IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 164 OF 2022

(Originating from Land Application No. 2 of 2020)

AINEA KALEBI MKOMA (Administrator of the Estate of the Late Yoheli Mkoma.....**APPELLANT**

VERSUS

KILWA LABALA.....**RESPONDENT**

11/9/2023 & 29/01/2024

JUDGMENT

MWASEBA J.

At the District Land and Housing Tribunal for Kiteto at Kibaya the appellant herein unsuccessfully sued the respondent over the claim of land ownership measured at 68 acres. The suit land is located at Diringishi village in Kiteto District within Manyara Region. It was alleged by the appellant that the suit land belonged to his late father, who acquired it by clearing the forest from 2003 to 2005. On his side, the respondent testified that the suit land was allocated to his father by the village council, and thereafter, his father gave it to him. The Tribunal, after hearing the evidence from both sides, decided in favour of the respondent.

Aggrieved by the whole decree and judgment, the appellant has filed this appeal on the following grounds:

1. *The Trial Chairman erred in fact and law by failing to visit locus in quo despite having conflicting evidence regarding the suit property.*
2. *The trial chairman erred in law and fact by failing to properly record witnesses' testimonies by leaving material evidence unrecorded.*
3. *The trial chairman erred in fact and law by admitting into evidence the document which had already been rejected by the tribunal.*
4. *The trial chairman erred in fact and law by relying on hearsay evidence, which was never collaborated.*
5. *The trial chairman erred in fact and law by relying on the document whose authenticity was in doubt by reason of forgery without giving reasons.*
6. *The trial chairman erred in fact and law by allowing a person with interest in the case to act as an interpreter.*

7. *The trial chairman erred in fact and law by admitting the document into evidence without being read and identified by the witness.*

8. *The trial chairman erred in fact and law by delivering judgment without properly analysing testimony put before him.*

9. *The trial chairman erred in fact and law by delivering judgment on a land which was not in dispute leaving the land which was in dispute.*

10. *The trial chairman erred in fact and law by considering testimony given by another person than the appellant witnesses.*

In his additional ground of appeal, the appellant complained that the trial tribunal's chairman erred in law by delivering and pronouncing its judgment outside of the prescribed time.

During the appeal hearing, Mr. Erick Christopher learned counsel appeared for the appellant while Mr. Nicholous Senteu learned counsel represented the respondent. The appeal was disposed of by way of written submission. I commend both parties for adhering to the filing schedule. The same will not be summarised here but will be referred to in the process of determining the grounds for appeal.

I have gone through the submissions from both parties and the record, the main issue that calls for my determination is whether the appeal has merit or not.

Starting with the 1st ground of appeal, the appellant complained that the trial tribunal erred in law and fact for not visiting the *locus in quo*. While acknowledging that it is the discretion of the court or tribunal to visit *locus in quo*, Mr. Erick Christopher clarified that the case at hand necessitated the visit due to the contradictory facts as to the size and boundaries of the disputed land. So, the question of whether the appellant and the respondent were testifying regarding the same plot could have been resolved by visiting the *locus in quo*. To support his argument, he cited the cases of **Joseph Kereto v. Njachai Maripet and 8 others**, Misc. Land Appeal No. 23 of 2020 and **Avit Thadeus Massawe v. Isidory Assenga** both reported in the Tanzlii.

Responding to this ground, Mr. Senteu insisted that visiting the *locus in quo* is a discretional matter of the tribunal. He said the evidence of the parties did not raise any dispute about the size of the disputed land. Further, the appellant was represented, but his advocate never notified the tribunal about the necessity of visiting the *locus in quo*.

It is a legal position, as stated by both parties, that visiting the *locus in quo* is not mandatory; rather, it falls within the discretion of the court or tribunal. In the case of **Nizar M. H. Ladak v. Gulamali Fazar Jan Mohamed** [1980] T.L.R 29, it was clearly stated by the Court of Appeal that visiting the *locus in quo* aims at resolving any ambiguities in the case, including issues of ascertaining the size of the land, the actual location of the disputed land in cases where there is a controversy about its existence and location of a particular feature thereon, or where there is a dispute concerning boundaries of the disputed property.

Looking at the case at hand, nothing suggests the need for visiting the *locus in quo,* and its omission cannot render the decision unjust. The issue of the size of the land was made clear by both parties. As it was well submitted by Mr. Senteu learned counsel, the appellant was well represented at the tribunal, but his counsel never notified the tribunal of the need to visit the *locus in quo*. The same cannot be raised at this stage. Therefore, the 1st ground had no merit.

Coming to the 3rd and 7th grounds of appeal, Mr. Erick challenged the act of the trial tribunal for admitting the document that was previously rejected, and also, the documents were admitted without being identified. He complained about exhibit D1 (Proof of allocation of

land by village council), which was first rejected by the tribunal when DW1 wanted to tender it as an exhibit due to the fact that it was not annexed to the written statement of defence. Hence contravened **Regulation 10 (3) (a) and (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations,** 2003.

To his surprise, the trial chairman later allowed DW3 to tender the document and admitted the same as exhibit D2 despite objection regarding identification raised by the appellant's counsel, and still it was not annexed to the pleadings, and there was no compliance to the said **Regulations 10(3) (a) and (b)** of the said Regulations. Consequently, it denied the right to the appellant to properly cross-examine DW3 regarding the contents of the said document. To bolster his argument, he referred this court to the case of **Yara Tanzania Limited v. Ikuwo General Enterprises Ltd,** Civil Appeal No. 309/2019, Court of Appeal sitting at Dar es Salaam which discussed the importance of pre-trial disclosure of documents under **Order VII Rule 14 (2) of the Civil Procedure Code**. So, he prays for this exhibit to be expunged from the record.

Responding to this ground, Mr. Senteu admitted that when the respondent wanted to tender the exhibit, it was objected to by the

counsel for the appellant on the ground that it was not annexed to the pleadings. However, DW3 tendered the said document, which was not objected to by the appellant's counsel. So, there is nowhere in the records that shows that the same was objected to on the ground that it was not identified.

I have revisited the record. Indeed, there is confusion about how the trial chairman marked the exhibits. The record shows that Exhibit D1 was rejected and returned to the respondent. Then, later on, he proceeded to receive other exhibits and marked them as Exhibit D2 (agreement for hiring land), exhibit D3 (Judgment between the same parties), and again Exhibit D2 (the land allocation minutes, which was previously rejected). That means there is no exhibit D1 in the record. And there are two exhibits marked D2. This is an error, but, in my view, it is not fatal as both parties were fully represented, and the record shows that after the reception of the said exhibits, the witnesses were well cross-examined by the counsel for the appellant.

Mr. Erik complained further on admission of exhibit D2, which was previously rejected, and later DW3 tendered it in court. He says it was admitted in contravention of **Regulation 10 (3) (a) and (b) Land Disputes Courts (The District Land and Housing Tribunal)**

Regulations and **Order VII Rule 14 (2) of the Civil Procedure Code**. The record shows that when DW3 was called to testify, he tendered it as an exhibit, and it was admitted by the chairman after overruling the objection raised by the counsel for the applicant that it was not identified by the witness. It should be noted that **Regulation 10 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations,** 2003 allows the Chairman to receive material documents that were not annexed to the pleadings without necessarily following the procedure of the CPC or Evidence Act and the same can be done at any stage. Therefore, based on the above legal position, I find that the trial Chairman was right to admit the said document as he was not bound by the procedure of the CPC and Evidence Act. Thus, this court finds no merit on the 3rd and 7th grounds of appeal.

Regarding the 4th ground of appeal, the appellant complained that the trial court relied on hearsay and uncorroborated evidence submitted by the respondent in determining the matter. He says that there is no proof that the respondent's father gave the said land to the respondent. Upon going through the records of the trial tribunal, this court noted that the evidence of the respondent did not merely rely on

hearsay and uncorroborated evidence since the respondent submitted documentary evidence to prove that the land was allocated to his father by the Village council and thereafter, he inherited it. That is the reason the appellant sued him in his personal capacity. Thus, this ground, too, has no merit.

Coming to the 5th ground of appeal, the appellant complained that the trial tribunal relied on the document, which was questionable and forged. He submitted further that the signature which is appended to Exhibit D2(agreement for hiring land) is not his, and the evidence is clear that when the agreement was entered, the appellant was too young and he did not go to the village office.

It is a trite law that in a claim of forged signature, the person who alleged that the signature was forged is the one who was supposed to prove his/her claim. Further, the claim of forgery needs to be proved via criminal charges as it is provided under **Section 342 of the Penal Code**, Cap 16 R.E 2022 as hereunder:

> "342. *Any person who knowingly and fraudulently utters a false document is guilty of an offence and is liable to the punishment provided for in respect of the offence of forgery in relation to that document.*"

Thus, guided by the cited authority, the forgery issue was supposed to be proved via a criminal case, not the present one. More to that, it was the appellant's duty herein to prove if the document was really forged or not. The allegation that the respondent was too young to sign the same is baseless, so this ground has failed.

Coming to the 8th ground of appeal, the appellant complained that the evidence was not properly evaluated and the evidence of some of the appellant's witnesses was not properly recorded. I am aware that this being the 1st appellate court, is mandated to subject the evidence on record to an exhaustive examination before reaching to its conclusion. As it was held in the case of **The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (Unreported) inter alia that:

> "*The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (Peters v Sunday Post, 1958 EA 424; William Diamonds Limited and Another v R,1970 EA 1; Okeno v R, 1972 EA32*)".

Having gone through the proceedings of the trial tribunal, this court noted that the evidence was properly evaluated by the trial

tribunal, see pages 6 to 10 of the trial tribunal's judgment. The respondent's evidence, which was supported by his witnesses, proved that he was given the disputed land by his late father, who was allocated the same by the village council. To prove it, he tendered Exhibits for showing land allocation, an agreement for hiring land, and a previous judgment involving the same parties. On the other hand, the appellant, who had no material exhibits proving ownership of the disputed land, alleged that the land belonged to his father, who cleared the bush from 2003 to 2005, whereby he cleared 68 acres. After evaluating both shreds of evidence, the trial Chairman decided that the evidence of the respondent herein was heavier than that of the appellant. That's why he was declared the owner of the disputed property. I agree with the trial chairman as the respondent proved how he acquired the said land by tendering the documentary evidence and summoning village leaders to support his evidence. Thus, this ground has no merit.

As for the 9th ground of appeal, the appellant complained that the respondent was declared the owner of the land different from the one in dispute. This court, after going through the application filed by the appellant herein at the tribunal, noted that the suit property is located at Ndirigishi Village Council, Kiteto District, within Manyara

Region, and the tribunal decided that "*Kwamba eneo lenye ukubwa wa ekari 70 lililopo katika Kijiji cha Ndirigishi wilaya ya Kiteto na Mkoa wa Manyara ni mali ya mjibu maombi.*" Thus, although the application which was submitted by the appellant herein at the tribunal did not mention the size of the disputed land, the same was established during the hearing where the appellant said his father cleared 68 acres which is the centre of the disputes and the respondent said his father was allocated 70 acres of land. Therefore, this court does not agree with the appellant that the respondent was given a different land than the one in dispute simply based on the difference in the measurement of the land. It should be noted that the land in dispute is not surveyed, so the measurement is based on the paces, which might have slight differences depending on the steps of the person measuring it. For those reasons, this ground is found with no merit as well.

Coming to the last ground of appeal, the appellant complained that a judgment was given out of the prescribed time which was three months from the date the order of the judgment was given. I am aware that **Regulation 19(1) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003,** requires a tribunal judgment to be served within three months. The last date for having the

assessor's opinion was 29/7/2021, and the judgment was delivered on 20/10/2021; that means he was within the prescribed time to deliver judgment. Therefore, this ground is found with no merit.

For all the reasons I have endeavoured to show, the appeal is found with no merit, and the same is dismissed with costs.

It is so ordered.

DATED at **ARUSHA** this 29th day of January, 2024.

N.R. MWASEBA

JUDGE