IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SUB-REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL NO. 56 OF 2022
(Originating from Land Application No. 69 of 2022 of Maswa District Land and Housing Tribunal atMaswa)

SELEMANI MANDALU.....APPELANT
(Administrator of the estate of the late Nyamizi Mahulu)

VERSUS

NGASA MCHIMA NKWABI.....RESPONDENT

JUDGMENT

12th February & 15th March, 2024

MASSAM J.

This is the first appeal where by the Respondent in Land Application No, 10 of 2021, before the District Land and Housing Tribunal of Shinyanga at Shinyanga, sued the appellant claiming for the land properties located at Lunguya village, Talaga Ward at Kishapu District one with 90 acres valued at Tsh 18,000,000/= and 70 acres valued at Tsh. 14,000,000/=.

During the hearing at the DLHT the respondent stated that he owned that land property from the year 1988 from his late father Nhima Nkwabi who divided the same among them before his death. He added that they have been using the said land from then till the year 2021 when the applicant was appointed as an administrator of the estate of

the late Nyamizi Mahulu who claimed the land the same to be owned by the late Nyamizi Mahulu.

The trial tribunal heard the matter inter parties and held in favour of the respondent herein above by declaring the dispute land to be part of the estate of the late Mchima Nkwabi the respondent's father.

Being aggrieved by the decision of the trial tribunal, the appellant herein appealed to this court with three grounds of appeal to the effect that the suit land was not the estate of the late Mchima Nkwabi.

When the matter was called the for hearing, it was argued orally and the appellant was represented by Mr. Audax the learned advocate and the respondent was represented by Mr. Sululu the learned advocate.

Before arguing in support of his ground of appeal the appellant's counsel informed this court that before urging his appeal on merit he pray to address this court on the way the trial tribunal recorded the evidence in bulleting instead of narrative way which is contrary to Order 18 Rule 10 the Civil Procedure Code, Cap 33 R.E 2019 as was explained in **Moses Seni Vs Seni Mashilingi and Others**, Land Appeal No 50 of 2021 at page 3-4.

He also alleged that, the procedure for visitation of locus in quo the trial tribunal did no follow the procedure in accordance to the case

of **Prof. T.L Maliyamkono Vs Wilhelm Sylvester Erio,** Civil Appeal No 93 of 2021 at page 9-13. He prayed this court to nullify all the proceedings from page 28-40 and order the judgement to be composed on the evidence recorded before the visitation of the disputed land following the procedure.

On his reply, the advocate for the respondent submitted that the advocate for the applicant did not mention any page with irregularities on the issue of recording the evidence in bullet. He added that on the issue of visitation of locus in quo this court can ignore the same because the procedure was properly followed, he cited the case of **Sewerage Authority Vs Didus Kameka and 17 Others,** Civil Appeal No 233 of 2019 CAT, where the court held that irregularities were too small to disturb the same.

He submitted that, parties were given right to give opinion and not to record the same, he urged that if the evidence of witness was not understandable the court can nullify the evidence from page 3-27 left other pages of the proceedings undisturbed.

On his rejoinder, he reiterated that the procedure for visiting locus in quo was not followed and that the trial tribunal was wrong to record the evidence in bullet instead of narrative.

This court after a thoroughly perusal of the trial tribunal records on the evidence given, and the arguments by both parties at the appeal level, the issue for considerate is whether **this appeal has been brought with sufficient cause.**

Before addressing the grounds of appeal, the appellant's advocate chose to depart from his grounds of appeal and submitted two issues concerning the procedure on recording the evidence, first issue was that the evidence was recorded in bullet form instead of narrative form and second issue was of visiting locus in quo that it did not follow the required procedure.

On this first issue, on how the evidence was recorded the counsel for the applicant submitted that the trial chairman did not adhere to Order 18 Rule 5 the Civil Procedure Code (Supra) which directs the evidence to be recorded in narrative form. The law is very clear on how the evidence required to be recorded, the said order provides that:

> *"The evidence of each witness shall be taken down in writing, in the language of the court, by or in the presence and under the personal direction and superintendence of the judge or magistrate,* ***not ordinarily in the form of question and answer, but in that of a narrative and the judge or magistrate shall sign the same"***

This provision directs on how the evidence should be recorded, the language and the manner. In case of the manner at which the evidence is supposed to be recorded the provision provides that it should be in form of narrative and not in bulleting form. From the trial tribunal proceedings it is clear and shown from page 5-40 during examination in chief and cross examination the trial chairman recorded the evidence in bullet form which makes this court difficult to grasp what was the question which led to the answer recorded. Some of the said statement is found in page no 5 of court proceeding it reads;

-Ardhi hiyo nilipewa na baba

-alinipatia mwaka 1988

-Ndugu zangu ilikuwa ninaleta

-Hakuna maandishi

According to that record of the evidence, I will reach agreement with my brother Hon. Judge Kulita in **Moses Seni Vs Seni Mashilingi &2 Others,** Land Appeal No 50 of 2021 where he was in the opinion that this kind of errors leads to injustice and it is a serious irregularity committed by the trial tribunal. Also the same renders the tribunal proceedings and the decision nullity.

Mr. Audax raised the issue on the procedure for visitation of locus in quo that the trial tribunal did not follow the procedure, he submitted

that the tribunal did not give the reasons for the visitation and the procedure during visitation was not followed.

First of all, there is no law which forcefully and compulsory requires the court or tribunal to conduct a visit at the locus in quo, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial.

Nevertheless, when the court or the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial, See the case of **Nizar M.H. v.Gulamali Fazal Jan Mohamed** [1980] TLR 29 and **Avit Thadeus Massawe v. Isidory Assenga,** Civil Appeal No. 6 of 2017 where it was decided that;

"When a visit to a locus in 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 re-assembles 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, I f they are relevant, and the court only*

refers to the notes in order to understand, or relate to thee vidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future" [Emphasis added].

In this appeal the proceedings are clear that there was the visiting in quo on 21/06/2022 and parties attended, the evidence was taken at the disputed land but the trial according to the proceedings did not assemble to the court and read the notes taken at the visiting to the parties in case of any comments or amendments, but in this case the trial tribunal while in the visitation ordered the date for the assessor's opinions that was on 29/06/2022.

The procedures underlined in **Nizar M.H. v. Gulamali Fazal Jan Mohamed** (Supra) they were not adopted when it visited the locus in quo. This is my view that, failure of adopting the procedures and guidelines in visiting in quo also is a serious errors that renders the proceedings and the decision nullity.

For the fore said reasons, I find this appeal meritorious and allow it. In the event, I hereby nullify the entire proceedings and quash the judgment of the tribunal and subsequent orders thereto.Parties are at liberty to institute a fresh land matter if still interested, subject to the law of limitation. If the said suit re- filed should be entertained by

another chairperson with a new set of assessors. No order as to costs. It is so ordered.

DATED at **SHINYANGA** this 15th day of March, 2024.

R.B Massam
JUDGE
15/03/2024