IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB – REGISTRY)

AT MBEYA

LAND APPEAL NO 31 OF 2023

(*Originating from Application No. 71 of 2022 the District Land and Housing Tribunal for Mbeya at Mbeya*)

JUMA MLOLI.....APPELLANT

VERSUS

LENA YOBELE.....RESPONDENT

JUDGMENT

8th December, 2023 & 28th February 2024

POMO, J

Through Land Application No. 71 Mbeya District Land and Housing Tribunal (the Trial Tribunal) the respondent successfully sued the appellant herein, JUMA MLOLI, on the claim that he invaded her piece of land at Ifiga Village in the district and region of Mbeya comprising of 90 and 85 steps length and width respectively. To be precise, the relief sought were: -

1. *That be declared the lawful owner of the land in dispute*

2. *That it be declared that the appellant had no any right over the land in dispute.*
3. *That the appellant should vacate from the land in dispute.*
4. *That the appellant should pay compensation for the damaged made by him on that land for three years*
5. *Costs of the suit be awarded.*

After a full trial, the trial tribunal declared the Respondent a lawful owner of the suit land. Unhappy with the decision, the appellant has approached this court parading four grounds of appeal as follows: -

1. *That the learned trial Chairman grossly erred in law and fact when entered the judgment in favour of the respondent without considered the evidence obtained from the locus in quo*
2. *That the learned trial Chairman grossly erred in law and fact when entertained application No.71 of 2022 without valid certificate of conciliation from the Ward tribunal.*
3. *That the learned trial Chairman grossly erred in law and fact in the assessment of evidence on record.*
4. *That the learned trial Chairman grossly erred in law and fact to declare the respondent to be the lawful owner of the disputed land without considering the strong testimony adduced by DWI, DW2 and DW3 without justifiable reason.*

Briefly, the back ground of the case as can be gathered from the trial tribunal record are as follows. The respondent herein, for TZS 125,000/- and one Goat loan mortgaged her land in dispute to one JAPHET MANAMBA the young brother of the appellant. It was the term of the agreement that during subsistence of the loan, the said JAPHET MANAMBA will have the right to use the suit land and will be returned to the Respondent upon returning the money as well the goat. At a time, dispute arose between the two over the same land in which the respondent won and was ordered to return TZS 125,000/= plus one goat to reclaim his land. On 1st October 2029 before she could return the money and a goat the said JAPHET MANAMBA passed away. Despites demise of the said JAPHET MANAMBA, the respondent returned the TZS 125,000/- and a goat as ordered to the appellant who received the same on behalf of his deceased young brother. Following that the land was returned to the respondent in the presence of village leaders and traditional chiefs and the respondent started using it peacefully. Sometimes later, the Appellant obstructed the respondent from using the suit land. Following that, the respondent commenced Land Application No. 71 of 2022 before the trial tribunal against the Appellant and was declared the lawful owner.

16.

Dissatisfied, as hinted earlier on, the appellant has appealed to this court parading four grounds of appeal above listed.

On 12/10/2023 when the appeal was called on for hearing, by consensus it was agreed the appeal be disposed by way of written submissions. Whereas the Appellant appeared in person unrepresented, the Respondent enjoyed legal service of Ms. Neema Siwingwa, learned counsel

Arguing the 1st ground, the appellant contends that the reason of visiting *locus in quo* is to enable the court physically see the objects and premises referred in evidence to clear conflicting evidences. In support, he cited the case of **Akosile vs Adeye** (2011) 17 NWLR (pt.1276) p. 263. He then submitted that the trial tribunal in its judgment did not explain what happened when it visited the *locus in quo*.

On the second ground, the Appellant argued that the law dictates that in absence of certificate of conciliation for the ward tribunal no suit can be instituted before the District Land and Housing Tribunal. That, the respondent's attached certificate in her Land Application before the trial tribunal didn't qualify so be on a reason it was not addressed to the district

Land and Housing tribunal rather to the lawyer and bears no signature of the ward tribunal secretary.

The appellant combined the 3rd and 4th grounds and argued them together. Arguing the grounds, begun by submitting that the burden of proof lies on a party who alleges anything citing section 110 (1) & (2) and section 112 of the Evidence Act [Cap.6 R.E. 2019] and the case of **Bahati Mwakalasya vs Kampala International University** [2020] TLR 162.

That, the judgment must convey indication that a magistrate or judge has applied his mind to the evidence on record and no material portion of evidence laid before the court has been ignored. Bolstering his contention, he referred this court to the case of **Ahmed Salmin Bin Taher vs Latifa Said Ganzel,** Land Appeal No. 77 of 2020 High Court (Land Division) at Dar es salaam (unreported). That, the Chairman didn't properly evaluate the evidence on record instead relied on evidence of PW2; PW3; PW4; PW5 and PW6 who reside at Iwalanje and not at Ifiga where the suit land is located and are not local chiefs who participated in resolving the dispute between his deceased young brother and the respondent, contending they are cooked witnesses.

Arguing further, the appellant submitted that the disputed land does not form part of the land which his young brother received in exchange of loan and goat advanced to the respondent. That, the first appellate court is entitled to re-evaluate the entire evidence adduced and subject them to critical scrutiny. Substantiating this power vested in this court, the Appellant cited the cases of **Deemay Daati & 2 Others versus Republic**, [2005) TLR 132 and **Ndizu Ngasa versus Masisa Magasha** [1999] TLR 202. Thus, the appellant prayed his appeal be allowed with costs.

Replying on the first ground, Ms. Neema submitted that it was the appellant who testified that the disputed land is different from what the respondent sued the appellant in the trial tribunal and this is what forced the tribunal to visit the *locus in quo* to clear doubts and not to obtain evidence as the appellant is arguing. In support, she cited the case of **Isdory Frances Makata and Another versus Kassimu Mohamed Himbahimba**, Misc. Land Appeal No.15 of 2021and **Avit Thadeus Masawe versus Isidory Assenga** Civil Appeal No.06 of 2017 CAT at Arusha (unreported)

Regarding the second ground, Ms. Neema submitted that the application was accompanied with the certificate from Ijombe Ward Tribunal

where the parties went for mediation and the appellant refused the mediation process hence the matter was referred to District Land and Housing Tribunal. Bolstering her stance, she cited the case of **Idd Kauzu vs Ally Abdallah Mkoko and Another**, Land Appeal No.8 of 2022 High Court at Mwanza (unreported)

On the third and fourth grounds, Ms. Neema argued them together by submitting that the trial tribunal rightly evaluated the evidence on record coupled with visiting the *locus in quo* which aimed at clearing all doubts arose during trial whereby it was revealed that the appellant's evidence is weak compared to that of the respondent. That, as regards to the assertion that the suit land which the appellant was sued for is different from that which the respondent leased to his young brother, but when the tribunal visited the *locus in quo* the appellant failed to locate the suit land allegedly to be different land from that of the Respondent rather, he subjected himself to the land which the respondent leased to his late young brother. Ms. Neema concluded by praying this appeal be dismissed.

In rejoinder, as to the 1st ground, the appellant argued that the case of **Asokile vs Adeye (supra)** explains the purpose of visiting *locus in quo*.

Regarding the second ground, in rejoinder, the Appellant insisted that there was no proper conciliation certificate from the ward tribunal hence the District Land and Housing Tribunal acted on a matter which it had no jurisdiction.

As to 3rd and 4th grounds, the appellant's rejoinder is that the trial tribunal did not make critical analysis and evaluation of evidence adduced during the trial and the visit of *locus in quo*. Henceforth, the appellant reiterated his prayer that the appeal be allowed with costs.

Having considered the grounds of appeal, submissions for and against the appeal from the parties and the tribunal record, what I am called to determine therefore is whether the Appellant's appeal is merited or otherwise.

In resolving the appeal, therefore, I will determine the 3rd and 4th grounds of appeal first because reading the grounds all fault on evaluation of evidence.

It has to be understood that, as trite law, that the trial tribunals like any other trial courts are duty bound in deciding disputed, to evaluate evidence testified by witnesses by both sides in making findings on the issue.

Again, this court which in this matter is sitting as a first appellate court, is empowered to re- appraise the evidence on record and draw out its own inferences and findings of facts. This is the stance of the court as obtaining, among others, in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal No.45 of 2017 CAT at Mwanza (unreported) at page 17; **D.R PANDYA vs R** [1957] E.A 336 and **Martha Weja vs Attorney General and Another** [1982] TLR 35].

According to the trial tribunal proceedings, six witnesses testified for the respondent, that is to say, PW1; PW2; PW3; PW4; PW5 and PW 6 while three witnesses were for the Appellant, DW1; DW2 and DW3, for that matter. From pages 4 – 12 of the proceedings, is the evidence testified by the respondent's witnesses who were village leaders and traditional Chiefs. They testified to the effect that the land in dispute belongs to the respondent having reclaimed the land which she had leased to the appellant's deceased young brother one JAPHET MANAMBA by paying TZS. 125,000/= and one Goat. They witnessed when the respondent was being given back his land after paying the said amount of money and a goat and the piece of land in dispute was inclusive.

Besides, these testimonies are partly accepted by DW2 and DW3 in their evidence testified from page 15 to page 17 of the proceedings.

During the visit of *locus in quo* the respondent testified that she owns the whole land. The appellant partly accepted the fact however he failed to describe which piece of land is in dispute (see pp. 18 – 19 the proceedings).

In deciding, the trial tribunal reasoned that the respondent's witnesses who were village leaders and chiefs witnessed the returning back of land to the respondent and that the land in dispute was inclusive.

On the other hand, the appellant has raised concern in his submission that PW2; PW3; PW4; PW5 and PW6 are not chiefs who participated in resolving the dispute. However, these witnesses the time they testified before the trial tribunal the appellant did not cross examine them on this vital fact he is raising at this stage. It is a settled law that failure to cross examine on a fact implies acceptance of it. In **Paulina Samson Ndawavya** case cited (supra), at page 20, quoting the case of **Shadrack Balingo versus Fikiri Mohamed @ Hamza and 2 Others,** Civil Appeal No.223 of 2017 CAT at Mwanza (unreported) stated as follows: -

"As rightly observed by the learned judge in her judgment, the appellant did not cross examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross examine the first respondent amounted to acceptance of the truthfulness of the appellant's account" at page 20.

[See also: **Issah Hassan Uki vs Republic**, Criminal Appeal No.129 of 2017 CAT at Mtwara at page 16; **Damian Ruhere vs Republic**, Criminal Appeal No.501 of 2007 CAT at Mwanza and **Nyerere Nyague vs Republic,** Criminal Appeal No.67 of 2010 CAT at Arusha (all unreported].

From the foregoing, it is the finding of this court that the trial tribunal properly assessed; evaluated and analyzed both sides evidence and rightly, in my view, decided in favour of the Respondent herein hence 3rd and 4th grounds lacks merit.

As to the 2nd ground of appeal, this one need not detain me. The issue of lack of conciliation certificate from the ward tribunal was not determined by the trial court therefore can not be raised as ground of appeal herein.

Also, the trial tribunal proceedings speaks loud against the Appellant as it is on record that he withdrew the same ground he raised by way objection against the respondent's Land Application before the trial tribunal

that the suit was filed without a certificate of conciliation from the ward tribunal. He did so after discovering the certificate is there (see page 2 of the proceedings). The proceedings of 02/11/2022 on which the Appellant withdrew the objection reads thus: -

"02/11/2022

Akidi: T. Munzerere – Mwenyekiti

Washauri: 1. Vivian

2. Musa

Zamda

Mdai

Mdaiwa Wapo

Pingamizi la awali linasikilizwa

Mleta pingamizi anaeleza

- ***Naomba pingamizi londolewe sina nia ya kulielezea***
- ***Barua ya baraza la kata ipo***

Amri

- *Pingamizi la awali limeondolewa kama alivyoomba mleta pingamizi*
- *Barua ya baraza la kata ipo*
- *Shauri linaendelea kwa usikilizaji*

Imesainiwa

T. Munzerere

Mwenyekiti

02/11/2022."

Therefore, the Appellant cannot be heard complaining that there was no conciliation certificate from the ward tribunal when the respondent filed her suit before the District Land and Housing Tribunal. He is estopped. This ground fails

Lastly, is ground one of appeal. Under this ground, the Appellant faults the trial tribunal for not considering evidence obtained during visiting *locus in quo.* In **Avit Thadeus Massawe** case cited **(supra)**, among other things, held that: -

> *"The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make different case from the one he led in support of his claims"*

[see also: **Msigwa Selemani vs Paulo Lukumpa & 2 Others**, Land Appeal No.24 of 2018 High Court of Tanzania at Tabora pp.9 – 10; **Kimonidimitri Mantheakis vs Azim Dewji & Others**, Civil Appeal No.4 of 2018 CAT at Dar es salaam at page 8 (both unreported) and **Akosile vs Adenye** (2011) 17 NWLR (pt. 1276 pg 263].

Applying the settled law in the above cited case laws, in the manner this court appraised the trial tribunal evidence on record including the visiting

16.

of *locus in quo*, when resolving the 3rd and 4th grounds of appeal, in my considered view, there is nothing as complaint that the evidence obtained during visiting locus in quo was not considered, the appellant having failed to show his allegedly land as compared the Respondent who showed her land in which part of which the appellant invaded

In the upshot, I find the Appellant's appeal is unmerited and consequently dismiss it with costs. It is so ordered.

Right of appeal explained

DATED at **Mbeya** this 28th day of **February, 2024**

MUSA K. POMO

JUDGE

28/02/2024

Judgment delivered in chamber in present of both parties and Ms. Neema Siwingwa, learned advocate for the Respondent

MUSA K. POMO

JUDGE

28/02/2024