IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT SONGEA

LAND CASE APPEAL NO. 50 OF 2023

(From the Decision of the District Land and Housing Tribunal of TUNDURU District at TUNDURU in Land Application No. 17 of 2023

MOHAMED CHINUNGA DAMLA.....APPELLANT

VERSUS

MOHAMED HASSAI KALISINJE ..... RESPONDENT

JUDGMENT

Dated: 6th February & 7th March, 2024

KARAYEMAHA, J.

The appellant herein is robustly contesting the decision of the District Land and Housing Tribunal (henceforth the "DLHT") in Land Application No.17 of 2023. That decision declared the respondent the lawful owner of the unsurveyed pad farm measuring 6 acres (henceforth "the suit land") located at Namakungwa Village in Namwinyu ward within Tunduru District.

The appellant's case as deciphered from the application lodged before the DLHT is that he is the lawful owner of the suit land he acquired along with his father from the respondent's father, namely, mzee Mataula. He claimed that the respondent trespassed in the suit

land in August 2022 without the applicant's permission and knowledge and started cultivation. Nonetheless, despite efforts to settle the dispute amicably, nothing fruitful came out of it. Triggered by that outcome, the appellant resorted to enlist the intervention of the DLHT. In his application the appellant prayed for the following reliefs:

1. *A declaration that the applicant is the lawful owner of the land in dispute.*
2. *A declaration that the respondent is the trespasser.*
3. *Eviction order against the respondent, his workmen and his agents.*
4. *General damages.*
5. *Costs of the suit.*
6. *Any other order as the tribunal deemed fit and just to grant.*

The respondent defended himself through a Written Statement of Defence (WSD) filed in the DLHT on 19/1/2023. All along, he denied the allegations raised by the appellant and put the applicant to a strict proof of the same. After analysing the evidence of both parties, eventually, the DLHT found the appellant's evidence embracing substantial contradictions and finally declared the respondent the lawful owner. This means the learned trial Chairman believed the respondent's story and declared him the rightful owner of the suit land.

Feeling that justice was not rendered, and further quest for justice, the appellant challenges the decision of the DLHT and has in presently lodged a petition of appeal containing three (3) grounds of appeal as follows:

1. That, the Trial Land Tribunal erred in law and facts to entertain the suit contrary to the law.
2. That, the Trial Land Tribunal erred in law and facts by failure to evaluate the evidence adduced before it by the appellant witnesses and held the matter in favour of the respondent herein.
3. That, the Trial Land Tribunal erred in law and facts by failure to establish who was the first to develop and cultivate the disputable land between the appellant and the respondent and proceed to held the matter in favour of the respondent.

The parties who are both lay and unrepresented chose to argue the appeal by way of written submissions. The request was acceded to by the Court. It is only the appellant who filed the submission as scheduled. The respondent having no sounding reasons, did not file the reply to the appellant's submission.

Notably, the respondent failed to comply with the Court's order to file his submission as ordered in time. This Court has held time without

number that Courts' orders are made in order to be implemented; they must be obeyed. Conversely, if they are disobeyed or ignored the system of justice will grind to halt or it will be chaotic that everyone will decide to do only that which is convenient to them. See the case of **Olam Tanzania Limited v. Halawa Kwilabya,** (DC) Civil Appeal No. 17 of 1999 HC-Registry which was quoted in the case of **Harold Maleko v. Harry Mwasanjala,** DC. Civil Appeal No. 16 of 2000 and in **Seti Tete v. Mwanjelwa SACCOS**, Misc. Civil Application No. 22 of 2018 HC Registry – Mbeya (all unreported).

In principle, written submissions are a substitute of oral hearing. Thus, failure to file a written submission as ordered by court is akin to failure to appear when the case is called on for hearing and consequent orders for such nonappearance are inevitable. This rule is extracted in **Harold Maleko** (supra) and **Godfrey Chawe v. Nathaniel K. Chawe**, Misc. Civil Application No. 22 of 1998 (unreported). Particularly, in **Godfrey Chawe** (supra) the court grappled with a corresponding situation and held that:

> *"...Failure to file written arguments on the part of the learned counsel for the applicant is an omission which constitutes want of prosecution. I would dismiss the application on that account..."*

See also **Andrea Numba v. Trezia Mwigobane**, Civil Appeal No. 1 of 2006 (unreported).

In the upshot the respondent has defaulted in honouring orders of this Court to file his written submission thus failed to defend the appeal. The inexcusable conduct of the respondent triggers the lone consequence of determining the appeal without an advantage of hearing the respondent's views.

Having considered the appellant's submissions and, after a scrupulous review of the trial tribunal's proceedings, I have decided, for the reason which will be apparent shortly, that I should only deal with the second ground of appeal. In this ground of appeal, the appellant's contention is that the trial chairman wrongly evaluated the evidence which made him reach to a wrong decision. It is submitted further that the trial Chairman relied on a slight contradiction on his pleading and evidence, to wit, being the lawful owner of the suit land as per the pleadings but evidence reveals that the lawful owner is his father. He thus, held the view that this minor contradiction could not have led him to draw conclusion that the appellant failed to prove ownership of the land in dispute. He cited page 3 of the proceedings to cement that his

evidence proved to have acquired the suit land along with his father and used the same for 45 years uninterrupted.

The appellant faulted the trial Chairman for relying on yet another minor contradiction relating on who was given the suit land first between Mzee Masudi and Mzee Mataula. His conception of this fact is that the contradiction did not go to the root of the matter. He said that what was to be proved was who was the lawful owner of the land in dispute as per the issues framed. He was satisfied that he proved ownership of the land in dispute to the balance of probabilities.

Having gone through the submission I called the evidence from the original record to satisfy myself on the appellant's contention. Indeed, my evaluation of the evidence on record discloses uncertainties. I think if the learned trial Chairman had examined the same very carefully, he would have spotted that the location of the suit land is not certain.

It is gathered from the appellant's evidence that the suit land boarders the respondent's land. They are separated by banana trees and sugar canes. Seemingly, and of course in the light of the evidence on record, the appellant and respondent are related though not by

consanguinity. According to Mohamedi Kinunga Damla, PW1, Kinuga Damla his father was given the suit land by Mzee Mataula who was his compatriot/close friend and the respondent's relative. Culling from the evidence of PW2, Omary Yasini Mataula, and PW3, Abibi Mohamed Abdala, it is obvious that the appellant's father got the land from Salum Omary Mataula. This is where ownership of the suit of land is traced. But be it noted that in this respect, the evidence informs further that the respondent's piece of land neighbours the suit land.

At the same time the respondent, namely, Mohamed Hassan Kalisinje, who posed as DW1 testified that by 1948 he acquired a land along with his late father from Mohamed Rashid Kamboa. Later, Haji Damla sought for a piece of land from his father. After the latter's death, the land returned to him. That is why he planted banana trees. But according to DW2, Mohamed Kamboa's father gave the suit land to Kalisinje. Sanda Omary and Salum Omary were given land across the river. He informed the DLHT further that Chinunga is not the rightful owner of the suit land.

The evidence of both parties brings forth substantial contradiction. It is not clear where basically the suit land stands. Does it stand where the respondent claims it is or where the appellant claims it is. Are there

two pieces of land separated by sugar canes and banana trees or not. Is there a river between these two pieces of land as claimed by DW2? These questions have remained unanswered by the judgment of the DLHT or the proceedings.

In any case, the learned trial Chairman had to open his eyes and see this contradiction and resolve it prior issuing an order as he did. I understand that he might have avoided paying a visit to the *locus in quo* in order to avoid go into a fishing expedition by assuming the role of an investigator and gather fresh evidence at the trial something which is abhorred as stated in the land mark case of **Nizar M.H. Ladak vs. Gulamali Fazal Janmohamed** [1980] TLR 29, in which the Court inter alia held that:

> ***"It is only in exceptional circumstances that a court should inspect a locus in quo,*** *as by doing so a court may unconsciously take the role of a witness rather than adjudicator."* [Emphasis added]

Similar example of the above situation was accentuated in the case of **Mukasa vs. Uganda** [1964] EA 698 in which the erstwhile East Africa Court of Appeal had an occasion to discuss similar issue at page 700 where it held:

> *"A view of a locus in-quo ought to be, I think, to check on the evidence already given and* ***where necessary, and possible,*** *to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence.* "[Emphasis added]

On my part, where there is a contradiction as to where the suit land is located, like in this case, circumstances make it necessary for the *locus in quo* to be visited. The visit will be an eye opener to the adjudicator to see the suit land before declaring one party a lawful owner. Considering the evidence of this case closely, I don't have any doubt that the Chairman was only to check on the evidence already given so as to have such evidence ocularly demonstrated in as much as it is already in record and shows the uncertainty of the location of the suit property.

The tough question for determination at this juncture is; what is the way forward? If I allow the appeal, I shall be blessing the trial tribunal's decision which I find to carry along some errors and inexecutable orders. If I dismiss it, I shall give inexecutable order again. What I think can be a solution for all these is to order additional

evidence in terms of section 42 of the Land Disputes Courts Act, Cap 216 R.E 2019 which provides that:

> *"42. The High Court shall in the exercise of its appellate jurisdiction have power to take or to order the District Land and Housing Tribunal to take and certify additional evidence and whether additional evidence is taken or not, to confirm, reverse, amend or vary any manner the decision or order appealed against."*

With respect to the quest for additional evidence, the position on when and under what circumstances additional evidence may be ordered is settled. One of the recent guidance in this respect was accentuated by the Court of Appeal in **Ismail Rashid vs. Mariam Msati,** CAT- Civil Appeal No. 75 of 2015 (unreported), which quoted with approval, the holding in **S.T. Paryani vs. Choitram & Others** (1963) EA 462. In the latter, the regional apex Court quoted with approval Lord Denning L.J., as he then was, in the **Ladd vs. Marshall** (4) (1954) 3 All E.R 745. Noteworthy, Lord Denning's stance was adopted by the Court of Appeal for Eastern Africa in **Tarmohamed and Another vs. Lakhani *& Co*** (3) (1958) E.A 567(CA). It held as hereunder:

> *"To justify the reception of fresh evidence or a new trial: three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence*

for use at the trial: second, the evidence must be such that; if given would probably have an important influence on the result of a case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible ..."

The reasoning in the just cited decision is amplified by the authors of ***SARKAR LAW OF EVIDENCE*** 16th edition 2007, at page 2512. Discussing grounds upon which additional evidence may be given and the related restrictions, they opined as follows:

"The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is required for a proper decision of a case. The legitimate occasion for admission of additional evidence is when on examining the evidence as it stands. Some inherent lacuna or defect becomes apparent, and not where discovery is made outside the court, of the fresh evidence and the application is made to import it. The rule is not intended to allow a litigant who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal."

In my view, additional evidence on the location of the suit land will probably have an important influence on the result of a case. This is simply because the evidence will reveal whether the referred suit land is one or they are two distinct pieces of lands.

In any case, there were lapses in the evidence of the DLHT regarding the location of the suit land. Most importantly, the DLHT is criticized for not going deep into the heart of the evidence.

In view of the foregoing, the DLHT is ordered to visit the *locus in quo* and ocularly observe the location of the suit land take additional evidence regarding which part the suit land is located and certify the same to this Court. Costs to be in the due course.

It is so ordered.

DATED at **SONGEA** this **7th** day of **March, 2024**

J. M. KARAYEMAHA
JUDGE