IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS LAND CASE APPEAL NO. 3 OF 2012

(From the decision of the District Land and Housing Tribunal of Njombe District at Njombe in Land Case Appeal No. 1 of 2011 and Original Ward Tribunal of Kichiwa Ward in Application No. 5 of 2010)

ANANGYE MLONGANILE ---------- APPELLANT

VERSUS

ZABRON MLONGANILE ---------- RESPONDENT

19/03/2015 & 14/05/2015

JUDGEMENT

P. F. KIHWELO, J.

This is an appeal by Shem Mlonganile (The Administrator of the estate of the deceased the late Anangye Mlonganile), against the judgment of the District Land and Housing Tribunal of Njombe in Land Appeal No. 1 of 2011 delivered on 16th February, 2012 and which set aside the decision of Kichiwa Ward Tribunal and declared the respondent herein the lawful owner of the suit land. Dissatisfied

with the decision of the District Land and Housing Tribunal the appellant preferred this appeal with four points grounds of appeal which may be summarized as follows:-

(1) That the appellate tribunal erred in entertaining new evidence.

(2) That the appellate tribunal erred in failing to consider the strong evidence adduced by the appellant.

(3) That the appellate tribunal erred when it based its decision on weak evidence adduced by the respondent.

(4) The appellate tribunal failed to observe the proper composition of the Ward Tribunal during the mediation of this suit (sic).

The brief background to this appeal is that the appellant instituted a Land Application No. 5 of 2010 before the Kichiwa Ward Tribunal which having heard the application and visiting the locus in quo delivered its decision on 22nd December, 2010 and decided to divide the suit land between the appellant and the respondent by putting demarcations. Dissatisfied with the said decision the present respondent preferred the appeal before the District Land and Housing Tribunal in which he raised 5 grounds of appeal. The District Land and Housing Tribunal in addition to reading the parties written submissions decided to visit the locus in quo and subsequently delivered its judgment on 16th February 2012 in which the District Land and Housing Tribunal set aside the decision

of the Ward Tribunal with its orders and declared the respondent the lawful owner of the suit land except the piece of land for burial purposes.

Before this court the appellant was under the services of Mr. Danda, learned counsel while Mr. Onesmo, learned counsel appeared for the respondent. Upon directions by the court this appeal was heard through written submissions.

While arguing in support of the first ground the appellant contended that the appellate tribunal had no strong reason to visit the locus in quo and by so doing it turned out to be party in the case as a result manufactured new evidence.

The appellant further faulted the appellate tribunal in its evaluation of the evidence as raised in ground two and three of the appeal. The appellant submitted that the appellate tribunal arrived at the conclusion based upon weak evidence of the respondent.

In reply the respondent filed a two page submission which I must confess that they were not useful at all to this court as the arguments were in parables and did not have any substance at all.

A cursory and careful perusal of both the court records and the rival submissions in particular the ones filed by the appellant the central issue for determination is whether the present appeal is meritorious.

In attempting to answer the above issue I will focus on two issues one whether the appellate tribunal erred in visiting the locus in quo and secondly whether the decision of the appellate tribunal was based upon weak evidence which was adduced by the respondent.

I will first examine the locus in quo. The appellant counsel contents that the appellate tribunal was wrong in visiting the locus in quo being an appellate tribunal it had no strong reason to conduct the locus in quo. With all due respect I find that proposition to be misleading and misguided as the law is very loud and clear on this aspect. Section 34(1) (b) of the Land Disputes Courts Act, Cap 216 RE 2002 reads;

> *34(1) The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors; and shall*
>
> *(a) N/A*
>
> *(b) receive such additional evidence if any;*

Turning to the court records on 14th July, 2011 the Hon. Chairperson had this to say;

> *"An appeal (sic) is coming for judgment today but I failed to prepare/draft the said judgment because after going through record of proceedings (sic) and judgment of the Ward Tribunal, I realized that the Ward Tribunal visited the locus in quo and drew 2 sketch map (sic) but both of them do not indicate clearly the disputed land. Therefore, I see the necessity of this tribunal to visit the suit land."*

It is therefore apparently clear that the Appellate tribunal opted to visit the locus in quo in order to clear the glaring contradictions. The position of the law is settled that there is actually no law which require visit of locus in quo as a mandatory requirement. Visit of the locus in quo is only done when it is necessary to assess the situation on the ground based upon the dispute in question.

That is why it is common for locus in quo to be conducted in disputes where boundaries are at issue. [**Jeremia Bundala V Yuda Katanga**, Miscellaneous Land Case Appeal No. 102 of 2009, High Court of Tanzania, Land Division at Dar es Salaam (unreported).

In my considered opinion the visit of the locus in quo by the appellate tribunal was a necessity in order to resolve the contradiction which was made clear by the appellate tribunal in its proceedings. In the case of **Ally Sudi V Emanuel Swai**, Land Appeal No. 1 of 2012, High Court of Tanzania, Land Division at Dar es Salaam (unreported), the court had the following to say;

> *"Revisit to the locus in quo can only be done if the lower court records are not clear and hence necessitating revisiting of the locus in quo. Otherwise the practice is discouraged lest the visiting court to be part of the case rather than adjudicator."*

As rightly pointed out by the chairperson of the appellate tribunal there is on record two sketch maps one dated on 29/11/2010 and the other dated on 30/12/2010 in those circumstances it was inevitable for the appellate tribunal to visit the locus in quo by virtue of Section 34(1) (b) of Cap 216. Therefore this ground must fail.

I will now turn to the second issue whether the decision of the appellate tribunal was based upon weak evidence which the respondent adduced.

Looking at the records of the appellate tribunal it is quite clear that this issue should not detain me much as the judgment clearly reveals that the Honourable Chairperson analyzed the evidence of

the Ward Tribunal and came to the logical conclusion that the respondent had been using the suit land since 1962 without any complaints from the appellant hence the evidence of the respondent out weighed the evidence of the appellant.

I am therefore of the considered opinion that ground number two and three must fail too.

For the above reasons and to the extent shown above this appeal is dismissed with costs.

P. F. KIHWELO
JUDGE
14/05/2015

Right of Appeal is fully explained.

P. F. KIHWELO
JUDGE
14/05/2015