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

LAND APPEAL NO. 248 OF 2020

(Originating from Ilala District Land and Housing Tribunal in Land Application No.308 of 2019 (Hon.L.R. Rugarabamu, Chairman)

SELEMANI SAID KUWI.....APPELLANT

VERSUS

LORENI RAMADHANI.....RESPONDENT

Date of Last Order: 27.09.2021
Date of Ruling: 25.10.2021

JUDGMENT

V.L. MAKANI, J

This is an appeal by SELEMANI SAID KUWI. He is appealing against the decision of the Ilala District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 308 of 2020 (Hon.L.R. Rugarabamu, Chairman).

At the Tribunal the appellant herein was claiming that the respondent had trespassed in his land approximately 19.5 footsteps. The land is located in Amani Street, Tabata Chang'ombe, Ilala District Dar Es Salaam (the **suit land**). The application at the Tribunal was dismissed for want of merit, and being dissatisfied with the said decision, the

appellant has preferred this appeal with five grounds of appeal reproduced herein below:

1. *That, the honourable tribunal grossly erred in law and in fact to visit the locus in quo in the absence of the appellants Advocate who was not notified.*

2. *That the Honourable Tribunal grossly erred in law and fact in visiting the locus in quo without complying with the required procedures for site visit including hearing and recording party's submission, and reading the notes collected after site visit in the presence of both parties to allow any comment or challenge.*

3. *That the Honourable tribunal grossly erred both in law and fact to admit Exhibit D1 which was tendered by an incompetent person.*

4. *That the Honourable tribunal grossly erred in law and fact for failure to properly evaluate and analyse the evidence on record in order to arrive at a right conclusion.*

5. *That the Honourable Tribunal grossly erred in law and fact for failure to resolve the key question in dispute as to the rightful owners of the suit property.*

With leave of the court the appeal was argued by way of written submissions.

In arguing the first ground of appeal the appellant said that when the respondent's evidence was concluded at the Tribunal, the Chairman fixed the matter for site visit and the defence hearing on 18/09/2020. He said that on the said date the Tribunal did not visit the site instead

the Tribunal had a surprise visit on 21/09/2020, a date which was not fixed by the Tribunal. He said the appellant's advocate Mr. Ngowi was not notified to appear on the site visit and so the Tribunal proceeded in absence of appellant's advocate. He said that in the case of **Avit Thadeus Massawe vs. Isdory Assenga, Civil Appeal No.06 Of 2017 (CAT-Arusha)** (unreported) the Court of Appeal stated that where locus in quo is necessary, the court should attend with parties and their advocates.

On the second ground, the appellant said that the Tribunal did not comply with the requirement of reading notes collected after the site visit to allow comments and challenge. He cited the case of **Avit Thadeus** (supra) and stressed that reading of the notes collected from site in front of the parties and their advocates is for comments, amendments, comments, or objection. He said the appellant's advocate was not involved, witnesses were not called to testify on the matter in controversy and notes were not read to the parties and their advocates. That the irregularity vitiates the whole proceedings as there was no fair trial between the parties. That even the appellant was not re called to testify on the site visit. The appellant relied in the case of **Sikudhani Said Magambo & Another vs. Mohamed**

Roble, Civil Appeal No.197 Of 2018 (CAT-Dodoma) (unreported).

Submitting on the third ground, the appellant said **Exhibit D1** was tendered by an incompetent person. That the respondent who tendered the said exhibit was neither the maker nor a witness to the said document. That the objection was raised and overruled by the Chairman based on Article 107 of the Constitution of the United Republic of Tanzania, 1977. He said that it was not the respondent who bought the suit land as per **Exhibit D1**, so he had no knowledge of the said exhibit. He said that the admission of the said exhibit contravenes section 34C (1) (a) and (b) of the law of Evidence Act, Cap 6 RE 2019. He added that the respondent was not an Administrator of the Estate of his late father, that there was no information supplied to him and no proof that his father is deceased, hence in law the respondent was incompetent to tender the said document and it should be expunged from the records. He said Article 107 A (2) of the Constitution cannot be applied to defeat procedural rules. He relied on the case of **Attorney General Zanzibar vs. Algubra Marine Service Ltd, Civil Appeal No.175 Of 2017 (CAT-Zanzibar)** (unreported)

On the fourth and fifth grounds, the appellant said that the judgement of the Tribunal did not justify that the disputed property belonged to the respondent's father. That the Tribunal did not discuss the appellant's evidence that the suit land is within 80 footsteps of the appellant's area. He insisted that after taking the measurements the Tribunal was required to state why the suit land does not fall within the estimated 80 footsteps by the appellant and it is part of 100 times 50 footsteps. That there was no test of balance of probability by the Tribunal. He said the respondent admitted in cross examination that his father did not show him the boundaries. And further that during the site visit the measurements showed that 50 footsteps ended at their house door and that it did not cover the banana tree which is the centre of place of dispute. He said if the Tribunal compared **Exhibit D1** and physical measurements, it had also to compare **Exhibit P1** and physical measurements and state who has the right over the suit land by giving sufficient reasons deduced from the party's evidence. He prayed for the appeal to be allowed and a re-trial be conducted for proper procedure to be complied with and the site visit be conducted for determination of the said dispute.

In reply the respondent said that the Tribunal did not visit locus in quo by surprise. He said the Tribunal initially arranged a site visit to be conducted on 18/09/2020 but on the said date the Tribunal adjourned the visit in the presence of both parties including the appellant's advocate. He said the visit was rescheduled for 21/09/2020 with notice to both parties. He insisted therefore that the Tribunal did not visit the site by surprise and the Tribunal reminded the parties to be present on the rescheduled date of the site visit. He said the appellant was informed through his mobile phone and he was told to inform the respondent to attend on the date of the site visit. That it was the appellant's wife who went to inform the respondent that the Tribunal was on the way to the site visit as the respondent's mobile phone number could not be retrieved by the Tribunal. He said that the appellant was present in person at the site and his advocate appeared very late when the Tribunal was leaving the site. That the appellant failed to locate his boundaries despite residing there since 1988. He said when the respondent was asked to show his boundaries, the measurements of 100 x 50 - footsteps were done as per **Exhibit D1** and the boundaries of the respondent were clearly identified to include 19.5 footsteps claimed by the appellant. He said

that the case of **Avit Thadeus Massawe** (supra) as cited by the appellant does not provide what the appellant claims.

On the second ground of appeal the respondent said that the Tribunal followed all the procedures of the site visit. It included recording the findings, an opportunity to the appellant to give comments and re-assembling in the court room. That the appellant was the only witness as all other witnesses had passed away. Therefore, the claim by the appellant that the witnesses were not called is baseless. He distinguished the cases cited by the appellant for being misplaced.

On the third ground of appeal, the respondent said that the Tribunal acted diligently in admitting **Exhibit D1**. That the three witnesses out of the four who witnessed the Sale Agreement had passed away. The only witness alive was the appellant who is claiming to be the lawful owner of the suit land and the respondent's father had also passed away, so the respondent was the only person to tender **Exhibit D1**. Further the appellant never disputed the contents of **Exhibit D1** but only the competence of the respondent. He insisted that the Chairman is not bound to follow rules of evidence and rules under the CPC if he is of the opinion that following those rules is likely

to jeopardise justice. That under the development of the legal system in Tanzania, the court is required to have regard to substantive justice. He relied on the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph, Civil Appeal No.55 Of 2017.** (unreported).

Regarding the issue that the respondent is not the Administrator of the Estate of his late father, he said it is the appellant who chose to sue the respondent. If the respondent's father had been alive then the appellant would have sued him personally. That the appellant being neighbour to the respondent is aware of the death of respondent's father and he could have also sued any person who was appointed Administrator of the Estate of the respondent's father if he had known the same.

On the fourth ground of appeal, he said that the respondent's evidence, the Sale Agreement, which was tendered and admitted as **Exhibit D1** proved that the suit land forms part of the land purchased by respondent's father, and the same was witnessed by the appellant and his names and signature appears in **Exhibit D1**. He said respondent testified that the suit land is part of the 100 x 50 footsteps which his father purchased on 16/10/1993 from one Maliki Hamadi.

That among the witnesses were ten cell leaders of the located area. He insisted that the appellant never objected that the respondent's father purchased the land with the size of 100 x 50 footsteps. He said that ownership of the land cannot be proved by mere words without any evidence. He relied in the case of **Rupiana Tungu & 3 Others vs. Abdul Buddy & Halik Abdul, Civil Appeal No.115 Of 2004 (HC-DSM)** (unreported)

Submitting for the fifth ground respondent said that, the main issue before the Tribunal was whether the applicant is the lawful owner of the suit land. the Tribunal considered the evidence presented before it and the facts on the site visit where parties were personally present. That the appellant claimed to own the land since 1988 meanwhile the appellant was also a witness in purchase of the land by the respondent's father in 1993 and his signature appears on **Exhibit D1** as S. Kuwi. he asked, if the land owned by respondent measuring 100 x 50 footsteps is the appellant's property, then why did he participate in the sale of his own land? He said the appellant admitted that the size of respondent's land was 100 x 50 way back in 1993 and confirmed that the suit land measuring 100 footsteps fell within respondent's land. That the appellant even admitted that he did not

know the size of his land. He only claimed to own the land measuring 80 footsteps without stating whether it was the length or width. That he even failed to show his boundaries despite being on the land since 1988. The respondent prayed for this appeal to be dismissed with costs.

In rejoinder, the appellant reiterated his main submission and added that disposition of the land should comply with the laws of the land. He insisted that the Tribunal visited the site without his knowledge, and it was in the knowledge of the Tribunal that he had an advocate.

I have carefully gone through the proceedings of the Tribunal and considered the submissions by the parties. In so doing, I was guided by the principle that this being a first appellate court, it has a duty to reconsider and evaluate the evidence on the record and come to its own conclusion bearing in mind that it never saw the witnesses as they testified. See the cases of **Audiface Kibala v. Adili Elipenda & others, Civil Appeal No. 107 of 2012, (CAT-Tabora)** and **Maramo Slaa Hofu & others v. Republic,** Criminal Appeal No. 246 **of 2011 (CAT-Arusha)** (both unreported).

The merit of this appeal rests mainly on two issues. Firstly, whether the site visit was properly conducted by the Tribunal, and secondly whether the Tribunal properly evaluated the evidence presented before it to arrive at a just decision.

I have taken time to go through the typed proceedings of the tribunal. It reveals that on 24/08/2020 the Tribunal scheduled a site visit to be on 18/09/2020 and both the applicant and respondent were present. The records are silent as to what transpired on the said date. However, on 21/09/2020 when the Tribunal made a site visit the quorum shows that both the applicant and respondent were present. The Tribunal recorded that they took measurements of the premises at the site as indicated by the parties. The measurements that were revealed from the visit are not reflected in the proceedings, but there are drawings measurements by the applicant and the respondent in an independent page. The only observation that can be deduced is that indeed both the appellant and the respondent were present at the site, and they participated in the measurements of the suit land. So, the allegation by the appellant that he was not aware and was not informed of the site visit is unsubstantiated. In the case of **Avit**

Thadeus Massawe (supra) it was stated that "*The visit [to the site] should be done only in exceptional circumstances by the trial court to ascertain the state, size, location and so on of the premises in question".* It is on record that the Tribunal measured the size of the land which meant the Tribunal wanted to satisfy itself as to the size of the suit premises/land as presented by both parties but it is unfortunate the Tribunal did not properly record the result of the measurements.

Despite the above anomaly, still the circumstances and evidence by the respondent is heavier than that of the appellant. The Tribunal gave its decision basing on the Sale Agreement by the parties (**Exhibit P1** and **Exhibit D1**) and oral testimonies by the parties. **Exhibit P1** indicate that the appellant bought a piece of land from one Maliki Hamadi. The size of land is not stated. On the other hand, **Exhibit D1** shows that Ramadhan Salehe Mwinyimvua (the respondent's father) bought a piece of land from Malik Ahmad measuring 100 x 50. Further, according to the proceedings of the Tribunal, when the appellant was cross-examined by the respondent he said:

"When your father bought the plot, I was the one who sold it to him, your plot is 50 x 100 footsteps".

When the Tribunal further questioned the appellant, he said:

"The plot which belongs to the respondent I was the one who sold it to him...".

These assertions by the appellant corroborates the findings of **Exhibit D1** that the land of the respondent measures at 100 x 50. This means the respondent owns the same size of land bought by his late father from the appellant. Further, the appellant himself was the witness to the seller in the Sale Agreement (**Exhibit D1**) between the respondent and Maliki Ahmad so he is aware that the suit land measures 100 x 50. In that regard the appellant cannot claim ownership of the suit land as he was the one, according to the proceedings, who sold the suit land to the respondent's father. He was also a witness to the sale transaction between the respondent's father and one Malik Ahmad. The appellant's claim is very uncertain and accordingly the respondent's evidence on record is heavier than that of the appellant. According to the case of **Hemed Saidi vs. Mohamed Mbilu [1984] TLR 113** both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the

one who must win. And in this present matter it is the respondent's evidence that is heavier than that of the appellant.

The appellant herein raised the issue that the respondent is not the Administrator of his late father's estate and that he was not fit to tender the Sale Agreement (**Exhibit D1**). Obviously, it was the appellant who sued the respondent at the Tribunal, meaning that he was fully satisfied that respondent had locus standi. Raising the issue of the respondent's locus standi at this stage is an afterthought after failing to prove his claim at the Tribunal. Further, the maker of the Sale Agreement (**Exhibit D1**) is now a deceased, and since the respondent is in possession of the Sale Agreements and is in knowledge of the contents of the said agreement it means that he is a competent person to tender the said Sale Agreement. In the case of **The DPP vs. Mirzai Pirbakhsh @ Hadji & 3 Others, Criminal Appeal No. 493 of 2016 (CAT-DSM)** (unreported) the Court of Appeal stated:

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina Case is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has the*

knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."

Based on the above case, the respondent being the possessor and custodian of the Sale Agreement following the death of his father, he was thus a competent witness to tender the said Sale Agreement (**Exhibit D1**) irrespective that he was not the Administrator as alleged by the appellant. This ground is therefore devoid of merit.

In the result and for the reasons stated above, I find this appeal to have no merit and it is hereby dismissed with costs.

It is so ordered.

V.L. MAKANI
JUDGE
25/10/2021