IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO.76 OF 2019

(From the Decision of the District Land and Housing Tribunal of Morogoro District at Morogoro in Land Case No. 149 of 2017)

GRACE ASHIMOGO.....1ST APPELLANT
ALEXANDER CLEOPHAS ASHIMOGO.....2ND APPELLANT
HILDA ASHIMOGO.....3RD APPELLANT

VERSUS

ZEBIO REAL ESTATE CO. LIMITED.....RESPONDENT

JUDGMENT

OPIYO, J.

Briefly, the instant appeal emanated from the judgement and decree of Honourable Mzava, C.T, the learned Chairperson of the District Land and Housing Tribunal of Morogoro District dated 18-5-2018. The respondent, ZEBIO Real Estate company Limited, reached the trial tribunal seeking among others a declaration that she is a legal owner of the suit land, measured 15 acres located at Mkundi Area, Morogoro Municipality as against the three appellants. She was granted the reliefs sought. Unhappy with the decision and orders of the trial tribunal, the appellants lodged this appeal with five grounds, mainly faulting the trial tribunal for misdirecting itself on the facts, evaluation and analysis of evidence thereby concluding the matter in favour of ZEBIO Real Estate Company Limited.

In hearing of the appeal which was by written submissions, Tumaini Mfinanga, learned counsel appeared for the appellants, while the respondent enjoyed the legal services of Mr. B.L. Tarimo, learned Advocate.

Tumain Mfinanga for the appellants has insisted in his submissions that, the appellants have occupied the suit land for a quite long time since 1996, therefore it is no right to disturb them as 12 years have lapsed since they set their feet on the land in question (see Item I, Part I of the Law of Limiting of Act). Mr. Tumaini cited the case **of Shaban Nassoro versus Rajabu Simba (1967) HCD**, where it was observed that:-

> *"The Court has been reluctant to disturb persons who have occupied land and developed it over a long time. The respondent and his father have been in occupation of the land for minimum of eighteen (18) years which is quite a long time. It will be unfair to disturb their occupation."*

On the 2nd ground, the submissions of Mr. Tumaini was that, DW4, one Robert Kirugu was joined as a necessary party at the trial tribunal, he introduced himself as an Administrator of the Estate of the late Clement Pius who is said to have sold the suit land to the respondent. The trial tribunal believed his testimony without any proof that he was in fact the administrator of the estate of Clement Pius. In absence of that proof, DW4 lacked capacity to represent the late Clement Pius.

Mr. Tumaini went on to argue on the 3rd ground of appeal that, the trial tribunal believed the respondent to be the owner of the suit land basing on weak evidence compared with that of the appellants. The respondent tendered a sale agreement of 20th January 2015, which was the only document relied upon by her, though she claimed to have surveyed the land. However, the appellants tendered documents showing that, they had surveyed the land earlier in 2008 and granted the latter of offer, therefore the respondent cannot claim to have surveyed the land in 2015. Mr. Tumain also cited the case of **Rupiana Tungu & 3 Others versus Abdul Buddy & Halik Abdul, Civil Appeal No. 115 of 2004, High court of Tanzania at Dar es Salaam (unreported)**, for the holding that:-

> *"the right of occupancy over the disputed land as evidenced by the documents produced by the respondents/plaintiffs were granted on 12th October 1988, the appellants who alleged to have been allocated the same land by village council in 1995 cannot be said to have been allocated the said land before the respondent".*

On the 4th ground it was submitted by the appellant's counsel that, the trial tribunal was wrong to deliver judgement in favour of the respondent on account of differences on the farm numbers and street names of the suit land as the same did not change the appellant's ownership of the said land. The case of **Frank Safari Mchuma versus Shaibu Ally Shemndolwa, (1998) TLR, 278,** was cited for the quotation that: -

> *"Acquisition of tittle to land is signified by an offer followed by an acceptance, as in this case an offer was made to and acceptance by the plaintiff in respect of a parcel of land physically known to both the*

offeror and offeree, the two are at ad-idem on the subject matter notwithstanding the differences in description of that land between the offer and the certificate of occupancy."

Lastly, on the 5th ground, it was argued by Mr. Tumaini that, the trial tribunal gave little weight to the evidence of the appellant's. The appellants tendered a search report, letter of offer with Ref No. MMC/LD/11475/1/JW, joining instruction, letter from Kihonda Ward and fee payments slips. All these documents have the name of the 1st appellant as the guardian of the 2nd and 3rd appellants. The trial tribunal did not consider all these hence decided in favour of the respondent.

In reply, Mr. Tarimo for the respondent argued on the 1st ground that, the vendor, one Clement Pius had occupied the land since 1985, 11 years before the appellants, therefore, he was the real owner capable of selling the suit land to the respondent, ZEBIO, Real Estate Company Limited. Also, the appellants and their witnesses failed to identify even a single neighbour surrounding the suit land, and that created a doubt as to their existence on and knowledge of the said land. They also contradicted themselves in identifying the location of the suit land during the trial, in terms of street names and farm number, hence their contradiction worked in favour of the respondent.

As for the 2nd, 3rd and 5th grounds of appeal, it was submitted that, the applicant's counsel has raised a new issue which is an afterthought. The same was not raised during the trial as far as the proof of administration of the estate of Clement Pius by DW4 is concerned. Therefore, these grounds

should be dismissed for lack of merits. However, the testimony of PW2, Tatu Shaabani Mbuka and PW3, Nyamizi Othman Mzee, coupled with exhibits P1 (sale agreement) and P2 (document from Mtaa Government) were credible enough to outweigh the evidence of the appellants. As stated in **Hemed Said versus Mohamed Mbilu, (1984), TLR 113**, that, *"both parties to the suit cannot tie, but a person whose evidence is heavier than that of the other is the one who must win,* he submits.

Regarding the 4th ground of appeal, the respondent's counsel maintained that, the appellants were advised to consult the relevant authorities in order to trace and identify their farm so as to avoid further disputes as all of the appellant's witnesses could not identify the suit land. Therefore, the trial tribunal was right to decide in favour of the respondent. To him the entire appeal lacks merit and should be dismissed.

In rejoinder, Mr. Tumaini for the appellants reiterated his submissions in chief and insisted that, the fact that the appellant's father purchased the land in dispute remained unchallenged as there is a clear evidence to that effect. As for the witnesses' failure to identify the neighbors surrounding the suit land, it was submitted by Mr. Tumaini that, it was difficult for the appellants' witnesses to do so owing to the circumstances around the suit land at that material time that it was surrounded by thick bushes.

After giving the submissions of the parties through their learned counsel the deserving consideration, as well as going through the records of the trial tribunal, I will now turn to the determination of the merit or otherwise of each ground of appeal. In my analysis, with ground 4 as it deals with lack of

ascertainment of some facts during trial. Then grounds 1,2,3 and five will be considered jointly as they all challenge the trial court's evaluation of evidence. In relation to ground 4, the judgment of the trial tribunal stressed much on the facts that, the witnesses (DW1-DW3) did neither know the boundaries of the suit land, nor did they have a clue of the location of it, whether it is at Nguvukazi Street or Forest Street. In my considered view, such kind of uncertainty together with uncertainty on the exact size of the suit land could have been solved by visiting the *locus in quo*. The appellants have claimed that the suit land is measuring 10 acres, while the respondent claimed that it is 15 acres. That, was pertinent because, mere failure to describe the suit land in one's testimony alone cannot deny him/her the right of ownership of the said land. It is the duty of the tribunal to satisfy itself on the existence of what the witnesses have said in their testimonies.

I am alive to the fact that, visiting the *locus in quo* is not mandatory, save for when the circumstances of the matter, nature of the case and the interest of justice to parties in dispute so require. This is the spirit of the decision in the case **Mukasa, V. Uganda (1964) E.A 698 at 700** which was relied by **the Court of Appeal of Uganda in Matsiko Edward V. Uganda C.A. Crim. Appeal No. 75 of 1999,** which seems highly persuasive to me. In this case Hon. Sir Udo Udoma C.J (as he then was), held that:-

> *"A view of locus in quo ought to be, I think, to check on the evidence already given and, where necessary and possible to have such evidence accurately demonstrated in the same way a court examines a plan or map on the same fixed object already exhibited or spoken of in the proceedings."*

From the records of the trial tribunal, it is evident that, the issue of the exact size and location of the disputed land and even the boundaries were uncertain. What seems certain to me, in the circumstances of this matter is that each party claims ownership of a piece of land in the area. As for the issue of Forest and Nguvu Kazi street being the same location or not was not solve, it was not proper for the trial court to reach a decision without ascertaining important facts about the disputed land. Such ascertainment, as I noted earlier, is only possible through site visit. In the circumstances, I believe, interest of justice mandated visiting *locus in quo* before reaching a decision as argued by the appellant instead of leaving a number of unsettled issues. Such visit was also necessary in order to ascertain if the appellants meant a different land from what is claimed by the respondent. In my opinion, such visit could have impacted so much on the decision of the trial tribunal in terms reliefs awarded to the parties by the trial Tribunal. Based on that, I am convinced that, it was an error on the part of the trial tribunal in reaching its decision without visiting *locus in quo*, since, in the nature of this dispute, visiting the *locus in quo* in such circumstances becomes inevitable.

For the above reasons, the fourth ground of appeal is found to have merits. It is therefore allowed. Consequently, the judgement and decree of the trial tribunal are hereby nullified. The file is remitted back to the trial tribunal to compose fresh and informed judgement after visiting *locus in quo*. No order as to costs.

Ordered accordingly.

M. P. OPIYO,

JUDGE

11/12/2020