

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT SUMBAWANGA

LAND APPEAL NO. 22 OF 2020

(Originating from the Decision of the District Land and Housing Tribunal of Katavi

District at Mpanda in Land Application No. 14 of 2019)

AUGUSTINE MATHEW MBALAMWEZI APPELLANT

VERSUS

MARY PETRO MGOLOKA RESPONDENT

Date of last Order: 22/09/2020

Date of Judgment: 23/12/2020

JUDGMENT

C.P. MKEHA, J

The present appeal originates from the District Land and Housing Tribunal of Katavi before which the respondent sued the appellant seeking declaration that the disputed land is the property of Petro Nicholas Mgoloka's family under administration of the respondent as well as vacant possession. At the end of trial, the respondent emerged victorious. The disputed land was declared to be the property of Petro Nicholas Mgoloka's family. The appellant was ordered to vacate the disputed land. He was also ordered to bear costs of

the application. The appellant was not satisfied. He therefore preferred the present appeal consisting of five grounds of appeal as hereunder:-

1. That, G.K. Rugalema the Chairman of the Trial Tribunal erred at law by drawing the judgment and signing it in the name of P.I Chairman(sic) the Chairperson who heard and conducted the original case contrary to law;
2. That, the Trial Tribunal erred at law by dealing with the dispute which was determined by the Inyonga Ward Tribunal as Land Dispute No. 7 of 2017 and the Respondent lost but did not appeal against the decision, a decision which was recognized and approved by the same Trial Tribunal in Land Appeal No. 29 of 2018;
3. That, the Trial Tribunal erred both at law and fact by giving its judgment in favour of the Respondent despite conflicting evidence adduced by the Respondent and her witnesses;
4. That, the Trial Tribunal erred both at law and fact by its failure to visit **locus in quo** despite agreement reached by the Tribunal and the parties to visit the **locus in quo**. Thus, it failed to have a full appraisal of the area in dispute and hear from neighbours to the suitland and
5. That, the Trial Tribunal erred at law by failure to recognize Appellant's long occupation of the suitland.

During hearing of the appeal, the appellant appeared in person. On the other hand, the respondent was represented by Ms. Amulike learned advocate.

It was submitted by the appellant in respect of the second ground of appeal that the matter was *res judicata* as between the parties to this appeal. According to the appellant earlier, the parties litigated over the same cause of action before the Ward Tribunal and then, the respondent instituted a fresh case which was inadvertently entertained by the District Land and Housing Tribunal of Katavi.

The appellant submitted in respect of the third ground of appeal that the respondent's witnesses contradicted themselves in the course of testifying. He did not specifically point to testimonies of witnesses containing the alleged contradictions.

In the fourth ground of appeal, the appellant's complaint was the fact that, the trial Chairperson failed to visit the disputed land. That is irrespective of the fact that, there was an order issued for visiting the disputed land.

Finally, the appellant submitted in respect of the fifth ground of appeal that he had been in occupation of the said land since 1994 without interruption. The appellant condemned the trial Chairperson for failure to take into account the said fact.

Ms. Amulike learned advocate submitted in reply that, there has never been a case involving the parties save far the one instituted by the respondent before the District Land and Housing Tribunal of Katavi.

In view of the learned advocate there was no contradiction in the witnesses' testimonies. She gave no further clarification.

The learned advocate conceded that, it is true that the disputed land was not visited by the District Land and Housing Tribunal. In view of the learned advocate, the visit was not mandatory. The learned advocate submitted that, in the case of **AVIT THADEUS MASSAWE VS. ISDORY ASSENGA, Civil Appeal No. 6 of 2017** circumstances justifying visits to **locus in quo** are listed. In view of the learned advocate none of the circumstances existed in the present case.

The learned advocate finally submitted that, it is not true that the appellant had occupied the disputed land for more than twelve (12) years. According to the learned advocate, it is the respondent's family which occupied the disputed land for a long time.

In view of satisfying myself whether the matter between the parties was really *res judicata*, I had to revisit proceedings in Land Case No. 7 of 2018 before Inyonga Ward Tribunal. The parties in the said case were the appellant as the complainant and the Village Executive Officer of Kalovya Village as the respondent. In the absence of evidence to the effect that the respondent

derives her title from the Village Executive Officer of Kalovya Village, the doctrine of res-judicata cannot be invoked to bind the respondent. The second ground of appeal is therefore held to be baseless. The same is dismissed.

Whereas the learned advocate for the respondent insists that there were no contradictions in testimonies of the respondent's witnesses, the appellant insists that there were some contradictions. He however failed to point out such contradictions. In the course of rereading the trial tribunal's record, I found the appellant's complaint to carry a ring of truth. Whereas PW3 testified that the disputed land measures ten (10) acres in size the respondent and the rest of her witnesses testified that the disputed land measures four (4) acres in size. That might have been one of the reasons, the predecessor Chairperson made an order for visiting the **locus in quo**. Whether the contradiction is vital or not, that would depend on the findings of the Tribunal after visiting the **locus in quo**.

It was the learned advocate's submission that visiting of the **locus in quo** was unnecessary in the circumstances of this case. The appellant insisted that, the visit was necessary. I choose to travel in the appellant's path. As per the decision in **AVIT THADEUS MASSAWE** (supra), the following are factors to be considered before the courts decide to visit the **locus in quo**.

1. Courts should undertake a visit to the **locus in quo** where such a visit will clear doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence.
2. The essence of a visit to **locus in quo** in land matters includes location of the disputed land, the extent, boundaries and boundaries neighbour and physical features on the land.
3. In a land dispute where it is manifest that there is a conflict in survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the **locus in quo**.
4. 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 a different case from the one he led in support of his claims.

The principles hereinabove have been explained by the Court of Appeal of Tanzania to be very relevant and crucial in providing general guidance to our courts in the event they, either on their own accord or upon request by either party, exercise their discretion to visit the locus in quo. Read: **AVIT THADEUS MASSAWE** (supra) at page 13.

As demonstrated while determining the third ground of appeal, there was a contradiction as to the actual size of land in dispute. While PW3 testified that


the land in dispute measures ten (10) acres in size, the respondent and the rest of her witnesses testified that, the disputed land measures four (4) acres. PW3 who is the respondent's elder sister was unable to identify neighbours to the disputed land. That is not all! PW4 is on record to have testified that, the dispute between the appellant and the respondent's family is all about boundaries. Therefore as correctly submitted by the appellant, and in accord with the principles cited hereinabove, this was a fit case for a visit to locus in quo to be made. The fourth ground of appeal is held to be meritorious, hence, upheld.

Since determination of the fifth ground of appeal partly depends on the findings of the tribunal on visiting the locus in quo and taking into account the way I intend to dispose the present appeal, I hold that, for the time being, it would be premature to determine the said ground of appeal.

For the foregoing reasons, the trial Tribunal's judgment is set aside. The matter is pushed to where it stood on 02/12/2019. The same is to proceed before a distinct Chairperson and new set of Assessors.

Dated at **SUMBAWANGA** this 23rd day of DECEMBER, 2020.




C.P. MKEHA
JUDGE
23/12/2020

Court: Judgment is delivered in the presence of the parties.




C.P. MKEHA
JUDGE
23/12/2020

Court: Right of appeal explained.




C.P. MKEHA
JUDGE
23/12/2020