THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

LAND APPEAL NO. 80 OF 2023

(Originating from the District Land and Housing Tribunal for Songwe at Mbozi Application No. 28 of 2021)

PETER JAMPAN NDABILA ..... APPELLANT

VERSUS

JULIUS NYINGI ..... 1ST RESPONDENT

ERASTO G. SIKAMENYA ..... 2ND RESPONDENT

SUBIRA LWIGA ..... 3RD RESPONDENT

JUDGMENT

Date of Last Order: 05/12/2023

Date of Judgment: 23/02/2024

NGUNYALE, J.

The appellant Peter Jampan Ndabila alleged that he was the owner of a parcel of land measured ¾ of an acre located at Mtakuja Street in Isanga Village within Mbozi District in Songwe Region. His allegations pointed a

finger to the respondents Julius Nyingi, Erasto G. Sikamenya and Subira Lwiga as persons who trespassed his piece of land without lawful justification. According to his application he alleged that he came to realize that his land has been invaded in the year 2019. The respondents in their side faulted the claims of the appellant as false and unfounded. According to their defence they stated that the whole suit land was the property of the 1st respondent who later transferred part of it to the 2nd and 3rd respondent. In 2010 he gave part of it to the family of the 3rd respondent and in 2020 another part to the 2nd respondent.

The contentious position which existed between the parties about the suit land moved the appellant around October 2021 to file Application No. 28 of 2021 before the District Land and Housing Tribunal for Songwe at Mbozi (hereinafter to be referred to as the tribunal) praying for orders of the tribunal that he was a lawful owner of the suit land thus the respondents were mere trespassers.

Upon receiving the above land dispute, the tribunal invoked its jurisdiction to conduct hearing through a full trial which was concluded in favour of the respondents on 26th August 2022. In its reasoning the tribunal stated that the 1st respondent was the lawful owner of the suit land and he was in continuous use of the same since 1983.

The appellant was aggrieved with the order of the tribunal, he facilitated procedures which enabled him to file the present appeal per memorandum of appeal containing seven grounds of appeal that the tribunal erred in law and fact; **one**, for determining the matter in favour of the respondent by failure to consider and analyse the evidence adduced **two**, for filling gaps in favour of the respondent and the same casts doubt as he had not been impartial adjudicator but bias in favour of the respondents **three**, failure to visit locus in quo whereby such a visit was necessary to clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence tendered during trial at the tribunal **four**, the tribunal erred to consider the evidence of the village leaders without ordering them to tender documentary evidence on the division of the disputed land without considering that they are the one who keep records of division of land in the village. **Five**, failure to analyse and evaluate properly the evidence adduced by the appellant the evidence which was stronger comparing to that of the respondent **six**, it was wrong to consider the evidence of Rais Damas Mwampashi without considering that he was not a Chairman of the Hamlet when the land was given to Jampan Pesambili Ndabila and **seven,** failure to consider that the father of the appellant owned the land for the long time or since time immemorial.

The hearing of the appeal took the form of written submission, I commend the learned Counsels for their industrial work and research necessary to assist the court, God bless them abundantly.

The appellant's submission was drawn and filed by Lugano Mwalubunju learned Counsel from AJ Law Attorneys. In respect of the 1st and 2nd grounds of appeal the appellant insisted that the tribunal ought to make a fair decision based on proper evaluation and analysis of evidence adduced by both parties but he failed to do so thus he ended with unfair decision to the party. The appellant could not go in detail to establish the extend of failure as far as evaluation and analysis of evidence is concerned but he complained that the tribunal escaped to record evidence adduced by the appellant and his other witnesses. In the typed proceedings the phrases of evidence spoken by the appellant are missing especially the evidence about the suit property which was owned by his father and later it was owned and cultivated by the appellant family. About the essence of the tribunal to evaluate and analysed evidence he relied to the case of **Stanislaus Kasusura and A. G vs. Phares Kabuje** (1982) TLR 335 and the case of **National Microfinance Bank vs Chama Cha Kutetea Maslahi ya Walimu Tanzania** Civil Appeal No. 07 of 2019 (unreported).

It was submitted further that it was the duty of the trial tribunal to record, evaluate and to analyse well evidence of the appellant in order to reach a just decision, as that was not done the court should quash the decision of the trial tribunal.

On the third ground of appeal about visiting locus in quo they submitted that visiting locus in quo is not a requirement of the law, but it is a matter of practice if necessary to know well the suit property. But visiting locus in quo is important as emphasized in the case of **Masoya Mahemba vs Nyasuma Kihanga** Land Appeal No. 41 of 2021 (unreported) which was recited in the case of **Mariam F. Kalengela vs Victoria Swai**, Land Appeal No. 290 of 2021 where it was ruled that the importance of visiting locus in quo is to clear the ambiguity of the suit land. He also cited the case of **Yeseri Waibi vs. Edisa Lusi Byandala** (1982) HCD 28 where the court held that;

> *"the practice of the visiting the locus in quo is to check on the evidence given by witnesses and not to fil the gap for them, the court may run the risk of making itself a witness in the case"*

The appellant Counsel submitted further that in the present case the evidence of the appellant and the respondent were contradicting in the issue of size, plantation in the suit land, where the respondents state that

the disputed land has covered 1 acre, likewise the appellant stated that the land covered ¾ acre. These doubts were to be clear by visiting locus in quo, failure by the tribunal to visit the locus in quo led to a decision which is unfair to the side of the appellant.

On the 4th and 6th grounds of appeal he submitted that RAIS DAMAS MWAMPASHI (DW4) being a Hamlet chairman, he was duty bound to present vivid documents which prove that the respondents were lawful owners of the disputed land but as a leader he did not do so. Therefore, the tribunal reliance to the testimony of DW4 was improper.

The respondents filed their Joint submission opposing the memorandum of appeal. They opted to argue the 1st, 2nd and 5th grounds of appeal together the way they were argued by the appellant Counsel. They submitted that, the appellant in his submission is just biting around the bush because he did not show how and to what extent the trial tribunal failed to evaluate and analyse the evidence. The evidence of the appellant was weak because he could not state how the land came to his possession from his father. The appellant was neither owner nor administrator of the estate hence he had no capacity to sue. The tribunal was right to hold and decide the case in their favour since the 1st respondent was given the suit land by the Village Council in 1983 and he was in use of the land in

dispute since 1983 to 2020 uninterruptedly. On the issue of visiting locus in quo they submitted that during trial there was nothing which necessitated for the visiting locus in quo.

In rejoinder the appellant reiterated his earlier position about evaluation of evidence and locus in quo insisting that in his testimony he did not say that the land belong to his father but he said it belong to his family.

Having in mind the record of the case and the rival submission, I will answer the issue as to whether the trial tribunal entered its decision according to law and procedure related to land matters guided by the grounds of appeal as filed and argued by the parties.

I will start to answer the 2nd ground of appeal which is to the effect that, the tribunal was not impartial because the evidence of the appellant was not recorded in full in order to fill gaps in favour of the respondent. Admittedly, the ground is rather strange but carries a serious allegations knocking against the door and the mind of the trail Chairman. Generally, it goes to the trust and the integrity of the learned Chairman, he is accused to have abstained or refrained from recording some phrases of evidence spoken by the appellant and his witnesses during trial. The appellant complained that this biasness aimed to favour the respondent in the final decision. In answering this complaint let me accept to be

guided by the law and practice related to courts record and at the end I will comment on the expected future as far as recording of evidence is concerned. The appellant complained that the trial was not fair because the important evidence was not recorded by the tribunal Chairman. He complained that the evidence to the effect that the land belonged to the appellant's father and later it was used by the appellant was not recorded thus the learned Chairman was bias.

Evidence in courts in our country including the tribunals is recorded by hand writing by way of long hand. I had time to read thoroughly the proceedings of the trial tribunal which include the hand written and the typed proceedings. Both typed and hand written evidence reveal that the recording was by way of long hand. Courts record is considered to be sacred and a heart of judicial administration in determination of cases. That being the case courts record cannot easily be faulted. In the case of **Selemani Juma Masala vs. Sylivester Paul Mosha & Another**, Civil Reference No. 13 of 2018 Court of Appeal of Tanzania at Dar es Salaam it was observed in part; -

> *"We must emphasize that the record of the court is always taken to be authentic unless the contrary is proved. It is in this regard that in Halfani Sudi v. Abieza Chichifi v. The Republic (1998) TLR 557 the Court stated*

that: - " A court record is a serious document; it should not be lightly impeached; there is always a presumption that a court record accurately represents what happened".

The allegations raised by the appellant about the record were not specifically replied by the respondent. The respondents generally submitted that the appellants evidence was weak, thus proper analysis and evaluation ended in favour of the respondents though the appellant could not substantiate how the evidence was not evaluated. To reflect back, the trial tribunal entered its decision on 26th August 2022 and the copy of the proceedings were availed to the parties for further actions including appeal purposes. The appellant has not laid foundation to establish that the records were not recorded in full to persuade the court to rule otherwise against the records of the tribunal. In short there are allegations raised by the appellant against the records but he could not expound the alleged omission.

In view of the circumstance of the complaint, I confidently hold that the record of the trial tribunal reflects what transpired, thus I cannot therefore take the mere allegations raised by the appellant. On the complaint about the analysis and evaluation of evidence I am not persuaded by the stance suggested by the appellant that evidence was not properly evaluated. I

had time to read thoroughly and weigh out the evidence of both parties. I am in agreement with the argument of the respondent that evidence was accurately analysed and evaluated in order to end with a fair and balance decision.

The appellant testified as PW1 during trial. In his testimony he testified that '*Nadai ardhi yangu'* but he could not elaborate on how he came to own the suit land and for how long he has been owning the same. But during cross examination he said that the land was not his property but the property of his parents. His testimony could not prove on the balance of probability that he was the owner of the suit land. The respondents testified as DW1. He said that he was allocated the suit land by the village authorities of Isangu village in 1983. He was living there since 1988 making a total of 38 years living there. He has been living there without any form of interruption in presence of the appellant and during life time of the appellant parents. In 2010 he harvested part of his trees and he allocated the piece of land to the 3rd respondent. It was his testimony also that around 2020 he sold part of the suit land to the 2nd respondent. The appellant has been living not far from the suit land but he never complained that his land has been invaded. The testimony of DW1 was corroborated by DW2 Erasto Sikamenya and DW3 Subira Lwinga. In

weighing the pieces of evidence from both sides it is without doubt that the respondents proved their case on the balance of probability the legal standard in civil cases. If it was true that the appellant was the owner it will not be understood why he stayed silence for the whole time from 1983. All the respondents have constructed residential houses at the premise, still he remained silence till recent when he filed the application. With due respect to the appellant, I am of the firm view that the trial tribunal properly analysed and evaluated the evidence before it, and ended with a balanced and fair decision as pointed out before.

The 3rd ground of appeal as raised by the appellant was failure to visit locus in quo. On this ground of appeal, the appellant admitted that visiting locus in quo is not a legal requirement as argued by the respondent. He said that it is a matter of practice in order to cross check evidence received and the scene. He cemented that in this case such visit was necessary. The respondent in his part did not submit specifically on the issue of visit locus in quo though he commented that it was not a legal requirement. I was keen to read thoroughly the proceedings before the trial tribunal and noted that neither party requested the tribunal to visit locus in quo. The fact that neither party to the case requested to visit locus in quo it means the appellant expected the tribunal on its own motion to order visit locus

in quo depending on nature and facts of the case. It has been observed in the case of **Yeseri Waibi** (supra) as cited by the appellant courts avoid the risk of being witnesses through locus in quo which means courts are very keen during locus in quo to avoid being witnesses and in the other circumstance, they do not easily entertain locus in quo where there is no need to do so as it happened to the instant case. I am aware that there is no law which dictate the tribunal or the courts to conduct the visit locus in quo but wherever such visit is done, it is done at the discretion of the court depending to the nature and circumstance of the case as the court will deem fit. This legal position has been emphasized in a number of the judicial decisions including the case of **Sikuzani Saidi Magambo & Another vs. Mohamed Roble**, Civil Appeal No. 197 of 2018 Court of Appeal of Tanzania at Dodoma. In the circumstance where such visit is done, the courts are forced to comply to the guidance of visit locus in quo as laid in the case above. In the present case such visit was not done, one cannot be heard to blame against the discretion of the tribunal which was exercised judiciously. There is no legal harm that the trial tribunal did not conduct visit locus in quo. This ground of appeal has no merit at all.

The 4th and 6th grounds of appeal will be considered together. In the fourth ground of appeal the appellant attempts to fault the evidence of a

village leader who could not tender documentary evidence and in the sixth ground of appeal he complains that the tribunal erred to consider the evidence of Rais Damas Mwampashi who was the Chairman of the Hamlet when the appellant was given such land. These two grounds of appeal will not take long to be reduced into nothing because proof of any fact does not necessarily need documentary evidence. In the present case there is direct evidence that the 1st respondent was the owner of the suit land since 1983. He had been in continuous use of the same peaceful save for these few years which the appellant emerged claiming ownership. Therefore, the oral evidence of the village leader meets the standard of oral evidence as provided by section 61 and 62 (1) of the **Evidence Act** which require oral evidence must be direct to prove a certain fact. In his testimony before the tribunal the appellant testified nothing about the way he got the suit land as noted herein earlier. He cannot be understood when he says, that at the time when he was allocated such land Rais Damas Mwampashi was a chairman. Having said and done I think these two grounds of appeal are unmerited. The last ground of appeal as raised by the appellant dies a natural death because it lacks support from the testimony of the appellant as determine in the ground of appeal about analysis of evidence.

From what has been endeavoured to discuss, I am of the settled view that the trial tribunal correctly entered its verdict. The appeal is hereby dismissed with costs.

Dated at Dar es Salaam this 23rd day of February 2024.

D. P. Ngunyale

JUDGE

23rd Febr. 2024

The Judgment delivered this 23rd day of February, 2024 in the presence of 1st and 2nd respondents and in absence of the appellant and 3rd respondent vide video link from chamber at Mbeya High Court.

D. P. Ngunyale

JUDGE

23rd Febr. 2024