IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 44 OF 2023

(Originating from judgment and decree of the District Land and Housing Tribunal for Babati at Babati, in Land Application No. 58 of 2021)

MELAU SAILEVU..... 1ST APPELLANT

CHOKO MAIBUKO..... 2ND APPELLANT

VERSUS

LUCAS LOIBANGUTI.....RESPONDENT

JUDGEMENT

12th December, 2023 & 22nd February, 2024

Kahyoza, J.:

Lucas Loibanguti (the respondent) sued **Melau Sailevu** and **Choko Maiboku** for trespass to his land measuring 233 X 150 paces. The appellants vehemently opposed the claim. The District Land and Housing Tribunal for Babati at Babati (the tribunal) decided in favour of the respondent, declaring him the lawful owner of the suit land, measuring 6 acres, and order for vacant possession and permanent injunction against the appellants together with an award for Costs of the suit.

Aggrieved, **Melau Sailevu** and **Choko Maiboku** appealed to this court raising three grounds of appeal, to wit-

1. *"That, the trial tribunal erred in law and in fact for failure to interpret, evaluate properly and consider the evidence tendered before it by both parties.*
2. *That, the trial tribunal grossly erred in law and fact for failure to consider that the dispute of land between parties were on the boundaries of the concerned lands, thus the trial tribunal erred not to visit locus in quo as prayed by the respondent.*
3. *That, the trial tribunal erred in law and fact for failure to consider the law before and during the hearing and deciding the matter at hand."*

A background is that; **Lucas Loibanguti**, (Pw1) purchased land from one Idd Doa in 2008 through his relative one Wilson Loibanguti. Wilson Loibanguti handed the purchased land by deed to **Lucas Loibanguti**, (Pw1). The handing over deed and the sale agreement were collectively admitted as exhibit **P1**. That the suit land, measures 6 Acres, located at Gejedabong village within Babati District. It is alleged that in October 2021, the appellants trespassed to his land, destroyed respondent's trees and sisal plants. **Wilson Loibanguti,** (**Pw2**) testified to have bought the suit land (measuring 233 by 150 paces) on 20/10/2008 from Idd Doa on behalf of

Lucas Loibanguti, his relative. The boundaries; Paulo Elius (East), Idd Doa (West), the road (North) and a valley (South). That he handed over the said land by executing a handing over deed to **Lucas Loibanguti**, (Pw1) on 13/10/2021. He identified exhibit P1. He testified that **Lucas Loibanguti**, (Pw1) occupied the suit land peacefully for 13 years.

Paulo Hhalahaly, (Pw3), the then Hamlet chairperson of Kambini "B", stated that at one time he was involved as witness in a sale agreement between Wilson (**Pw1**) and Idd. He was the hamlet chairman from 2005 to 2010. And that he was the author to the sale agreement and a witness to the handing over deed, he acknowledged the authenticity of the same as it was admitted collectively as exhibit P1.

Melau Sailevo, (**Dw1**), testified that he never trespassed to the suit land but that his land is adjacent to Lucas Loibanguti's land, as he is on the northern side of the suit land, and there is a valley which cut across his land. He acquired the said land by clearing the bush and the village government validated or authorized his occupation of land in 2002. That it was the respondent who encroached to his land measuring 44 by 2 by 30 by 47 paces l in the year 2021. He deposed that a settlement was reached regarding the

disputed boundaries. He tendered the settlement agreement admitted as exhibit D1. That he shares Eastern border with Choko Maibuko.

Choko Maibuko, (**Dw2**) testified that he did not trespass any land. He admitted that his land borders the respondent's land. That it is the respondent who encroached his land by 40 paces in the year 2022. That the village government placed beacons in 2019 to demarcate their lands. The valley area was demarcated and reserved.

Seuri Meibuko, (**Dw3**) testified that he is in the same neighbourhood with the appellants. That the suit land was formally owned by Idd Doa. He shares a northern border with the respondent. And that the valley area was demarcated. In the early 2022, the village government placed beacons. That the respondent bought the whole land that was formally belonged to Idd Doa.

The tribunal as stated above found in favour of the respondent. The appellants appealed raising three issues for determination as follows-

1. Did the trial tribunal fail to analyze and evaluate evidence availed?
2. Did the tribunal err or failure to observe the laws?
3. Is this appeal meritorious?

This court being the first appellate court is required to re-evaluate the evidence on record and if necessary to arrive at a conclusion different from that of the trial court. 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. "*

The appellate court must act judiciously when dealing with the findings of facts by the trial court which had an advantage ***of seeing and hearing the witnesses*** as held in **Peters Vs. Sunday Post Limited (1958) EA 424** at page 429 that -

> *"It is a strong thing for an appellate court to differ from the finding, on the question of fact, of the judge who tried the case and who has had the* ***advantage of seeing and hearing the witnesses****. The appellate court has indeed jurisdiction to review the evidence in order to determine* ***whether the conclusion originally reached upon that evidence should stand****. But this* ***is a jurisdiction which should be exercised with caution****; it is not enough that the appellate Court would itself have come to a different conclusion".*

It is also settled that not every error the tribunal may have committed, which entitles this court to alter or nullify the decision as provided by section

45 of **the Land Disputes Court's Act**, [Cap. 216 R.E 2019] (the LDCA) which states that-

> *"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 added)*

Did the trial tribunal failed to analyze and evaluate evidence availed?

Mr. Joseph Mwita Mniko, the appellant's advocate, complained that, the tribunal failed to interpreter, evaluate properly, and consider the evidence tendered before it by both parties. He contended that the respondent and his witness never testified as to the acres of land the appellants were alleged to invade. There was no evidence whether the appellants invaded the land severally or jointly. He contended that the respondent's evidence was too general that, the appellants invaded his 233

X150 paces of land which was equal to 6 acres of land. He added that the tribunal also failed to consider the evidence from the appellants.

The respondent's advocate's submission was that the tribunal did properly evaluate the evidence and interpret the evidence. He added that the respondent explained how he acquired title to six acres of land. He added that the respondent indicated that the appellants invaded his land.

I considered the evidence on record, which revealed that the parties owned adjacent lands. The pivot of the dispute is the boundary between the parties' adjacent pieces of land. The appellants' claim is that their land extend crossing the valley *"Korongo"* whereas the respondent's claim is that his land extend up to the valley *"Korongo"*. To the respondent, the valley, *"Korongo"* is the border between him and the appellants.

The respondent traces his title to the disputed land from one person called Idd Dao. The appellants, Melau Sailevu (**Dw1**) and Choko Maibuko (**Dw2**) do agree that Lukas Loibanguti bought his land from Idd Dao. There is another defence witness, Seuri Meibuko (**Dw3**) who deposed that the suit land belonged to Idd Dao. He deposed that "*shamba lenye mgogoro lilikuwa la Idd dao*" literally meaning "*Idd Dao was the owner of the disputed land*".

Seuri Meibuko (**Dw3**) added later that Idd Dao's land did not extend to the valley. There is no dispute that Idd Dao passed title by way of sale to the respondent. Lukasi Loibanguti (**Pw1**), the respondent, deposed that he bought the disputed land from Idd Dao. The sale contract was executed between Idd Dao and Wilson Loibanguti (**Pw2**) on behalf of Lukasi Loibanguti (**Pw1**). Wilson Loibanguti (**Pw2**) tendered the sale agreement. The tribunal admitted the sale agreement as Exhib. P1.

Indisputably, Lukasi Loibanguti (**Pw1**), the respondent, acquired title to the disputed land by buying it from Idd Dao. The sale agreement among other things, it specifies that on the Southern border was a valley, "*korongo*". The sale was executed in 2008. The disputed emerge on or around 2021. It was almost after 13 years from the date the sale contract was executed.

Apart from that the sale agreement, Paulo Hhalahaly (**Pw3**), who was the hamlet chairman and a witness to the sale, testified to that the respondent's land extended to the valley *"Korongo"*. He deposed that he was the hamlet chairman from 2005 to 2010. Part of his evidence reads-

"Mipaka ni Kusini nikorongo na Magharibi Idd Dawa..." literally meaning "the borders were, on the North was a valley and on the West was Idd Dawa.."

I find that the respondent proved by balance of preponderance that the he procured land from Idd Dao and on the Southern border lies a valley *"Korongo"*. Having re-evaluated the evidence as shown above, I am of the view that the tribunal's failure to analyse the evidence is not fatal and cannot be the ground for this Court to alter the decision of the tribunal. For that reason, I find no merit in the first ground of appeal.

Did the tribunal fail to consider any law?

The appellants' advocate's main complaint was that the tribunal rejected the invitation to visit the *locus in quo*. he submitted that the tribunal was required to visit the *locus in quo* to satisfy itself on the boundaries and the physical features of the given land. He argued that the respondent claim was that the appellants had trespassed to his land measuring 233 x 150 piece of land whereas the appellants claimed that the appellant had invaded their land measuring 30X44 paces in case of the first appellant land, and 70 x 40 paces, in case for the second appellant. To support his argument, he

cited the case of **Martin Mgando v. Michaele F. Mayanga**, Land Appeal No. 93 of 2019, HC (T) Land Division.

Mr. Joseph Mwita Mniko, the appellants' advocate, added that the trial chairman misapprehended facts of the case, for instance failure to grasp the fact that there were conflicting contentions of parties as to the issue of boundaries and the identity of the suit land, which called for a visit in *locus in quo.*

In rebuttal, Mr. Lucas Loibanguti submitted that visit to a *locus in quo* is not a mandatory procedural requirement, save for matters related to boundaries of the suit land being at the heart of the dispute, citing the rule in **Mhela Bakari vrs. Manoni Bakari**, Land Appeal No. 23 of 2021 High Court of Tanzania, at Shinyanga (unreported).

In the case of **Avit Thadeus Massawe vrs. Isidory Assenga**, Civil Appeal No. 6 of 2017 (unreported) in determining the propriety or otherwise of visiting the *locus in quo*, the Court of Appeal relied on the decision of the Nigerian court in **AKOSILE VS ADEYE** (2011) 17 NNWLR (Pt 1276) p.263 where it was held-

"The essence of a visit in locus in quo in land matters includes location of the disputed land, ***the extent, boundaries and boundary neighbour, and physical features on the land****. The purpose is* ***to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects.****"*

In the present case, visiting the *locus in quo* was important but not indispensable as there was sufficient evidence on record to resolve the dispute, which was over the boundary. All parties and witnesses were in agreement that Lucas, the respondent procured his land from Idd Dao, thus, his title was limited to the title Idd dao had at the time of entering the sale agreement. The boundary was said to be the valley *"korongo"*. The first appellant deposed that he acquired the land by tilling the virgin and the village authorities validated his occupation and ownership in 2002. He had no document to prove the extent and the boundaries of the land, allocated to him. I therefore, find that the respondent sufficiently proved the boundaries, hence, the tribunal properly determined the dispute without visiting the *locus in quo*. There is no merit in the second ground of appeal.

Is this appeal meritorious?

The last issue to consider is whether the appeal was meritorious.

The appellant's advocate argued that the tribunal failed to consider section rule 22 (b) and section 47(1) of the **Stamp Duty Act**, [Cap. 189 R.E. 2019]. He submitted that the section 5 of the Act requires that every instrument specified in the schedules to the Act executed in Tanzania Mainland be chargeable to the duty. He added that rule 22 (b) requires all conveyance documents to be subject to the payment of stamp duty fee to put them into effectiveness and section s. 47(1) requires all document chargeable with duty not to be admitted in evidence unless being stamped. To support his contention, he cited the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] TLR 211.

It is trite law that, omission to a pay stamp duty in accordance with section 45 (a) (i) read together with section 5 and the Schedule, both of the **Stamp Duty Act**, rendered the document inadmissible as evidence in court. The position was taken in the case of, among others, **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] T.L.R 21. Failure to stamp the document does not render it useless. Unstamped documents are not useless documents, a court may admit such documents and rely upon them after stamp duty is paid, as held in the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** (supra). It is however, improper for a court to admit

and act on unstamped document. For that reason, I find merit in the appellant's advocate complaint that the trial tribunal erred to admit and rely on the unstamped exhibit. Consequently, I expunge Exh.P.1 from the record. I wish to emphasis that even after, expunging the sale agreement, there is still ample evidence to establish that the respondent's land extended up to the valley "korongo". The evidence of Paulo Hhalahaly (**Pw3**), the hamlet chairman and a witness to the sale agreement proved that the respondent land extended up to the valley "korongo".

I wish to rely on the principle, stated in the criminal appeal of **Issa Hassan Uki V. R**, Criminal Appeal NO. 129/2017 (CAT unreported), which I believe it applies to this case, where the Court of Appeal having expunged the exhibit and may rely on the evidence of the witness which covers the contents of the exhibit. It stated-

> *"However, we haste the remark that even without Ext. P3, the testimony of Anthony Ndorozi Penia (Pw4) is quite sufficient to cover the contents of Exh. P3."*

In the end, I find the appeal without merit, and dismiss it. I find for the respondent that the disputed land belonged to Idd Dao and Idd Dao's land extended up to the valley (Korongo) on the Southern part. The boundaries between the appellants and the respondent is as described by

Paulo Hhalahaly (**Pw3**), is the valley "korongo". Consequently, I uphold the tribunal's judgment and dismiss the appeal in its entirety with costs.

It is ordered accordingly.

Dated at **Babati** this 22nd day of February, 2024.

J. R. Kahyoza

JUDGE

Court: Judgment delivered in the presence of the parties. Ms. Fatina (**RMA**) is present.

J. R. Kahyoza

JUDGE

22/02/2024