

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 38 OF 2023

(Arising from the District Land and Housing Tribunal for Muleba, Land Application No. 39/2020)

NOVART MAGEMBE..... APPELLANT

VERSUS

THEOFILO BWAKEA..... RESPONDENT

JUDGMENT

19th and 23rd February, 2024

BANZI, J.:

Before this court, the appellant, Novart Magembe has appealed against the decision of the District Land and Housing Tribunal for Muleba (the trial tribunal) in Application No. 39 of 2020 which declared the respondent the lawful owner of the disputed land.

Briefly, at the trial tribunal, the respondent alleged that, the appellant encroached his land measuring 88 paces width and 235 paces length which he bought in 2015 from Eunice Kaindoa (PW2), the appellant's aunt, who inherited it from her father, Gabriel Kaindoa. In his evidence, he contended that, before purchasing that land, he made inquiry on its legality and he was assured by Ignatio Shumbusho (PW3), the administrator of estate of Gabriel Kaindoa that, it had no any encumbrances. After such inquiry, he purchased

it for Tshs.22,000,000/=. However, in 2020, the appellant encroached it and sold it in portions to Matungwa Philip, Sophia Katanga, Denita William, Advera and Geoffrey Njenga, (1st, 3rd, 4th, 5th and 6th respondents before the trial tribunal) who are not part to this appeal. The respondent's allegation was supported by the vendor, Eunice Kaindoa (PW2), Ignatio Shumbusho (PW3), the clan member Elisa Kaindoa (PW4) and Alkanjera Audax (PW5), the hamlet chairperson.

The appellant in his defence contended that, after the death of their mother, Verdiana Kaindoa, they inherited her land measuring 314 paces length and 120 paces width. They knew the size of that land after being shown by PW3 in 2017. After being shown, they fenced half of it and built a two-room foundation and thereafter they returned to Dar es Salaam. Sometimes later, they were informed that, their land was invaded by PW2 in collaboration with Eliezer Rutazamba and Shedrack. He filed the case at Izigo Ward Tribunal where it proceeded ex-parte after PW2 failed to appear and eventually, he won that case. However, while in the process of execution, he was informed that, he was sued before the trial tribunal for encroaching that land.

After hearing both sides, the trial tribunal decided in favour of the respondent by declaring him as the lawful owner of the suit land. Dissatisfied

with such decision, the appellant lodged this appeal comprising four grounds thus;

- 1. That, the Trial Tribunal erred in law and fact by quashing the judgment and proceeding of the Izigo Ward Tribunal in Case No. 59/2020 on the ground of non-joinder of the parties since the opposing party was summoned 3 times but did not appear nor send a representative.*
- 2. That, the Trial Tribunal erred in law and fact for stating that the appellant failed to prove ownership of the land while all witnesses brought before the Tribunal testified that half of the land belonged to one Verdiana Shumbusho who is the appellant's mother and the other half belonged to PW2.*
- 3. That, the Trial Tribunal erred in law and fact granting the whole land to the respondent without considering the boundary set thereon as testified by PW2, PW3 and PW5.*
- 4. That the Trial Magistrate (sic) erred in law and fact by deciding the case in favor of the respondent while the matter was proved by the appellant on the required standard in civil cases.*

At the hearing, the appellant appeared in person, unrepresented whereas Mr. Elieza Rutazamba appeared on behalf of the respondent under the special power of attorney duly registered on 5th September, 2023.

In his submission, the appellant stated that, the trial tribunal erred to quash the decision of Izigo Ward Tribunal where he won the case against PW2 who was the previous owner. Concerning the second ground, the appellant claimed that, before the trial tribunal, his witness proved that, part of the land belonged to his mother and he produced the judgment of the Ward Tribunal. However, the Chairman failed to consider such evidence. On the third ground, the appellant contended that, the chairman erred to grant the whole land to the respondent without considering the boundaries. Concluding with the fourth ground, he stated that, he proved his case against the respondent. He prayed for the court to consider his evidence and make just decision.

On his part, Mr. Rutazamba on behalf of the respondent briefly stated that they have not exceeded the boundaries and they were never summoned by the Ward Tribunal. In his brief rejoinder, the appellant prayed for this court to consider the law and give them their rights.

Upon being probed to address the court on whether this was the fit case for the trial tribunal to use its discretion to visit the locus in quo, the appellant submitted that, the trial tribunal was supposed to visit the locus in quo. On his side, Mr. Rutazamba on behalf of the respondent contended

that, there was no need to visit the locus in quo because, there was ample evidence to establish that, the appellant invaded their land.

I have carefully considered the arguments by both sides in line with evidence on record. Before the trial tribunal, each party tried to show how he is entitled to the suit land. While the appellant, on behalf of his siblings, contended to have inherited it from their mother, the respondent alleged to have bought it from PW2, the sister of the appellant's mother. In proving his ownership, the respondent summoned PW3, the administrator of estate of Gabriel Kaindoa, who distribution the estate of the deceased to the appellant's mother and PW2. PW3 testified that, the respondent is the lawful owner of the suit land. The respondent further summoned the hamlet leader who witnessed the sale agreement. In her testimony, she stated that, she witnessed the sale agreement between PW2 and the respondent. It was further her testimony that, she even witnessed the sale agreement when the appellant sold his land. According to her, the sale of land to the respondent was lawful contending that she had knowledge of the land of PW2 measuring 235 paces length and 88 paces width and there was a trench between the land of PW2 and that of Verdiana.

On the other side, the appellant contended that, after the death of their mother, they went to Muleba and approached their uncle, PW3

requesting him to show them their mother's inheritance. After being shown that plot, they fenced part of it, built a two rooms foundation and they returned to Dar es Salaam. He also stated that, they have already sold part of their land to six people. However, after returning to Dar es Salaam, that foundation was destructed by PW2 and Elieza Rutazamba. When he returned to complain to his uncle for such destruction, he did not cooperate contending that, he had already finished his job of distributing the properties to the heirs and therefore, it was PW2 who was concerned with that land.

From the evidence of both sides, it is undisputed that Verdiana is dead. It is also undisputed that, the land sold to the respondent is measuring 235 x 88 paces. However, there is no proof if the land was ever distributed between PW2 and Verdiana because, PW3 and PW4 stated that, the clan had never participated in distributing that land between the two. Also, PW3 stated that, after distributing that land to PW2 and Verdiana jointly, the duo had never installed permanent boundaries between their land. Therefore, it is clear that, before selling, the whole land was jointly owned by PW2 and Verdiana. Although PW2 and the PW5 stated that the land between PW2 and Verdiana was demarcated by a trench and natural boundaries '*Bianya*', it is not known who demarcated the land between the two sisters considering that PW3 and PW4 stated that, after distributing that land to PW2 and

Verdiana, they do not know how the two partitioned the said land between themselves. On the other hand, although PW2 conceded to have sold 235 x 88 paces, the records are silent on the measurement of the whole land that was bequeathed to PW2 and Verdiana.

From what has been stated above, before reaching into the decision, the tribunal had to satisfy itself on the correctness of the boundaries between the two owners. Notably, there is no law that forces the tribunal to visit to locus in quo but rather, it is in the discretion of the tribunal, either on its own motion or by prayer from any party to make a visit as it was held by the Court of Appeal in **Bomu Mohamed v. Hamisi Amiri** [2020] TZCA 29 TanzLII that:

"...we would like to put it clear that a visit to the locus in quo is purely on the discretion of the court. It is done by the trial court when it is necessary to verify evidence adduced by the parties during trial. There is no law which forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo."

However, there are circumstances that demand the tribunal or court to visit the locus in quo even where there is no such prayer by either party, for example, **one**, to verify the evidence adduced by parties during trial and **two**, where there is no clear description of the land. In this case, although

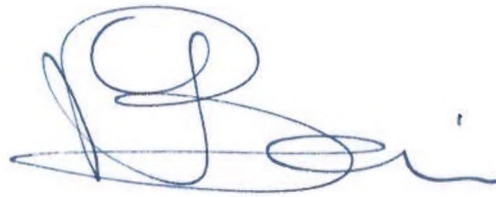
there was no prayer by either party to make a visit, I am of the considered view that, there was a need for the trial tribunal to visit the locus in quo before determining the application because of the following reasons; firstly, PW2 conceded that she owned that land jointly with her sister Verdiana who was entitled to get equal share. Secondly, PW2 contended that, her land and that of Verdiana was demarcated by the road and natural boundaries '*Bianya*'. Thirdly, neither party proved the measurement of the whole land, apart from DW2, the ward tribunal's secretary, who contended that, the land is measuring 624 paces lengthy and 120 paces width.

From the above controversies, I join hands with the appellant that, this is a fit case for the trial tribunal to exercise its discretion to visit the locus in quo and in order to determine the case justly, with clarity and certainty in view of the conflicting evidence in respect of the boundaries of the suit land between PW2 and Verdiana. Since the appellant complained that PW2 exceeded the boundaries to their land, the tribunal would be able to determine that issue properly by making a visit.

For the foregoing reasons, I am inclined to invoke the provisions of section 43 (1) (b) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] to nullify the proceedings starting from the part when DW1 closed his defence on 16/03/2023. I quash the judgment and set aside the decree of trial

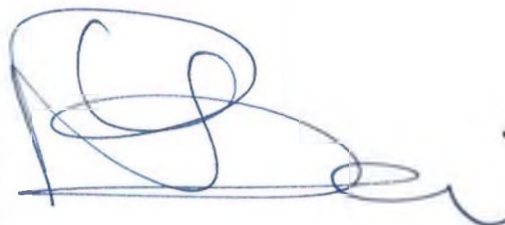
tribunal. I hereby remit the case file back to the trial tribunal for it to visit the locus in quo before taking afresh the opinion of assessors and recomposing the judgment. It is also ordered that; the trial tribunal shall follow all legal procedures concerning visiting the locus in quo. Considering the circumstance of the case, I make no order as to costs.

It is so ordered.



I. K. BANZI
JUDGE
23/02/2024

Delivered this 23rd day of February, 2024 in the presence of the appellant, Mr. Elieza Rutazamba on behalf of the respondent, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, B/C. Right of appeal duly explained.



I. K. BANZI
JUDGE
23/02/2024