IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

LAND APPEAL NO. 34 OF 2023

(Arising from Land Application No. 58 of 2020 of the District Land and Housing Tribunal for Mtwara at Mtwara)

AHMAD MOHAMED TRAFIC.....APPELLANT

VERSUS

HAWA ABDALLAH LINGALA *(Legal Representative of Abdallah Ahmed Lingala)*.....**RESPONDENT**

JUDGMENT

26th June & 4th July, 2024

DING'OHI, J;

The present appeal originates from the decision of the District Land and Housing Tribunal for Mtwara at Mtwara (the trial tribunal). In the trial tribunal, the present respondent (as the Legal Representative of the late Abdallah Ahmed Lingala) successfully sued the appellant over the ownership of the parcel of land, situated in the Mikindani area within Mtwara municipality. It was alleged, the suit land was owned by the late Abdallah

Ahmed Lingala, the father of the respondent. On the other hand, the appellant claimed that the same land is his property. He obtained it from the original owner, Salumu Mohamedi who gave it to him (the appellant). At the end of the day, the trial tribunal found the evidence of the respondent's part heavier. It declared him the rightful occupier of the suit land. The trial tribunal did not end like that only, it further ordered the appellant to provide vacant possession and bear the costs of the suit.

The three grounds of complaints by the appellant against the decision of the trial tribunal are;

1. *That, the trial Tribunal erred in law and facts by considering that the House No. 117 and House No.1 are on the same plot (the land in dispute).*
2. *That, the trial tribunal erred in law and facts by pronouncing judgment and decree in favour of the Respondent without sufficient proof of ownership of the land in dispute.*
3. *That, the trial Tribunal erred in law and facts by relying on evidence obtained in site visit while the evidence was unlawful obtained.*

The background of this matter may briefly be tressed from the origin of the matter before the trial tribunal. According to the record, it was the respondent, who initiated the matter before the trial tribunal, as the legal representative of the late ABDALLAH AHMED LINGALA, against the appellant. It was alleged that the respondent's father had been the owner of the disputed land since 1972. He started it as a virgin land when he started to clear it. Before the demise of the respondent's father, in 1985, the appellant was invited to use part of the disputed land for business where he built a place. It is the respondent's case that from 1985 the appellant used the land as an invitee, but to his surprise, he resisted vacating claiming it to be his. On the other hand, the appellant also claimed to be the rightful owner of the suit land as he was given the same by Salumu Mohamedi in 1987. He asserted that he enjoyed the use of land until 2018 when the respondent came and claimed to be the rightful owner of the disputed land.

It was agreed by both sides that this appeal be and was argued by way of filing written submissions. The appellant appeared in person. Whereas the respondent had the able services of Mr. Emmanuel Ngongi, a learned advocate.

In arguing this appeal, the appellant opted to start with the second ground of appeal. The appellant submitted that the respondent failed to provide accurate proof showing that there was such an agreement between the late Abdallah Ahmed Lingala and him to use the land in dispute. He further argued that he has been in the said disputed land for more than thirty years without any disturbance, that is from the moment he started clearing the bush till the time the case was instituted by the respondent. The appellant was of the settled view that had the trial tribunal evaluated properly the evidence it would have arrived at a different conclusion.

On the third ground of appeal, the appellant faulted the trial tribunal for not complying with the guidelines and procedures of conducting a visit to the locus in quo. According to him those procedures to visit locus in quo were laid down in **Nizar M.H, vs. Gulamal Fazal Jan Mohamed** [1980] TLR 29. The appellant further argued that the trial tribunal records were silent on whether the evidence collected from the locus in quo was read out to the parties and their advocates. He was of the firm view that the records do not show if the witnesses were invited to attend at the locus in quo. The appellant opined that failure to comply with the laid procedures the suit void.

He thus prayed this court to validate the entire trial tribunal judgment, proceedings, and decree thereof.

On the first ground of appeal, the appellant blamed the trial tribunal for considering that houses No. 117 and 1 are on the same plot. In brief, the appellant contended that the alleged houses are not in the same plot.

In opposing the appeal, Mr. Emmanuel Ngongi, for the respondent submitted against the second ground of appeal submitted that the appellant was an invitee regardless of how many years he stayed on the suit property. Under the circumstances, according to the learned advocate, he cannot acquire the status of adverse possession. To support his stance, he cited the case of **Magoiga Nyankorongo Mriri vs. Chacha Mororo Saire**, Civil Appeal No. 464 of 2020. In addition, Mr. Ngongi argued that the evidence in the records alludes to how the appellant was invited to the land in dispute and that the long usage by itself does not qualify him for ownership under adverse possession.

As regards the second ground of appeal, the learned advocate for the Respondent contended that there was no sufficient proof of ownership of the land in dispute to the appellant as the said appellant did not bring anyone

present when the disposition was made to him by the said Salum. According to the learned advocate, even the appellant's witness did not even know when the disposition was made rather than he heard from the appellant himself that he was given the land. Mr. Ngogi cited section 110 (1), and (2) of the Evidence Act Cap 6 R.E. 2022 that requires he who alleges is the one responsible to prove his allegations. He also referred to me the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014.

As to the third ground of appeal, the learned advocate contended that according to the case of **William Mukasa vs. Uganda** (1964) EA 695, the aim of visiting the locus in quo was checking on the evidence already given and if necessary the court to examine the map or plan that already exhibited or spoken of in the proceedings. The learned advocate submitted that the procedures and guidelines for a locus in quo principle were met accordingly as evidenced under the trial tribunal's typed judgment.

According to Mr. Ngongi, there was no infringement of the position as advanced in the case of **NIZAR M.H** (supra) because the trial tribunal invited the assessors to adduce their opinion, the facts were read loudly to the parties, and the witnesses of both parties were invited. Mr. Ngongi was of

the firm view that if there was any irregularity on visit locus in quo then the overriding objective principle can cure the moment and bring justice to the parties.

Regarding the first ground of appeal, Mr. Ngongi observed that the issue of the number of houses was not discussed by either party in the case. He opted not to argue against that ground of appeal because it suggests new evidence and facts that require one to seek a leave of the court.

In a brief rejoinder, the appellant almost reiterated what he cemented in submission in chief.

Following the parties' rival submissions, the germane issue that needs to be decided by this court is whether this appeal has merit. In the circumstance of this case, the posed issue will be answered by considering the grounds of appeal argued by both sides. But before going to the merit of this appeal, it is important to revert to the duty of the first appellate court in re-evaluating the whole shreds of evidence properly to find if the trial tribunal made any error in its decision. This position has been well-observed by the Court of Appeal of Tanzania in the case of **Melchiades John Mwenda vs. Gizelle**

Mbaga & Others (Civil Appeal No. 57 of 2018) [2020] TZCA 1856. It was held that;

> *"Secondly, we wish to remind the parties that this is a first appeal. We are mindful that in terms of rule 36 (1) (a) of the Tanzania Court of Appeal Rules, we, as a first appellate court, have a duty to reappraise the evidence adduced at the hearing of the suit and come up with our own conclusion if there is a dire need to do so."*

I will confront the grounds of appeal in the manner both parties did; that started with the second ground of appeal, the third, and lastly the first one. The second ground of appeal, as already alluded to above, challenges the trial tribunal for pronouncing the judgment and decree in favour of the respondent without sufficient proof of ownership.

I have well considered the rival arguments of both parties. Let's begin by stressing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. I am

toughened in my standpoint by the provisions of sections 110 and 111 of the Evidence Act, Cap. 6 of the R.E. 2022 which states that;

> *"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*
>
> *"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

See; **Godfrey Sayi vs Anna Siame** (Civil Appeal 114 of 2012) [2017] TZCA 213, **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama** (Civil Appeal 305 of 2020) [2021] TZCA 699, and **Mustafa Ebrahim Kassam t/a & Another vs Maro Mwita Maro** (Civil Appeal 76 of 2019) [2022] TZCA 228. Just to mention few.

The records of this case revealed that in proving her stance that the disputed land belonged to her late father Abdallah Ahmed Lingala, the respondent has brought her widow's mother (SM2) who proved that she witnessed that the appellant was just invited by her late husband to use a piece of the disputed land. For clarity, I wish to extract herein what she said during the trial;

> *"kwenye kipande chenye mgogoro mjibu maombi alikuja kwetu akamkuta mume wangu akamuomba tumuazime ardhi yenye mgogoro ajenge kibanda kidogocha kuweka mabox ya pipi, mafuta ya taa na vibiliti. Mume wangu aliniita ili tuone kama tumuazime majibu maombi kujenga kwenye ardhi yenye mgogoro. Kwakuwa nilikuwa ninamfahamu mjibu maombi tukamruhusu ajenge kibanda chake cha biashara kwenye ardhi yetu."*

The above statements imply that SM2 witnessed that the appellant was just invited to use the land in dispute. However, on his part, neither the appellant nor his witness proved that the said land belonged to him. The appellant was entitled to call a witness who would justify that he was a rightful owner of the land. The fact that he has used the land for over thirty years without any

disturbance is unfounded because it is trite law that the invitee cannot own the land to which he was invited to the exclusion of his host whatever the length of his stay. In **Maigu E.M. Magenda vs. Arbogast Maugo Magenda** (Civil Appeal 218 of 2017) [2018] TZCA 214, for instance, I grappled with a similar situation; it was observed that;

> *"In this appeal, although the appellant has argued that he had exclusive ownership for over eighteen years before the respondent staked his claim of ownership in 2012, we do not think continuous use of land as an invitee, or by building a permanent house on another person's land or even paying land rent to the City Council of Mwanza in his own name would amount to assumption of ownership of the disputed plot of land by the appellant."*

Also See; **Musa Hassani vs Barnabas Yohanna Shedafa** (Civil Appeal No. 101 of 2018) [2020] TZCA 34.

Given the foregoing analysis, I am of the certain view that the trial tribunal rightly decided that the appellant had been using the disputed land with permission from the late Abdallah Ahmed Lingala. He was therefore an invitee. He cannot therefore be saying that he acquired that land by long and undisturbed occupation. For that reason, I found this ground of appeal is without merit. It is accordingly disregarded.

On the third ground of appeal, it was a complaint that the evidence in the visit locus in quo was unlawfully obtained. Having examined the record of the appeal and considered the submissions made by both parties I wish to give my observation concerning visit locus in quo. There is no law that forcefully and mandatorily 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. That is a position adduced by the Court of Appeal of Tanzania in **Bomu Mohamed vs. Hamisi Amiri** (Civil Appeal No. 99 of 2018) [2020] TZCA 29 to the effect that;

> *"We come now to the issue of locus in quo. In the first place 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."*

In the case at hand, the records of the trial tribunal indicate that the parties were conflicting on the ownership of the parcel of land and not the boundaries, boundary neighborhood, and physical features over the land. One may wonder why the trial tribunal stressed visiting locus in quo in the absence of a need to do so. As per records, the evidence adduced by the parties did not necessitate the trial tribunal to pay a visit to the locus in quo. Being aware that the exercise of visiting locus in quo puts parties at costs in terms of money and time courts should not dare to do that unless it is very necessary for the ends of justice. I have already said that under the circumstances of this case, there was no need to visit the land in dispute because I find that no party would be prejudiced only because of the failure of the trial tribunal to visit the locus. Parties were very conversant with what was the matter in dispute. The dispute was not over the boundaries or

something that would necessarily require the tribunal to visit the locus in quo.

For example, in her testimony, the respondent exposed that;

> *"Mimi na Ahmad Traffic tuna bishania umiliki wa eneo lililopo Mtaa wa Mtonya na kata ya Mtonya – Mikindani Mtwara"*

In his part, the appellant was recorded telling the trial tribunal that;

> *"Nimekuja hapa kujitetea kutokana na mgogoro wa kiwanja changu. Kiwanja chenye mgogoro nilikibuni mimi mwenyewe baada ya kupata ridhaa kutoka kwa mmiliki wa asili..."*

In **Kimonidimitri Mantheakis vs Ally Azim Dewji & Others** (Civil Appeal No. 4 of 2018) [2021] TZCA 663, the CAT approved the decision of the Nigerian case of **AKOSILE VS ADEYE** (2011) 17 NNWLR (Pt 1276) p.263 where it was held that;

> *"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 dear doubts arising from conflicting evidence** if any about physical objects."*

In the upshot, this ground also is without merit; it deserves dismissal as I hereby do.

On the first ground of appeal, the appellant claimed that the trial tribunal failed to consider that houses No. 117 and 1 are on the same plot. In disposing of this ground, I will agree with Mr. Ngongi that in the entire proceedings, none of the parties testified about the number of houses. That is a new issue that cannot be raised at this appellate stage. Under the circumstances, the complaint in the first ground of appeal is unmerited, and therefore, dismissed.

Since the evidence by the respondent at the trial tribunal was heavier than that of the Appellant, the trial tribunal was right in declaring the suit land to be the rightful property of the late ABDALLAH AHAMADI LINGALA, whose Legal representative is the respondent herein.

Consequently, I find that the entire appeal is without substance. It is hereby dismissed with costs.

DATED at **MTWARA** this 4th day of July 2024

S. R. DING'OHI

JUDGE

04/7/2024

Court: The judgment delivered this 4th July 2024 in the presence of the appellant and the respondent in person.

S. R. DING'OHI

JUDGE

04/7/2024