IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 61 OF 2023

(Originating from the judgment and decree of the District Land and Housing Tribunal for Babati at Babati, in Land Application No. 62 of 2022)

HIITI JELA.....APPELLANT

VERSUS

YOHANA VITALIS..... RESPONDENT

JUDGMENT

7th March & 7th May, 2024

Kahyoza, J.:

Yohana Vitalis successfully sued **Hiiti Jela** for trespass to his land measuring 12 metre to 64 metre located within Endakiso ward before the district land and housing tribunal (the DLHT). Aggrieved, **Hiiti Jela,** (**the appellant**) appealed contending that the DLHT did not evaluate the evidence properly, it relied on the irrelevant document and that the decision was marred by procedural irregularities.

The appellant enjoyed the services of Mr. Ndonjekwa and the respondent appeared in person. During the hearing of the appeal, the appellant's advocate argued two grounds jointly, thus, the appeal raised two issues as follows-

1) Did the DLHT properly consider the evidence?
2) Is the decision of the tribunal marred by procedural irregularities?

A brief background is that; **Yohana Vitalis**, (the respondent) filed an application on land trespass seeking for a declaration that he is the lawful owner of the suit land measuring 12 by 64 meters, located at Endasiko Ward, Babati District within Manyara Region.

To substantiate his case, **Yohana Vitalis** (**AW1**), a resident of Endakiso, testified that the suit land is bordered by Lesinoe Lala (West), Peter Mshangaa (South), Jela Haqwn (East) and a road (North). On 22.12.2018 the appellant trespassed on respondent's land, excavated the house foundation and planted trees. He complained to the Village Executive Officer (VEO), to the Village Land Tribunal (VLT) and the Ward Land Tribunal (WLT), but justice was not accorded to him. When cross-examined by the appellant, Yohana Vitalis responded that in 2018 when the matter was before VLT he claimed the disputed land as the guardian of the family, then. At the WLT he claimed the land in dispute, Plot No. 152 as his own land, also the said land does not belong to Lesinoe lala. He bought Plot No. 152 from a person to whom he did not summon as a witness.

The appellant summoned **Paschal Daniel Saka**, **AW2**, testified that the suit land belonged to one Malik Daniel before he sold it to Yohana Vitalis (**AW2**) at a consideration of forty thousand, he paid eighty thousand and ten thousand to build a house and the same was built. **Leandry Yaro**, (**AW3)**, supported the evidence of the respondent and **Paschal Daniel Saka**, **AW2**, that he witnessed the sale agreement in 1999 between Maliki and Yohana Vitalis. The last witness was **Leonce Daniel Umbu**, (**AW4**) the VEO of Endasiko who tendered a map as exhibit P.4 which showed Plots without indicating the owners of the Plots in question.

Hiiti Jela, **RW1**, a resident of Endakiso village, testified that together with his late father used to live in the suit land, which was subject to 1974's operation, until 1990 where his father left and went to settle at the neighbouring village. He stayed there as the owner of the suit land until September 2012 where a family meeting was convened and he was appointed as an administrator of the family. In 2018, the respondent started this land dispute. The dispute went to the Village office, they visited the suit land and found that he had not trespassed to Yohan Vitalis' land. he tendered the judgment of the which was admitted without objection and marked as exhibit "D1". He added that he has planted "mitiki" on the suit

land. That his plots and his father's plots are 153, 154, 155 and 156. That the plot he lives in is near to the disputed plots. The appellant summoned **Saitoti Toronge**, **RW2**, as the then VEO-Endasiko who de posed that they visited the suit land with his committee and found that the appellant had not trespassed to the respondent's land. He deposed that Mark Daniel's name did not feature in the map. Mzee Jela's plots are self-explanatory. That the appellant and his father do have three plots in total and not four.

Lweshie Zebedayo Mollel, **RW3**, testified that the suit land belonged to Mzee Jela even before operation Vijiji. The respondent trespassed on the open space area and built a house therein. The said space is located between the Mzee Jela and Lesielwi and that is where the dispute arose. The said piece of land was unoccupied. The plot that the appellant lives in, he bought it.

I am aware as to the duty of the High Court in appeals, in the likes of the matter at hand. The Court of Appeal held in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, that-

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.* "

I will consider the first and second grounds of appeal jointly.

Did the DLHT properly consider the evidence?

The appellant's advocate, Mr. ndonjekwa, submitted that the DLHT ought to have to dismiss the application for there was no evidence that favoured the respondent. That the respondent failed to establish the size of the disputed land, as there was contradictory evidence, exhibit tendered by Pw4 it shows the numbers of plots but it does not indicate who owns which plot. The same did not indicate where the suit land situated. The tribunal ought to visit the *locus in quo* so as to identify boundaries.

The respondent supported to the findings of the DLHT, that indeed the appellant trespassed on his land. However, he argued that the decisions of the VLT and the WLT are valid and should be respected. That the exhibit tendered by Pw4 shows the boundaries the way he bought it. And he prayed that the court to visit the *locus in quo*.

I had a cursory review of the proceedings and the judgment of the DLHT, at page 4 of the judgment, which contained the analysis of evidence and the findings of the tribunal, the DLHT had this to say-

"Kwa Ushahidi uliotolewa na pande zote hakuna ubishi juu ya ardhi yenye mgogoro ukubwa wake kwamba ni mita kumi na mbili kwa sitini nan ne urefu. Pamoja na kuwa wadaawa wanajiwakilisha wenyewe lakini maelezo yao yanajitosheleza ikiwa ni sambamba na nyaraka zilizotolewa na kuambatanishwa katika hati zao za mdai na utetezi zinahusika. Ni hoja ya baraza hili kwamba nyaraka zao hata kuwa hazikutolewa kama vielelezo kwa utaratibu uliozoeleka lakini ni sehemu ya Ushahidi wao.

Nimezingatia pia nyaraka kielelezo A1 alichoambatanisha mleta maombi katika hati yake ya madai kwamba ni hati ya kuuziana eneo la plot. Aw1 alinunua plot hiyo toka kwa Malikiad tarehe 28/8/1999. Ni plot ya ukubwa wa mita 63 kwa 64. Katika mauziano hayo Aw2 alikuwa shahidi. Aw4 Leonce Daniel Umbu Afisa Mtendaji Kijiji cha Endasiko ametoa maelezo yake ya Ushahidi sambamba na ramani ya maeneo yaliyopimwa na kusema eneo lenye mgogoro ni mali halali ya mleta maombi. Nimezingatia Ushahidi huo Pamoja na maoni ya wajumbe B Alibina Sulley na Bw. Maulid Barie wote wanasema eneo lenye mgogoro ni mali ya mleta maombi haya."

Literally to mean: -

"By the evidence adduced by both parties there is no dispute on the fact that the suit land measures twelve by sixty four meters length. Notwithstanding that parties were unrepresented, but their statements are self-explanatory with availed documents annexed in their pleadings. It is the concern of this tribunal that their documents

though not tendered as exhibits on usual procedure but they are part and parcel of their evidence.

I considered also the document in exhibit A1 that was annexed by the applicant in his application to be a deed of sale of the plot area. Aw1 bought the plot from Malikiad on 28/8/1999. It measures 63 by 64 meters. In the sale agreement Aw2 was a witness. Aw4 Leonce Daniel Umbu the VEO-Endakiso testified that based on the surveyed map of plots, that the suit land belonged to the applicant. I have considered the said evidence and the assessors opinion Ms. Albina Sulley and Mr. Maulid Barie as both opined that the suit land belongs to the applicant herein."

From the foregoing extract, it is obvious that the trial tribunal considered irrelevant matters that were not captured on evidence. In **Ismail Rashid vrs. Mariam Msati** (Civil Appeal 75 of 2015) [2016] TZCA 786 (29 March 2016) where the case of **Shemsa Khalifa And Two Others vrs Suleman Hamed**, Civil Appeal No. 82 of 2012 was cited in approval, it was held that:

"it is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise It is not a decision at all. As the decision of the High Court is grounded on improper evidence, such a decision is a nullity."

It is true that the DLHT is not bound to follow procedures enshrined in **the Civil Procedure Code**, [Cap. 33 R.E 2019] or those under **the**

Evidence Act, [Cap. 6 R.E 2022] on matters related to documentary evidence. See rule 10 of **the Land Disputes Courts (the District Land and Housing Tribunal) Regulations**, 2003. However, the DLHT has a duty to analyze the evidence and to arrive at sound findings.

To start with the testimony of Leonce Daniel Umbu, (**AW4**), the VEO-Endasiko, who testified about the existence of a map (exhibit Aw4) showing surveyed plots. I find him to be a credible witness as his testimony was not challenged anyhow. Much as the map he tendered was a photocopy and did not depict names of owners of plots but his evidence proved the disputed land was surveyed.

I find the evidence by Leonce Daniel Umbu, (**AW4**), supported by the appellant's evidence that the land in dispute was surveyed or had planned plots. The appellant deposed that he had four plots in the area but his witness Lweshie Zebedayo Mollel (RW3) deposed that the appellant owns three Plots. Lweshie Zebedayo Mollel (RW3) confirmed that all plots measured uniformly, seventy by seventy.

Given the evidence on record, it is clear that the parties own adjacent land. There is a great chance that one of the parties trespassed to his

neighbor. This is a fit case which the DLHT ought to have visited the *locus in quo*. I am well informed that visiting the *locus in quo* is not mandatory, for the same cannot be used to add evidence, neither can it be used by a court for fact finding. However, in this case it was imperative first to identify the suit land. If at all the respondent was claiming plot no. 152, which is not mentioned by the appellant, then no land dispute could have ensued.

I find support in the decision of the Court of Appeal in **Avit Thadeus Massawe v Isidory Assenga** Civil Appeal No 6/2017, held that there are cases where visiting the *locus in quo* is inevitable. It observed thus-

> *"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****. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo* ***so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located****. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the 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/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the locus in quo. The factors include:*

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) NSCQR 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. Dominie 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."

I find that it was vital for the DLHT to visit the *locus in quo to determine the location of the disputed land, the extent, boundaries and*

boundary neighbors, and physical features on the land. There is no doubt that parties had adjacent plots but they differ on what is the boundary. The current and past leaders took side, they did not give evidence which would bring the dispute to finality. Not only that but also, the decision of the DLHT that the respondent was the winner without declaring the boundaries left the did not resolve the dispute conclusively.

The evidence depicts that, the dispute is respect of the survey plans or say the boundaries. As held by the Court of Appeal in in **Avit Thadeus Massawe v Isidory Assenga** (supra), this was a case for demanding visiting the *locus in quo*. It accepted the position that "*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. Dominie Okwara*** *(1997) 11 NWLR(Pt. 527) p. 1601).*

I took time to consider the evidence of one of the appellant's witness Lweshie Zebedayo Mollel (RW3) who deposed that he did not see ground of parties quarreling as they own distinct plots. He deposed that-

"Yohane Vitalis aliingia kwenye eneo la wazi na kujenga nyumba. Kieneo hicho kipo katikati ya Mzee jela na Lesielwi ndo mgogoro ulianza hapo. Ni eneo ambalo halikuwa na mwenyewe.

Hata sijui wanagombea nini maana eneo hili ni mali ya Kijiji."

Literally to mean; -

"Yohane Vitalis trespassed on the open space area and built a house therein. The said space is located between the Mzee Jela and Lesielwi and that is where the dispute arose. The said piece of land was unoccupied. I don't know why are they disputing upon as the suitland belongs to the village"

In the circumstances, if what RW3 testified is the truth of the matter, then the same can be resolved by paying a visit to a *locus in quo*, if a parcel of land is reserved as an open space, no one can claim it to be his own.

Is the decision of the tribunal marred by procedural irregularities?

The appellant's advocate complained that the trial was marred by procedural irregularities but he did not substantiate his complaint during the hearing. He instead argued on substantive evidence.

I have stated above that this is the first appellate duty bound to reconsider the evidence on record. I revisited the proceedings to find out

whether the DLHT did properly conduct the case. There is no evidence to show that when a party tendered exhibit, the tribunal invited the adverse party to comment before the tribunal admitted the evidence on record. The record depicted that the DLHT called upon the respondent to comment before it admitted exhibit D1. The record is silent on how the respondent's Exhibits A1 and A2 as well as the appellant's second exhibit wrongly marked Exh. D1 found their way in the record.

As if the above is not enough, astonishingly, the DLHT marked the respondent's documents attached to the application as exhibits. There is no evidence that the respondent tendered the exhibits. It is not clear at what time the respondent tendered the documents.

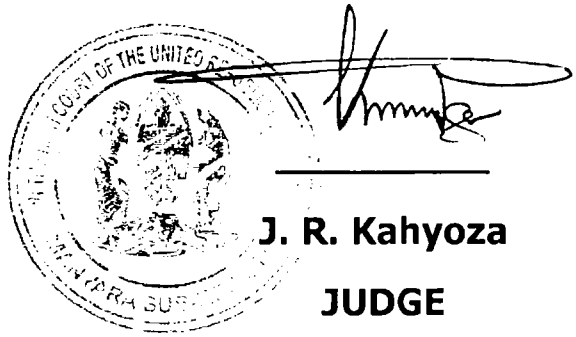
I find it proved that there are a lot of procedural irregularities. It is my opinion that the flaws cannot be saved by section 45 of **the Land Disputes Courts Act,** [Cap. 2016 R.E 2019] which provides-

> *"S. 45. -* ***No decision or order of*** *a Ward Tribunal or* ***District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing*** *or in such decision or order or on account of the improper admission or rejection of any evidence* ***unless such***

error; omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice. *" [Emphasis]."*

In the end, I allow the appeal. Consequent to the procedural irregularities discussed above and the DLHT's failure to visit the *locus in quo*, this is a fit case to order trial *de novo*. I therefore, nullify and quash the proceedings, and set aside the judgment and the decree of the DLHT. I order a trial *de novo*. As parties cannot be blamed for procedural flaws committed by the DLHT, each party shall bear its own costs.

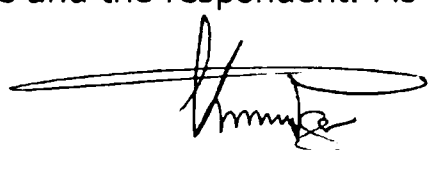
Dated at **Babati** this 7th day of **May**, 2024.



J. R. Kahyoza

JUDGE

Court: Judgment delivered in the presence of the appellant, Mr. Ndonjekwa the appellant's advocate and the respondent. Ms Fatina (RMA) is present.



J. R. Kahyoza

JUDGE

7/ 05/2024