IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MTWARA

LAND APPEAL NO. 7 OF 2023

(Arising from Miscellaneous Land Application No. 5 of 2022 at the DLHT for Lindi at Lindi)

DESDERIA LUKAS ..... **APPELLANT**

VERSUS

1. **JOSEPH TOTINATI BULU** ..... **RESPONDENTS**
2. **SIMONI KULOMBANGA**

JUDGEMENT

Date of last Order: 21.08.2023

Date of Judgment: 22.11.2023

Ebrahim, J.

The herein appellant filed the instant appeal challenging the decision of the District Land and Housing Tribunal for Lindi at Lindi (the DLHT) delivered on 10.01.2023 in Land Application No. 05 of 2022. The land in disputed is estimated to be an acre of un-surveyed land with estimated value of Tshs. 4,500,000/- and it is at Myangao area in Lindi.

Going by the evidence of the Appellant at the trial Tribunal who testified as **PW1**, she said initially the disputed land was the property of her grandmother who was allocated the same by the

Village Government. Upon her death, her mother took over the ownership and gave it to her in 2020. It was year 2020 when the 1st Respondent invaded into the said land claiming that he purchased the same from the 2nd Respondent, his uncle. Responding to cross examination question, the Appellant said that the 1st Respondent's piece of land is 1/4 of an acre and they are bordering each other. She testified also that her mother gave her the said land in writing. **PW2, Cecilia Paul,** the Appellant's cousin told the trial Tribunal that she knows the disputed land as it was once owned by their grandmother. She said their grandmother had two pieces of land of which one she gave it to her and the disputed land was given to the Appellant. She said the boundaries between the pieces of land were set and the dispute is on the boundaries as the 1st Respondent invaded the disputed land by 2 to 3 steps. **PW3, Christa John**, mother of the Appellant told the Tribunal that the disputed land was once owned by her mother and they were living in the same village at Myangao. They moved and after the floods they went back to Myangao. Her mother was allocated two pieces of land of which she availed one piece to PW2. Her mother remained with 1 acre which the 1st Respondent built a house. Part of the 1st Respondent's piece of land was sold

following a loan he had with Vikoba and remained with a small piece of land. It was then that the 1st Respondent stepped into her land, said PW3. It was in 2020 when she gave the disputed piece of land to the Appellant and realised that the 1st Respondent has trespassed into her land. When they asked him, the 1st Respondent said he purchased the disputed land from one Simon and he later said he purchased from Kalambanga.

In his defence, the 1st Respondent testified before the trial Tribunal that the disputed piece of land is his property since 1999 having purchased it from one Joseph Anselemu Ngatunga. He said, PW3 went to ask him to accord necessary cooperation on boundaries as she wants to give her land to her daughter. It was when the Respondent also called his father to witness the marking of boundaries. However, PW3 put a mark one step more to his land but he let it go. They then set the boundaries and planted the cassava trees. However, a week later, the Appellant appeared with another person planting tree into his land and he stopped her. PW1 went to the Ward Tribunal who visited locus in quo and found that the boundaries are set by the cassava trees. The Appellant was dissatisfied and filed the case at the Tribunal. He

said his witnesses when he was purchasing the disputed land were Angelika Joseph Ngatunga and the second Respondent. Responding to cross examination question he said he purchased the land from Joseph Ngatunga who passed on year 2005. **DW2, Simon Beatus Milanzi** told the court that he has never sold the land to the 1st Respondent but he was a witness when he purchased it from Joseph Anselemu Ngatunga and the Ten Cell Leader concerned was Joachim Nyara. He said the 1st Respondent purchased one acre of land for Tshs. 50,000/-. **DW3, Angelica Joseph Gatu** told the trial Tribunal that the 1st Respondent purchased the disputed land from her father in 1999. The 1st Respondent built a two-bedroom house and resided with his family. Later, he built another three-bedroom house and surrendered 3/4 of his land to pay for vikoba. It was the Appellant who later brought about the new boundaries from the previous ones. DW3 said the 1st Respondent is her son and that he purchased the disputed land in 1999 and built a house. She said PW3 has her own piece of land but not the one in dispute and that 1st Respondent has not invaded the disputed land.

After hearing the evidence from both sides, the trial Tribunal found that the evidence of the 1st Respondent is heavier than that of the Appellant and that the 1st Respondent has been in long occupation of the disputed land and that the Appellant is time barred. Hence, he dismissed the application with costs.

Aggrieved, the Appellant lodged an appeal in this court raising 4 grounds of appeal faulting the trial Tribunal's failure to visit locus in quo hence arriving to a wrong decision; and that the Tribunal did not consider the strong evidence of the Appellant including a documentary evidence. The Appellant faulted the trial Tribunal for failure to give weight to the evidence of the 1st Respondent who said that he purchased the disputed land from the 2nd Respondent while there was no documentary evidence for such transaction.

When the case was called for hearing, both parties appeared in person unrepresented. The appeal was argued by way of written submission.

I shall not recapitulate the submissions by parties as they are in the record but shall refer to them in the course of addressing substantive issues.

I shall begin with the legal issue raised by the Appellant that the trial Tribunal had no jurisdiction to entertain the matter as there is no evidence that parties referred the matter to the Ward Tribunal first as required by the law i.e., **section 13(4) of the Land Disputes Courts Act, Cap 216 RE 2019** as amended by the **Written Laws (Miscellaneous Amendments) (No.3) Act, 2021**.

The 1st and 2nd Respondents challenged the point of objection to be raised at the submission stage without leave of the court as per **Order XXXIX Rule 2 of the CPC, CAP 33 RE 2019.** The cited law reads:

*"2. **The appellant shall not, except by leave of the Court,** urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; **but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule: Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground".*** [Emphasis is mine]

With respect to the Respondents, I can easily tell that they have misconstrued the above cited provision of the law. First, the above law specifically provides for the grounds of objection of the appeal i.e., grounds of appeal. Secondly, the cited law has not confined the court not to entertain any other ground of objection

that it has not extended its leave on its decision provided that the affected party has been given sufficient opportunity to contest on the ground.

The above notwithstanding, the Appellant has raised an objection on the point of law concerning jurisdiction which as per the rule of the thumb it can be raised at any stage of the matter even on appellate stage. There are plethora of cases discussing the position. The Court of Appeal had the following to say in **Sospeter Kahindi vs. Mbeshi Mashini,** Civil Appeal no. 56 of 2017 (unreported);

"at this point we would hasten to acknowledge the principle that the question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level".

In our case, the Appellant had rightly raised the issue of jurisdiction at the stage of submission in chief which allowed the Respondents an ample time to respond in their reply submission. They did not do so. Therefore, this court takes it that they waived their right to be heard on the issue and I shall proceed to determine the same.

Section 13 (4) of the Land Disputes Courts Act, Cap 216 RE 2019 as amended by **Section 45 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2021** provides as follows:

"(4) Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceeding affecting the title to or any interest in land unless the ward tribunal has certified that it has failed to settle the matter amicably.

Provided that, where the ward tribunal fails to settle a land dispute within 30 days from the date the matter was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the ward tribunal.

Deriving from the above position of the law, it is clear that a land matter emanating from the Ward Tribunal has to have a certificate of failure to reconcile/mediate from the Ward Tribunal in filing a case at the DLHT. Nevertheless, the law has provided a leeway in a situation where the Ward Tribunal has within 30 days failed to settle mediate/reconcile a dispute.

In that sense, a party filing a case at the DLHT must provide undisputed material facts or document to show the trial Tribunal that the procedure has been adhered to.

Coming to the facts of this case, the Appellant stated at para 5(iv)(v)(vi) in her Application that she initially referred the case at the ward tribunal of which the process was ordered to start afresh by the DLHT. Much as she used the word Respondent but it can easily be construed that she made several attempts to start afresh at Nyangao ward tribunal to no avail.

Responding on the issue, the Respondent acknowledged that the ward tribunal received the complaint and the 2nd Respondent appeared as the witness for the 1st Respondent.

The Appellant herself said that the DLHT referred the settlement proceedings to start afresh, however, she has not availed this court with confirmation that indeed she initiated to start the settlement process at the Ward Tribunal as directed by the DLHT to no avail. All she said is that the Ward Tribunal refused to sit for the same case. I believe if the Ward Tribunal had such observations there would be written findings/order/records to such effect. Such findings have not been provided to the court.

In consideration of the fact that the Respondents in their WSD denied not to have taken any initiatives to go to the Ward Tribunal, I find that the Appellant skipped the stage as directed by the DLHT Lindi that the matter at the Ward Tribunal be started afresh.

For that, I sustain the 1st limb of objection.

It would not have been necessary to go to the grounds of appeal however, I find it apt to discuss the issue of visiting locus in quo albeit in passing.

Indeed, the law as it stands, visiting locus in quo is not a creature of any statute but case law. It was clearly stated in the case of **Nizah MH, Ladak vs Gulamal Fazal** [1980] TLR 29 that locus in quo is visited in exceptional circumstances where it is necessary to verify the confusion which arose during hearing in order to resolve the dispute conclusively. Again in **Dar Es Salaam Water and Sewerage Authority versus Didas Kameka and 17 others**, Civil Appeal No. 233 of 2019, at page 30 (CAT–DSM) held inter alia that:

> *'We think the learned trial judge found it unnecessary to inspect the focus in quo which is not mandatory and as rightly argued by Mr. Kariwa the learned trial judge found the facts and evidence placed before him were sufficient to dispose of the dispute."*

The Court of Appeal discussed the purposes of visiting the *locus in quo* in the **Avit Thedeus Massawe vs Isidory Assenga,** Civil Appeal No. 6/2017, where it stated that

> *"Since the witnesses differed on where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained."*

From the above observations of the Court of Appeal, it is clear that the visiting of locus in quo depends on the prevailing circumstances of each case. Mostly, where the matter would not be justly adjudicated upon without seeing either the boundaries or size of the land in dispute.

Tailoring the findings of the Court of Appeal in **Avit Thedeus Massawe vs Isidory Assenga (supra),** I am of the firm stance that this was one of the case that would have required the trial Tribunal to visit locus in quo as argued by the Appellant. I am saying so because, upon my screening of the evidence on record, I realised that the issue was mainly as to whether the 1st Respondent trespassed by few steps to the land of the Appellant. The submission of the Respondents clearly articulate that the issue is on the boundaries and encroachment and not who owned which piece of land and from when? In that case, the trial Tribunal could not have justly adjudicated the matter without visiting locus in quo.

Deriving from the above background, I find that the matter was filed at the DLHT without first following the directives set by the DLHT of referring the case to the Ward Tribunal. I therefore, nullify

and set aside the proceedings and the judgement of the trial tribunal and all the resultant orders therefrom and order that the matter be first referred to the Ward Tribunal as directed the DLHT. The same should be done expeditiously. I give no order as to costs. Each party to bear its own.

Ordered accordingly.

R.A. Ebrahim

JUDGE

Mtwara

22.11.2023