IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

LAND APPEAL NO. 119 OF 2023

(Arising from the decision of the District Land and Housing Tribunal for Morogoro at Morogoro in Land Application No. 142/2018)

DR. CALISTER MGENI MAYOMBANA (Suing as an Attorney of Dr. Charles C. Mayombana).....APPELLANT

VERSUS

EVARISTO MWALONGO.....1ST RESPONDENT

MASUMBUKO MAULID BAGAYA.....2ND RESPONDENT

ASHA HUSSEIN.....3RD RESPONDENT

EZAKIEL DAUDI KAFUKU.....4TH RESPONDENT

SAMOLA MWENDO.....5TH RESPONDENT

JUDGMENT

08/04/2024 & 30/05/2024

KINYAKA, J.:

In the present appeal, the appellant, Dr. Calister Mgeni Mayombana is attempting to assail the decision of the District Land and Housing Tribunal for Morogoro, herein after "the Tribunal" in Land Application No. 142 of 2018 that declined among others, her prayers for a declaration that she is the

lawful owner of a parcel land measuring twelve acres located at Maili kumi na nane in Mvomero District within Morogoro Region. In her petition of Appeal, the appellant has presented the following grounds of complaint:

1. That the trial Tribunal erred in law and fact in deciding the matter in favor of the first respondent as a result of improper analysis of evidence adduced before for trial;
2. That the trial tribunal misdirected itself based its decision on an offer of right of occupancy, the location of which is not of the disputed land;
3. That the trial tribunal erred in law and fact in holding that the 1st respondent land measured forty acres (40) the fact of which was never proved at *locus in quo*;
4. That the trial tribunal erred in law and fact for failure to appreciate the evidence that the land that the first respondent claims to be his, was not surveyed, the fact of which raise doubt as to the validity of his offer of a right of occupancy;
5. That the trial tribunal erred in law and fact for visiting *locus in quo* without assessors;
6. That the trial tribunal erred in law and fact to order cost for the first respondent as against the appellant.

The appeal was canvassed by way of written submissions. Mr. Gabriel Kitungutu, learned advocate represented the appellant while the 1st respondent had the legal services of Ms. Patricia Pius, also learned advocate. The appeal proceeded *ex parte* against the 2nd, 3rd, 4th, and 5th respondents following their failure to enter appearance despite being served by substituted service made on the Mwananchi newspaper of 9th March 2024, 12th March 2024 and 15th March 2024.

In arguing for the appeal, the appellant's counsel proposed to consolidate and argue jointly the first and fourth grounds, the third and fifth grounds and separately argue the second ground while formally withdrawing the sixth ground of appeal.

Submitting in relation to the first and fourth grounds, Mr. Kitungutu contended that upon their review of the evidence on record, it is apparent that the trial Tribunal's efforts were primarily focused on discrediting the evidence presented by the appellant and that there was a clear lack of fair assessment of the evidence tendered by both parties. Elaborating on his contention, the counsel told the Court that the Tribunal dismissed the appellant's claim on the grounds that the land in question was part of the land owned by the first respondent and was surveyed despite there being

no evidence to support this claim as no approved survey plan was tendered or admitted into evidence.

The learned counsel referred the Court to trial tribunal's judgment on the last paragraph at the bottom of page 5 to page 12, and claimed that the same reveals a clear bias against the appellant's evidence. He added that from page 12 to page 16, the Tribunal appears to favor the evidence presented by the first respondent. According to him, the bias is evident and undermines the integrity of the Tribunal's decision-making process.

To that end, Mr. Kitungutu averred that as there was no proper evaluation of the evidence tendered and hence the decision arrived at should not be left to stand. To add weight to his submission, the counsel cited the decision of the High Court of Tanzania **in D.B Shapriya and Co. Ltd v. Mek One General Trader & Alcon Auction Mark Limited, Civil Appeal 197 of 2016** [2019] TZHC 167 (17 December 2019) where on page 8 the High Court stressed the need for objective evaluation of evidence by courts.

The appellant similarly submitted that the Tribunal wrongly perceived the Maili kumi na nane street as the allocation authority without taking due consideration of the evidence of PW6, Elizabeth Charles and PW4, Salehe

Muhede that the only way to be allocated with the land was through Kihonda Ward Development Committee [Baraza la Maendeleo la Kata].

He said, undoubtedly, the 2nd to 5th respondents occupied the pieces of land, now the suit property from 2006/2007 after being allocated at Ward Development Committee level and shown the same by the Maili kumi na nane Street Government to 2010 when they sold the same to the appellant. He highlighted that the 2nd to the 5th respondents occupied the land and cleared the bush as evidenced in PW1's documentary evidence, the sale agreement from which the compensation was made for it. Since there is no evidence of previous occupation of the pieces of land cleared by the 2nd to the 5th respondents, then the ownership is termed to be valid. To buttress his submission, the learned counsel referred the Court to the case of **Ramadhani Rashid kuhuka v. Jela Maiko and 44 others (land case No. 25 of 2022 TZHC 18312(16 June 2023)** at page 8 where the court held that there must as well be a proof that they had good title over the land in dispute before selling to another person, including, one; by allocation of Government authority, two; by purchase, three, inheritance, four gift, five, adverse possession, six; clearing of unoccupied bush.

He further cited the case of **Gidion John Mwikola and 19 others v. the Registered Trustee of Archdiocese of Dar es Salaam and 2 Others, Land Case No. 115 of 2017 [2022] TZHC Land D 42 (8 February 2022)** on page 26 para 3 and asserted that clearing of unoccupied bush is as good as means of ownership until the same is proved to be occupied before. Connecting the above authority to the case at hand, Mr. Kitungutu told the Court that there is no proof on the presence of pre-ownership/occupation of the suit property before the occupation by the 2nd to the 5th respondents except the allegation of the 1st respondent who claim to own the suit property after a purchase in 2012. In his view, the 1st respondent was duty bound to satisfy the Tribunal that the suit property prior to the occupation of the 2nd to the 5th respondents was either owned by him, his vendor or the giver of the offer of right of occupancy, the duty of which he failed.

He proceeded that the evidence by DW2 that the suit land was surveyed in 1980s contradicts both the testimony of DW1 who when cross examined admitted that he wrote a letter requesting to survey the farm in the year 2012 and that of the surveyor, William Charles, who informed the Court that the land was not surveyed. He concluded that since an offer of a right of

occupancy is granted to a surveyed land and since the 1st respondent's land was not surveyed then the possible outcome is that an offer of a right of occupancy in respect of the land located in Nguru ya ndege is not in any way connected to the suit property in this case which is Maili kumi na nane.

As regards to the second ground of appeal, Mr. Kitungutu elucidated that Exhibit DE2 (a purported offer of the right of occupancy) described the land as "all that piece or percel of land known as Farm No. 188 situated at Nguru ya Ndege, Morogoro District....." which is different Maili Kumi na Nane area that the first respondent had described through his written statement of defence.

He further attacked the plan accompanying Exhibit DE2 for not indicating several important aspects to make it reliable and authentic to wit; to which location does it refer, who drew it, where does the farm starts and end and the beacons and beacons numbers of the farm, if any. He cited the case of **Miriam Jeremia Solomon v. Zaramo Real Estate and 4 others [2023] TZHC Land D 16952 (2 October 2023**) and reminded the Court of a settled position that only approved survey plan could be relied upon to prove the size and location of land.

He also attacked Exhibit P13 and P14 for not qualifying in law to prove the correctness of the location and size of the land for want of approval by the Chief Surveyor (Director of Survey and Mapping) as per section 18 of the Land Survey Act, Cap. 324 R.E. 2022 and averred that the fact that the cadastral report does not have the approval of the Chief Surveyor, it cannot be relied upon.

He notified the court that, there is a Government Gazzete No. 220A of 31st March 2002 which is titled "tangazo la marekebisho ya uundaji wa Wilaya and which on page 1087 of paragraph 13 shows clearly that the area known as Nguru ya ndege and that named Maili kumi na nane are separate and different from one another. In that regard, he implored the Court to take a judicial notice of the same as it is a notice having force of law even though the gazzete was not tendered as evidence during trial.

As for the 3rd and 5th grounds, the learned counsel made a reference to the guidelines for *locus in quo* visit as set in the case of **Kimonidimitri Mantheakis v. Ally Azim Dewji & Others, Civil Appeal 4 of 2018** [2021] TZCA 663 (3 November 2021) on page 8 and 9 and that of **Hussein Kasomela & Another v. Anita Boniface Mapule, Land Appeal 25 of 2022) [2023] TZHC 21941 (19 October 2023)** which quoted with

approval the case **of Nizar M.H. v. Gulamali Fazal Janmohamed [1980] TLR 29**. He explained that according to the holding in the latter, among the guidelines is that the court should attend with the parties and their advocates if any. He added that other guidelines are allowing the parties and their witnesses to adduce evidence on oath at the *locus in quo* and cross-examination by either party, or his counsel. Citing section 23(1) of the Court (The Land Disputes settlements) Acts, 2002 [R.E. 2019], the learned counsel was bold to submit that as the District Land and Housing Tribunal is constituted when held by the Chairman and not less than two assessors, while attending the *locus in quo* the presence of Tribunal assessors was essential as they are part of the Tribunal.

He said, from the record it is evident that during the visit to the *locus in quo* neither the assessors nor the 1st respondent was in attendance in the visit leading into a conclusion that the visit was conducted in abrogation of the requirements of the law and guidelines as enunciated in the cited decisions above. He therefore prayed that the Honorable Court makes a finding that the whole decision and proceedings of the trial Tribunal are a nullity for contravening the mandatory requirements of the law. In totality of his submissions, the appellant's learned counsel implored the Court to allow the

appeal and grant all other reliefs as prayed in the appellant's memorandum of appeal.

Resisting the appellant's appeal, the 1st respondent's learned counsel firmly argued against Mr. Kitungutu's submissions. In relation to the first ground, Ms. Pius reminded the Court of the cherished principle on standard of proof in civil cases as provided under section 3(2)(b), 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2022 as amplified in the case of **Anthony M. Masanga v. Penina (Mama Mgesi) and Lucia (Mama Anna) Civil Appeal No. 118 of 2014** and averred that, it was correct for the trial Tribunal to decide the matter in favor of the first respondent herein basing on the evidence adduced at the trial since the appellant failed to prove his case as required by the law. She submitted that the first respondent herein managed to prove at the trial Tribunal the way he acquired the disputed land, and in so doing he proved that he bought the said land from one Hassan Yusufu and the copy of the sale agreement entered between the first respondent and Hassan Yusufu was tendered and admitted as exhibit "D1".

He went on submitting that since the 2nd, 3rd, 4th and 5th respondents did not have a legal title over the disputed land then even the appellant has no legal

title over the said land due to the existence of a latin maxim *Nemo dat quod non habet* which means no one gives a better title to property than he himself possesses as emphasized in the case of **Paschal Maganga v. Kitinga Mbarika, Civil Appeal No. 240 of 2017**, the Court of Appeal of Tanzania sitting at Mwanza, on page 8.

Attacking the alleged appellant's allocation of the suit land by the Kihonda Ward Tribunal, the learned counsel told the Court that there is no any evidence from Regional Commissioner who authorizes the disputed land to be allocated and also there is no evidence from Kihonda Ward Executive office which directed the said land to be allocated.

Putting reliance on the case of **Ombeni Kimaro v. Joseph Mishili t/a Catholic Charismatic Renewal, Civil Appeal No. 33 of 2017** on page 16 and 17 which underlined that the first person to acquire the disputed land is presumed to be the real and true occupier of that land, Ms. Pius informed the Court that the disputed land has been registered as Farm Number 188 which have total of forty acres and the letter of offer number 137814 of 1992 was tendered at the trial and admitted as Exhibit "D2". She said, the 12 acres in dispute is part of forty acres occupied by the first respondent which is shown in the letter of offer.

Replying on the fourth ground, the learned advocate submitted that the first respondent managed to prove the way he came into the ownership of the suit land by way of sale and the sale agreement was admitted by the trial Tribunal as Exhibit D2 as revealed on page 13 of the judgement of the Tribunal but also that the first respondent was the first person to be registered over that suit land.

She further told the Court that the trial Tribunal conducted a fair trial by following all legal procedures and afforded each part to argue its case and present its evidence and later rightly analyzed the presented evidence and reached into its just and fair decision.

Against the second ground, the learned counsel pressed that the trial Tribunal did give its decision on the exactly portion of land which was in dispute as per Regulation 3(2)(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174 of 2003 which was well amplified by this Court in the case of **Swaibu s/o Hassani v. Serikali ya Kijiji cha Wanga, Land Appeal No. 28 of 2020,** High Court of Tanzania (Land Division) at Tanga.

Explaining the pointed out discrepancy as to the location of the suit land, the learned counsel highlighted that the suit land is within Maili kumi na nane

area but previously it was within Nguru ya ndege area as appearing in the letter of offer and that at the time the letter of offer was issued, the land was within Nguru ya ndege but after declaration from the government recently, it is within Maili kumi na nane. She prayed for the second ground of appeal raised by the appellant to be dismissed.

As for the 3rd and 5th grounds, the learned counsel's submission was to the effect that the fact that the 1st respondent's land is measured forty acres was proved at the *locus in quo* by DW2 one Maneno Omary who participated at the time when the land was measured as reflected on page 12 of the judgment of Tribunal. She added that the size of the land was further proved by both the sale agreement which was entered by the 1st respondent and one Hassan Yussufu, and the fact that the 1st respondent who was the first person to be registered on the disputed land.

As to the claim that the Tribunal visited the *locus in quo* without assessors, the learned counsel asserted that the trial Tribunal was well constituted when it visited at the *locus in quo*, and the assessors who participated were Aularia Minja and Jane C. Mnganzija as reflected on page 2 of the decree of the trial Tribunal. She cited section 23(1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 and the case of **Tubone Mwambeta v. Mbeya**

City Council, Civil Appeal No. 287 of 2017, and that of **Edina Adam Kibona v Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017**, which emphasized on the requirement of the participation of assessors in the proceedings of the District Land and Housing Tribunals.

She also referred the authorities in the cases **of Kimonidimitri Mantheakis v. Ally Azim Dewji and 7 others, Civil Appeal No. 4 of 2018, Nizar M.H. Ladak v. Gulamali Fazal Janrnohamed [1980) T.L.R 29** and of **Swaibu s/o Hassani v. Serikali ya Kijiji cha Wanga, Land Appeal No. 28 of 2020 on page 7 and 8** and submitted that the assessors participated at the locus in quo.

Basing on the above submissions, the 1st respondent prayed that this appeal be dismissed in its entirety with costs and the Judgment and decree of the trial Tribunal be upheld.

In his rejoinder, the appellant's advocate reiterated his submissions in chief. As for the first and fourth ground he elaborated that the issue of the acquisition of title by the Appellant from the second and third respondent was by way of compensation to the second and third respondents as evidenced by evidence tendered. He said, the two respondents did not deny having sold the suit land to the appellant. According to him, the evidence by

the first respondent was weak, shaky and unreliable and cannot be relied upon to conclude that the suit land was at any time lawfully allocated to Hassan Yusuf from whom the first respondent claimed to have acquired his title to the suit property.

He also pointed out that the 1st respondent's Counsel has not denied the existence of evidence of bias in the judgment of the trial Tribunal and therefore prayed that the Honourable Court finds that the appellant's contention in this ground merited.

As for the second ground, Mr. Kitungutu maintained that the description of the suit property as offered under paragraph 3 of the application was not disputed by the first respondent hence the address and location of the suit property should have been taken to be Maili Kumi na nane. He said, the evidence tendered by the first respondent did not match that description and there is no any evidence on record to prove the allegation that Nguru ya Ndege and Maili kumi na nane used to be one and the same place as in his view, if that was the case, it should have been placed on record by evidence. He further insisted that the alleged letter of offer tendered by the first respondent was not accompanied by any approved survey plan which is critical in locating the size and location of the property alleged to be owned

by the first respondent. The counsel added that the visit to the *locus in quo* is not on its own sufficient to prove that Nguru ya Ndege and Maili kumi na nane used to be one and the same place or that the land alleged to be owned by the first respondent is at Maili kumi na nane contrary to its documented description. As such, he stressed that the trial Tribunal's holding that the suit land is part of the first respondent's land was made without there being any sufficient evidence to warrant that conclusion.

Rejoining on the third and fifth grounds regarding violation of the law and wrong approach to the evidence collected from the *locus in quo*, the learned advocate maintained his contention that the assessors did not partake in the visit to the *locus in quo*. In his view, a mere assessors' participation in the proceedings does not change the position that their non-participation in the visit to the *locus in quo* is fatal to the whole proceedings.

As regards to the size of the land owned by the first respondent, he substantiated that their claim is based on the absence of an approved survey plan which would have shown clearly not only the size but the location and demarcations of the alleged property. In the end, Mr. Kitungutu reiterated his prayers in his submission in chief that the appeal be allowed with costs.

I have careful read the submissions of the parties in support and against the grounds of appeal. For a fair determination of the present appeal, I have also read the judgement and proceedings of the Tribunal in Land Application No. 142 of 2018 hence the pleadings, oral testimonies and documentary evidence tendered by the witnesses and admitted in evidence by the Court. However, upon scrutiny of the grounds, I have decided to begin determining the third and fifth grounds of appeal as consolidated and argued by the parties together regarding the propriety of the Tribunal's visitation to the *locus in quo*. If need be, I will proceed to determine the remaining grounds of appeal.

The appellant's complaint in the fifth ground of appeal that the visitation to the *locus in quo* was conducted without assessors is not supported by the proceedings of the trial Tribunal. Page 78 of the typed proceedings reveal that the assessors, Ms. Jane Mngazija and Minja were present in the disputed land on 31st July 2023 when the Tribunal visited and conducted proceedings at the *locus in quo*. I have had an ample time to read the handwritten proceedings of the trial Tribunal. The same reveal that on 31st July 2023 when the Tribunal visited the *locus in quo*, the two assessors, Ms. Jane Mngazija and Ms. Aurelia Minja were present together with the applicant and

her advocate. The appellant's allegation is therefore disproved by the proceedings of the Tribunal which is taken to be the true reflection of what transpired before it during trial. Fortified by the decision of the Court of Appeal in the case of **Oscar John Bosco @ Jacob & Another v. R., Criminal Appeal No. 140 of 2018**, I hold that the record of the trial Tribunal carries the true record of the proceedings before it and cannot be easily impeached.

The above notwithstanding, in line with the ground raised as to the propriety of the proceedings during the visitation to the *locus in quo*, I have noted irregularities in the conduct of the said proceedings as reflected on page 78 of the typed proceedings and which is similar to the Tribunal's hand written proceedings. The proceedings read:-

> *"31/7/2023*
> *AKIDI – MWENYEKITI .....*
> *WAJUMBE: (1) Jane Mngazija*
> *(2) Minja*
> *Baraza: Mdai yupo na wakili wake Asifiwe Alinanuswe. Mdaiwa No. 01 yupo na wakili wake Patricia Mbassa. Mdaiwa No. 02 yupo na pia anawakilisha Mdaiwa No. 03.*
> *Baraza linatembelea ardhi ya mgogoro kwa utambuzi tu. Baraza lilikuwa na Mpima (Surveyor) kutoka Wilaya ya Mvomero*

(Halmashauri) aitwaye Willie Charles ambaye alionyesha alama za mipaka za ardhi ya Mdaiwa No. 01 za ardhi (demarcation point) mdai pia alionyesha ardhi yake. Akionyesha iko katikati ya eneo la Mdaiwa na 01. Mdaiwa No. 02 pia alionyesha ardhi aliyouza pia alionyesha kwa niaba ya mdaiwa No. 03, pia ipo katikati ya eneo la mdaiwa No. 01

-MCHORO

MWENYEKITI

31/7/2023

AMRI

Maoni & uamuzi 16/8/2023

MWENYEKITI

31/7/2023"

It is apparent from the proceedings of the *locus on quo* as reproduced above that what was recorded by the Tribunal were the observations of the Tribunal and not the actual account of the proceedings including the testimonies of witnesses who testified at the *locus in quo* including the Surveyor, the 1st respondent, and the 3rd respondent and whether they were cross examined. It is clear from page 16 of the judgement of the Tribunal, the Tribunal heavily relied on the testimony of the Surveyor who, according to the Tribunal, was the 1st respondent's witness. The excerpt of the Tribunal's judgement on page 16 paragraph 6 reads:-

".....Baraza, bila kufungwa (detained) na kiini hiki, Baraza lilitembelea ardhi ya mgogoro likiwa na wadaawa, ardhi waliyoonyesha ni ile ile, na pia Mjibu Maombi namba moja alionyesha vigingi (beacons) vya ardhi yake, ambavyo viko katika eneo lile lile. ***Mjibu maombi namba moja alileta shahidi ambaye alishiriki katika mchakato wa upimaji, alieleza kwamba mashamba yaliyopimwa, moja wapo ni shamba la mgogoro. Mabadiliko ya maeneo ya kiutawala, au kigezo cha utambuzi wa ardhi unaotumiwa na wapima (surveyor) kwa kutumia jina fulani la eneo, hayawezi kuondoa uhalisia katika ardhi bishaniwa.*** [Emphasis added]

I have carefully gone through the records of the lower tribunal. The Surveyor was not among the witnesses who testified at the Tribunal before the Tribunal visited the *locus in quo*. He was the witness who was called and testified at the *locus in quo* in favour of the 1st respondent. It means that the Tribunal succumbed to collection of new evidence which was not part of the evidence at the trial and from a new witness who was not among the witnesses during the trial.

It is a well-established position that the visit of the *locus in quo* is not mandatory, but is normally done only in exceptional circumstances. When it is necessary to conduct the same, the courts are bound to carry it out

properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because the visit is not for the purposes of filling gaps in evidence. It was held in the case of **William Mukasa v. Uganda [1964] E.A. 696** on page 700, Sir Udo Udoma G (as he then was) that:-

> *"A view of a locus in quo ought to be, to check on the evidence already given and where necessary and possible, to have such evidence oculary demonstrated in the same way a court examines a plan or a map or some fixed object already exhibited or spoken of in the proceedings....."*

Apart from the Tribunal's observation or report of what was testified, the proceedings does not indicate the exact testimony of the witnesses; if the witnesses' testimonies were taken under oath; and if parties were allowed to cross examine the witnesses. Further, the entire proceedings showing exactly what transpired at the *locus in quo* was not recorded. Again, there is no record of any view, opinion or conclusion of the Tribunal and no record that the same was made known to the parties and their advocates. The proceedings fall short of the requirements as articulated by the Court of Appeal in the case of **Kimonidimitri Mantheakis** (supra) on page 8

through to 9 which has been heavily relied by both the appellant and the 1st respondent in their respective submissions.

As there is no record of the proceedings evidencing what exactly transpired at the *locus in quo*, there is no account of what happened in absence of such record. Based on the irregularity, which I find to be fundamental, I cannot safely conclude that the proceedings at the *locus in quo* was conducted properly, transparently and fairly, according both parties the right to a fair hearing.

The irregularity occasioned a miscarriage of justice such that this Court, sitting as the first appellate Court, cannot properly re- evaluate the evidence adduced at the Tribunal including what had transpired at the visit in the *locus in quo*. The irregularity being fundamental, vitiates the proceedings and resulting judgment of the Tribunal. Consequently, I hereby nullify the proceedings of the District Land and Housing Tribunal of Morogoro at Morogoro in Land Application No. 142 of 2018, and quash the judgment and set aside the resultant orders. I order an expedited retrial before another Chairperson of the Tribunal.

Since this ground has sufficiently disposed of the entire appeal, I won't labour on the rest of the grounds.

In the circumstances, the appeal is allowed but considering the irregularity was occasioned by the trial Tribunal, I make no order as to costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 30th day of May 2024.

H. A. KINYAKA

JUDGE

30/05/2024