IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB- REGISTRY

AT MOSHI

CONSOLIDATED LAND APPEAL NO. 35/39 OF 2023

(C/F Application No. 62 of 2016 in the District Land and Housing Tribunal for Moshi at Moshi)

ADINANI ISMAIL SHOO.....APPELLANT

VERSUS

ZAHIRI HASSAN MWANGA (As

Administrator of the Estate of the

Late Hassan Mtambo Mwanga)..... RESPONDENT

JUDGEMENT

Date of Last Order : 14.05.2024
Date of Judgement: 11.06.2024

MONGELLA, J.

The respondent in this appeal sued the appellant in the District Land and Housing Tribunal for Moshi at Moshi (hereinafter, the tribunal). The matter concerned 17 acres of unregistered land located at Kawaya village, Masama Rundugai North-Hai Ward valued at TZS 34,000,000/= (hereinafter the suit land). The suit land bears the following boundaries; North- Mfereji wa Mtambo; South-Hemedi Sangiwa; East-Mohamedi Ismail Mmari and; West- Korongo la Kanyonge.

The respondent alleged that the suit land, which was part of 23 acres of unregistered land, belonged to the late Hassan Mtambo Mwanga, who acquired the land in 1948. The said Hassan Mtambo passed away in 2009 and the respondent was granted letters of administration to administer his estate in 2016. In the course of executing his duties as administrator, he was obstructed by the appellant who was a mere lessee of the suit land from 2007. He thus sought for a declaration that the late Hassan Mtambo Mwanga was the lawful owner of the suit land. He as well sought for an order restraining the appellant and his agents or any person acting under their instruction from interfering with the suit land, costs of the suit and any relief the tribunal deemed fit.

The appellant denied the allegations against him including knowing the late Mwanga and the suit land. He alleged that he owned a piece of land measuring 12 acres located at Chekimaji village formerly, Rundugai village that he and one Emmanuel Mboya purchased from one Iddi Makorani in 1987. He claimed further that in 1989, the village authority allowed the respondent to clear a portion of land surrounding the 12 acres which was a swampy area- "Tindiga" now measuring 37 Acres. He further claimed that they both have been in uninterrupted use of the said 37 acres from 1989. In those bases, he sought for dismissal of the application, costs and any relief(s) the tribunal deemed fit.

The matter proceeded to trial whereby the tribunal found in favour of the appellant and dismissed the application. The respondent appealed to this court vide Land Appeal No. 34 of 2019. This court

found the appeal with merit and nullified the proceedings and judgement of the tribunal thereby ordering retrial.

In the fresh trial, the tribunal found in the respondent's favour and declared the suit land belonging to the late Mwanga and the appellant a trespasser. The tribunal further ordered the appellant to vacate the suit land. The parties were as well instructed to bear their own costs. Both parties were aggrieved by the said decision. The appellant preferred Land Appeal No. 35 of 2023 on the following eight grounds:

1. *That the trial tribunal grossly erred in law and fact to find that the respondent's deceased father was allocated, possessed and owned the suit land since 1940s without any evidence whatsoever.*

2. *That the trial tribunal grossly erred in law and in fact to allow the respondent's claim while his evidence was very weak compared to the appellant's evidence.*

3. *The tribunal erred to disregard the appellant's witnesses' testimonies without assigning any reasons.*

4. *That the trial tribunal's chairman erred in law by allowing the Respondent's claim regarding ownership, while he had failed to bring any key witness namely the bordering neighbours of the disputed land, for undisclosed reasons.*

5. *That the learned chairman did not properly evaluate the evidence on record which he could reach to different decision.*

6. *That the trial tribunal grossly erred in law and in fact to find that the respondent's deceased father leased the suit land to the appellant in the year 2007 without any evidence whatsoever.*

7. *That the trial tribunal grossly erred in law by relying and admitting a so-called report of a land surveyor without following legal procedures.*

8. *That the trial tribunal grossly erred in law by conducting visit of the locus in quo without following mandatory procedures of law.*

The respondent, on the other hand, preferred Land Appeal No. 39 of 2023 on the following two grounds:

i. That, the trial chairman erred for not finding that the respondent was supposed to pay costs to the appellant.

ii. That, the trial chairman erred for not granting general damages to the appellant for the loss he suffered due to respondent's trespass.

The appeals were consolidated for ease of decision and saving time. They were resolved by written submissions whereby both

parties were represented. The appellant (Adinani Ismail Shoo) was represented by Mr. Chiduo Zayumba and the respondent (Zahiri Hassan Mwanga) by Mr. Erasto Kamani, both learned advocates.

For reasons to be apparent in due course, I shall first address the 8th ground of appeal in Land Appeal No. 35 of 2023. Under this ground of appeal, the appellant faults the visit to the *locus in quo*. It is settled that the failure to observe mandatory procedures in visiting the *locus in quo* has the effect of nullifying the entire proceedings regarding the visit to the *locus in quo* and thereby vitiating the judgement and any orders thereto i. In such circumstances, it becomes pertinent to deliberate on this ground foremost.

In his submissions in chief on this ground, Mr. Zayumba averred that the record shows that the visit to the *locus in quo* was held twice, being; on 02.12.2022 and 18.03.2023. Referring the court to page 7 of the typed judgement, he alleged that the tribunal relied on findings of the visit to the locus in quo in making its decision. He faulted the visit on the ground that it was meaningless as the required procedures, as established in **Nizar M. H. vs. Gulamali Fazal Jan Mohamed** [1980] TLR 29 were not observed.

Explaining further on the procedures, he contended that there were no notes recorded in respect of what transpired at the *locus in quo*. He added that the tribunal did not measure the size, width or length of the suit land; the boundaries were not shown by the parties; no sketch map was drawn; and no statements of witnesses who testified at the *locus in quo* were recorded. He further

contended that there was also no report read after the visit. Instead, the report by a land surveyor was read at the tribunal and the contents were not produced on record. That the said report was also neither tendered nor admitted as exhibit. Regarding the surveyor's report, Mr. Zayumba held the view that it was illegal for the tribunal to accept the surveyor's report and have it read before it. Instead, he said, the tribunal ought to have had the surveyor testify before it as its witness so that he could be subjected to cross examination by the parties.

Mr. Zayumba further held the stance that the omission to observe the guidelines in visiting the *locus in quo* renders the entire proceedings and judgement a nullity. In support of his argument, he referred the case of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others** (Civil Appeal 4 of 2018) [2021] TZCA 663 (3 November 2021) TANZLII; and that of **Prof. T.L. Maliyamkono vs. Wilhelm Sirivester Erio** (Civil Appeal 93 of 2011) [2022] TZCA 39 (18 February 2022) TANZLII, in which the Court took a different approach and nullified the proceedings of the visit to the *locus in quo*.

In what I consider a contradiction in his arguments, the learned counsel, on the other hand, asked this court not to nullify the entire proceedings of the tribunal, but to only reverse its judgement. He prayed so arguing that the decision was not based on findings of the visit to the *locus in quo*, but rather on the weight of evidence of both parties. He cited the case of **Depson Balyagati vs. Veronica J. Kibwana** (Civil Appeal No. 21 of 2021) [2023] TZCA 17772 (23 October 2023) TANZLII to support his prayer. In this case, the Court

of Appeal considered that the judgement was not founded on proceedings of the *locus in quo* but evidence adduced, thus refrained from ordering a retrial. Maintaining that the failure to follow procedure in visiting the *locus in quo* should not lead to nullification of the entire proceedings but only a repeated visit, he cited the case of **Joseph Lomayani and Others vs. Melekizedeck Michael** [1997] TLR 192 (HC).

The counsel further requested the court to take into consideration the fact that this was an old case and the appellant is a 78-year-old man who suffered stroke and paralysis, hence in the premises shall be disadvantaged if this court shall order a retrial. He referred the case **Agnes Severini vs. Mosa Mdoe** [1989] TLR 164 (CA) whereby the Court of Appeal took into consideration an order for retrial issued at the high court and overturned the order for retrial. Mr. Zayumba called for the evidence to be considered in terms of whether the respondent proved the assertion that the deceased's father leased the land to the appellant.

In reply, to this ground of appeal, Mr. Kamani disputed the assertions by Mr. Zayumba regarding tampering with procedures on visit to the *locus in quo*. He alleged that the tribunal recorded notes at the visit to the *locus on quo*. Addressing the content of the alleged record, he contended that the said record shows that the parties showed the *locus in quo* and a land survey was made and GPS report recorded. He said that it was further agreed that the report be brought to the tribunal on 21.03.2023 to be read to the parties and the same was duly done. Regarding the assertion that

the tribunal failed to take measurements of the size of the suit land and to draw a sketch map thereto, he averred that the record of the tribunal shows that the parties showed the size and boundaries of the suit land.

The learned counsel further contended that it should be noted that in this matter the purpose of visiting the *locus in quo* was not to verify its size, boundaries or physical appearance, but to ascertain in which village the suit land was found. That, this was due to the fact that the appellant claimed it was in Cheka Maji village while the respondent claimed it was in Kawaya village. In his view therefore, there was no need of measuring the size or drawing the sketch map of the suit land.

Mr. Kamani further faulted the allegations that the tribunal never assembled to read its findings to the parties. He termed the claim baseless and unfounded. He alleged that the record of 21.03.2023 shows that the tribunal re-assembled and its findings vide land survey were read to the parties. He claimed that due to the nature of the dispute, it was inevitable that the tribunal findings would be by land survey. He added that the record of 02.12.2022 showed that when the tribunal, parties and their advocates reached the suit land on the material day, they failed to verify whether the area at which the suit land was found was within Kawaya or Cheka Maji villages. That, every witness who was present at the *locus in quo* kept testifying according to the interest of the party they came to represent. He claimed that, in the premises, the parties unanimously agreed with the tribunal to use GPS to ascertain the village in which

the suit land was situated. That the parties agreed that a land surveyor from Hai district should be recruited to verify where the suit land was situated. That, such findings were presented on 21.03.2023 before the tribunal.

Mr. Kamani further argued that the reason the tribunal re-assembled on 21.03.2023 while the visit was conducted on 18.03.2023 was that the visit was conducted at late hours on Friday. He had the stance that according to the nature and purpose of the visit to the *locus in quo*, relevant procedures were complied with. While agreeing with Mr. Zayumba's request not to nullify the tribunal proceedings, he contended that there was no evidence to make this court find in his favour.

Rejoining, Mr. Zayumba reiterated his argument that the procedures for visiting the *locus in quo* were not observed. He faulted the submissions by Mr. Kamani for lacking any supporting case law to prove that the procedures were observed. Referring to the decisions in **Nizar M. H. vs. Gulamali Fazal Jan Mohamed** (supra) and in **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others** (supra), he maintained that the procedures on visit to the *locus in quo* were not observed.

Arguing further, he challenged the tribunal for abdicating its legal duties and handing the exercise to a land surveyor whose report was admitted as exhibit without following legal procedures. He as well faulted the land surveyor contending that the alleged expert did not testify as a tribunal witness. He contended further that while

the tribunal re-assembled for purported notes or report of the visit to be read to the parties, it was all meaningless as the mandatory procedures were not observed. That, even though the visit was meant to identify on which administrative area the suit land was located, the procedures were not observed.

I have considered the rival submissions by the parties' counsels in regard to this ground of appeal as well as the record of the tribunal. Foremost, I wish to re-echo the settled position that visiting the *locus in quo* is not a mandatory requirement. It falls within the discretion of the court or tribunal. In **Sikuzani Saidi Magambo & Another vs. Mohamed Roble** Civil Appeal No. 197 of 2018) [2019] TZCA 322 TANZLII, the Court stated:

> "As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the *locus in quo*, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial."

However, where the court or tribunal decides to exercise such discretion, it out to comply with several requirements. This was well established in the case of **Nizar** (supra) whereby the Court stated:

> "When a visit to a *locus in quo* is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with such witnesses as may have to

> testify in that particular matter, and for instance if the size of a room or width of the road is a matter in issue; have the room measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be readout to the parties and their advocates, and comments, amendments or objections called for."

See also, **Avit Thadeus Massawe vs. Isidory Assenga** (Civil Appeal No. 06 of 2017) [2020] TZCA 365 (24 July 2020).

Such procedures to be observed have been well advanced by the courts over the years. For instance, in **Kimonidimitri** (supra), the Court stated:

> "In the light of the cited decisions, for the visit of the *locus in quo* to be meaningful, it is instructive for the trial Judge or Magistrate to: **one**, ensure that all parties, their witnesses, and advocates (if any) are present. **Two**, allow the parties and their witnesses to adduce evidence on oath at the *locus in quo*; **three**, allow cross-examination by either party, or his counsel; **four,** record all the proceedings at the *locus in quo*; and **five** record any observation, view, opinion or conclusion of the court including drawing a sketch plan, if necessary, which must be made known to the parties and advocates, if any"

It is apparent therefore that it is mandatory for: parties, their witnesses and advocates to attend the visit; to be allowed to adduce evidence on oath at the *locus in quo*; to be allowed to cross examine such witnesses; most important, all proceedings must be recorded; and the tribunal/court must communicate any

observation, view, opinion or conclusion or sketch plan made from the visit when the court re-assembles. Further that, if the size is in dispute, it ought to be measured in the presence of the parties.

Upon observing the tribunal proceedings, I find it apparent that the request to have the *locus in quo* visited was made by Mr. Kamani on behalf of the respondent on 31.10.2022. Mr. Zayumba did not object the prayer and the visit was fixed to be conducted on 02.12.2022. On 02.12.2022, a fully composed tribunal, the parties and their advocates seem to have appeared in court and headed to the *locus in quo*. It was recorded in the locus that the respondent (formerly applicant) stated that the land is located at Kawaya village while the respondent recorded that the land was located at Cheki Maji village. The tribunal merely stated that what transpired at the *locus in quo* would be read to the parties on 05.12.2022. I will reproduce the same as hereunder:

> ***"KWENYE ENEO LA MGOGORO***
>
> *Mwombaji: Eneo hili la mgogoro lipo katika Kijiji cha Kawaya.*
>
> *Mjibu Maombi: Eneo la mgogoro lipo katika Kijiji cha Cheki Maji*
>
> *Signed- R. Mtei Chairman*
>
> *02.12.2022*
>
> *Baraza: Yaliyojitokeza kwenye eneo la mgogoro yatasomwa kwa wadaawa tarehe 05.12.2022.*

Signed- R. Mtei Chairman"

On 05.12.2022, when the tribunal re-assembled, the tribunal noted that the respondent had shown the suit land which had rice paddies and stated it was in Kawaya village while the respondent stated it was in Cheki Maji village. The tribunal further noted that it was agreed that to resolve the dispute on where the suit land was located, surveyors from Hai district should be called to determine the beacons by using GPS (Global Positioning System). Both advocates agreed that that was the position. It was then agreed that a summons would be issued to the Executive Director of Hai district so as to get surveyors.

On 18.03.2022, the tribunal, parties and their advocates again visited the *locus in quo* in company of a surveyor. The recording of what transpired was noted by the tribunal chairman who wrote that the surveyor had noted the coordinates and would prepare a report which he would hand over. The said report was then read to the parties on 24.03.2022 and the matter immediately fixed for hearing of assessor's opinion.

It is well settled that proceedings are presumed authentic, as to what transpired in court. See; **Salehe Omary Ititi vs. Nina Hassan Kimaro** (Civil Application 583 of 2021) [2023] TZCA 232; **Stanley Murithi Mwaura vs. Republic** (Criminal Appeal No. 144 of 2019) [2021] TZCA 688 and; **Alex Ndendya vs. Republic** (Criminal Appeal 207 of 2018) [2020] TZCA 202. In **Alex Ndendya vs. Republic** (supra), the Court of Appeal stated:

> "It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."

The Court further cited its decision in **Halfani Sudi vs. Abieza Chichili** [1998] T.L.R. 527, where the record of the High Court was questioned, it held:

> "(i) A court record is a serious document; it should not be lightly impeached;
>
> (ii) **There is always a presumption that a court record accurately represents what happened."**

It is evident from the record that in both visits, proceedings were not recorded. This is because, the first visit shows only parties stating that the suit land belongs to a certain village alone and the tribunal finally fixing a date for reading what transpired in the visit. While on the other hand, when the tribunal re-assembled, it was shown that parties had agreed to procure services of a surveyor to inquire on what administrative location the suit land was located. Such fact ought to have been reflected on the proceeding recorded at the visit. This error is further reflected in the submissions by Mr. Kamani that the surveyor had to be included because there were many witnesses and each was defending the party he or she was representing. This clearly shows that the tribunal did not record exactly what transpired at the *locus in quo*. Since there were witnesses, there is sensible reason to believe they were not put in

position to testify as their testimonies were not recorded nor were the parties allowed to cross examine them.

The 2nd visit suffered the same error, this surveyor so called, was an expert witness and ought to have testified as such. It was not enough for his report to be read before the court. It ought to have been admitted as an exhibit so as to form part of the record of the tribunal. The surveyor ought to have testified on oath or otherwise on the procedure of finding on which administrative area the GPS location fell and parties had to be afforded the opportunity to cross examine him.

It is immaterial, in my view, that the parties were arguing on which administrative area the suit land fell. It was imperative for all laid out procedures for visiting the *locus in quo* to be observed including a depiction of measurement of the suit land. If the parties consented to involve a surveyor, as alleged, such concession or decision should have been reflected on the proceedings. That would have served to show that the parties were accorded the right to be heard which is the cornerstone on fair trial. The faulty proceedings bore a surveyor's report which was also relied on by the tribunal in reaching its decision.

Mr. Zayumba prayed for this court not to order re-trial of the matter as the tribunal decision did not consider the evidence gathered at the locus in quo to reach its decision. This prayer and argument were conceded by Mr. Kamani. Like I pointed out earlier, this was a contradiction on his part as he had earlier on argued that the

tribunal considered such evidence as evident at page 7 of its decision. I have gone through the tribunal decision and indeed found, at page 7, that the evidence gathered at the tribunal particularly on the survey conducted and the report that followed was analysed by the tribunal. At page 9 of the decision, it is vivid that the tribunal considered such evidence in awarding the reliefs prayed, which formed part of the issues framed to guide the tribunal. Thus, contrary to the learned advocates' arguments, the tribunal considered the evidence that resulted from the visit to the *locus in quo* and that cannot be ignored.

In the foregoing observation, I find this ground with merit. Paying regard to the holding of the Court of Appeal in **Prof. T.L. Maliyamkono vs. Wilhelm Sirivester Erio** (supra) I hereby nullify the tribunal proceedings from 31.10.2022 when the court ordered the visit to the *locus in quo*.

I further quash the entire judgement and decree and set aside all orders resulting from the same. I order the matter be remitted to the tribunal for completion of the same before a different chairman for interest of justice to both parties. Since the visit to the *locus in quo* was previously declared necessary by this court in Land Appeal No. 34 of 2019 (Mutungi, J. as she then was), a decision which stands valid to-date, I insist that the same be done with mandatory procedures adhered to. I find this ground of appeal disposing the entire appeal thereby rendering the rest of the grounds of appeal, including those under Land Appeal No. 39 of 2023 by the respondent herein, redundant.

Since the error was occasioned by the tribunal, each party shall bear its own costs.

Dated and delivered at Moshi on this 11th day of June, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA