

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND APPEAL NO. 46 OF 2023

(Arising from the District Land and Housing Tribunal for Karagwe, Land Application No. 25/2022)

OSWARD GABAGAMBI..... APPELLANT

VERSUS

CHARLES GABAGAMBI..... RESPONDENT

JUDGMENT

3rd and 13th November, 2023

BANZI, J.:

The appellant, Oswald Gabagambi and the respondent, Charles Gabagambi are blood brothers fighting over a piece of land measuring three and a half acres (the suit land) located at Kakashombwe area, Bwikalo Mato hamlet, Nyakahanga ward in Karagwe District. Before the District Land and Housing Tribunal for Karagwe (the trial tribunal), the respondent instituted a land suit claiming to be the lawful owner of the suit land by way of purchase from Josephat Byesigwohi Felix in 2009. He further claimed that, the appellant trespassed into the suit land and began to develop it by planting various crops and erecting a house. The appellant denied the allegation claiming that, the suit land belongs to him after he purchased the same in 2017 from Benedicto Boniface and Silialisi Mutayabarwa.

After receiving the evidence of both sides and visiting the *locus in quo*, the trial tribunal decided in favour of the respondent and declared him as the lawful owner of the suit land. It further issued a permanent injunction against the appellant with an order of vacant possession of the suit land. Dissatisfied with that decision, the appellant lodged this appeal containing three grounds, whereby, the first two grounds concern visiting the *locus in quo* and the third one is about the respondent's failure to prove his case on the required standard.

At the hearing, the appellant was represented by Mr. Dickson Laurent, learned counsel whereas, Mr. Alli Chamani, learned counsel appeared for the respondent.

Mr. Laurent began his submission with the third ground. He attacked the evidence adduced by the respondent at the trial tribunal claiming to be weak and full of inconsistencies. Expounding his argument, he argued that, the respondent failed to prove the size of his land he bought considering that, the sale agreement (Exhibit A1) does not disclose the size of purchased land. Also, each of his witnesses mentioned different size. Apart from that, the boundaries mentioned stated in Exhibit A1 are different from those mentioned by the respondent and those found in the suit land when visiting the *locus in quo*. To him, these inconsistencies go to the root of the matter

and he cited the case of **Martin Fredrick Rajab v. Ilemela Municipal council and Another** [2022] TZCA 434 TanzLII to support his argument.

Concerning the first and second grounds, he challenged the procedure of visiting the *locus in quo* claiming that, the same was flawed because, the trial tribunal made the visit in the absence of the appellant's advocate while the reason for his absence was well known. Also, at the *locus in quo*, the witnesses did not testify under oath, neither they were allowed to cross-examine. Likewise, the tribunal did not bother to measure the suit land. He supported his point by citing the case of **Nazir M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29. He added that, despite these flaws, the judgment of the trial tribunal was based on what was stated at the *locus in quo* concerning boundaries of the suit land which was inconsistency with boundaries mentioned in the course of testimony of the respondent before the trial tribunal. Therefore, he prayed for the proceedings at the *locus in quo* to be nullified, judgment to be quashed and the appeal be allowed with costs.

In his reply, Mr. Chamani contended that, the respondent managed to prove his claim on the required standard. He cited the case of **Charles Katesigwa v. John Bosco Lwabutiti**, (PC) Criminal Appeal No. 88 of 1991 HC at Mwanza (unreported) which laid down four conditions for proof of

ownership of land; one, evidence of acquisition; two, who were the witnesses; three, the people bordering the disputed land and four, type of demarcation. According to him, the respondent met all conditions and thus, the fact about size of the suit land he bought was not an issue before the trial tribunal. He added that, there was no contradiction in the evidence before the trial tribunal and at the *locus in quo*. If there is any, does not go to the root of the matter and can be caused by lapse of time and illiteracy.

Moreover, he submitted that, there was no irregularity during the visit at the *locus in quo*. Also, it was not the role of the trial tribunal to measure the size of the suit land because by doing so, it would become a witness. Concerning visiting the *locus in quo* in the absence of appellant's advocate, he submitted that, the record does not disclose about the notice of his absence and since the court record is a serious document, it should not be lightly impeached. He cited the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 to support his point. It was further his contention that, the appellant accepted the visit in the absence of his counsel and after returning to the trial tribunal, his counsel accepted the report and thus, the appellant was not prejudiced. Besides, at the *locus in quo* there was no any witness who testified. As for parties, it is assumed that, they were still under oath. In that regard, he prayed for appeal to be dismissed without costs.

In his short rejoinder, Mr. Laurent insisted that, it was necessary for parties to take oath before showing demarcations of the suit land because visiting was made after each party had closed his case and hence, they were no longer under oath. Likewise, it was necessary for parties to be sworn because each had a right to cross-examine the other. Concerning his absence at the *locus in quo*, he requested this court to peruse the file if there is no letter of adjournment. He also urged this Court to consider Exhibit A1 concerning the boundaries.

Having carefully considered the grounds of appeal, the submissions of both sides and the record of the trial tribunal, I find it apposite to begin with the first two grounds which concerns the procedure of visiting the *locus in quo*.

It is important to underscore that, visiting the *locus in quo* is done in exceptional circumstances in order to avoid court to unconsciously take the role of a witness rather than an adjudicator. It is settled law that, where the court finds it necessary to visit *locus in quo*, the court should attend with the parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter. This was settled way back in 1980 through the case of **Nazir M.H. Ladak v. Gulamali Fazal Janmohamed** (*supra*). This position was reaffirmed in the case of **Kimnidimitri Mantheakis v.**

Ally Azim Dewji and 7 Others [2021] TZCA 663 TanzLII where the Court of Appeal gave instructions to be followed when visiting the *locus in quo* by stating 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 matter at hand, the proceeding of 31st May, 2023 reveals as follows:

"Tarehe 31/05/2023

AKIDI:

D.S. Davis: Mwenyekiti

Amina: Katibu

Mleta Maombi: yupo

Mjibu Maombi: yupo

Wazee: 1. Mzee Mushashu

2. Bi Rushambila

BARAZA

Shauri ni kwa ajili ya kutembelea eneo bishaniwa na kwa sasa tumeshafika kwenye eneo bishaniwa.

MLETA MAOMBI

Nipo tayari

MJIBU MAOMBI

Nipo tayari pia, japo wakili wangu hayupo

BARAZA

Kwa kuwa wakili wa mjibu maombi hayupo naona ni vema kufanya taratibu ya kukusanya taarifa za yaliyomo kwenye eneo binashaniwa pekee na hatua nyingine za zoezi la kutembelea ikiwa ni pamoja na kusomea wadaawa taarifa na kusikiliza kwenye taarifa hizo itaendelea kwa tarehe nyingine.

Saini: D.S. David

Mwenyekiti

31/05/2023

BARAZA

Mleta maombi alianza kwa kuonesha mipaka yake na alieleza kuwa mpaka wake ni kijito cha maji na mwisho akaeleza kuwa ni kichuguu na mti wa Muharani, ambao vyote hiyo vipo pembeni ya kijito hicho. Ila mjibu maombi yeye akalitaarifu baraza kuwa mti huo hautambui, na kuwa hicho alichikionesha sio kichuguu bali ni tuta la marando.

Na baraza limeona mti huo unaobishaniwa na kamlima hako wanachosema kuwa ni kichuguu na mwingine

akasema ni tuta. Na mti huo unaobishaniwa pia baraza limeona kuwa unaanza kuchipuka baada ya kukatwa.

Kwa upande wa mjibu maombi, yeye ameonesha mpaka wake kuwa ni Msusuru au safu ya minyaa iliyonyooka na baraza pia limeiona na amesema minyaa amepanda yeye mbele ya aliyemuuzia.

Saini: D.S. David

Mwenyekiti

31/05/2023"

(Emphasis supplied).

Thereafter, the trial tribunal proceeded to draw sketch plan and adjourned the matter to 8th June, 2023 when the report of the visiting the *locus in quo* was read over to parties. Observably, the record reveals that, throughout the trial, the appellant was represented by learned advocate, Mr. Dickson Laurent. It is apparent from the extract above that, on the day of visiting the *locus in quo*, the trial tribunal decided to proceed with the exercise after acknowledging the absence of the advocate. In the original file, there is a letter dated 30th May, 2023 from appellant's advocate praying for adjournment as the advocate was appearing before the High Court for another case. Although the proceeding does not reflect existence of notice of absence as argued by Mr. Chamani, the acknowledgment of the trial tribunal at page 41 of the proceeding is a clear indication that, Mr. Laurent

informed the tribunal about his absence through the letter filed within the original file. Under the prevailed circumstances, it is clear that, despite being informed, the trial tribunal proceeded to visit the *locus in quo* without the appellant's advocate which is against the first instruction stated in the cited case of **Kimnidimitri Mantheakis v. Ally Azim Dewji and 7 Others**.

Apart from that, it is obvious from the extract above that, the second instruction was also not complied with because, the record does not reflect if parties testified under oath. Since they visited the *locus in quo* after both parties had closed their cases, we cannot assume that, they were still under oath as suggested by Mr. Chamani considering that, when a witness is discharged after completing to testify, he cannot no longer be under oath. Whatever parties stated to clarify what they stated at the trial ought to be under oath as directed in the cited case. Moreover, the proceeding does not disclose if parties were given opportunity to cross-examine each other which is yet another irregularity. What is reflected from the proceeding is a mere report of statement and conduct made by parties. In other words, the trial tribunal took a role of a witness rather than being adjudicator.

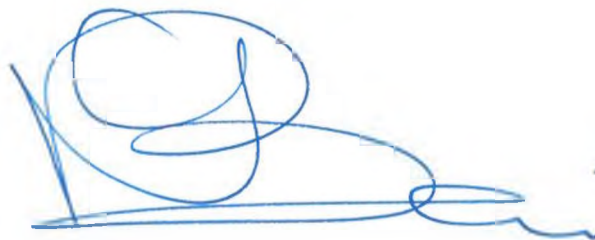
In that regard, from what I have discussed above, it is apparent that, the procedure of visiting the *locus in quo* was not complied with. It is my considered view that, the irregularities vitiate not only the proceedings at

the *locus in quo* but also the judgment which relied much on what was collected and observed during such visit. Under these premises, the proceedings from 31st May, 2023 onwards and the resulting judgment cannot be spared. In the circumstances, I hereby nullify the proceedings starting from 31st May, 2023 to 16th June, 2023, quash the judgment and set aside the decree. I order a fresh trial starting from the proceedings ending on 4th May, 2023 including visiting of *locus in quo* according to law. In the premises, I allow the appeal and owing to the nature of this matter, I make no order as to costs. It is so ordered.



I. K. BANZI
JUDGE
13/11/2023

Delivered this 13th day of November, 2023 in the presence of the appellant and the respondent both in person.



I. K. BANZI
JUDGE
13/11/2023