IN THE HIGH COURT OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

LAND APPEAL NO. 13 OF 2023

(Arising from Land Application No. 84 of 2021 of the District Land and Housing Tribunal for Tanga at Tanga)

SHAFII M. K. MSECHU ----------APPELLANT

VERSUS

SAID A. BAGHOZAH ----------1ST RESPONDENT

AMIRI ANDIKI LEMU ----------2ND RESPONDENT

PILI ABDALAH SADIKI ----------3RD RESPONDENT

SAID MAULID ALLY ----------4TH RESPONDENT

JUDGMENT

K. R. Mteule, J

21/8/2023 & 23/10/2023

In the District Land and Housing Tribunal of Tanga (DLHT), the Appellant sued the Respondents alleging the 1st Respondent to have invaded his land measuring 73 acres allegedly sold to him by the 2nd, the 3rd and the 4th Respondents in 2015, According to the Appellant, the sale of the disputed land was blessed by Msakangoto Village Council in 2014 which confirmed the said land to be owned by the 2nd, 3rd and the 4th Respondents who were the sellers.

The 1st Respondent disputed the appellant's claim in the DLHT asserting that the suit land is among 200 acres allocated to him and his family by Msakangoto Village in 2007. The 2nd, 3rd and 4th Respondents admitted to have sold the disputed land to the Appellant and according to them, they inherited the said land from their fathers.

The DLHT found the appellant to have not sufficiently proved ownership of the land. It found the 2nd, 3rd and 4th Respondents to had no titled capable to be transferred to the Appellant. It confirmed that the Respondent's evidence was stronger than that of the appellant and proceeded to dismiss the suit against the Appellant.

The Appellant was aggrieved by the decision of the DLHT hence preferred this appeal. The appeal contains five grounds as listed hereunder.

1. That the trial Tribunal erred in fact and law for failure to visit *locus in quo* for the purpose of satisfying itself on the boundaries and location of the disputed land.

2. That the trial Tribunal erred in fact and law for failure to consider the appellant's evidence.

3. That the trial Tribunal erred in fact and law to hold that the village authority allocated the disputed land to the 1st Respondent while the same was not a village property.

4. That the trial Tribunal erred in fact and law to dismiss the appellant's case while the same was proved on the required standard.

When the appeal came for hearing on 31st July, 2023, parties were ordered to dispose it by a way of written submission. The Appellant was represented by Advocate Sweetbert Rwegasira while the Respondents appeared unrepresented.

In his submissions on the 1st grounds of appeal, Mr. Sweetbert stated that the trial Tribunal erred in fact and law for failure to visit *locus in quo* for the purpose of satisfying itself on the boundaries and the location of the disputed land despite of the Appellant's several requests to the DLHT to hold such a visit. He referred to the case of **Avit Thedens Massawe vs Isidory Assenga** Civil Appeal No. 6 of 2027 CAT, which referred to Nigerian case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others**, Suit No. FCT/HC/CV/1036/2014, Motion No. FCT/C/CV/M/5468/2017, in which various factors to be considered by the courts to decide to visit the *locus in quo*. According to Mr. Sweetbert, the Court of Appeal of Tanzania explained the purpose of visiting the *locus in quo* that is to clear the doubts arising from conflicting evidence in respect of where the suit property is located.

Expounding the factors in the cited case, Mr. Sweetbert listed the following:-

> *1. ....*
>
> *2. The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*
>
> *3.*
>
> *4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (Emphasis added).*

He added that the Appellant requested the trial Tribunal to visit the *locus in quo* due to the existed doubts arising from conflicting evidence in respect of the location, size and physical features on the land in dispute. According to him, the evidence provided in the trial Tribunal raised doubts on the location of the land, the size whether it is 73 acres or 50 acres, existence of some physical features such as grave of the second respondent's father, beacons and also to show if the parties were talking about the same piece of land due to the existence of evidence that the first respondent was allocated a different piece of land from the one in dispute.

Cognisant of the principle that visiting the *locus in quo* is not mandatory and should be done only in exceptional circumstance as per the case of **Nizar M. H. Ladak V. Gulamali Fazal Jamohmed** [1980] T.L.R 29, Mr Rwegasira is of the view that in the instant case it was and is necessary because failure of it led to failure of justice since the trial tribunal decided the matter blindly.

Submitting on the second ground of appeal that the trial Tribunal erred in fact and law for failure to consider the appellant's evidence, Mr. Rwegasira argued that the trial Tribunal did not consider the evidence of the Appellant and other important pieces of evidence which support the appellant's case with reasons which led to the miscarriage of justice. He submitted that it is the evidence of the Appellant that the land he bought from the 2nd, 3rd, and 4th Respondents measures 73 acres which is a different size from the land the first respondent claimed to have been given by Msakangoto village. He contended that, the 1st Respondent trespassed to the appellant's land of 73 acres.

It was submitted by Mr. Rwegasira that the evidence in support of the Appellant's case proved that the land in dispute belonged to the 2nd to 4th Respondents and it was used a way before 2006 with the proof of

existence of the grave of the second respondent's father and different fruit trees which were planted before 2006.

He referred to the evidence of RW8 which showed that he used to be employed in different times by the 2nd, 3rd, and 4th Respondents to clear the disputed land something which shows that the 2nd, 3rd and 4th Respondents were the lawful owners of the disputed land before they sold it to the Appellant. He impugned the trial Tribunal for having disregarded the testimonial evidence without any justifiable reasons or ground.

With regards to the **third ground** of appeal the Appellant asserted that the trial Tribunal erred in fact and law to hold that the village authority allocated the disputed land to the 1st Respondent while the same was not a village property. Mr. Rwegasira submitted that for a title to pass from one person to the other the person who transfers it must be the owner of that title. He added that according to the evidence on the record, before the alleged allocation of disputed land to the 1st Respondent in 2006, the disputed land belonged to the families of the 2nd, 3rd and 4th Respondents who acquired it by clearing the bush which can be evidenced by the development made to the disputed land such as planted fruit trees such as coconut trees, mango trees and cashew

nut trees, the presence of a grave for the 2nd Respondent's father and the evidence of a person (RW8) who used to clean the disputed land when the 2nd, 3rd and 4th Respondents were the owner, all being before that allocation in 2006. According to him, it is clear that the disputed land did not belong to Msakangoto village to be able to allocate it. He referred to the case of **Farah Mohamed V.S Fatuma Abdallah [1992] TLR 205**, where the court of appeal when dealing with the kindred issue stated:-

> *"He who does not have legal title to the land cannot pass a good title over the same land to another."*

He used the famous Latin Maxim *"Nemo Dat Quod Non Habet"*, meaning no one gives what he does not have. He submitted that Msakangoto village did not have any legal title to the disputed land to pass it to the 1st Respondent. He further referred to the Court of Appeal case of **Enock Kalibwani Vs Ayoub Ramadhani & 3 Other** Civil Appeal No. 85 of 2020, Court of Appeal of Tanzania at Dares Salaam where the same position was maintained. The appellant insisted that the land did not belong to the village authority to be able to allocate it to another person.

Submitting on the **fourth ground** of appeal challenging the dismissal of the appellant's case while the same was proved on the required

standard, Mr. Rwegasira referred to **Section 3 (2) (a) of The Evidence Act** which provides that, the fact is said to be proved when in civil matters, its existence is established by a preponderance of probability. According to him, the appellant successfully proved his claim to the balance of probability in that, the land now is owned by the appellant after buying it from the 2nd, 3rd and 4th Respondents who inherited it from their fathers. He added that the evidence in record shows that their father was the one who cleared the bush to own the disputed land and keep using it for years since 1988. He added that when the 1st Respondent was allocated the land in 2006 by the Village the said land was owned by the 2nd 3rd and 4th Respondent and their family, planted different fruit trees and the grave of the father of the second Respondent, to show that it was used and owned before such allocation of 2006. He referred to the evidence of (kibarua) RW8, who was cleaning the place way before that allocation which proved that the land was been used by the family of 2nd, 3rd and 4th Respondents. He thus prays that the judgment and decree of the trial Tribunal be quashed and set aside, and the Appellant be declared lawful owner of the disputed land.

The 1st Respondent's Reply Submission was drawn and filed by Mr. Christopher Wantora Advocate. He claimed that the appeal is devoid of

merits. Submitting on the first ground concerning visitation to the *locus in quo*, Mr. Wantora argued that the Appellant in his application form No. 1 before trial tribunal claimed the surveyed land as reflected at paragraph 3 of the application. According to him, this being the case it does not need a visitation to the *locus in quo*. He referred to the case of **Nizar M. H vs. Gulamali Fazal larimohamed 19801TLR 29, the Court of Appeal of Tanzania** where it was held that;- *"It is only in exception circumstance that a court inspects a locus in quo/ as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator"*

Mr. Wantora thought that, the learned trial Chairman found it unnecessary to inspect the *locus in quo* which is not mandatory and as rightly found the facts and evidence placed before him were sufficient to dispose of the dispute. He referred to the case of **Dares Salaam Water and Sewarage Authority Vs. Didas Kameka & Others, Civil Appeal No. 233 Of 2019, Court Of Appeal DSM** (unreported) at page 29 and 30 of the judgment.

Responding to the second ground of appeal on trial Tribunal evaluation and consideration of the evidence on record, Mr. Wantora referred to page 20 of the judgment of the tribunal and stated that it evaluated the

evidence on record, and that the pieces of evidence of existence of graves were contradicting and hence accorded no weight. According to Mr. Wantora, the Appellant submit that the trial Chairperson correctly considered the evidence of the Appellant and that of the 1st Respondent as reflected at a page 19, 20 and 21 of the tribunal judgment discussing Exhibit A2 which is sale agreement tendered by the Appellant before the Tribunal.

Addressing the third ground of appeal faulting the lack of title capable to pass from the village to the 1st Respondent, Mr. Wantora submitted that the trial tribunal did not error in any way to hold that Village authority rightly allocated the suit land to the first Respondent. It is Respondent's reply submission that it is a principle that he who alleges must prove. According to Mr. Wantora, the Appellant should not base on the evidence from the defence side. He cited the case of **Kwinga Masa Versus Samwel Mtubatwa** [1989] TLR. To cement the principle "He who alleges must prove."

According to Mr. Wantora, the issued as to whether the village authority allocated the land to the 1st Respondent was not among the pleaded issues before the trial Tribunal and was not in dispute and no one claimed to be the ownership to the suit land before the allocation to the

1st Respondent by village authority. He this prayed for the appeal to be dismissed.

On the the fourth ground of appeal, Mr. Wantora averred that the trial tribunal did not error in law and fact as it correctly scrutinized and evaluated the evidence on record. According to him, there is a clear contradiction by the Appellant's counsel at page 4 last paragraph of the submission in chief as he admitted that the 2nd, 3rd and 4th Respondent inherited the disputed land without any back up evidence on how they legally inherited the same while Exhibit A2 state that they sold it as the family lands with no family members identified to be the owner and without consent of the members. He referred to the case of **Jibu Sakilu v Petro Miumbi (1993) TLR 75** which defined defined clan land to mean "land which has been inherited successfully without interruption". He further cited the case of **Nicolaus Komba v Kondrad Komba (1998) TLR 172 HC**, which held that:- " Clan land cannot be sold to non-clan members without prior approval of other clan members. Mr. Wantora submitted that the Respondent had no right to sell clan land to a non-clan member without clan members' consent."

According the Wantora the Tribunal's judgment has legal reasoning based on precedent set forth in the case of **Farah Mohamed versus**

Fatuma Abdallah [1992] TLR 2005, whereby Hon. Mrosso J (as he then was) held inter alia that:

> *"He who doesn't have legal title to the land cannot pass good title over the same to another person. "*

In his opinion, the Appellant failed to prove to have legally purchased the land as it is clear from the record that the 1st Appellant produced sale agreement which is a void contract as the 2nd, 3rd and 4th respondents stated that the land was owned by the families without legal capacity and without identifying which families used to own that land.

Mr. Wantora proceeded to submit extensively on the validity of the sale contract. He finally formed opinion that the Appellant did not discharge his burden to prove the case to the balance of probability and claimed that the sale agreement was not proced. He thus prays to this Court to uphold the decision of the District Land and Housing Tribunal and dismiss the Appellant's Appeal and the Appellant be condemned to pay costs.

The 2nd, 3rd and 4th Respondent's submissions joined hand the Appellant's submission on the importance of visiting the *locus in quo*. They referred to the similar authorities cited by the Appellant indicating

that visit to the *locus in quo* was very essential for the proper determination of this matter and to clear all doubts arising from conflicting evidence in respect of location, size, boundaries, neighbors and physical structures and features on that disputed land. They supported the position in Avit Thedeus Massawe v.s Isidory Assenga Civil Appeal No. 6 of 2017, Court of Appeal of Tanzania (unreported) on the following factors to be considered before the courts decide to visit the *locus in quo*. The following was quoted therefrom:

1. Courts should undertake a visit to the *locus in quo* where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see Othiniel Sheke V Victor Plankshak (2008) NSCOR Vol. 35, p. 56.

2. The essence of a visit to *locus in quo* in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p. 263.

3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the *locus in quo* (see Ezemonye Okwara Vs. dominic Okwara (1997) 11 NWLR (Pt. 527) p. 1601).

4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims.

The 2nd to the 4th Respondents as well supported the Appellant's assertion that the evidence of the appellant clearly indicated that the first respondent trespassed the appellant's land of 73 acres which they sold him. Generally, the 2nd, 3rd and the 4th Respondents supported all what was stated by the Appellant and therefore I see no reasons to produce their submissions.

From the grounds of appeal and the parties' submissions, the main issue is whether the appeal has merits. Another issue is to what reliefs are the parties entitled. In addressing these issues all the grounds of Appeal will be taken into consideration.

Starting with the ground concerning visitation to the *locus in quo*, both parties are in agreement that in some circumstances, such visitation is essential. The principle regarding relevance of visiting *locus in quo* was more recently expounded in the case of ***Avitus Thadeus Massawe Vs. Isidory Assenga, Civil Appeal No. 6 Of 2017, (CAT-Unreported).*** *the Court of Appeal observed as follows:-*

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

The Court explicated from the Nigeria case the four factors listed by the Appellant and the 2nd the 4th Respondents on the circumstances where such visitation is inevitable. One of the events is where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute. That in these situations the only way to resolve the conflict is for the court to visit the *locus in quo*. From this position, the fact that the land is surveyed does not exempt it from being visited as Mr. Wantora is suggesting. The land can be surveyed but still covered by ownership dispute. Visitation to the cite is still essential to clear doubts and confirm what parties testified in court.

At page 3 of the trial Tribunal judgment, it appears that the Appellant defined the boundaries of the land he was claiming by mentioning the neighbours in each side. The 1st Respondent could not give such description. On top of this, parties are talking on pieces of land whose size differ significantly. While the Appellant mentioned his land to be 73 acres, the 1st Respondent claimed that his share of land from the land offered by the village to his relative measured 50 acres. See page 7 of the trial Tribunal Judgment. This is another confusion which ought to be resolved by visitation in the *locus in quo* because. The confusion rests on the assumption that if the Appellant was claiming 73 acres and the land alleged to have been given to the 1st Respondent is 50 acres, this

would mean that the judgment added 23 acres to the 1st Respondent's by declaring him to be the owner of the suit land claimed to measure 73 acres while he testified to own a land measuring 50 acres, if it all the land measuring 73 acres does exist. All these needed to be confirmed by visitation.

Since the 1st Respondent did not mention the boundaries of the land, it was necessary for the Court to visit the *locus in quo* for the village to identify the piece of land it allocated to the 1st Respondent. As submitted by the counsel for the appellant, parties may be talking of different pieces of land. Short of the visitation will leave doubts as to whether the land in dispute is actually the land assigned to the 1st Respondent by Msakangoto Village.

Apart form the improper description of the disputed land, the Appellant alleged the existence of certain features on the land such as graves, beacons and plantations. Visitation to the *locus in quo* was necessary to confirm if the said features truly existed on the land and who planted them. Deciding it without the appropriate picture poses a dangers of deciding the matter without sufficient information.

From the above decision, there was an error in failure to visit the *locus in quo* which may have hindered the sufficiency of the information to

guide the DLHT to reach at a proper conclusion. Since the rest of the grounds of appeal challenged the weight of evidence, it is not appropriate to discuss them because it is already found that there was lack of sufficient information to prove the case. From the foregoing, the appeal can be disposed of basing on the first ground. The first issue as to whether this appeal has merits is answered affirmatively.

On relief, the Appellant has prayed for the Court to declare him the lawful owner of the land. Since it is found that the matter in the DLHT did not contain sufficient information to decide it due to failure to visit the *locus in quo*, then this Court as well, is not in a position to declare the Appellant the lawful owner of the land. The best this Court can do is to nullify the proceedings and allow whoever wants to pursue it do so.

This being the case, I nullify the proceedings of the DLHT and quash and set aside the judgment and orders arising therefrom. Should any party be interested to pursue the matter, the same can be reinstituted in the DLHT. It is so ordered.

Date at Tanga this 23rd Day of October 2023

KATARINA REVOCATI MTEULE

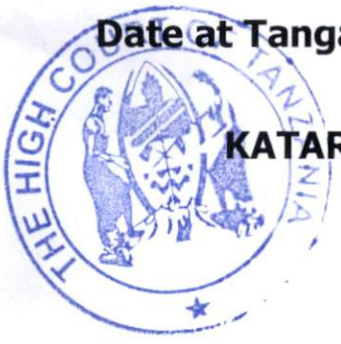
JUDGE

23/10/2023

Court

Judgment delivered this 23rd Day of October 2023 in the presence of Ms. Ezerida Mganga, Advocate holding brief for Mr. Sweetbert Rwegasira Advocate for the Appellant and the Appellant present in person, and in the presence of Mr. Christopher Wantora Advocate for the 1st Respondent, and the 2nd Respondent present in person and in the absence of the 3rd and the 4th Respondents.

Date at Tanga this 23rd Day of October 2023



KATARINA REVOCATI MTEULE

JUDGE

23/10/2023