IN THE HIGH COURT OF THE UNITED REPUBLIC OFTANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 258 OF 2019

(Arising from the land application No. 12 of 2016 at the District Land and Housing Tribunal for Iiala at Ilala before Hon kirumbi, Chairman)

JOSEPHAT PAUL..... APPELLANT

VERSUS

ABEID STAMBULI..... RESPONDENT

JUDGMENT

Dated 21st & 25th June, 2021

J.M.KARAYEMAHA, J.

On 23rd December, 2015 Abeid Stambuli, who is the respondent in this appeal, appeared before the District Land and Housing Tribunal for Ilala at Ilala District (the DLHT) complaining that Josephat Paul, who is the appellant in this appeal, had invaded his parcel of land he bought from Hassan O. Karata located at Viwege Area – Majohe and that after purchasing he started preparations for construction by putting bricks at the suit land.

The respondent asserted that after putting bricks, he didn't visit the suit land for some time. He complained that the appellant used that opportunity to construct his building in the same suit premises claiming to be the lawful owner. His attempt to prevent the appellant from building the house didn't succeed. The respondent added that he informed the appellant that he had trespassed in his land but the appellant claimed to be the lawful owner.

The appellant, on the other hand, disputed the claims by the respondent vehemently and stated that Hassan Karata had no land to sell or transfer to the respondent. He averred that Hassan Karata's alleged ownership was long time revoked by the village council. He averred that he bought the land allocated to Maria John Urassa. In addition, the appellant stated that after purchasing the plot on 8/5/2013 at the cost Tshs. 2,000,000/= started constructing three rooms for shop frames. It was his statement that the respondent was coned by Hassan Karata who purported to sell the land to him on 18/6/2012 and when he couldn't not support him the matter was reported to police. The appellant stated further that he could not trespass in the respondent's land because they were separated by the street. He wound up by stating that when the matter of ownership arose they engaged the Majohe Ward Tribunal and thereafter the District Land and Housing Tribunal (appeal No. 81 of 2013) but he emerged a winner after both tribunals ordered parties to obey the boundary which was a street road that separated their pieces of lands.

In its decision, the District Land and House Tribunal found in favour of the respondent with costs and declared him a lawful owner of the disputed land.

Being dissatisfied with the decision of DLHT, the appellant preferred an appeal to this court basing on 4 grounds. However, when the appeal was called for hearing on 21/6/2021, Ms. Catherine Lyasenga reshaped the memorandum of appeal. She retained ground one and consolidated grounds 2, 3 and 4. In this context the grounds of appeal are:

1. The DLHT erred in law and fact by failing to consider appellant's prayer to visit locus in quo due to conflicting evidence adduced at

the tribunal in respect of suit property's location. Was the prayer recorded?

2. The District Land and House Tribunal erred in law and fact by deciding in favour of the respondent herein without sufficient reasons.

When the appeal came up for hearing before me on 21/6/2021, Ms. Lyasenga the learned counsel appeared for the appellant and Mr. Burhan Musa learned counsel appeared for the respondent.

Submitting on the first ground, Ms. Lyasenga faulted the DLHT for refusing the prayer to visit the *locus in quo* while there was a clear conflicting evidence adduced at the tribunal. She emphatically remarked that the evidence adduced in the tribunal showed that the appellant purchased the land measuring 20 x 32 footpath located at Viwenge from Maria John Urassa. That piece of land according to her borders the road in the West and North part, neighboring Emmanuel Richard in East and Maria john Urasa in the South. She referred this court to page 5 judgment.

The learned counsel submitted that in his testimony, PW1 Omari Karata informed the tribunal that he sold a piece of land to the respondent measuring 20 x 30 footpath and that the boundary between the appellant and the respondent is a road. She observed further that the evidence adduced in favour of the respondent demonstrated that his piece of land purchased by the respondent was on the different location from that of the appellant's piece of land. She referred this court at page 9 of the judgment to underscore her point. She was again convinced that the tribunal had to visit the ***locus in quo*** because the appellant testified that he bought the plot of land on 9/5/2013 while the respondent bought his on 13/6/2013.

It was her observation that given the conflicting evidence regarding the size and location of the land in dispute it was necessary for the tribunal to visit the *locus in quo*. To buttress her position, she took refuge the case of ***Avit Thadeus Masawe v Isdory Asenga,*** Civil Appeal No. 6 of 2017 CAT (Unreported) at page 13.

Arguing in respect of ground two, Ms. Lyasenga stated that the tribunal had no good reasons to decide in favour of the respondent. In her oral address, Ms. Lyasenga narrated what the witnesses for both sides told the trial tribunal. She was emphatic that since there was no allocation of land to village residents in 1999, Hassan Karata could not have land to sell. She said that DW4 testified that the land was allocated to residents in 2002 with a condition of developing it within one year. When the mandate changed from village council to serikali ya Mtaa on 17/5/2005, the latter held the meeting to discuss on undeveloped plots. It was during that period when Maria John Urassa was allocated 40 acres and later sold ap piece of land to the appellant. She stated that Maria John Urassa could not appear in the trial tribunal because the last time she was seen by the appellant she was very sick. She insisted that the sale agreement between Maria John Urassa and the appellant of May, 2013 was witnessed by Mohamed Tungaraza a leader by that time. Daud James who witnessed the sale agreement dated June, 2013 was not a local leader. In respect of Serikali ya Mtaa to lack mandate to allocate the land, Ms. Lyasenga said could not be the reason to deny the appellant ownership of the land as there was no law cited to that effect.

Mr. Burhan did not file a reply to the memorandum of appeal. He, however, argued in respect of ground one that apart from the trial tribunal promising to visit the ***locus in quo*** in case circumstances allowed, it did not see the necessity. He stated that visiting the ***locus in quo*** is the

discretion of the court and should be exercised in exceptional circumstances. He cited the case of ***Avit Thadeus Masawe v Isdory Asenga,*** (supra). To him there was no dispute on the location of the suit land. He backed his argument leaning on DW1's evidence that he acquired the title of disputed land from Maria John Urassa and tendered exhibit D1 which showed that Maria John Urassa was allocated land and later sold the same to the appellant. On the authenticity of Exh. D1, Mr. Burhani discredited it and named it a piece of paper because it lacked the Serikali ya Mtaa stamp. He said there was no agreement of sale between Maria John Urassa and the appellant. He was convinced therefore that Mary John Urassa never sold land to the appellant. Conversely, he said that at least the oral evidence from Mary John Urassa would add value to the appellant's allegations.

Mr. Burhan submitted zealously that the appellant's WSD states that the disputed land was revoked from Hassan Karata and re-allocated to Maria John Urassa who sold it to the appellant. It was the same land Hassan Karata sold to the respondent. In view of that he did not see the need of the trial tribunal to visit the ***locus in quo***.

Arguing on ground number two, Mr. Burhan stated that the trial tribunal decided in favour of the respondent basing on the quality of evidence. He stated that PW1 Hassan Karata tendered exhibit P1 exhibiting how he acquired the land. He added that PW4 tendered the sale agreement Exh. P2. He submitted further that DW3's evidence clearly indicated that the disputed land is adjacent to that of PW1. He was, therefore, convinced that the trial tribunal was right in deciding in favour of the respondent.

In her rejoinder, Ms. Lyasenga said that the appellant has a right but lost on technicalities because the sale agreement between the appellant and Mary John Urassa was rejected by the trial tribunal.

I have given due consideration to the rival arguments by counsel for both parties. From the totality of the submissions and evidence, the main issue that calls for determination by this court is whether on evidence adduced at the trial, was the Chairman justified to find that the suit property was the one once owned by Hassan Karata and that the same belonged to the respondent.

Clearly from the totality of the respondent's pleadings and testimonies of his witnesses at the trial coupled with the counsel's submissions, it is clear that the respondent's contention is that the disputed land was sold to him by PW1 and therefore it belongs to him. In the event the appellant trespassed. On the appellant's side, the pleadings, evidence of his witnesses at the trial and submissions of his counsel, tend to invite the court to agree with him that 1st he bought the land from Maria John Urassa who was allocated the land in 2005 and 2nd that he owns the land different from the one the respondent owns.

I should state from the wake that the evidence adduced at the trial was conflicting. Both parties agreed that the suit land is one and the appellant stresses that the road is a boundary between his land and that of the respondent. This is vivid on the 9th paragraph of the reply to the application which states that:

> *"9. That, the respondent never invaded nor trespassed to the alleged applicant's land. The respondent's the owner (sic) of his land, as there is a street in between which separates the two different plots. Thus, the applicant has no any claim over the said land."*

This statement featured in the appellant's evidence. features his He testified that:

> *"My land is bordered by the road on west and north sides, east is Emmanuel Richard and south is Maria John."*

The appellant testified further that his land is measuring 20x30 footpath. On his side PW3 (Philemon Matinde Magwaiga) told the trial tribunal that Hassan Karata sold the piece of land to the respondent measuring 30x20 steps and PW4 the respondent testified a plot land measuring 35x20 steps.

It is now clear that the appellant informed the trial tribunal that between his plot of land and that of the respondent there is a road as a boundary. This issue was resolved by the Majohe WT and later the DLHT on appeal. When the dispute arose, he is now trying to intimate that the two have ownership over two different pieces of land with different neighbours and size. There is no evidence on record intimating that the appellant is neighbouring Hassan Karata. It is also undisputed that the appellant's neighbours are Emmanuel Richard, Maria John Urassa and the road.

I have closely studied the exhibits tendered during the trial. I have learnt that exhibit P1 indicates that on 31/9/1999 the serikali ya Kijiji allocated a piece of land to Hassan O. Karata measuring one (1) acre. Exhibit P2 demonstrates that on 18/6/2013 Hassan Karata sold a piece of land to Abed Stambuli measuring 35x20. Exhibit D1 shows that Maria John Urassa was allocated a piece of land measuring 40x90 by Serikali ya Mtaa. It is gathered from it that that piece of land was previously allocated to someone who did not develop hence was reallocated to Maria John Urassa. Very unfortunately, it did not disclose the victim of revocation.

Form those 40x90 Maria John Urassa sold a piece of land to the appellant measuring 20x30.

Since the evidence seems to suggest that parties purchased two different pieces of land, with different sizes and from two different people on different dates, I am satisfied that the truth could not be known by relying on the oral and documentary evidence.

I have cautiously considered Mr. Burhan's argument that since e appellant stated in his WSD that Hassan Karata's land was revoked and reallocated to Maria John Urassa and later sold to him. Paragraph 4 of the WSD states as follows:

> *"4...the said Hassan Karata has no land to sell or transfer to the applicant herein; as his alleged ownership was long time revoked by the village council, but the plot legally belongs to Maria John Urassa, who later on transferred it to the respondent."*

My take of this paragraph is that Hassan Karata's plot of land was revoked by the village council. It does not say it was reallocated to Maria John Urassa. What the paragraph says is that the plot belongs to Maria John Urassa. The question is which plot? The paragraph had to state in no uncertain terms that it was the one which was revoked from Hassan Karata or not. A specific guidance is gleaned from DW2's testimony that:

> *"I started to live at Viwege in 1999, and I know well the land which the respondent purchased. Previously that land was owned by serikali ya Kijiji cha Najohe which allocated it to us from 1999 up to 2008 when the Serikali za Mitaa was (sic) established. In 2005 when the serikali ya mtaa established (sic), it proceeded with the system of land allocating land (sic) to wananchi,*

and is when it allocated it to Maria Urassa in 2004 and after been (sic) granted, Maria Urassa developed it until 2013 when she apportioned it and sold to some people including the respondent."

From the above quoted version of testimony, it is clear that Hassan Karata's land was not reallocated. In view of the evidence he is still in his land neighbouring the respondent.

As hinted earlier on, to establish that the land in question is one plot or two different plots reliance on oral and documentary evidence was unsafe. As correctly argued by Ms. Lyasenga, a fair resolve of the dispute needed the physical location of the suit property be ascertained. Since the appellant requested the trial tribunal to visit the *locus in quo* so as to clear doubts arising from conflicting evidence, in my considered opinion the Chairman had to see it fit that the matter was wrapped in exceptional circumstances that coerced that step to be taken. I share Ms. Lyasenga's view that a visit on *locus in quo* was indispensable.

The rationale and factors to be considered before court decides to visit the locus in quo were well explained in the case of ***Avit Thadeus Masawe v Isdory Asenga,*** (supra). In this case the Court of Appeal speaking through Hon. Lila, JA quoting the case of **AkosileVs. Adeye** (2011) 17 NWLR (Pt. 1276) p. 263 stated that:

"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."

The Court of Appeal subscribed to the above principles and enjoined courts/tribunals to be guided by these very crucial and relevant guiding principles in exercising their discretionary powers either on their own accord or upon request by either party, to visit the *locus in quo*.

In the present case, as alluded to above, the evidence on record shows very clearly that there are conflicting contentions in respect of which suit land the appellant trespassed in and what piece of land exactly belonged to Hassan Karata which he sold to the respondent and is neighboring and what piece of land belonged to Maria John Urassa she sold to the appellant. The location of these pieces of land and their size can very easily be ascertained so as to resolve the dispute justly, properly and with certainty.

In the circumstances of this case, we are highly guided and instructed by the principles set forth in the case of ***Avit Thadeus Masawe v Isdory Asenga,*** (supra) that, a visit to *locus in quo* will definitely help the Court determine the appeal with clarity and certainty.

However, the trial tribunal should be very cautious when visiting the locus in quo to avoid errors. The case of **Nizar M. H. Vs. Gulamali Fazal Jan Mohamed** [1980] TLR 29 explained the procedure to be followed at the locus in quo, which in my view need to be comprehended, as follows:

"When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify

in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence In court given by the witnesses. We trust that this procedure will be adopted by the courts in future."

What is the way forward? Having demonstrated on the need to visit *locus in quo*, the procedure to be observed thereat and the precaution to be taken by the Chairman not without a purpose, I am of the view that this is a fit case for the trial tribunal to exercise its discretion to visit the ***locus in quo***. For the foregoing reasons I am inclined to invoke section 42 of the Land Disputes Courts Act [Cap 216 R.E 2019] and set aside the judgment of the tribunal and the subsequent decree thereto. I further direct the trial tribunal to take additional evidence for parties to ascertain the evidence on physical location of the parties pieces of land so that it can make a more informed decision. The trial tribunal shall also make sure that the parties to the appeal and their advocates are present when the additional evidence is taken.

Now, having taken such a stance for the above obvious reasons, I do not think I am called upon to labour on the remaining ground of appeal. Findings on the raised irregularity suffice to dispose of the whole appeal.

That said, this appeal is allowed to the extent explained. No order as to costs are 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.***

It is so ordered.

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

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J.M. KARAYEMAHA
JUDGE