**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MOSHI SUB- REGISTRY**

**AT MOSHI**

**LAND APPEAL NO. 40 OF 2023**

*(C/F Application No. 70 of 2020 in the District Land and Housing Tribunal for Moshi at Moshi)*

**JUSTINE LESIYEKI…….....APPELLANT**

**VERSUS**

**MWANAHAWA KAJASI……..……1ST RESPONDENT**

**MAWAZO KAJASI..……..……..……....2ND RESPONDENT**

**JUDGEMENT**

Date of Last Order: 15.05.2024
Date of Ruling : 06.06.2024

**MONGELLA, J.**

The appellant herein filed Application No. 70 of 2020 in the District Land and Housing Tribunal of Moshi at Moshi (herein after the tribunal). The matter was over a two-acre piece of land situated at Shuleni Area in Mawalla Village, Kahe Ward, Moshi Rural District (hereinafter, the suit land). The suit land was boarded as follows: in the North by Ngamushe; in the East by Ndiarambu; in the West by the Applicant and in the South by a grazing land. The applicant sought a declaration that he is the rightful owner of the suit land; an eviction order against the respondents, a permanent restraining

order against the respondents, general damages, costs for the suit any relief the tribunal deemed just and fit to grant.

Before I proceed, I wish to give a brief background of the case as follows: The appellant claimed that he was given the suit land by TANU party ward chairman one Hotheniel Mbwambo way back on 07.02.1974. That, he cleared the land and used it for cultivation of seasonal crops by irrigation scheme whereby water was supplied by National Agricultural and Food Cooperation (NAFCO). That, in 1989, NAFCO stopped supplying water to all farms in the area. Then, one Sekondo Juma (deceased) who had inherited the 1st respondent from one Kajasi Juma, who was murdered, borrowed the suit land for cultivation. In 1991, the late Sekondo gave back the land to the appellant since he had failed to cultivate the same due to drought and absence of irrigation water. Thereafter, the applicant used the suit land to graze cattle. In April 2019, the respondents started claiming the suit land belonged to them. They lodged a complaint at the village office which decided that the suit land belonged to the respondents and issued a restraining order against the appellant.

The respondents denied his claim averring that the applicant never used nor possessed the suit land. They claimed that the 1st respondent was allocated the suit land by her husband in 1991 prior to his demise. That, she used the land until 2019 when the applicant trespassed. She sought amicable settlement of the matter through Mawalla Village elders who opined that the land belonged to her. In the premises, they said that the suit land belongs to the 1st

respondent. They sought for dismissal of the application, a declaration that the 1st respondent was the lawful owner of the suit land, a declaration that the 2nd respondent was wrongly sued, costs of the application and any relief the tribunal would deem fit.

The tribunal heard both parties whereby the appellant testified as SM1 and tendered two exhibits which were admitted as P1 and P2. He as well called 7 other witnesses. The 1st respondent testified as SU1 and tendered one exhibit which was admitted as D1. The 2nd respondent testified as SU2 and had 2 witnesses. The tribunal also visited the *locus in quo*. At the end of trial, the tribunal found in favour of the respondents and declared both respondents lawful owners of the suit land. It as well declared the applicant a trespasser, issued an eviction order against the applicant and awarded the respondents costs of the application. Aggrieved, the appellant has filed this appeal on the following grounds:

1. *That the learned Chairman misdirected himself in entering judgement in favour of the respondents while there was overwhelming evidence from the appellant and his 7 witnesses that the land in dispute belonged to the appellant since 1975 up to 2019 when he was stopped by the Village vide exhibit P1.*

2. *That the learned Chairman misdirected himself in putting very heavy weight on the document D1 which shows that the appellant was not present and which does not bear any village stamp of the Village council of the*

*parties* (sic)*; and no Village leader gave evidence before the District Land and Housing Tribunal to support it.*

*3. That the learned Chairman misdirected himself in regarding the furrow of water (mfereji wa maji) as a boundary separating the appellant's shamba from that of the respondents.*

*4. That if the learned Chairman had properly evaluated the evidence he would have entered judgement for the appellant.* (sic)

The appeal was resolved in writing whereby both parties were represented. The applicant was represented by Mr. Chiduo Zayumba and the respondent by Mr. Emmanuel B. Shayo, both learned advocates.

Submitting on the 1st ground, Mr. Zayumba averred that the appellant furnished 7 witnesses whose testimonies were disregarded for no apparent reason. He said that SM2 testified to have borrowed the suit land from the appellant in 1975 and returned the same in 1985. That, SM3 stated that he was allocated land in 1975 neighbouring the appellant. He contended that both witnesses were of age whereby one was a pastor/evangelist with reputable position in society, thus in position to testify the truth on allocation of the suit land, acquisition, possession and use. In those bases, he faulted the tribunal for ignoring their testimonies for no

good reason. Referring the case of **Goodluck Kyando vs. Republic** [2006] TLR 363, he argued that all witnesses are entitled to credence.

The counsel further argued that the tribunal ought to have assigned reasons on why it disregarded the evidence of such witnesses who had witnessed his continuous possession of the suit land since 1974. Insisting that the tribunal was mandated to assign reasons, he referred the court to the case of **Kapama Hamisi Juma & Others vs. Republic** (Criminal Appeal No.591 of 2020) [2023] TZCA 17412 (17 July 2023) and **Ikindila Wigae vs. Republic** [2005] TLR 365.

Comparing the evidence of both sides of the case, Mr. Zayumba held the stance that the appellant's evidence was heavier than that of the respondents, thus he ought to have won the case. To buttress his argument, he cited the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113.

Addressing the respondents' evidence, the learned counsel argued that the respondents' witnesses were unreliable. Expounding his assertion, he argued that the 1st respondent stated that she and her husband one, Kajasi Juma were jointly allocated the suit land in 1974. However, he said, at the same time she testified to have been 61 years old. He challenged the 1st respondent's testimony on the ground that at the time of allocation, she would be 13 years of age. He argued further that during cross examination she testified to got married to the late Kajasi in 1972 which entails that she was 11 years old by then. Mr. Zayumba added that SU4

testified to have witnessed the 1st respondent being in possession of the suit land since 1983/1984. That, SU4 testified on 25.04.2023 that he was 51 years, which shows that in 1983 he was 11 years old and in 1994, he was 22 years old. He found it questionable on how the villagers entrusted him to be the canal supervisor. He argued further that SU3 was of sufficient age to witness the possession but she did not state how she came to know the land belonged to the 1st respondent.

Mr. Zayumba concluded on this ground arguing that the respondents and their witnesses were liars as according to their ages they were not in position to witness facts they alleged to have witnessed. He considered their testimonies made up. He further contended that since the appellant's evidence was heavier than that of the respondent, the tribunal ought to have declared the appellant the rightful owner of the suit land and not both respondents as the 2nd respondent had not even claimed ownership over the suit land but testified that it was the 1st respondent's.

Addressing the 2nd ground, Mr. Zayumba averred that the tribunal put weight to Exhibit D1 in its judgement. That, the said exhibit is allegedly minutes of a meeting for resolving the dispute between parties in which it is alleged that the appellant admitted that the 1st respondent was the owner of the suit land and requested to be given an acre. He argued that the tribunal erred in relying on minutes of a meeting while none of the members to the said meeting appeared to testify on the matter. He considered such

members being important witnesses to the case thus called the court to draw an adverse inference against the respondents for omission to call the witnesses He fortified his argument with the case of **Stephen Nyakire vs. Ilala Municipal Council & Others** (Civil Appeal No.178 of 2020) [2023] TZCA 17622 (18 September 2023) TANZLII.

With regard to the 3rd ground, Mr, Zayumba averred that the tribunal chairman strayed into error when he decided that the irrigation furrow was a boundary separating the appellant's undisputed land to the suit land. He as well challenged the tribunal chairman for failure to provide the reason he came to such findings considering the fact that none of the parties stated that the furrow marked the boundary, separated or divided the lands. He contended that there was no boundary separating the two lands. That the whole land belonged to the appellant and the furrow was for irrigation purposes alone.

Addressing the 4th ground, Mr. Zayumba faulted the tribunal for failure to properly evaluate the evidence before it thereby reaching a wrong conclusion dismissing his application and declaring the respondents the rightful owners of the suit land while they had no counter claim to the suit land. Referring to the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003, he alleged that the rules of procedure require the respondents to raise counter claims.

The learned counsel further averred that weight was given on the respondent's evidence while their witnesses failed to state how the respondents acquired ownership of the suit land. That, SU4 who is allegedly the 1st respondent's co-wife stated that her late husband, Kajasi Juma Sekondo, was appointed as administrator or care taker after the death of the 1st respondent's husband. He added, she however did not state that the respondents inherited the suit land or that the alleged customary clan meeting distributed the land to the respondents. That, there was also nowhere indicated that the respondents acquired the suit land vide legal administration.

Mr. Zayumba further pointed out that another aspect that shows that the tribunal failed to evaluate the evidence before it is the tribunal concluding that the suit land belonged to the respondents merely because they were found in use of the same during the visit to the *locus in quo*. He argued that the tribunal failed to note the appellant's claim that the respondents invaded the suit land in 2019 and his application for temporary injunction was dismissed, hence it was obvious that they would be found in use of the suit land.

He further challenged the chairman alleging that he put much reliance on findings at the visit to the *locus in quo* conducted on 06.05.2023 while the same had many legal short comings in the light of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others** (Civil Appeal 4 of 2018) [2021] TZCA 663 (3 November 2021) TANZLII. Mr. Zayumba finalized his submission by praying for the appeal to be allowed with costs.

The appeal was opposed. In reply to the 1st ground, Mr. Shayo averred that the suit land belongs to the 1st respondent as she and her husband acquired the same from the village council in 1974. That, her husband and the 2nd respondent's father demised in 1985 and left the suit land in her possession whereby she used the land to cultivate seasonal crops like maize and rice. That, she cultivated on the land in dispute for over 40 years without interference until 2019 when the appellant started to trespass into the disputed land claiming he is the lawful owner. Mr. Shayo had the stance that if the appellant was the lawful owner, he would have not abandoned the land for more than 40 years.

The counsel further averred that the cardinal principle of law is that in civil cases the standard of proof is on balance of probabilities as provided under **Section 110 and 111 of the Evidence Act** [Cap 6 R.E 2022] and also stated in **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113. He as well alleged that the record is clear that the respondents' evidence was stronger than that of the appellant's and that the appellant's witnesses contradicted each other.

Arguing further, he averred that the appellant stated in his application that he acquired the suit land from TANU ward chairman one **Hothiniel Mbwambo** in 1974, but in his testimony, he stated that he acquired the suit land from TANU chairman one **Hassan Mwambo** in the same year 1974 whereby he acquired 4 acres. On the other hand, he said, SM6 testified that the appellant had 6 acres of land while SM7 stated it was 12 acres. In his view, the appellant's witnesses clearly contradicted each other and the

tribunal had the duty to resolve the contradictions in accordance with the dictates settled **Geofrey Elias Kigala vs. Republic** (Criminal Appeal 230 of 2020) [2022] TZHC 320 (3 March 2022) TANZLII. He believed that the tribunal discharged the said duty at page 7 of its Judgement.

Mr. Shayo further averred that the trial tribunal reached a fair and just decision based on the evidence adduced by both parties including Exhibit D1 which contained minutes of the meeting in which the conflict of ownership was resolved amicably by the elders whereby they found the suit land belonged to the 1st respondent. He added that the tribunal also observed the evidence of SU3 who neighbours the 1st respondent on the Northen border and SU4.

While conceding to Mr. Zayumba's contention that every witness is entitled to credence, he maintained that in this matter the appellant's witnesses contradicted each other and, in the circumstances, the tribunal chairman could not accord credence to every witness that testified before him as he would not reach a fair, just and reasonable decision. He added that the tribunal chairman evaluated the evidence on balance of probabilities assessing the quality of the same and not the number of witnesses as well directed in **Dionisia Abeli Makundi vs. Constantine Mathew Mseke** (Misc. Land Appeal 3 of 2022) [2022] TZHC 11107 (15 July 2022).

As to whether the tribunal chairman assigned reasons for his decision, he firmly contended that he did assign reasons whereby be based on Exhibit D1and the evidence of SU3 and SU4. He added that the chairman proceeded to cite the case of **Bashiru Athumani vs. Annajoyce Mutungi (Administratix of the estate of the late Veneradiana F. Ihangwe)** (Land Appeal 5 of 2022) [2022] TZHC 15132 (11 November 2022) TANZLII and **Hemed Said vs. Mohamed Mbilu** (supra).

Mr. Shayo also alleged that the witness being of an advanced age, a pastor or person in a reputable position in society is not the only requirement to believe his or her evidence. He held the stance that what is required is the credibility of the evidence produced. To buttress his point, he referred to the case of **Shabani Daud vs. Republic** Criminal Appeal No. 28 of 2007 and **Director of Public Prosecutions vs. Simon Mashauri** (Civil Application 394 of 2017) [2019] TZCA 22 (28 February 2019) TANZLII.

Responding to the 2nd ground, Mr. Shayo averred that the respondents themselves were among members of the conflict settlement meeting held by elders. In that regard, he saw that they too were in good position to explain what transpired in the meeting, especially since they were material witnesses. In his view, it was unnecessary for other members of the meeting to be called to testify.

Addressing the 3rd ground, the learned counsel supported the tribunal chairman in finding the furrow of water being a boundary

between the suit land and the land not in dispute. He contended that it was clear that the appellant recognized the boundaries as among the boundaries on the west side of his farm. That, the 1st respondent was able to recognize boundaries of the suit land property and identified the appellant as her neighbour. He added that the evidence on the furrow of water being a boundary was also corroborated by the elders as recognized by one of the tribunal assessors.

As to the 4th ground, Mr. Shayo found the trial chairman to have properly evaluated the evidence and reached a fair and just decision. He had the view that filing a counter claim was not mandatory as the respondents were lawful owners of the suit land and used the same from 1974. That, the respondents did not have any counterclaim against the appellants other than the claiming interference by the appellant on the suit land. He elaborated that the 1st respondent and her husband were allocated the suit land by the village council during TANU era in 1974 and that her evidence was corroborated by that of SU3.

Submitting further, Mr. Shayo elaborated that the tribunal chairman put much reliance on findings from the visit at the *locus in quo* on 06.05.2023 based on what transpired thereat. He claimed that the respondents were able to identify the suit land properly and its size. That they were also able to identify the appellant's land measuring 8 acres whereby the said land and the suit land were separated by a furrow of water. That, on 16.05.2023, facts on what transpired at

the *locus in quo* were read before the parties and admitted by both parties and their counsels.

He argued further that on the visit to the *locus in quo*, both parties identified the same boundaries of the suit land and there was no dispute that the furrow of water was a boundary separating the suit land from the 8 acres of land owned by the appellant. He challenged the appellant for not disputing such details on the visit to the *locus in quo* and when the facts on observation made at the *locus in quo* were read at the tribunal. In his view, the visit to the *locus in quo* was meaningful as it helped the tribunal chairman to reach to a fair, just and reasonable decision. He maintained that the respondents' evidence was overwhelming and stronger than that of the appellants. He finalized his submissions by praying for dismissal of the appeal with costs for want of merit.

Rejoining, Mr. Zayumba insisted that the respondents' evidence was not heavy compared to the appellant's. That, none of the witnesses witnessed the suit land being allocated to the 1st respondent and her husband. That the two witnesses that testified in the respondents' favour were not in the position to testify on how the 1st respondent came into possession of the suit land. He maintained that the appellant's evidence was heavier that he acquired the suit land in the 1970's and rented the land to one Senkondo Juma, the 1st respondent's brother-in-law who returned the land to him in early 1990's. He alleged that the appellant's evidence was disregarded for no apparent reasons.

As to contradictions on the names of the TANU village chairman who supervised the hand-over of the land to the appellant, the typed proceedings show the name to be Hassan Mbwambo. Mr. Zayumba, however, argued that the tribunal chairman must have slipped into error as he did not hear the name well when pronounced as "Hothiniel/Hosiniel" is not a common name. On the other hand, he argued that even if there was such contradiction, it did not go to the root of the matter. He alleged that TANU party leaders were both, political and administrative at such time and were also village chairmen. He believed the first name of the leader that allocated the land to the appellant was not necessary. That, the surname was enough considering the event took place 50 years ago. In support of his argument that the contradiction was minor and immaterial, he referred the case of **Dickson Elia Nsamba Shapwata and Another vs. Republic** (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008) TANZLII and that of **Gabriel Mathias Michael & Another vs. Halima Feruzi & Others** (Civil Appeal No.28 of 2020) [2023] TZCA 17484 (10 August 2023) TANZLII.

On alleged contradiction pertaining the size of the land the appellant possessed, he insisted that the same did not go to the root of the matter as there is no dispute that the suit land is 2 acres and no other portion of land owned by the appellant is in dispute. In his view, the difference in measurements cannot invalidate the evidence on ownership. To that effect, he referred the case of **Gabriel Mathias Michael & Another vs. Halima Feruzi & Others** (supra). He further contended that the witnesses were peasants

from Mawalla village, Kahe Ward, Moshi Rural District and their level of education was low. In that respect, he contended that they should not be expected to have knowledge on the measurements of the undisputed plot of land in width and length such as to calculate the area of both disputed and undisputed land in acres. Mr. Zayumba concluded on this argument submitting that the witnesses only contradicted each other on the size of the undisputed plot of land, but were aware of the suit land measuring 2 acres.

Considering the weight of exhibit D1 tendered by the respondent, he maintained that the same held no legal weight at all as members of the said meeting were not called to testify and the appellant did not sign the said minutes. He reiterated his point that the testimonies by appellant's witnesses were disregarded for no apparent reason. That, it was not sufficient for the tribunal to state that the respondent's evidence was heavier while not assigning reasons on such findings.

Replying to the 3rd ground, Mr. Zayumba maintained that the findings on the visit to the *locus in quo* were obtained without mandatory procedures being adhered to as provided in the case of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others** (supra). He said that the said case required evidence to be adduced on oath and cross examination be allowed during the visit. In further support of his assertion, he referred the court to the case of **Wemaeli Juma Mlay vs. Anderson Kimath and 2 Others** (Land Appeal No. 48 of 2023) [2024] TZHC 651 (4 March 2024) TANZLII. He further averred

that Mr. Shayo failed to reply to the arguments concerning irregularities in visiting the *locus in quo* which shows that he concurred with his submissions on the same.

Mr. Zayumba concluded by maintaining his stance that the appeal is with merit. He sought for the same to be allowed with costs and for the tribunal decision to be reversed and, in alternative without prejudice, for the tribunal proceedings and judgement to be nullified.

Upon considering the rival submissions of both parties' counsels I am of the view that all grounds of appeal revolve around the question of evaluation of the evidence on record by the tribunal. In that respect, the issue at hand is whether the tribunal was right to find the respondents lawful owners of the suit land or rather, who is the lawful owner of the suit land. However, prior to addressing this issue, it appears that in discussing the final ground of appeal, Mr. Zayumba raised concerns regarding procedures in visiting the *locus in quo* whereby he claimed the same not to have been observed.

It is well settled that parties are bound by their own pleadings. See, **Jonathan Kalaze vs. Tanzania Breweries Limited** (Civil Appeal 360 of 2019) [2022] TZCA 312 TANZLII. In that respect, parties are prohibited from raising new issues or grounds save for when leave is granted by the respective court. Upon observing the records, I find it evident that the issue of *locus in quo* was not in the appellant's memorandum of appeal. However, being a matter of law and well replied to by the respondents, this court can safely deliberate upon

it. Considering the gravity of the issue, I shall first address the issue on whether the legal procedures for visiting the *locus in quo* were observed.

Mr. Zayumba, referring to the case of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others** (supra) faulted the tribunal chairman for failure to observe mandatory legal procedures for visiting the *locus in quo*. However, in his submission in chief, he did not give details on the legal procedures alleged to be flawed. He just quoted phrases from the mentioned decision. It was only in his rejoinder whereby he stated that in the case of **Kimonidimitri** (supra) it was stated that during the visit to the *locus in quo*, the evidence is to be adduced on oath and cross examination allowed to be done. In his reply, Mr. Shayo stated that the visit to the *locus in quo* was held on 06.05.2023 whereby the parties were able to identify the boundaries to the suit land. That, on 16.05.2024, the tribunal read facts on its observation before the parties and their advocates.

To this point, the question that follows is as to which procedures ought to be observed in visiting the *locus in quo* and whether the same were observed by the tribunal. It is well settled that visiting the *locus in quo* is not a mandatory procedure. The Court of Appeal 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."

See also, **Nizar M.H. vs. Gulamali Fazal Jarimohamed** (supra); **Sikuzani Saidi Magambo & Another vs. Mohamed Roble** (supra); **Bomu Mohamed vs. Hamisi Amiri** (Civil Appeal 99 of 2018) [2020] TZCA 29 TANZLII and **Kimonidimitri Mantheaki** (supra).

However, when a court or tribunal visits a *locus in quo*, there are procedures to be observed. These procedures have been developed over time. In **Nizar M. H Ladak vs. Gulamali Fazal Janmohamed** (supra), the Court of Appeal 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**."

In **Kimonidimitri Mantheakis vs. Ally Azim Dewji & Others** (supra), the Court of Appeal, having considered its previous decisions, advanced necessary requirements for the visit to the *locus in quo* to be meaningful. It 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"

Upon observing the tribunal record, it is evident that the request to visit the *locus in quo* was granted on 25.04.2023 whereby the visit was scheduled to take place on 06.05.2023. The proceedings reflect that on the material day for the visit of the *locus in quo*, the chairman, two assessors, the applicant, respondents and one, advocate Faustine Materu, for the appellant and advocate Tumaini Materu, for the respondents were in attendance before the tribunal. The record also reflects their presence at the *locus in quo*. At this point, I find it pertinent to reproduce what transpired at the *locus in quo*, as reflected in the proceedings:

> ***"KWENYE ENEO LA MGOGORO***
>
> *Baraza: Wadaawa waoneshe eneo la mgogoro.*
>
> *Mwombaji: Eneo la mgogoro ni hili lenye ukubwa wa ekari mbili.*
>
> *Mjibu maombi 1: Eneo hili ni mali yangu na linatenganishwa na mfereji huu wa maji.*

*Mhe: R. Mtei - Mwenyekiti*

*6/5/2023*

*Amri: Kusomewa yatayojitokeza kwenye eneo la mgogoro tarehe 16/5/2023.*

*Mhe: R. Mtei - Mwenyekiti*

*6/5/2023"*

As seen, the proceedings only indicated that the appellant as the respondent by then only showed the tribunal the suit land. The appellant referred to the land as the suit land and the 1st respondent pointed out that the land is hers and was demarcated by a stream or what they called a furrow of water. Thereafter, the matter was fixed for what the tribunal stated to be reading to the parties what transpired at the *locus in quo*.

On 16.05.2023 the tribunal read to the parties and their respective counsels the observations it recorded on the visit. The tribunal noted that both parties showed the suit land which is 2 acres. The respondents showed the stream separating the suit land from the appellant's 8 acres of land. The tribunal further pointed out that the suit land was bordered by one, Salimu Sekondo on one side, one, Ndyaruumbu on another side and another part there was a grazing area. For ease of reference, the passage thereof is hereby reproduced:

***"YALIYOJITOKEZA KWENYE ENEO LA MGOGORO***

*Mwombaji alionesha eneo la mgogoro lene ukubwa wa ekari 2. Wajibu maombi walionesha eneo hilo la mgogoro lenye ukubwa wa ekari 2. Hata hivyo wajibu maombi walionesha mpaka ambao ni mfereji wa kupitisha maji ambao ndio unaotenganisha eneo lao (eneo la mgogoro) na eneo la Mwombaji ambalo lina ukubwa wa ekari 8. Eneo la mgogoro limepakana na Mwajuma Salimu Sekondo kwa upande mmoja. Upande mwingine ni Ndyaruumbu Mkumbe na upande mwingine. Eneo la malisho na mifereji ambao ndio uliodaiwa kuwa mpaka.*

*Mhe: R. Mtei - Mwenyekiti*

*16/5/2023"*

The tribunal then inquired from parties whether the details were accurate. They all confirmed the said details and their counsels had no any comments in that regard.

In consideration of the process conducted by the tribunal, I find that the tribunal observed the requirement to involve the parties and their advocates in the visit. The tribunal also read the observations it recorded before the parties and their advocates after the visit. However, on the other hand, I also find that the tribunal failed to observe all the required procedures in visiting the *locus in quo*. The record does not show clear recording of what transpired during the visit. This is not only because it is unbelievable that the parties only showed the suit land to the tribunal, but also because there are traces in the observations read, opinion of assessors and the judgement of the tribunal showing more of what transpired than what the record depicts.

As seen in the observation, the tribunal noted that allegedly the boundaries of the suit land had been shown and that the undisputed land of the appellant was found to be 8 acres. In the said observation, there was no description of the exact cardinal points on which the said boundaries were located. However, one assessor, Ms. Mkindo, did put a description of the boundaries per the cardinal points which was: on south- Salimu Juma/ Sekondo; West- the appellant and the two were separated by a water stream.

Further, I find the record showing no details as to who else was present during the visit of the *locus in quo though* Ms, Mkindo opined that the description of the suit land by the respondent was affirmed by the village elders and neighbours at the *locus in quo*. Further, at page 8 of the Judgement, the tribunal chairman noted that SU4 showed the stream/ furrow of water separating the suit land from the appellant's land. This, in my view, shows there were other people in attendance including some of the witnesses that appeared at the tribunal during trial. The other assessor, Ms. Mchau, also noted in her opinion, that there was rice planted by the respondents in the suit land.

Considering all these anomalies, I can summarise that: **one**, the tribunal did not record what exactly transpired on the suit land during the visit to the locus in quo. There were even additional witnesses, such as, the village elders but they were never recorded in the proceedings. **Two**, the tribunal did not follow necessary procedures in receiving evidence at the *locus in quo*. ***Three***, the

tribunal committed another flaw in not showing the sketch map to the parties when reading its observations. **Four**, the tribunal confused two distinct requirements being; the need to record every detail that transpired at the *locus in quo* and recording of observations which ought to be shared. It is mandatory under the law that proceedings be correctly recorded and read out for parties to approve the correctness of the same. This was held in **Nizar M. H Ladak vs. Gulamali Fazal Janmohamed** (supra). As for observation or opinions, when the same are provided they ought to be shared. This includes the sketch map so drawn.

In the foregoing, I find the omission vitiating the trial on the part of visit to the *locus in quo*. Paying regard to the holding of the Court of Appeal in **Prof. T.L. Maliyamkono vs. Wilhelm Sirivester Erio** (Civil Appeal 93 of 2011) [2022] TZCA 39 TANZLII, and for interest of justice, I hereby nullify the proceedings of the trial tribunal from 25.04.2023 specifically from when the order for visiting the *locus in quo* was issued. I quash the entire Judgement and decree and set aside all orders resulting from the same. I also hereby order the matter to be remitted to the tribunal for completion of the same before a different chairman for interest of justice. Shall the visit to the *locus in quo* still found necessary as according to discretion of the tribunal, the same should be conducted in strict adherence to the procedures settled under the law as discussed hereinabove in this Judgement.

Considering that part of the proceedings, the judgment and decree have been nullified, the issue of ownership cannot be

addressed. The appeal is therefore allowed. Taking into account that the error was occasioned by the tribunal, I order for each party to bear his/her own costs.

Dated and delivered at Moshi on this 06th day of June 2024.


X

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