesses who witnessed the alleged sale of the land. Hence the trial tribunal was required to enter adverse inference against the respondent as per **City Coffee Ltd Versus the Registered Trustee of Ilolo Coffee Group [2019] 1 T.L.R 182 (CA).**

According to the counsel for the appellant, the tribunal ought to have dismissed the application based on the irregularities pinpointed above. He therefore prayed that the appeal be allowed with costs.

The respondent was being served by Ms. Sekela Amulike, learned advocate who has indicated in the submission that she was retained for drawing the written submission.

On the 1st ground of appeal, the counsel for the respondent has submitted in line with the appellant's position save for the fact that there was no compliance to the procedure. She agrees that in the instant case it was necessary to visit *locus in quo* as it is featured at page 6 of the tribunal's judgment and that the procedure laid down in **Nizar M.H. Versus Gulamali Fazal Janmohamed [1980] T.L.R 29** which included taking notes (proceedings) of what happened at the field and the notes were read before the tribunal when it assembled after visiting *locus in quo*.

On the issue of not calling the witnesses who testified during *locus in quo* visit, when the tribunal re assembled again, this is left at the discretion of the tribunal as correctly stated in the case of **Nizar M.H. Versus Gulamali Fazal Janmohamed** (supra). The tribunal did not see the necessity of

calling witnesses to testify because the purpose of visiting *locus in quo* had already been met and the tribunal had already inspected the suit land; she prayed this ground to be dismissed.

On the 2nd ground of appeal, the counsel for respondent has submitted that it is true the suitland was bought by the respondent and her husband, in various phases from 1988, 1989 and 2000 as co – occupiers; the term is defined under section 159(1) of the Land Act, [Cap 113 R.E 2019] as:

> *"...Co – occupancy means the occupation of land held for a occupancy right or a lease by two or more undivided shares and may be either joint occupancy or occupancy in common".*

The suit land was owned by the respondent together with her husband as the law recognizes and it permits co-occupancy, also according to section 159(4) (b) of the Land Act, [Cap 113 R.E 2019] it clearly states:

> *"On death of joint occupier his interest shall vest in the surviving occupier jointly".*

The suitland is currently owned by the respondent because her husband is deceased and according to the above provision of the law the interest of the

co-occupier passes to the surviving occupier without passing through probate and administration of estates procedures.

In the present case it was not necessary for the respondent to claim as the administrator of the estate of her late husband or the claim as the representative of the same because the suitland belongs to her. She thus prayed for dismissal of an appeal.

On the 3rd ground of appeal, the counsel for the respondent has submitted that Regulation 3(2) of the Land Disputes Courts Act, (the District Land and Housing Tribunals) Regulation 2003 [GN. No. 174 of 2003] provides for the applications made to the tribunal should provide sufficient identification of the suitland.

The respondent managed to show clearly the suitland, by indicating that the suitland is at Tulieni Area, in Kaziwa Ward, Mpanda Municipal Katavi Region. She also managed to show neighbours and some of them managed to appear before the tribunal and also testified particularly SM2 and SU3.

In the case of **Lupembe Village Government, Ikolo Ward, Kyela District and another Versus Bethelehamu Mwandafwa and 5 Others,** Civil Appeal No. 377 of 2020, Court of Appeal of Tanzania at Mbeya

(unreported) the Court when dealing with the situation of this kind, it stated that at page 16 – 17:

> *"...to ensure that each case is adjudged within its own circumstances, in the Written Statement of Defence (WSD), the appellant clearly did not challenge that description of the suitland, nor deny it".*

The counsel for the respondent submitted that failure of the respondent to dispute about location of the land, clearly verifies that the suitland is known to the parties. In the instant case the respondent who was the applicant in the trial tribunal managed to show, locate the area specifically and also the appellant didn't dispute about the existence of the area, and there was no party who was prejudiced by the description of the suitland.

The counsel submitted that the respondent who was the applicant before the trial tribunal managed to show the area, the Ward where such property is found and also managed to show the neighbors where such land is located. She submitted that such description helped the tribunal to visit *locus in quo* and even at *locus in quo* the appellants did not object. She prayed the appeal be dismissed.

On the 4th ground of appeal, the counsel for the respondent has submitted that the chairman of the trial tribunal gave chance to assessors to give their opinion and he recorded the same as required by the law and the opinion of the assessors were clear and not ambiguous as claimed by the appellants in their submission in chief; in particularly the opinion given by B. Mlundwa.

The opinion given by B. Mlundwa is very clear and it stated that SU5 who was known as Yotham Said Mdogo testified that his late father sold the suitland to the respondent. Hence the opinion was directly given right to the respondent and it is not ambiguous as the appellant stated. Due to that understanding the chairman decided correctly by agreeing with the opinion of the assessors because they were clear and pointing out to the owner of the suitland.

On the 5th ground of appeal, the appellants are complaining that it was an error to grant the respondent $1^3/_4$ acres while in her application she claimed a total of 6 acres. According to them, that was enough to say that the respondent didn't prove her case on balance of probabilities.

The counsel submitted that the fact that standard of proof in civil cases is within the balance of probability is very common, it has been stated in

various case laws including the case of **Anthony Masanga Versus Penina Kitira and Lucia Maiko [2015] TLR 46.**

The term balance of probabilities means that a certain issue is more probable that it occurred than it did not occur (more probable than not).

In this case, the respondent/applicant in the trial tribunal managed to prove her case to the required standard and also the evidence adduced by the appellants who were respondents before the trial tribunal was not satisfactory.

As it was clearly stipulated by the respondent (who was the applicant) in the trial tribunal, it is clear that the land she owns at that particular area is 6 acres and the respondents have invaded on part of his land only which is $1^3/_4$ acre of the whole land therefore what the appellants claim is unfounded which is a result of misapprehension of the facts. The respondent prays that the ground is dismissed. And therefore, the whole appeal be dismissed with costs.

In rejoinder, the counsel for the appellant has insisted that in the first ground of appeal, that their submission was centered on the failure to read the notes obtained at *locus in quo*, failure to invite parties to comment on the

observation's contrary to the guidelines in the case of **Nizar M.H. Versus Gulamali Fazal Janmohamed [1980] TLR 29.** Also, the respondent has failed to substantiate how the procedure was observed by replying to every pointed-out defect. He has invited this Court to verify on the proceedings of the trial tribunal.

On the 2nd ground of appeal, the counsel has faulted the line of argument that the respondent and her late husband were co – occupant of the land. That is a new argument not pleaded and also not adjudicated in the trial tribunal. Second it is not applicable in the circumstances as the land is not registered as per section 159 (3) of Land Act, [Cap 113 R.E 2019].

On the third (3rd) of appeal, the counsel for the appellants has submitted that the case of **Lupembe Village Government, Ikolo Ward Kyela District and Another Versus Bethelehamu Mwandafwa and 5 Others** (supra) is not applicable in the circumstances because firstly, the complaint before your Honourable Court was not on whether appellants didn't know the suitland or not rather it was on violation of the law for failure to describe properly the suitland something which led to the tribunal to give in executable decree which doesn't specify where respondent won.

On the fourth ground of appeal the counsel for the appellant has submitted that the case of **Eliumba Ezekiel** (supra) is not applicable in the circumstances of the case at hand because what was faulted in the submission in chief is the act of trial tribunal chairperson to agree with the opinion of one B. Mlundwa who provided a contradictory opinion as she never gave rights to the appellant nor the respondent.

On the 5th ground of appeal, the counsel has submitted that they maintain that the respondent never proved her case to the balance of probabilities that she entitled to the suitland by failure to call material witness who witnessed the sale of the suitland.

There was no evidence that she was the administratrix of the estate of her late husband's estate. Witnesses SM2 and SM3 testified that the suit land belongs to the late husband of the respondent. It was the duty of the respondent (applicant) in the trial tribunal to prove the case to the balance of probabilities. The appellants pray that the appeal be allowed with costs.

I have had an opportunity to read the record as well as the submissions by the parties. The issue for determination is whether the appeal at hand has

merit. As it would be referred herein above it is clear that parties are at a serious contest over the land.

The first ground of appeal faults the procedure at the *locus in quo*. The counsel has cited the case of **Nizar M.H. Versus Gulamali Fazal Janmohamed** (supra). That the notes were not read over after the tribunal re-assembled. That however, has been opposed by the counsel for the respondent. She has submitted that the trial tribunal read the notes after it had re assembled, even witnesses were not called because the purpose had been achieved.

I have read the record of the trial tribunal when it visited the *locus in quo* on the 8/7/2022. The applicant and respondents were present. They had a chance to show their respective areas and borders. That was done openly and no objections were raised. However, it is also clear, the trial tribunal re assembled on the 14/7/2022. It is unfortunate that it was not recorded why the witnesses were not called. However, in my view, since they had an open testimony by demonstration of showing real location in situ there was no need to call the witnesses as is demanded. I therefore run with the

submission by the counsel for the respondent that the procedure was followed. The first ground therefore fails.

On the 2nd ground of appeal, the issue is whether the respondent had *locus standi* to sue on behalf of her late husband without having the status of an administrator of the estate of the late Peter F. Kasangala. The point was the subject of objection on the 26/5/2021. A ruling was delivered on 17/6/2021. Briefly the respondent had a power of attorney, to supervise and or oversee properties of the late Peter F. Kasangala from her son AIDAN KASANGALA PETER who issued a power of attorney in favour of ANITHA BONIPHACE KWIMBA. That being the position it was proper for the respondent to claim as she did and also the tribunal to find that the dispute land was owned jointly by the respondent and her husband. With that position I find the issue is resolved by dismissing the ground of appeal for devoid of merit.

On the 3rd ground of appeal, the appellant allege that the dispute land was not sufficiently identified. The counsel for the appellant alleged that Regulation 3(2) of the Land Disputes Courts Act (District Land and Housing tribunal) Regulations, 2003 [GN. No. 173 of 2003] was not complied with; the said regulation required the applications at the tribunal to provide

sufficient identification of suitland. The provision of 3(2) of G.N. 173 of 2003 are as follows:

"(2) An application to the Tribunal shall be mad in the form prescribed in the second schedule to these Regulations and shall contain:

a) The names and address of parties involved;

b) The address of the suit premises or location of the land involved in the dispute to which the application relates;

c) Nature of disputes and cause of action;

d) Estimated value of the subject matter of the dispute;

e) Relief sought;

f) Amount of rent if the dispute involves payment of rent."

The provision was considered in the referred case of **Twapasyagha Yotam Kasalwike Versus Esili Kasanga**(supra) held that:

"It was intended to inform the tribunal of a sufficient description of the suit land in dispute for purposes of identifying it from other areas/land where it stands or where in particular Lusungo stands in Tanzania.

It is a common cause that in respect of un surveyed land, specification of boundaries, neighbours and/or permanent features surrounding the suitland is important for the purpose of identification".

According to the appellant the description of the suitland in this case was not sufficient. The counsel respondents submitted that the respondents managed to show a proper description indicating the location and also naming neighbours. Particularly SM2 and SU3. In addition, she submitted that, the appellants did not even oppose the same in their written statement of defence. She cited the case of **Lupembe Village Government, Ikolo Ward Kyela District and Another Versus Bethelehamu Mwandafwa and 5 Others** (supra). She prayed for the ground to be dismissed.

At page 2 and 3 of this judgment I referred to the averment in the application form paragraph 3 of application form. The appellants in their written statement of defence noted the paragraph, a sign that they had no dispute.

I am aware of the principle that parties are bound by their own pleadings. Parties to lawsuit are generally limited to the claims and defenses that they have raised in their pleadings. The purpose of the principle is to promote fairness and efficiency in the legal system. It prevents parties from surprising each other with new claims or defenses at the trial. The

importance of the principle is therefore threefold: one, it ensures that parties have a fair opportunity to prepare for trial; second, it helps to prevents the trial from becoming unnecessarily long and complex, third, it helps the Court to focus on the relevant issues in the case and to make a just decision. In the case of **Barclays Bank (T) Ltd Versus Jacob Muro, Civil Appeal No. 357 of 2019 [2020] TZCA 1875 (26 November, 2020).** It was decided that the principle binds even the Court. The same runs, from the quotation at page 12, as follows:

> *"...the Court would be acting contrary to its own character and nature if it were to pronounce any claim of defence not made by the parties. To do so would be to enter upon the realm of speculation".*

Under the circumstances, it is unbecoming for the appellants to argue that the case of **Lupembe Village Government, Ikolo Ward Kyela District and Another Versus Bethelehamu Mwandafwa and 5 Others** (supra) is not applicable in this case particularly for the position that the appellants never opposed nor denied the averment in their written statement of defence. I therefore find the ground to lack merit and dismiss it.

On the 4th ground of appeal, the appellants argue that it was wrong to agree with the opinion of the assessors in particular B. Mlundwa. In his view, the opinion is ambiguous. As the assessor affirmed the fact that the witness was absent during the sale and yet she suggested the land should be declared it belongs to the respondent.

The respondent has argued that the assessor opined that the land was sold to the respondent thus it is not ambiguous. The decision of the chairman was therefore correct. In my understanding which is also the position of facts, the respondent bought dispute land from the father of the witness (Yolam Samson Mdogo). The witness was not therefore in a position to dispute the fact of sale, although he could not confirm the exact location/point. But the land was shown by the respondent and other witnesses. That in my understanding was the basis of agreeing. I therefore find that the complaint is unfounded and the appellant had an opportunity to object at the scene. The ground is dismissed.

As to whether the respondent proved her case or not; I have the opinion that the answer is affirmative. The respondent was able to show that she owns a land whose size is six (6) acres and out of that the appellants have

encroached into a part of that land which was confirmed to be $1^{3}/_{4}$ acre as was verified when the trial tribunal visited the *locus in quo*. The respondent had a duty to prove her case and she did that and the trial Tribunal confirmed. In line to the decision in **Export Trading Co Ltd Versus Mzartz Trading Co. Ltd** (supra). The respondent proved the case to the balance of probabilities.

For the reasons and explanations given, I find the appeal has no merit and is dismissed with costs.

It is ordered accordingly.

Dated and signed at **Sumbawanga** this 19th day of October, 2023.

T.M. MWENEMPAZI

JUDGE

Judgement delivered this 19th day of October, 2023 via video conference. The 1st Appellant and the Respondent were at the Resident Magistrates' Court of Katavi at Mpanda.

T.M. MWENEMPAZI

JUDGE

19/10/2023

Right of further appeal explained.