IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 147 OF 2019

(From the Decision of District Land and Housing Tribunal of Temeke District at Temeke In Land Application No. 171 of 2008

SAID HASSAN SHEHOZA.....APPELLANT

VERSUS

THE CHAIRPERSON CCM BRANCH.....1ST RESPONDENT

THE REGISTERED BOARD OF TRUSTEES

OF CHAMA CHA MAPINDUZI.....2ND RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI, J:

At the Temeke District Land and Housing Tribunal ('The Tribunal"), the appellant herein unsuccessfully sued the two respondents for alleged trespassing to his land situated at Mbagala Kwanyoka area. The application was decided in favor of the respondents. Aggrieved by the said decision, the appellant has lodged this appeal on the following grounds:

1. The learned Chairman misdirected himself in deciding the first framed issue on the case record contrary to the framed issues and therefore the judgment reached was wrong.
2. The Chairman was biased in dealing with the matter for his refusal of conducting the site visit and failed to see how respondent trespassed

into the appellant suitland and construct a banda without observing boundaries hence entered into erroneous decision as decided.

3. The learned trial Chairman dismally failed to evaluate properly the available evidence on the case record hence arrived to a wrong and erroneous decision.

He did not make any prayer on his grounds of appeal. On the 28/09/2020, the court ordered the disposal of this appeal by way of written submissions. Despite service to the respondents, they didn't enter appearance, hence hearing of this application proceeded ex-parte of the respondents.

In his submissions to support the appeal, the appellant started with the 2nd ground of appeal whereby he alleged that the Trial Chairman unreasonably decided not to visit locus in quo while the same was needed in determining the matter. He submitted that there are allegations on trespass, over the Appellant's land, measuring 10 meters by 10 meters. That as per the records, the respondent's area is registered as TMK/MBGL/22/137 and on page 9 of the judgment, the tribunal held that the Appellants Plot is Plot No. 22/137 while the respondents' is Plot No. 21/319 and at the end made an order for the parties to respect the boundaries. He then questioned the boundaries to be respected in the absence of a proof from a visit of locus in quo. He argued that it is not known whose land starts where and ends where. That it is further confusing to hear that even the donator of the land to CCM one Mohamed Ramadhan, DW3, did not state the size of the farm he sold to CCM.

The appellant submitted further that at page 7 and 8 of the judgment, the vendor admits not to have been called to show the boundaries when the

dispute arose and was reported to the Area Commissioner. To support his submissions that the visit to the locus in quo was crucial, he cited the case of **Fatuma H. Namwanje & Others Vs Shaibu Hassan Kioze, Land Case Appeal No. 28 of 2018,** High Court of Tanzania at Mtwara, (unreported), where in similar situation His Lordhip F.A Twalib, J (as he then was) held at pages 5 and 6:

> *"the points on departure on the above issues as between the parties, in my view, necessitated a visit before determination of the dispute. No such visit was conducted".*

Further that at page 7, 8, 9 and 10 the Hon. Judge extensively stated the circumstances upon which a visit to the locus in quo must be made. He argued that the four scenarios or factors for a visit of locus in quo stated at page 8 of the said decision equally apply in the instant matter. He therefore prayed for the court to make a relevant order as to the visit on loqus in quo in order to determine the matter conclusively.

The appellant submitted further that things are more difficult as the CCM donator and the seller were not joined as necessary parties to assist the Trial Tribunal to arrive at ta conclusive decision as to the ownership of the disputed land. He supported this submission by citing the case of **Juma B. Kadala Vs. Laurent Mnkande 1983 TLR 103 (HC)** where it was held that;

> *"In a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant; non-joinder will be fatal to the proceedings".*

He then argued that the absence of a necessary party in the proceedings was fatal, citing the case of **National Housing Corporation Vs.**

Tanzania Shoe Company And Others 1995 TLR 251 (CA) in which it was held that;

> *"Since the trial commenced and continued in the absence of a necessary party the Court proceeded without authority and that constituted a major defect which went to the root of the trial thus rendering the proceedings null and void"*

He further cited the decision of the High Court, Tanga Registry in the case of **Musa Mdoe Vs Salimu Almasi, Land Case Appeal No. 1 of 2017 High Court of Tanzania, Tanga District Registry** where Honorable Amour S. Khamis J, observed that non-joinder of necessary parties deprived the trial tribunal an opportunity to arrive at a just and conclusive decision.

He then argued that non-joinder of the donator and the seller of the Applicant deprived the trial tribunal an opportunity to arrive at a just and conclusive decision. That the trial tribunal was duty bound to make necessary orders as to the joinder of the mentioned parties. He prayed that the ground be found with merits in line with the authorities presented.

Having considered the records of this appeal and the appellant's grounds of appeal as well as his submissions, I find that the matter in controversy is on the boundaries of each party to the respective suitland. Owing to that, the main issue for determination in this appeal as argued by the appellant is on the tribunal's failure to visit the locus in quo. It is therefore important that before I determine whether the visit to the locus in quo was indispensable in this case, there is a need to define the aspects and purpose of the visit to the locus in quo as part of hearing and/or taking evidence during trial.

Court's visit to locus in quo is part of or a category of real evidence. These visits are conducted in a certain matter which requires the court to be moved to the location of the subject-matter in dispute in order to afford the court the opportunity to view some relevant facts in issue during trial in order to appreciate the evidence adduced by the parties before it can resolve the dispute accordingly. Conduct of these visits is usually at the discretion of the court for the purpose of appreciating the issues in relation to the evidence adduced where a need arises.

In land matters, the visit to the locus in quo, in cases which fits for one, assist the court to resolve any ambiguities in the case including issues of ascertaining the size of the land, the actual location of the disputed land in cases where there is a controversy about the existence and location of a particular feature thereon. It is also useful in cases where there is a material variation on the evidence adduced requiring ascertainment by physical visit. This may assist the court to resolve what it heard with what it could see by visiting the locus. In the case of **John Chuma Appellant Vs. Pastoli Lubatula & Others, Land Appeal No. 9 of 2019**, High Court Mwanza (unreported) my brother Judge, Ismail, had this to say:

> *"These visits are intended to get a visual appreciation of the area in contention and check the accuracy of the evidence given in the course of the trial. Invariably, this happens when the dispute relates to boundaries, and it happens after the parties have closed their respective cases. The legal holdings are to the effect that the court or tribunal must exercise great caution when doing that, in order not to constitute itself as a witness in the case."*

However, Courts should always be cautious when conducting these visits because not every case necessitates a visit. If serious caution is not taken,

the court may fall into the danger of turning itself into a witness instead of that of an adjudicator. In the case of **Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed [1980] TLR 29** the Court of Appeal held:

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

This position was further well elaborated in the case of **Mukasa Vs. Uganda [1964] EA 698 at 700**, where the Court of Appeal for East Africa had this to say:

> *"A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary, and 9 possible, to have such evidence particularly (sic) 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".*

On the other hand, the importance of visiting the locus in quo was well elaborated in the decision of the Court of Appeal in the case of **Avit Thadeus Massawe Vs. Isdory Assega (Civil Appeal No. 6 of 2017) [2018] TZCA 357; (13 December 2018)** while citing the Nigerian Case of **Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory & Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 had** this to say:

> *"The essence of a visit to a locus in quo has been well elaborated in the to be considered decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case*

of Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors before the courts decide to visit the locus in quo. The factors include:

1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56*
2. *The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see Akosile Vs. Adeyeye (2011) 17 NWLR (Pt. 1276) p.263.*
3. *In a land dispute where it is manifest that there is a conflict in the 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 (see Ezemonye Okwara Vs. dominic Okwara (1997) 11 NWLR (Pt. 527) p. 1601).*
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. (Emphasis added).*

The Court held further:

"In the above cited case, the applicant was seeking the court and the parties in the suit to visit the locus in quo. In its ruling the Court

relied on the decision in the case of Akosile Vs. Adeye (2011) 17 NWLR (Pt. 1276) p. 263 which summarized the above factors thus:

> *"The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries."*

In the same case, elaborating the importance of the visit to the locus to our jurisdiction, the court then held:

> *"We find the above principles very relevant not only to the present case but are also 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. We fully subscribe to them"*

It must be noted that the visit to the locus in quo should not, however, be a substitute of the party's obligation to adduce sufficient evidence to prove his case. For the court to visit locus in quo, parties must, in their respective cases, have established sufficient evidence to establish a controversy or conflicting evidence or uncertainty of the existence of the issues elaborated above where the visit is inevitable.

Having elaborated the importance of visit of locus in quo and the caution that the court has to take before conducting the visit, I now have to see whether the case at hand was one fit for the visit, omission of which would render the decision unjust. This is because as per the records, it is obvious that the issue is not ownership of the land but rather that of encroachment

to a portion of his land measuring 10 meters by 10 meters as alleged by the appellant. Having perused the records, it is clear that in their respective pleadings, the appellant's land was registered under Residential Licence No. TMK.024803 with Land No. TMK/MBGL/KNY 22/137 with an estimated size of 330 square meters on Plot No. 22/137 (EXP2); on the other hand, the respondent's land was registered under Residential Licence No. TMK. 032080 with Land No. TMK/MBGL/KNY 21/319 with an estimated size of 3818 square meters on Plot No. 22/319 (EXD4). Both lands are registered and their estimated size elaborated.

I have further noted that while framing issues during trial, the first issue was "*whether when erecting their office, the respondents trespassed into applicant's by 10 meters either side*". Therefore the issue for determination was on the size of the land with regard to allegation of encroachment, hence a boundary issue which according to the cited Nigerian case of Evelyn above, is one of the situations which called for visit to the locus in quo. However, while determining the first issue of encroachment the tribunal held:

> *"Neither the applicant no his witnesses stated in their testimony that the respondent's office was constructed in the applicant's land; instead, the applicant stated that the respondents have trespassed in 1992, but she did not state how was that trespass. So this tribunal is not in a position to ascertain the alleged trespass because the applicant, while in his application alleges that the respondents have constructed office in his land, in his testimony he stated that the respondents have constructed business office. Further to that while, the applicant has stated that the trespass took place in 1998, his wife (PW2) has stated that the trespass took place in 1998.*

In that circumstances, it is clear that the applicant has failed to prove that the respondents when constructed their office trespassed into the applicant's land by 10 meters each side. So the 1st issue is answered in negation"

In context of the above holding, it is safe to conclude that the tribunal based its decision on minor variations of the evidence of the applicant which in my strong view, did not defeat the fact of encroachment neither resolve the issue in controversy. Whether the two witnesses differed on the year of encroachment would not be crucial to defeat the appellant's case on whether there was a trespass by the respondents. In the above cited case of **Avit Thadeus Massawe Vs. Isdory Assega** (Supra), the court went further to identify those situations where the visit to the locus in quo was of paramount importance. The court held:

"Since the witnesses differed on where exactly the suit property is located we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located.

As for the current appeal, since at the tribunal the issue was that of encroachment and given the variation of oral evidence of the boundaries and the boundary marks as elaborated by DW3 and those of PW1, it was important for the tribunal, in order to ascertain that issue, to visit the locus

in quo in order to resolve the issue in controversy before it. The question remains on the effect of the omission to visit the locus in quo in such a case where visit was inevitable. In the same case of case of **Avit Thadeus Massawe v Isdory Assega** (Supra), while making its conclusion and verdict, the court held:

> *"We have observed above that the evidence on record was insufficient for the Court to determine the appeai justly, with clarity and certainty in view of the conflicting evidence in respect of the location of the suit property. We are of the view that this is a fit case for the trial court to exercise its discretion to visit the locus in quo. Had the trial court done so the question regarding where the suit property is located would have either not arisen or would have been easily determined."*

Having the same principle in mind, it is the finding of this court that as per the available evidence on encroachment, the contradictions on the size of the land and the boundaries therein, it was a fit case for the trial tribunal to exercise its discretion and make a visit the locus in quo in order to ascertain the boundaries in dispute and the size of the land. I am convinced that by doing so, the tribunal would have made a more informed decision on the issue of encroachment. Failure to do so might have made the tribunal reach into a wrong finding.

Owing to the above, I hereby invoke my revisional powers and set aside the judgment of the tribunal and the subsequent decree thereto. I further direct the trial tribunal to take additional evidence in respect of the issue of encroachment by visiting the locus in quo and have parties ascertain their evidence on physical location so that it can make a more informed decision.

That said, this appeal is allowed to the extent explained. No order as to costs is issued regarding this appeal. It shall follow cause in the outcome of the subsequent judgment of the tribunal after the visit to the locus in quo.

Dated at Dar es Salaam this 25th January, 2021.

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S.M MAGHIMBI

JUDGE