THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

LAND APPEAL NO. 104 OF 2022

(Originating from the District Land and Housing Tribunal for Mbeya in Application No. 110 of 2020)

ILIMGADI LIHIMBA ..... APPELLANT

VERSUS

TITO CHRISTOPHER NJIBA

(Administrator of Christopher Njiba Mwakyelu) **..... RESPONDENT**

JUDGMENT

19th July & 16th October 2023

NONGWA, J.

The respondent, in the capacity of administrator of the estates of the late Christopher Njiba Mwakyelu, through Application No. 110 of 2020 at the District Land and Housing Tribunal for Mbeya, sued the appellant for trespass over house No. R/678 located at *soko la wakulima street*, Ruanda ward within the city and region of Mbeya. He prayed for **one;** vacant possession of the disputed house, **two;** a declaration that the disputed house is the property of the applicant by virtual of being the administrator of the deceased estate, **three;** general damages, **four,**

costs of the application and **five;** any other relief the tribunal would deem fit to grant.

From the records, it was alleged that the late Christopha Njiba Mwakyelu was the owner of the suit house from 1970's until his demise in 1990. That the appellants' husband one Peter Njiba had a piece of land near the suit house and after his demise in 2017, the appellant trespassed the suit house claiming ownership. Further that the respondent was appointed as the administrator of estates of Christopha Njiba Mwakyelu and the appellant has hindered him to collect the house hence filed the application in the tribunal.

The appellant disputed the allegation in his written statement of defence and raised point of preliminary objection which were overruled by the chairman. In her written statement of defence, the appellant alleged that the suit house was given to them in 1988 by her farther in law. Together with her late husband Peter Njiba bought other three plots nearby and merged with a plot given to form one plot which they later developed it without facing disturbance from the respondent when her father-in-law and husband were alive. It was further alleged that respondents' claim over the house was intended to defraud the appellant

from the matrimonial property. Thus prayed the application to be dismissed.

Before the trial tribunal, the respondent (by then applicant) paraded two witnesses, himself (PW1) and Matrida Charles (PW2) together with one documentary exhibit, letter of administration. On the adverse part the appellant (by then respondent) paraded four witnesses herself (DW1), Augustini Kabisa (DW2), Edward Kalonge (DW3) Emmanuel Kayoyo (DW5). The appellant produced two documentary proof, water payment bill exhibit D1 and PPF card exhibit D2. The tribunal further visited *locus in quo* where two additional witnesses testified, these are Edward Julius (L1) and Veronica Ngela (DW1) and a sketch map was drawn.

At the end of the case the chairman was impressed by the respondent's case with the findings that he is the lawful owner of the suit house by virtual of his capacity as the administrator of the estates of the deceased. Aggrieved with the decision, the appellant has filed memorandum of appeal containing four grounds which for the reasons to be apparent later will not be reproduced here.

Hearing of the appeal was through written submissions, parties' submissions will not be reproduced here for the appeal will be disposed on the matter which was raised by the court *suo moto* when set to

compose the judgment. This court thus, re-opened the proceedings so that parties can have right to be heard on the issues raised. The court *suo moto* invited parties to address on;

i. Whether proceedings during *locus in quo* was conducted according to the laid guidelines and procedures.

ii. Whether it was proper for the tribunal to grant 2nd relief in the application.

When the parties came for hearing, appellant was represented by Mr. Godwin Mwakyusa whereas the respondent was represented by Ms. Febby Cheyo, both learned counsels.

Addressing the court on the first issue Mr. Godwin argued that *locus in quo* was conducted *suo moto* in order to verify boundaries of the land the appellant bought and in which the house is situated. He submitted that after *locus in quo* the tribunal did not re-assemble rather the matter was set for assessors' opinion, he contended that the decision of the tribunal was on ownership of the house and not land. Counsel for the appellant left the matter to be decided by the court.

On part of Ms. Febby, she submitted that records are silent on who prayed for visit of *locus in quo*, it was *suo moto* and the tribunal did not re-assemble. It was submitted that, per **Nizar M.H. v. Gulamali Fazal**

Janmohamed [1980] TLR 29 failure to re-assemble after *locus in quo* was an irregularity which occasioned miscarriage of justice to the parties. Ms. Febby went on submiting that, before the introduction of overriding objection principle proceedings and judgment were being quashed and case ordered to restart afresh. However, by the oxygen principle, file may be being returned for the proceedings to be corrected from where the omission begins. She said in case the court find *locus in quo* was irregular only proceedings from when *locus in quo* was ordered should be affected.

As the second issue on the prayers, the respondent to be declared the lawful owner, it was submitted that the confusion was brought by chairman who wrongly interpreted the 1st prayer, because the application was in English language and the judgment came up in Kiswahili.

Having heard submission of the parties on the raised issue, regarding the issue of *locus in quo*, record is silence on why the tribunal opted to conduct *locus in quo* because it bears out that there was no such prayer from the parties or the tribunal itself. Be that it may, it is trite law that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the *locus in quo,* as 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. Some of the said guidelines and procedures were clearly articulated by this Court in the case of **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29 that;

> *"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 witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note 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 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 the witnesses.*** *We trust that this procedure will be adopted by the courts in future.' (Emphasis supplied).*

See also; **Avit Thadeus Massawe vs Isdory Assega**, Civil Appeal 6 of 2017, **Sikuzan Saidi Magambo & Another vs Mohamed Roble,** Civil Appeal 197 of 2018 and **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others,** Civil Appeal 4 of 2018 (both unreported). In **Kimonidimitri Mantheakis** the court highlighted that;

> *'... for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: one, ensure that all parties, their witnesses, and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo; three, allow cross-examination by either party, or his counsel, four, record all the proceedings at the locus in quo; and five record any observation, view, opinion or conclusion of the court including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any.'*

In the present appeal there are two issue which were irregular in procedure, **one;** recording evidence of persons who did not testify in tribunal room, these are Edward Julius (L1) and Veronica Ngela (DW1). This was an irregularity as *locus in quo* is only conducted to verify evidence already adduce during trial. In the case of **Paskali Nina vs Andrea Karera**, Civil Appeal No. 325 of 2020 [2023] TZCA 35 (www.tanzlii.org.tz) the court stated;

'The Ward Tribunal visited the locus in quo where it heard from a certain Mama Mary supporting the appellant's claim while, on the other hand, Guwa Gunti and Gitu Masonda maintained that the respondent bought the property from Shabani Hamisi. ***Perhaps, we should observe, albeit very briefly, that the approach by the Ward Tribunal in recording the statements made at the locus in quo by the three persons who did not testify at the trial was manifestly unprocedural****....' (Emphasis supplied).*

At hand it was an irregularity to allow Edward Julius and Veronica Ngela who did not testify during trial be recorded their evidence on visit of *locus in quo.*

The appellant's counsel has submitted that *locus in quo* was on to verify evidence on the plot bought and where the house was built. Although that may be the purpose the tribunal opted to conduct *locus in quo*, same is not reflected in tribunal's record, worse enough, there was no evidence which established the separate land as the counsel for the appellant submitted.

Two; failures to re-assemble after *locus in quo*, record shows that after the tribunal had recorded proceedings during *locus in quo* it did not re-assemble to verify what had been recorded and the parties be allowed to make some comments if any. What is deduced from the record is that

right during *locus in quo* assessors were given opportunity to prepare their opinion, the move which was contrary to the procedures and guidelines laid in **Nizar M.H. Ladak,** (supra) as rightly submitted also by counsel for the respondent.

In the instant appeal the matter has been complicated by the fact that what was recorded during visit of *locus in quo* was used in the judgment to find the appellant's case unmerited as observed at page 10 of the tribunal's judgment and the orders made. The demarcation between the house in dispute and other houses by black gate (geti jeusi) were not testified in the tribunal, the matter only surfaced during *locus in quo* which was conducted on 21/7/2022 testified by the respondent (PW1) and 3/8/2022 from Edward Julius (L1). These were new evidences which was taken contrary to the law. The chairman in the judgment stated;

> *'Kwa sababu hizo basi maombi haya yamekubaliwa. Mdai ametangazwa kuwa mmiliki wa nyumba yote yenye mgogoro isipokuwa nyumba zile/ile iliyonunuliwa na Pater kwa majirani ambayo haina mgogoro. Nyumba yenye mgogoro na ile isiyo na mgogoro zimetenganishwa na geti jeusi kama walivyonyesha wahusika'.*

From the above, it is evidence that the decision of the tribunal was mainly based on evidence recorded on visit of *locus in quo* which I have already held to be unprocedural. There is argument that the court should invoke overriding principle by only quashing proceedings during *locus in quo* and spare the rest. After considering circumstance of this case, if evidence during visit was not the basis of the judgment, the invitation could have been acceded by this court. So long as it had impact of the whole judgment, quashing proceedings in respect of only *locus in quo* will occasion more injustice to the parties. I therefore, the first issue is negatively answered.

On the second issue, in the tribunal the respondent filed the application in the tribunal as the administrator of the estate of the late Christopha Njiba. One among the reliefs sought was a declaration that the disputed house is the property of the applicant by virtual of being the administrator of the deceased estate. The chairman in his judgment declared the respondent as the lawful owner save for the house which was demarcated by black gate.

This was improper because the respondent being the administrator could not have been declared as the lawful owner in the capacity as administrator. The transfer of the suit land in the name of the

administrator was not done. The administrator was in the process of collecting the properties which could be vested to him before he finally distributes to lawful heirs. In my view it was an error for the chairman to declare the respondent the owner because at that stage the administrator was just collecting the properties of the deceased and the title of the suit house was yet to be vested on him. On this I find inspiration from the case of **Daniel Dagala Kanuda (as administrator of the estate of the lateMbalu Kashaha Baluda) vs Masaka Ibeho and 4 Others,** Land Appeal No. 26 of 2017 (Unreported) in which **Utamwa, J.** (as he then was) stated;

> *'The tribunal could not thus make the order declaring the suit land as belonging to the appellant. It did not have that jurisdiction as long as it was clear in the pleadings and evidence that he was not entitled to inherit the estate of the deceased. The pleadings showed that his duty was only that of the administrator of the estate. The proper order the appellant would have legally prayed before the tribunal therefore, was for a declaration that the suit land was part of the estate of the deceased. The first relief was thus improper before the tribunal....'*

In the same breath, I find the tribunal strayed into error when it declared the respondent the owner of the house in dispute instead of

declaring it forming part of the estates of the late Christopha Njiba. The respondent's counsel submitted that the prayer in the application was proper but the chairman misinterpreted it. In my view that prayer 2 in the application had also problems because the respondent sought to be declared the lawful owner in his capacity as administrator and not the suit land forming part of the estates of the deceased of which he was the administrator. This is clearly evidenced in paragraph 5(g) of the application in which the applicant pleaded that failure of the respondent to heed to the claim over the house had hindered him to finish to file inventory to the court which appointed him. Declaring the respondent, the lawful owner it means the suit house had been distributed to the respondent, being the administrator, it does not make one the owner as he prayed. The tribunal was only required to make a declaration that the suit house was part of estate of the deceased, which simply meaning the suit house was formerly lawfully owned by the deceased.

In the event, I hereby invoke revisional jurisdiction under section 43(1)(b) of the Land Disputes Courts Act [Cap 216 R: E 2019] and hereby nullify the entire proceedings and quash the judgement of tribunal. If parties are still interested, are at liberty to institute a fresh application before the tribunal, subject to the law of limitation. Should another

application be filed, hearing to be before another chairman with a new set of assessors? Since the anomalies and irregularities giving rise to the nullification were raised by the Court, *suo motu*, I make no order as to costs. Order accordingly.

V.M. NONGWA
JUDGE

DATED and DELIVERED at MBEYA this 16th October, 2023 in presence of the parties and their advocates.

Right of appeal is fully explained.

THE HIGH COURT OF TANZANIA

V.M. NONGWA
JUDGE