IN THE HIGH COURT OF THE UNINTED REPULIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 39 OF 2021

(Arising from the decision of the District Land and Housing Tribunal of Temeke District at Temeke in Land Application No. 53 of 2018 delivered on 10th day of February, 2021 by Hon. P. I. Chinyele Chairperson)

ABDUL ABDALLAH MNOLA.....1ST APPELLANT

MBAKILI MALIMA.....2ND APPELLANT

VERSUS

JOSEPH SIMON MALIMA.....RESPONDENT

JUDGMENT

Last order 23/06/2021

Date of Judgment: 01/07/2021

B.E.K. MGANGA, J

The Respondent is a retired army officer and elder brother of the 2nd Respondent. In 2018 the Respondent filed Land Application No. 53 of 2018 in the District Land and Housing Tribunal for Temeke District at Temeke against the Appellants claiming for vacant possession of a piece of land situated at Vijibweni - Kigamboni area within Temeke District in Dar es salaam Region. It was alleged by the Respondent that on 6th February

1996 he entered in sale agreement with Salehe Madenge over the disputed piece of land and that the 2nd Appellant witnessed the said sale as witness of the Respondent. It was further alleged by the Respondent that in 2008 to 2009 he was in the United States and in 2010 he was in Darfu, South Sudan on official duty. It was further alleged that upon his return, he found the 1st Appellant has built a house on the disputed area alleging that he bought the same from the 2nd Appellant. On his side, the 2nd Appellant admitted having sold the said land to the 1st Appellant on ground that he bought the same from Salehe Madenge. After conclusion of trial, the District Land and Housing Tribunal delivered its judgment and decree in favour of the Respondent. Being aggrieved by the said judgment and decree, the Appellants has appealed to this court on two grounds namely;

1. *That the District Land and Housing Tribunal Chairman erred both in law and fact in admitting and relying on the Respondent (sic) sale agreement without considering its legality; and*
2. *That the District Land and Housing Tribunal Chairman erred both in law and fact for failure to properly scrutinize the evidence adduced by the Appellants.*

When the appeal came for hearing on 23rd June 2021, I asked Mr. Lingopola and Mr. Urassa learned counsels for the Appellants and the

Respondent respectively to address me as to whether the procedure of visiting the locus in quo was followed. In addressing this issue, both counsels after referring to the cases of ***Nizar M.H. Ladak vs. Gulamali Fazal[1980] T.L.R29*** and ***Sikuzani Saidi Magambo and another vs. Mohamed Roble, Civil Appeal No. 197 of 2018 , CAT (unreported)*** submitted in agreement that it was not adhered to. The only point of their departure was its effects. While Mr. Lingopola submitted that the whole proceedings becomes a nullity, Mr. Urassa was of the opinion that it doesn't.

I have carefully examined the handwritten proceeding of the Tribunal and find that on 25th November 2020 after the Appellants (the Respondents by then) has closed their case, Mr. Urassa rose up and prayed the court to visit Locus in quo. The proceedings of that day shows:-

> *"Adv. Lingopola: I have no any other witness, I pray to close our case.*
> *Adv. Urassa: I pray for a visit at the locus in quo.*
> *Locus visit 11/12/2020 at 13;00*
> *Opinions 16/12/2020*
> *Judgment. 17/12/2020*
> *Parties to appear"*

Then followed proceedings of the 11th December 2020 that was conducted at the visit at the locus in quo. I agree with the submissions of

both counsels that the procedure was flawed with irregularities. From these proceedings it is clear that, the tribunal did not reassemble in the court room to consider the evidence obtained in the visit, it didn't inform the parties as to what facts were gathered in the said visit, parties and their advocates were not given right to give their opinions about the findings gathered from that visit and no notes were taken by the Tribunal. In the ***case of Sikuzani (supra)*** the Court of Appeal reproduced the guideline and procedure as was pointed out in the **Nizar's case** (supra) as follows:-

> *"**When a visit to a locus in quo is necessary** or appropriate, and as we have said, this should only be in necessary in exceptional cases, **the court shouid attend with the parties and their advocates**, if any, and with much each witnesses as may have to testify in that particular matter... **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 those notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future".*

After quoting the above passage and examined the proceeding of the Tribunal in the case of **Sikuzani (supra),** the Court of Appeal found that the Tribunal never reconvened or reassembled in the court room to consider the evidence obtained from the visit and, that notes were not taken. The court held that those irregularities vitiated the trial and occasioned a miscarriage of justice.

For the foregoing, and having found that the guideline and procedure of visiting locus in quo was not adhered to, do hereby nullify the entire proceedings and quash the judgment, decree and subsequent orders thereof. If parties are still interested are at liberty to institute a fresh application before the Tribunal. Since this point has disposed of the whole appeal, I have not considered the ground of appeal filed by the Appellants.

Since the issue which has disposed of this matter was raised by the Court, I make no order as to costs.

It is so ordered.

B. E.K. Mganga
JUDGE
1/07/2021