**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT MOSHI**

**LAND CASE APPEAL NO. 20 OF 2023**

(Originating from Application No. 11 of 2012 of the District Land and Housing Tribunal for Moshi at Moshi).

**WILIRK LEONARD KIMARO ..... APPELLANT**

VERSUS

**INYASI STEVEN MTOSHU..... 1ST RESPONDENT**

**ROBERT RAPHAEL KIMARO ..... 2ND RESPONDENT**

**JUDGMENT**

*20/09/2023 & 25/10/2023*

**SIMFUKWE, J.**

This is an appeal from the judgment of the District Land and Housing Tribunal for Moshi at Moshi (the Trial Tribunal) in Application No. 11 of 2012.

The gist of the dispute as captured from the records is to the effect that the appellant sued the 1st respondent herein before the trial tribunal claiming Tshs 2,300,000/= which was the loan advanced to him by the appellant. The records reveal that the 1st respondent secured his pieces of land at Mbomai Juu in Mbomai Village within Tarakea in Rombo District to obtain the said loan. The appellant alleged that the respondent had not

paid the said loan. As far as the 2nd respondent is concerned, the appellant alleged that he decided to sue him because he purchased the disputed land from the 1st respondent and he was using it illegally. Following such allegations, the appellant decided to institute a case before the trial Tribunal praying for the following reliefs:

1. *The Honourable Tribunal to order the respondent to pay this (sic) debt together with its rent accordingly as he promised.*
2. *To order the sale of the said shamba on failure of respondent to pay his debt.*
3. *To issue an order of injunction on part of respondent till the disposal of the suit*
4. *To order the respondent to pay Tshs. 1,600,000/= which the appellant incurred for reopening the shamba as it was plenty of bushes.*
5. *Any other costs as the Tribunal will deem fit to provide.*

The 1st respondent admitted that he secured the loan from the appellant to the tune of Tshs 2,300,000/-. However, he denied the claim of rent and any other costs which were claimed by the appellant. On part of the 2nd respondent, he alleged that he had never bought the said land from the 1st respondent.

In its decision, the trial tribunal was satisfied inter alia that the 1st respondent should pay back the loan advanced to him by the appellant. As for the 2nd respondent, the trial Tribunal observed that there is no

evidence to support the allegations that he is the owner of the disputed land. Hence, the appellant was ordered to pay costs to the 2nd respondent.

Following the Tribunal's findings, the appellant was aggrieved and preferred the instant appeal on the following grounds of appeal:

1. *That the learned trial Chairman erred in law and fact for ordering the Appellant to pay the 2nd Respondent costs of the suit while he has built a hostel on the suit plot and cultivating thereto hence unfounded.*
2. *That the learned trial Chairman erred in law and fact for believing that the said money was given to the Village executive officer while he was not called upon to testify.*
3. *That the learned trial Chairman erred in law and fact for failure to admit Appellant's contract as exhibit which shows that the land was sold to 2nd Respondent.*
4. *The learned trial chairman erred in law and fact ordering the Appellant to pay only the amount in the contract without order of general damages.*
5. *That the learned trial Chairman erred in law and fact failure (sic) to allow Appellant's prayer to visit locus quo before ordering costs to the 2nd Respondent.*
6. *That the learned trial Chairman erred in law and fact failure (sic) to order costs of the suit on part of the Appellant.*

At the hearing of the appeal, the appellant was unrepresented while the respondents had the service of Mr. Faustin Materu, learned counsel.

The appellant opted to argue the first, third and fifth grounds of appeal jointly while the second ground was argued separately and the rest of the grounds were dropped.

On the first cluster of the grounds of appeal, the appellant faulted the trial Chairman for believing that the money was given to the Village Executive Officer while the Village Executive Officer was not called upon to testify. It was the submission of the appellant that it is trite law that in proving a case what matters is not the quantity but the quality of evidence given by the witness. That, the law expects all material witnesses necessary to prove the alleged facts to be called to testify. That, the omission to call material witnesses attracts an adverse inference to the party who ought to call them. He made reference to the case of **Boniface Kundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008 (CAT), which held that:

> *"It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

The appellant went on to submit that, looking at the present case, the 1st respondent alleged that he returned the appellant's loaned money to the village executive Officer. However, without any reason, the said Village Executive Officer being an important and key witness, was not called to testify whether he received the money or not.

On the second cluster of grounds of appeal which covers the 1st, 3rd and 5th grounds of appeal, among other things the appellant blamed the trial Tribunal for failure to visit the locus in quo. He submitted that; it is trite law that visiting locus in quo is conducted at the discretion of the court when the need arises with the aim of enabling the court to satisfy itself on the evidence given during trial. The appellant stated further that in land matters, the essence of visiting locus quo is to find out the location of the disputed land, physical features thereon and the neighbours thereto as held in the case of **Avit Thadeus Masawe vs Isidory Asenga**, Civil Appeal No. 06 of 2017.

The appellant submitted further that, during the trial it was his evidence that he issued a loan to the first respondent a total of Tshs 2,300,000/= on agreement that in return, he was to cultivate the 1st respondent's suit properties until the loan was repaid. That fact was not objected by the first respondent. That, he further adduced evidence to the effect that the suit land was later sold to the 2nd respondent who constructed a hostel and engaged in cultivation of various crops therein. That, he tendered the sale agreement to that effect which was not admitted.

Under the circumstances, the appellant was of the view that it was necessary for the trial Tribunal to visit a locus in quo to ascertain the physical appearance of the suit property and the reality. He was of the opinion that, the trial tribunal was unjustified by failing to visit locus in quo.

In his conclusion, the appellant prayed the court to allow the appeal with costs.

Responding to the first cluster of the grounds of appeal, Mr. Materu submitted that parties are bound by their pleadings. He referred to paragraph 2(d) of the Respondents' Written Statement of Defence filed before the trial Tribunal which reads:

> *"That by a letter dated 05/10/2011 of Afisa Mtendaji Mbomai, the applicant refused to be handed over the Shs. 1,200,000/= which is still in the possession of the Afisa Mtendaji to date."*

The learned advocate averred that, copy of the letter was attached to the Written Statement of Defence and the 1st respondent testified to the same effect. Thus, Mr. Materu supported the findings of the Trial Tribunal at page 6 of its judgment that:

> *"Hoja ya tano bishaniwa inahusu nafuu wanazostahili wadaawa. Kwa kuzingatia Ushahidi uliotolewa, namna hoja tangulizi hapo juu zilivyojibiwa na pia kwa kuzingatia maoni ya wajumbe wa Baraza hili maoni ambayo nakubaliana nayo, Baraza hili linamuelekeza mjibu maombi wa kwanza kumrejeshea mwombaji fedha ambazo alichukua kwa mwombaji kama Mkopo…Hivyo mwombaji alipwe kiasi cha Shs. 2,300,000/=."*

The learned advocate contended that, it is the 1st respondent who is required to pay the appellant the money reflected in the undisputed agreement dated 01/08/2011 (Exhibit P7) and not the village executive Officer.

Replying to the appellant's claim that the trial Chairman erred to order the appellant to pay the 2nd respondent costs; Mr. Materu argued that while replying the 1st respondent's counter claim, the applicant/appellant replied as follows:

> *"As to the contents in paragraph 6, the applicant puts it clear that, the 2nd respondent is the one who is in the control of the suit premises after being invited by the 1st respondent since 2010. He is cultivating the said shamba, has already built a house and planted different cash and food crops. The issue here is how he managed to come and enter in a disputed land without my knowledge while the same was in my possession? He is required to show cause with clear documents how he managed to enter in the suit premises."*

Mr. Materu explained that, it was the 2nd respondent who was required to prove how he came into possession of the alleged shamba which he had pleaded from the very beginning that he never possessed.

The learned advocate referred at paragraph 6 of the amended Written Statement of Defence which reads:

*"That the averments in the application have not disclosed any cause of action against the 2nd respondent."*

The learned advocate went further to elaborate that, given the fact that the 1st respondent denied to have sold the suit land to the 2nd respondent and the 2nd respondent denied to have bought it, then; how can it be now that the appellant under the 3rd ground of appeal is claiming that he was denied opportunity to tender the sale contract as exhibit.

In respect of visiting the locus quo, it was Mr. Materu's reply that there was no request from any party to visit the locus in quo and the trial tribunal did not have any reason to do so.

The learned counsel prayed the court to dismiss the appeal with costs.

After careful examination of the evidence on record, the parties' submissions and the grounds presented before this court, I now turn to consider whether the raised grounds of appeal have merit.

On the first, third and fifth grounds of appeal, the appellant complained that the trial Chairman ordered him to pay the 2nd respondent costs of the suit while he has built a hostel on the suit plot and cultivating it. That, there is sale agreement which was rejected to be admitted as exhibit. On the 5th ground of appeal, the appellant was of the view that it was necessary for the trial Tribunal to visit the locus in quo to satisfy itself on the evidence which was tendered before it.

On the other hand, the respondents' counsel argued to the contrary. He was of the opinion that given the fact that the 1st respondent denied to

have sold the said land to the 2nd respondent and the 2nd respondent also denied to have bought it, it was the 2nd respondent who was required to prove how he came to possess the alleged shamba which he had pleaded from the very beginning that he never possessed. Concerning visiting locus quo, it was Mr. Materu's argument that there was no request from any party to visit the locus.

Starting with the issue of visiting the locus in quo; I agree with the appellant that the purpose of visiting the locus quo is for the court to satisfy itself on the evidence given by witnesses. Together with such reason, the Court of Appeal in the case of **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others (Civil Appeal 4 of 2018) [2021] TZCA 663** while elaborating the purpose of visiting the locus in quo at page 8 it quoted the Nigerian case of **AKOSILE VS ADEYE (2011) 17 NNWLR (Pt 1276) p.263** which held that:

> *"The essence of a visit in locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbour, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any, about physical objects."*

Looking at the noted purposes of visiting the locus quo, I am of settled opinion that, according to the nature of the present dispute, there was no need for the Tribunal to visit the locus quo. The reason is that there was

no land dispute between the parties. The dispute concerned the loan which was advanced by the appellant herein to the 1st respondent. The main issue for determination was whether the applicant advanced the said loan to the 1st respondent to the tune of Tshs. 2,300,000/=? This issue was not disputed by the 1st respondent during the trial. Therefore, there was no need of visiting locus quo.

Even if there was such a need, the applicant/appellant did not move the trial Tribunal to visit the locus in quo. Thus, he cannot blame the tribunal at this stage for failure to visit the locus quo.

The next issue to address is on the complaint that the appellant was ordered to pay the 2nd respondent costs of the suit while the 2nd respondent has built a hostel on the suit land and he is cultivating it.

I have keenly examined evidence of the appellant adduced before the trial Tribunal, as well as the raised issues. The fourth issue was whether the 2nd respondent was the owner of the land which the appellant claimed that it was used as security to secure the loan. While answering this issue, the trial Chairman at page 5 last paragraph to page 6 of the judgment, had this to say:

> *"Hoja ya nne bishaniwa ni iwapo mjibu maombi wa pili ni mmiliki wa shamba hilo la mgogoro. Kutokana na Ushahidi uliopo kwenye kumbukumbu, hakuna uthibitisho wa mjibu maombi wa pili kuwa mmiliki wa shamba hilo kwani hata katika ushahidi wake mjibu maombi wa pili alisema yeye hana maslahi yoyote na shamba hilo."*

From the above findings of the trial tribunal, I find no reason to fault it as the claim against the 2nd respondent was decided against the appellant. Thus, it was justifiable to order the appellant herein to pay the 2nd respondent costs of the suit. Moreover, there was no agreement between the appellant and the 2nd respondent. Also, in his application, the appellant was not claiming land as confirmed by himself during cross examination where he stated that:

> *"I claim for Tshs 2,300,000/= as a loan and its interest. I do not claim for land."*

Considering the fact that the appellant was not claiming land and given the fact that the 1st respondent was not disputing the claim of Tshs 2,300,000/=, I am of considered opinion that there was no need of considering the issue as to whether the land which was used as security was occupied by the 2nd respondent or not. Therefore, the submission under the 1st and 3rd grounds of appeal are misplaced and without merit.

The last issue for consideration which covers the 2nd ground of appeal is on failure to call the village Executive Officer to testify on whether the money was given to him by the 1st respondent; I am aware that what matters is the quality of evidence and not the quantity of the evidence as rightly submitted by the appellant. Also, I agree with him that material witnesses ought to be called.

In the instant scenario, I doubt if the Village Executive Officer was material witness considering the fact that the 1st respondent was not disputing the fact that the appellant owed him money. It was the evidence of the 1st

respondent that he paid the applicant/appellant through the Office of Village Executive Officer but the appellant refused to collect the same despite being required to collect the said money through the letter written by the Village Executive Officer. Therefore, the argument advanced by the appellant under the 2nd ground of appeal is without merit.

Basing on the above findings and considering the fact that the fourth and sixth grounds of appeal were dropped, I hereby dismiss this appeal with costs.

Order accordingly.

DATED and DELIVERED at Moshi this 25th day of October 2023.


X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

**25/10/2023**