IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 54 OF 2022

(*Originating from Land Application No. 95 of 2018 of the District Land and Housing Tribunal for Moshi at Moshi*).

LEOKADIA JOSEPH CHUWA..... APPELLANT

VERSUS

HASHIM A. DORSAN..... 1st RESPONDENT

AMINA BASHIRI RINGO.....2nd RESPONDENT

JUDGMENT

13th December 2022 & 26th January, 2023

A.P.KILIMI, J.:

This is an appeal from the decision of the District Land and Housing Tribunal for Moshi in Land Application No. 95 of 2018. The background facts to the dispute may be briefly recapitulates as follows: the appellant and the respondents are disputing over a surveyed piece of land located at Plot. 167 Rau area within Moshi Municipality.

The appellant filed a suit against the Respondents at the said tribunal, claiming that the said land belonged to her mother one Maria Mtengie (deceased), before her demise she handled it to his brother Protace Tumbo in 1970's. Appellant further stated thereat, later the said his brother gave the said land to her after her marriage dissolved and she had nowhere to live. Thus prayed the tribunal to declare the respondents are trespassers to the said land. In part of the respondents, the second respondent claimed that her husband Bashiri Mohamed (deceased) owned the said land since 1974. Her husband died in 1992, Later in 2014 the family led by her as an administrator of her husband estate sold the said land to the first respondent. The District Land and Housing Tribunal for Moshi determine the matter and decided in favour of the respondents.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Moshi and raised three grounds as follows;-

1. *That the Learned Trial Chairman erred both in fact and in law when failed to properly assess, analyze and evaluate evidence brought before him hence ruled against the Appellant's merit.*

2. *That the Learned Trial Chairman erred both in fact and in law when failed to adhere to the procedures governing visiting the Locus in Quo which led to miscarriage of justice on part of the Appellant.*
3. *That the Learned Trial Chairman erred both in fact and in law when failed to discover that the 1st Respondent purchased the land which is unknown.*

In this appeal the appellant enjoyed the legal service of Gideon Moshi learned counsel and respondents were represented by Martin Kilasara learned counsel. They both proposed this matter be disposed of by way of written submissions. The court acceded to their prayer and consequently a schedule for filing the submissions was issued which was duly complied by both parties.

The appellant counsel opted to combine all grounds of appeal and submit them as a whole. Submitting in support of these grounds, started that, on 30/6/2022 the Trial Tribunal conducted a visit at the Locus in Quo. When conducted the said visit, the Trial Tribunal found new Beacons which have been erected on the suit land. The said Beacons shows that they have been erected very recently for purposes of surveying lands which haven't yet

surveyed, and the tribunal at page 224 of the proceeding ruled out that no beacons affixed in 1970's but new beacons affixed during "urasimishaji" seen.

He further submitted that, since it was found new beacons erected on the suit land, and the fact the Respondents alleged that, the suit land is in a Square Shape but when visited the tribunal realized at page 225 it is not a square shape, there was a need of conducting cross examination on the new evidence found on the suit land which is erection of the new beacons. But the Learned Trial Chairman concluding end of the visit and set a date for Assessors Opinions contrary to the procedures, by doing so, the guidelines after the tribunal conducted such visit were not observed, thus failed to properly assess, examine and analyze evidence brought before it, which led to erroneous decision. To support his argument the counsel cited the case of **Sikuzani Saidi Magambo and another vs Mohamed Roble**, Civil Appeal No. 197/20182 Court of Appeal of Tanzania, at Dodoma (Unreported), **Nizar M.H. vs Gulamali Fazal Janmohamed** (1980) TLR 29. And **Avit Thadeous Massawe vs Isidory Asenga,** Civil Appeal No. 6/2017, Court of Appeal of Tanzania, Dodoma (Unreported).

The learned counsel also submitted that the Appellant's evidence was strong and direct compared to that of the Respondents, that through Exh. PI the Appellant confirmed to have owned the suit land since 12/6/1991 without any disturbance until the year 2018 when the Respondents trespassed on the suit premise and erected a wall surrounding it. Therefore, counting from the year 1991 to the year 2018 when the Respondents commenced their trespass over the suit land, it is more than 26 years, which is not within twelve (12) years as provided under **Item 22 to the Schedule of the Law of Limitation Act Cap. 89 R.E. 2019**.

Moreover, the counsel for appellant submitted that, the fact that that the first Respondent had Certificate of Title over the suit premise, and had paid Land Rents to that effect, cannot legally considered as conclusive documentary proof that he owns the suit premise. To buttress his position, the counsel invited this Court to consider the case of **Registered Trustees of Joy in the Harvest vs Hamza Sungura**, Civil Appeal No. 149/2017, Court of Appeal of Tanzania at Tabora (Unreported). He added further that, if at all the suit premise had been duly surveyed, there was no need for land

authorities to erect new beacons surrounding the suit premise.

Mr Gideon Mosha concluded that irregularities which was found on the Respondents' evidence including certainty of the suit premise as shown on the Sale Agreements which were admitted as ID2 doesn't show the size of the suit premise and the boundaries for proper identification. It seems that the issued Certificate of Occupancy which was given to the first Respondent, was in respect of other land and not specifically in respect of the suit land.

Mr. Martin Kilasara replying on above submissions, also chosen to argue all grounds jointly in the manner adopted by the appellant, and submitted that, the assertion of not adhering to guidelines in visiting locus in quo is frivolous, unfounded and grossly misconceived. It should be noted from the outset that the authority to survey, demarcate and allocate plots in Moshi urban is solely vested to Moshi Municipal Council. The Moshi Municipal Land Officer (DW3) clearly testified that the suit property is duly surveyed and that survey has never been revoked to date. On 27/6/2022, DW3 tendered the sale agreements of the suit property dated 18/11/1973 and 09/10/1974 as Exhibits D9 and D10 as well as the Letter of Offer dated 24/11/1975 as Exhibit D11 showing that even by then the suit property was duly surveyed

and identified as Plot No. 167 situated on Farm 181/182 within Moshi Municipality.

In respect to new beacons, the counsel submitted that as per Exhibit D2 (the letter dated 19/4/2018), the 1st Respondent (DW2) had successfully applied to restore the old beacons as seen in the approved master plan of the area whose extract copy is also availed in the Title Deed which was admitted as Exhibit D6. He also added, it is on record as testified by the Appellant (PW1) that the beacons were duly reinstated by the Moshi Municipal Council Officers and this was not refuted. Therefore, the existence or insertion of those beacons was never new evidence just found on the suit property upon visit of locus in quo as the Appellant tries to imply. The counsel further added, said beacons were restored as seen **in Exhibit D2** and as per master plan registered since 1970s; there was no new survey and or new insertion of beacons as the Appellant tries to insinuate. Thus, the cited case **of Registered Trustees of Joy in the Harvest** is distinguishable to this case.

Replying on the visiting done by the tribunal, Mr. Kilasara submitted that, it is undisputed, as seen on the record that the visit of locus in quo was done on 30/6/2022. Both parties duly participated during the visit and were

accorded chance to show the suit property and its border marks. The Appellant was able to identify the house of the second Respondent and her late husband whom she conceded to be her neighbors for over forty years. She also identified the reinstated beacons; the visit report is also duly availed and incorporated in the proceedings. The cited case of **Sikuzani Magambo case** (supra) and **Nizar M.H.** (supra) are thus distinguishable in the circumstances of this case.

Mr. Kilasara added that, there was no any prejudice against the Appellant that was occasioned during the visit, also remaining evidence on record is credible and sufficient to substantiate the tribunal findings. In any unlikely event, the net effect would be to order the revisit of locus in quo as was held in the cited case of **Avit Thadeus Massawe (supra)** so as to ascertain the boundaries. But not to quash/nullify whole proceeding as suggested by Appellant. Thus there was no gross procedural irregularity to render the whole proceeding a nullity; this ground is devoid of merits and should thus be dismissed.

Responding on the arguments that Respondents testified the said land in dispute to be square shape. Mr Kilasara submitted that, the suit property is

duly surveyed as seen also in the Certificate of Title No. 44249 **(Exhibit** 06). The extract map from the registered master plan No. 7036 therein is self-explanatory and clearly shows the shape and size of the suit property as 43,519 square feet.

He further contended that the Appellant claim that she was allocated the suit property by one Protas Tumbo by Exhibit P1. That exhibit which did not show proper descriptions of border, shows a mere information and not an agreement or declaration. It was not even signed by the Appellant to acknowledge receipt. Long thereafter the Sabasaba Street Chairperson, purported to endorse the same on 13/3/2018 while he was never there at first instance.

The counsel added that said Protus Tumbo was never even called as a witness and no any proof of sickness was ever produced to substantiate his absence. To support his stance, he cited the case of **Hemedi Saidi v Mohamedi Mbilu** (1984) TLR 113 and **Kimotho vs. Kenya Commercial Bank** (2003) E.A. 108. And further argued there are no irregularities and or misdirection of this vital and credible documentary evidence as the Appellant tries to suggest.

The counsel for the respondents, further submitted that the said Protus Tumbo never had title to pass it to the appellant and prayed this court to refer the case of **Farah Mohamed v. Fatuma Abdallah** (1992) TLR 205. He further added that the issue of time limitation, which was never even raised as an issue at the trial tribunal thus has no basis cannot thus arise in the circumstances of this case and at the Appellate stage. He maintained this position by authorities in the cases of of **Hotel Travertine Ltd. and Two Others v. National Bank of Commerce Ltd**. (2006) 133 at page 141 and of **Georgia Celestine Mtikila v. Registered Trustees of Dar es Salaam Nursery School and Another** (1998) TLR 512

Responding to allegation that the exhibits was for Identification purposes. Mr Kilasara submitted that on 20/6/2022 when Land Officer (DW3) testified; he substituted by actual exhibits tendered by DW3 on 27/6/2022. It is thus wrong and misleading to refer to Exhibits D9, D10 and D11 as IDs instead of Exhibits. It should be further noted that the said Bashiri Mohamed (2nd Respondent's husband), was the lawful registered owner prior to the disposition in favour of the first Respondent, therefore this title was duly

legally passed to the second respondent, to support this argument cited the case of **Hirji Holdings Ltd Vs the Liquidator, Musoma Textiles Ltd.,** Commercial Case No. 200 of 2002.

In concluding his submission Mr Kilasara submitted that, there was ample and credible evidence that the suit property was duly surveyed and allocated first to Ranbir Singh, then to Asha M. Shamsan and then to Bashiri Mohamed and eventually to 1st Respondent. And further maintained that, there was no shred of credible evidence that the said Protus Tumbo has ever been owner either registered or otherwise, capable of passing good title to the Appellant as she alleges.

I have revisited the entire evidence at the trial tribunal and submissions of both sides, I have seen it is conveniently to me to start with ground number two of this appeal.

I am mindful that, it is trite law that, a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. See the decisions of the Court of Appeal in **Future Century Ltd**

v. Tanesco, Civil Appeal No. 5 of 2009, **Makubi Dogani v. Ngodongo Maganga** and **Peters v. Sunday Post Ltd (1958) E.A. 424.**

Addressing on this second ground, counsel for appellant submitted upon tribunal visited the disputed land, was found not a square shape as testified by respondents, there was a need of conducting cross examination on the new evidence found on the suit land which is erection of the new beacons, the same was not done thus guidelines conducting such visit were not observed which led to erroneous decision which should be quashed.

Mr. Kilasara for respondents responding to the above argument, contended that there was no any prejudice against the Appellant occasioned during the visit, he further maintained that evidence on record is credible and sufficient to substantiate the tribunal findings. He urged this court in any unlikely event, the net effect would be to order the revisit of locus in quo as was held in the cited case of **Avit Thadeus Massawe (supra)** so as to ascertain the boundaries. But not to quash/nullify whole proceeding as suggested by Appellant.

I have considered these arguments of both counsels in respect to this ground, it has geared me to ask myself whether the procedure followed by

the tribunal after visiting the disputed land occasioned failure of justice to the parties in dispute.

Before dwelling into this issue, I wish to highlight that, from the outset and the evidence tendered, there is no dispute that the said landed property is surveyed since 1973, and it was registered as Plot No. 167 situated on Farm 181/182 within Moshi Municipality, this was evidenced by Moshi Municipal Land Officer (DW3) at the trial Tribunal. And there is no dispute that, currently it is registered in the name of the first Respondent. Nonetheless, in other part, the appellant is contesting that she acquired a good title from his brother Protace Tumbo who acquired its title from his mother in 1970.

Back to the issue raised, according to the record the trial tribunal visited the disputed land, at page 59 and 60 of the typed proceeding, the records revealed as follows;

> ***"Tribunal:*** *We are now at locus in quo at RAU SABASABA for visit.*
>
> *Sgd: P.J. Makwandi - Chairman*
>
> *30/6/2022*
>
> ***Applicant:*** *These "masale" were there prior to this wall built by Hashim*
>
> *This house belonged to Mama Amina and her husband. Mama Amina demolished it and sold it to Hashim.*
>
> ***Hashim****: It is true*
>
> ***Mama Amina****: It was my house.*

Applicant: *I have not dispute with ½ Acre. This boundary was between Amina and Mwalimu. Mwalimu is here.*

This house belongs to her (PW2) Songolena Faustine Shayo).

Songolena Faustina Shayo: *This house is mine. This part of the disputed land is mine. I have not lodged any case but I intend to lodge my case.*

2nd Respondent: *This part does not belong to Songolena. It is part of my land. The plot with a house belongs to Mwarabu. The beacons were there but were removed.*

Tribunal: *No beacons affixed in 1970's but the new beacons affixed during " urasimishaji" see These beacons were pointed by Applicant.*

Sgd: P.J. Makwandi - Chairman

30/6/2022

1st Respondent: *My plot is one Acre. It was legally surveyed. I have got all necessary documents.*

Applicant: *The wall built by 2nd Respondent is not in square shape. Clan can see this part. Also, these large trees were great by mother.*

Tribunal: *Party of the wall seen which is not in square shape.*

Sgd: P.J. Makwandi - Chairman

30/6/2022

Tribunal: *That is the end of the visit. Assessors' opInion on 8/7/2022.*

Sgd: P. J. Makwandi - Chairman

30/6/2022"

After taking opinion of assessors the trial tribunal, did nothing more but continued to deliver the Judgment on 8th August,2022. In respect to the said visit, at page 9 of the typed judgment, the trial court tribunal has this to say;

> *"Baraza lilipotembelea eneo liliona na kushuhudia kwamba ni mdaiwa Na. 1 (Hashim Dosan) ndiye ameweka maendelezo kwenye eneo la mgogoro kwa kuzungushia ukuta eneo hilo linalokadiriwa kuwa ni ekari 1.*
> *Pia tuliona mabaki ya nyumba ya mdaiwa Na. 2 kwenye eneo la mgogoro, huu pia ni ushahidi tosha kwamba awali alimiliki eneo hilo."*

I have considered what transpired during the tribunal visit and passage quoted above, to my view it has left new issues raised during the visit unsettled, to my opinion, firmly there were a need for the trial tribunal to reassemble in order to ascertain issues raised and recorded as shown above, there it rose the issue of where exactly the suit property is located although is a surveyed land.

In my view the location of the suit property could not, with certainty, be determined by the trial Tribunal by relying only on the mere evidence that was tendered at the trial. I think the issue of boundaries of the said surveyed property was not clearly ascertained, this is because the above evidence

recorded at the visit, bring in new issues need to be resolved, the same was not resolved in in the judgment of the tribunal, the issue of boundaries bring in the shape of the plot, tribunal itself said there was no beacons affixed on 1970's but the new beacons affixed during " urasimishaji" pointed out by Applicant, and one Songolena Faustina Shayo who was PW3 at the trial, said there at that, the part of the disputed land belong to him, and he has not lodged any case but he intend to lodge it. All these I think are crucial matters ought to be addressed and not be ignored. Moreover, even before the tribunal visited the disputed land, during the trial, matters to be considered during visit arose. Example at page 46 of the typed proceeding when the first respondent was cross examined by Mr. Gideon Mushi had this to say;

- *"I found Leokadia owning her house near the suit plot.*
- *The plot in "squire" shape.*
- *During the sale Amina was living on the same plot. She had a house there. I removed it.*
- .....
- *The tribunal can see the foundation of the demolished house.*
- *I am the one who demolished it.*
- *When I started construction there were no beacons. The land is surveyed."*

At page 47 when he was re-examined by Mr. Kilasara the same first respondent said;

- *"Leokadia is my neighbour on plot no. 168. I am on Plot. No. 167."*

Bringing home the point, as analyzed above, the evidence on record shows very clearly that, there are conflicting contentions in respect of said surveyed plot location. It is my considered opinion that its location could have very easily be ascertained and resolve if the tribunal could have re-assembled and evaluate the evidence taken at the said visit, but also the need for the land officer/ surveyor to be present at the tribunal visit, taking regard the landed property in dispute is the surveyed one. In the case of **Nizar M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29 the Court of Appeal faced akin situation to the case at hand and held as follows:

> *"When a visit to a locus quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witness as may have to testify in that particular matter .... When the court reassembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated witnesses, then have to give evidence of all those facts. If they are relevant, and the court only refers to*

the notes in order to understand, or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future".

(See also the case **Sikuzani Saidi Magambo and another v. Mohamed Roble** (supra)

According to the record, the trial tribunal never reassembled in the tribunal after locus in quo visit to evaluate the evidence obtained in the locus in quo visit, as shown above what has been revealed at the said visit, is my considered opinion brought some issues ought to be resolved by the trial tribunal.

The respondents counsel mitigated that this court to order the matter be remitted to tribunal to consider this missed procedure, he cited the case of **Avit Thadeus Masawe** case (supra), in my view of the said case, its circumstances differ from this case at hand, in that case, the Court of Appeal deliberately refrain from dealing with the merits of the appeal, pending the availability of the additional evidence, because the High Court did not visit the Locus in quo. In this case the trial Tribunal visited the land in dispute, therefore the case cited is distinguished from the facts of this case.

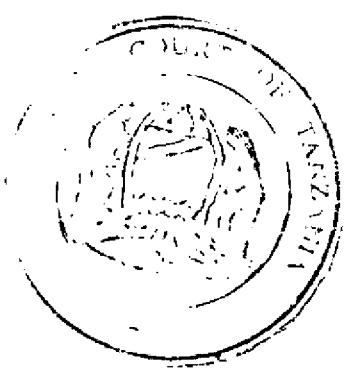
Guided by the above principle, I am settled that, the irregularity on the visit at the locus in quo vitiated the trial at tribunal, and also occasioned a miscarriage of justice to the parties, the appellants in particular. I thus find this second ground with merit.

This failure of the Tribunal to re-convene, means the evidence taken at the said visit were not dealt with in reaching the decision of the tribunal. Therefore, it is also my settled opinion, this is taken that, the tribunal has failed in totality to properly assess, analyze and evaluate evidence brought before it, consequently the first ground which says that, the Learned Trial Chairman erred both in fact and in law when failed to properly assess, analyze and evaluate evidence brought before it hence ruled against the Appellant's merit, is hereby also found to have merit and sustained. It is thus my considered view; these two grounds are sufficient to dispose of this appeal. For the foregoing, I will not discuss the remaining ground.

In the final analysis, I allow the appeal basing on the first and second grounds. In the exercise of revisional powers vested in this Court by section 43(l)(b) and (2) of the Land Disputes Courts Act (Cap. 216, R.E. 2019), the proceedings of the trial tribunal are hereby nullified and the judgment and

decree thereon quashed and set aside. The case is remitted to the trial tribunal for retrial. For the interest of justice, it is ordered that, the matter be heard by another chairperson and new set of assessors. Considering the circumstances of the case, I order each party to bear its own costs. Ordered accordingly.

DATED at **MOSHI** this 26th day of January, 2023.



A.P. KILIMI
JUDGE
26/1/2023

Court: - Judgment delivered today on 26th day of January, 2023 in the presence of Mr. Martin Kilasara counsel for the respondents while Mr. Gideom Mushi for the applicant absent. Parties present.

Sgd: A. P. KILIMI
JUDGE
26/1/2023

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI
JUDGE
26/1/2023