IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 36 OF 2023

(Originating from Application No. 134of 2020 of District Land and Housing Tribunal Moshi)

GERALD MLASANI MTUI ..... APPELLANT

VERSUS

JOSAPHAT NGAPIMA MTUI .....1ST RESPONDENT

DISMAS FAUSTINI MTUI .....2ND RESPONDENT

JUDGMENT

20th Sept. & 19th October 2023

A.P.KILIMI, J.:

The appellant sued the respondents hereinabove at the District land and Housing Tribunal of Moshi at Moshi claiming for the declaration that he is the lawful owner of the disputed land, injunction restraining the appellants to enter the disputed land, damages for destruction of wall and the crops at a tune of Tsh 2,000,000/=, general damages and the cost of the suit.

The brief facts of the case at the trial are simple and straight forward to the effect that; the appellant and respondents are close related as well as neighbors. That the appellant's father (deceased) distributed his land to his

two children, the appellant and his sibling (2st respondent father also deceased) whose land was inherited by second respondent. The dispute between them is about the piece of land which alleged to be invaded by the respondents demolish a wall, cutting trees and crops so as to enlarge the footway passage from 1 to 6 meter. The respondent on their side denied the allegation by saying it was the appellant who closed the way unreasonably. After the conclusion of the hearing the chairman of the tribunal enter judgment in favor of the respondent and the applicant was declared to have no right to the disputed property and ordered to open the way which he closed.

Aggrieved with the judgment and decree the appellant knocked the door of this court by way of appeal on the following grounds;

1. The learned trial chairman misdirected himself in evaluating evidence hence reached wrong decision.
2. That the learned trial chairman was bias hence reached wrong judgment.
3. That sum up by assessors was not proper also misdirected the learned chairman to reach wrong decision.

At the hearing of this appeal, the appellant stood himself while the respondents were represented by Deusderius Hekwe, advocate. It was fixed

this appeal be argued by way of written submission and all have complied with the scheduling order.

On the first ground of appeal the appellant argued that the Chairman of the Tribunal failed to evaluate the evidence before him and reached wrong decision. That on determining who was the rightful owner the chairman concluded without giving reason to his decision that the land belongs to the 2nd respondent. The appellant prays for this court as the first appellate court to re-evaluate the evidence and enter decision. He cited the case of **Kaimu Saidi vs R**, Criminal Appeal No 391 of 2019 CAT.

In respect to the second ground of appeal the appellant contends that the trial chairman was bias as he was a witness in locus in quo and his decision instead of basing on evidence was based on locus in quo which was done contrary to the guidelines. To buttress his arguments cited the case of **Sikuzani Saidi Magambo and Another vs Mohamed Roble**, Civil Appeal No. 197 of 2018, of 2018 CAT at Dodoma (Unreported) and **Nizar M.H vs Gulamali Janmohamed** [1980] TLR 29. Furthermore, the appellant stated to abandon the third ground mentioned above.

In reply Mr. Hekwe argued that the appellant centered his point of submission on the issue of procedural impropriety of locus in quo which was not an issue on the pleadings. It is a trite law that parties are bound by their own pleadings therefore the appellant is bound by his memorandum of appeal and that issue is wrongly premised.

In respect to the first ground of appeal, Mr. Hekwe contended that, the trial chairman did evaluate the evidence before tribunal by considering the testimony of the appellant and came into conclusion that the land belonged to 2nd respondent's father. Either the respondent admitted that it was the duty of this court to re-evaluate the evidence but the appellant failed to point out substantial error done by the tribunal.

Responding to the second ground of appeal, Mr. Hekwe argued that the tribunal did visit the locus in quo properly as the parties were present, both had right to show angles of the disputed land, they had right to ask questions and finally the tribunal's feedback was read out before the parties at the tribunal. The appellant failed to show the biasness of the chairman neither at the tribunal nor in his submission at this court.

In brief rejoinder, the appellant submitted that the chairman reproduced the evidence of parties only at the background of the case and not as to evaluate their evidence in merit. Further if the procedure of the locus in quo could have followed the chairman could have reached the said decision. Either the tribunal became bias when he acted as witness during the locus in quo and therefore the procedure of locus in quo was not followed.

I have dispassionately considered the submissions of both parties, the records of the trial tribunal and the judgment itself, I wish to point out before I proceed that, this being the first appeal, it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own conclusion of fact. (see **D.R. Pandya v. Republic** [1957] EA 336 and **Demeritus John @ Kajuli & 3 Others v. Republic**, Criminal Appeal No. 155 of 2013 (unreported).

Starting with the first ground of appeal, this court has to determine whether the tribunal chairman misdirected himself in evaluating evidence hence reached a wrong decision. That it is the appellant contention that the

chairman instead of evaluating the evidence adduced before the tribunal he took into consideration only the evidence in locus in quo. In the case of **Mkulima Mbagala vs R**, Criminal Appeal No 267 of 2006 (Unreported) the court stated that,

> *"for a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at"*

In view of the above, the issue before me is whether at the trial the evidence adduced geared the tribunal to reach the right decision. I have considered that, the dispute at the trial was the right to a way to the respondents, the allegation was for the appellant squeezed the said way to be narrow while formally was wide, the appellant himself when he was cross examined by Mr. Hekwe said, the way existed but in it he planted banana plants and Maize, also he admitted that the land belong to their clan and respondents

belong to that clan, but something interesting he said respondents slaughtered a cow but he was not invited to enjoy the meat. His witness (SM2) said he know the said way existed and is aiming to the respondents' residential homes but now has been widen to be 6 feet. Another witness is Salvatory Gerald Mtui said that the way existed but was narrow for allowing bicycles and motorcycles, but now it has been widened to pass motor vehicles. Also the same was done by clan meeting, further admitted the widening of the way to the respondent was very important economically. While the respondent stated that the appellant elevated stones wall to narrow the way to their home, the way used by clan members and neighbours.

I have considered the above evidence and the reasons advanced by the trial tribunal after visiting the locus in quo. I subscribe with the reasoning of the trial tribunal at page 6 and 7 of the typed judgment, that it was proved that the respondent have the right of easement to their homes, since the evidence after visiting the area in dispute revealed the way existed and the appellant narrowed it deliberated, it was not fatal for the chairman to rely on that evidence of what transpired on the said visit. Be it as it may, prudently done by clan meeting need to be appreciated for the betterment

of the social services to the clan members, taking regard the nature of the said land belonged to only members of clan. Having analysed as above, I am of considered opinion the trial court was right to decide that the way should remain five feet wide. This consequently answers the second issue at the trial of who own the said land in dispute, it is my opinion since it was evidence the right to way by the respondent existed since 1992, this is more than 12 years, thus, the same remained as an easement for common use by the appellant and the respondents. The way is open to be used by invitees and licensees of both parties in dispute. In the premises I find the first ground devoid of merit hence dismissed.

On the second ground of appeal, the appellant decided not to argue on the point he raised, instead argued on the procedural irregularity of the visit locus in quo. Although this was not pleaded before as ground of appeal but worthy to be determined by this court since the same is its duty as stated above.

I am aware that, in our jurisdiction there is no law which forcefully and mandatory require the court or tribunal to conduct visit at the Locus in Quo, the same is done at the discretion of the court or the Tribunal particularly when it is necessary to verify evidence adduced by the parties during trial.

However, when the court or the tribunal decides to conduct such a visit, there are certain guidelines, and procedures which should be observed to ensure fair trial. (See **Sikuzani Saidi Magambo & Another vs Mohamed Roble** [2019] TZCA 322 (Tanzlii). In this case the counsel for the respondent prayed without objection from the other party for the tribunal to conduct the visit locus in quo. The tribunal conducted the locus in quo on 15/4/2023 and feedback of it was read out on 19/4/2023.

Now, the issue is whether the said visit done occasioned failure delivering justice of the matter at the trial tribunal. For purpose of clarity of what happened at the said visit I find appropriate to reproduce page 23 of the typed proceeding;

15/4/2023
Akidi: R. Mtei- Mwenyekiti
Wajumbe: S. Mchau, S. Lukindo
Mdai: yupo
Mdaiwa Na1: yupo
Mdaiwa Na2: hayupo kwa taarifa toka kwa mdaiwa Na 1.
Karani: Yustina Mganga
Baraza: shauri liakuja kwa kwenda kutembelea eneo la mgogoro.
Saini: Mhe. R. Mtei- Mwenyekiti
15/4/2023

Mwombaji: nipo tayari

mjibu maombi 1: nipo tayari pia
Saini: Mhe. R. Mtei- Mwenyekiti
15/4/2023

KWENYE ENEO LA MGOGORO
Baraza: mjibu maombi wa kwanza ana mwombaji walionesha eneo la mgogoro.
Saini; Mhe. R. Mtei – Mwenyekiti
15/4/2023

Amri: kusomewa yaliyojitokeza kwenye eneo la mgogoro
19/4/2023.
Saini: Mhe. R. Mtei – Mwenyekiti
15/4/2023

Then on 19/4/2023 the trial reconvened and read to the parties what parties said, showed and the tribunal observed both the appellant and both learned counsels Mr. Zayumba for the appellant and Mr. Hekwe for respondent were present admitted that the briefing of what transpired at the visit was properly and correct. I also find appropriate to reproduce the said brief hereunder;

> *"**Baraza:** Eneo la mgogoro linahusu njia ya kutoka barabara ya Mtaa kuelekea kwenye makazi ya Mjibu maombi wa pili Dismas Fausatine Mtui. Baraza liliona njia hiyo ambayo imepakana na shamba la Gerald Mtui ambayo ina mipaka ya miti mikubwa na masale pamoja na mawe, na upande mwingine imepakana na eneo la Salvatory. Upande uliopakana na Gerald (Mwombaji) ndio wenye mgogoro. Upana wa njia hiyo ni hatua 5 lakini Mwombaji anadai ni hatua 2 tu upande na hizo hatua 3 zimeingia kwenye eneo lake. Mawe yaliyowekwa*

mwanzoni mwa njia iyo yameziba eneo lenye ukubwa wa hatua 3."

I have considered the statement above and the procedure above, in my view this is the case having special circumstances, thus is that the respondents were claiming the right of easement to their home which existed more than twelve years ago. Since in this case the visit aimed to show whether the right to way existed and whether the same was encroached by the appellant or not. In my opinion what have been shown above by the trial tribunal, the visit and re-convening meeting after the visit in the presence of both learned counsel, I am settled the trial tribunal was not bias and the above did not occasioned any failure of justice.

Therefore, in view of the above, I am of considered opinion under the circumstances of this matter, where the parties and the advocate were present, the requirements envisaged in the cases referred by the appellant principally were complied with, therefore any shortfall to it as said is due to the circumstances of this matter, which in fact did not occasion any failure of justice. I therefore hereby find also this ground devoid of merit and dismissed.

On the premises and from what I have endeavoured to discuss above, I find the appeal devoid of merit, consequently this appeal is hereby dismissed and the trial tribunal decision sustained and remain intact. Basing on circumstances and parties' relation, I make no order as to costs.

It is so ordered.

DATED at **MOSHI** this day of 19th October, 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court:- Judgment delivered today on 19th October, 2023 in the presence of Desderius Hekwe, Advocate for all Respondents, also first Respondent present while Appellant absent.

Sgd: A. P. KILIMI
JUDGE
19/10/2023

Court: - Right of Appeal Explained.

Sgd: A. P. KILIMI
JUDGE
19/10/2023