IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO. 290 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.386 of 2018)

MARIAM F. KALENGELA ..... APPELLANT

VERSUS

VICTORIA SWAI ..... RESPONDENT

JUDGMENT

Date of last Order: 15.09.2022

Date of Judgment: 20.09.2022

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land. The material background facts of the dispute are not difficult to comprehend. They go thus: Mariam F. Kalengela, the appellant instituted the application against Victoria Swai, the respondent. The appellant claimed that she is the lawful owner of the suit land measuring 15 meters and she bought the same in 2019 form the respondent to a tune

of Tshs. 6, 500,000/=. The appellant claimed that the dispute arose in 2017 when the respondent invaded the suit land. The appellant prayed for the tribunal to restrain the respondent from entering into the suit land, to pay general damages to a tune of Tshs. 10,000,0000/= and pay the costs of the case.

On his side, the respondent denied all the claims. He contended that the appellant is the one who trespassed into his land. The District Land and Housing Tribunal for Kinondoni determined the matter in favour of the respondent.

Believing the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala was not correct, the appellant lodged a Petition of Appeal containing four grounds of appeal as follows: -

1. *That the Honourable Chairman erred in law and fact by misdirect herself on which measurement was used by the Appellant and Respondent during the process of selling a plot nearby by the disputed area.*
2. *That the Honourable Chairperson erred in law by taking consideration on the contradicted evidence addressed by DW2, whereby he introduce himself as a constructor of the house and not the one who measured the disputed property, and in his Judgment the trial Chairperson come into conclusion that, it is the DW2 who measured the disputed property.*

3. *That the learned trial Chairman erred in law by misdirecting himself on the question of burden of proof and standard of proof. Had he properly directed himself he would have come to the conclusion that the Appellant had proved her case on balance of probabilities.*

When the matter was called for hearing on 11th August, 2020 before Hon. Arufani, J, the appellant was enlisted the legal service of Mr. Stephen Mosha, learned counsel while the respondent enjoyed the service of Raphael David, learned Advocate. The court ordered the hearing of the appeal will be by way of written submission. Pursuant thereto, a schedule for filing the submissions was duly conformed to save for the appellant who waived her right to file a rejoinder. The matter was scheduled for mention on 20th September, 2022. The appellant's counsel was informed that due to quick and expeditious disposal of this case, the same was cause listed in the Backstopping clearance session before me.

In his written submission, the appellant's counsel began by tracing the genesis of the matter which I am not going to reproduce in this appeal.

On the first ground, Ms. Ritha contended that the Tribunal mistakenly interpreted the SI unit of meter to mean "M" regarding measurements of the land in dispute. It was his view that meter in English is not necessarily to mean

"M" in Kiswahili. It was his view that in Kiswahili it is preferred to be "Mita" or "Miguu" however there is no short form of that SI Unit in Kiswahili.

Ms. Ritha went on to submit that the contract of sale (Exh.P1) is in Kiswahili. She valiantly argued that the Hon. Chairman erred in law and fact for failure to consider the testimonies of PW2, PW3 and PW4 who testified to the effect that the measurements were "*hatua za miguu 20 na upana wa hatua 15" and not "urefu wa mita 20 na upana wa mita 15*" and by saying so, the parties intended to interpret acronym "M" to mean "Miguu" and not "Mita" or "Meter".

The learned counsel for the appellant went on to submit that the Hon. Chairperson did not see the importance of *visiting locus in quo* for the purpose of ascertaining the difference in measurements between "M" and "Miguu". It was his view that the tribunal in corroboration with the e parties could clearly understand the difference in measurement between "M" to mean Meter and "Miguu". He insisted that it was crucial for the tribunal to visit *locus in quo* to clarify the contradictions. He further stated that it is settled principle that where contradictions regarding boundaries arise in the land dispute, it is important for the Tribunal to visit *locus in quo*, so as to satisfy itself as to what was actually the intention on the disputed land. He stressed that in the circumstances of the instant case, it was necessary and inevitable for the Tribunal to visit *locus in quo*.

The counsel referred this court to factors to be considered before the Court/Tribunal in visiting *locus in quo*. To support his position he cited the cases of the cases of **Martin Mgando v Michael F. Mayanga**, Land Appeal No. 93 of 2019, **Evelyn Even Gardens NIC LTD and Hon. Minister, Federal Capital Territory & Two others**, suit No.FCT/HC/1036/2014; Motion No. FCT/HC/CV/M/5468/2017, page 9 which stated that:-

i) Courts should undertake a visit to the *locus in quo* where such visit will clear the doubts as to the accuracy of piece of evidence when such evidence is in conflict with another evidence,

ii) The essence of a visit to *locus in quo* in land matters include location of the disputed land, extent, boundaries and boundary neighbor and physical features on the land,

iii) The purpose of a visit to *locus in quo* is to eliminate minor discrepancies as regards the physical condition of the land in dispute.

Ms. Ritha insisted that it was necessary and meaningful for the Chairperson to visit the *locus in quo* so as to clarify the contradiction of the measurement and ascertain whether they were taken by footsteps or tape measure.

The learned counsel for the appellant went on to submit another similar case is **Masoya Mahemba v Nyasuma Kihanga,** Land Appeal No. 41 of 2021, this Court discussed the principles and necessity to be considered by the Tribunal

to pay a visit to *locus in quo*. At page 10 to 16 of the Judgment, his Lordship Mahimbali, J. clearly discussed the factors and emphasized on page 14 that:-

> *"...with the available evidence in record, to be certain and for the purpose of resolving the real controversial issue between the parties, it is important that the DLHT performs the important task it reserved of visiting a locus in quo"*

It was her submission that in the tribunal's record there is nowhere shown that the Chairperson had invite parties to visit *locus in quo*. She went on to submit that the Court of Appeal insisted the guidelines and procedures to be observed to ensure fair trial. Fortifying his submission he cited the cases of **Barnabas Ludori v Registered Trustee of Archdiocese of Mwanza**, Land Appeal Bo. 67 of 2021 this court cited with approval the cases of **Nizar M.H. v Gulamali Fazal Janmohamed** [1980] TLR 29 and the case of **Kimonidimtri Mantheakis v Ally Azim Dewji & 14 Others**, Civil Appeal No. 4 of *2018, CAT*. She stressed that the Tribunal failed to observe the procedures and guidelines.

The learned counsel for the appellant opted to combine and argue the second and third grounds of appeal together. He submitted that the Chairman misdirected herself in considering the testimony given by DW2 who testified to the effect that he was not present on the day when the property was measured and sold to the appellant but rather, he was instructed by the respondent to

measure the said land in dispute few weeks before the date of physical visitation. The learned counsel for the appellant went on to submit that the measurements by DW2 was by "futi Kamba" meaning tape, and found the measurements of 15 width and 20 lengths, were in the absence of witness.

The counsel went on to submit that the respondent's evidence had no value it was contradicting itself where measurements by DW2 were done in the absence of any of the parties and or witnesses while measurements on the date of sale were done in the presence of the parties and several Appellant's witnesses. She added that, the Chairperson failed to consider the testimony of PW1, PW2, PW3 and PW4 who were present on the day when sale was effected hence mistakenly considered the testimony of DW2 who was absent hence didn't see how the sold property was measured.

He did not end there, the counsel for the appellant argued that the tribunal had misdirected itself in concluding that the appellant failed to prove her case on balance of probabilities. He added that the tribunal's decision tainted with illegalities as it went contrary to the position of the law, which in turn has greatly jeopardize the justice to the parties especially on part of the Appellant herein. She faulted the tribunal for reaching a conclusion that the respondent was not a trespasser in his view the appellant's rights was infringed.

On the strength of the above submission, the counsel for the appellant beckoned upon this Court for the interest of justice to quash and set aside the Judgment and Decree of the District Land and Housing Tribunal.

In response, Mr. Raphael started to narrate the historical background of the appeal which I am not going to reproduce in this appeal.

On the first and second grounds, that relates to measurements of the suit land and contradictory evidence, the counsel for respondent contended that the two grounds revolves around interpretation of the sale agreement (Exh. P1). He argued that the document is self-explanatory in a sense that, the seller (appellant) sold a piece of land measuring 20m x 15m at the price of Tshs. 6,500,000.00/=. He added that the two parties are bound by the four corners of their sale agreement. He added that during trial, the appellant was the one who informed the Tribunal that, their sale agreement was prepared when they went to the Street leaders without mentioning his/her name. She also said Gabriel Massawe (PW3) measured the land while Josephat Joblant Mushi (DW2) was handling the rope. He added that it is unusual to measure a land by *hatua za miguu* at the same time measuring the same by a rope. He went on to submit that in cross examination the appellant mentioned Rebecca Kaminyonge as the one who drew the sale agreement (Exh. P1) but the appellant did not call her as a witness to testify at the tribunal.

Mr. Raphael stressed that the appellant did not prove her case; he stated that if appellant sold to the respondent 20 x 15 *hatua za miguu* those words do not appear in the sale agreement. He valiantly submitted that the law requires who alleges must prove. To support his submission he referred this Court to section 110 of the Evidence Act, Cap. 6 [R.E. 2019]. He insisted that it was necessary for the appellant to call Rebecca Kaminyonge as a witness to support her case. He added that section 122 of the Evidence Act, Cap 6. [R.E. 2019] provides that, the Court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons. Fortifying his position he cited the case of **Azizi Abdallah v Republic** [1991] T.L.R 71 the Court, Mapigano, Ag. J.A, Makame and Ramadhani said:-

> *".....the general rule and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution".*

It his submission that the first and second grounds fails for being non meritorious as the appellant did not bring evidence to prove her case.

Arguing for the third ground, the counsel for respondent contended that the appellant in her written submission faulted the Tribunal for failure to visit *locus in quo*. The counsel contended that the appellant is shifting the burden of proof to the Court to shape her case. It was his submission that it was not the duty of the Court since the Court receives evidence from the litigants, make findings and then pronounce a judgment basing on the available evidence. He added that the appellant has never established before the trial Tribunal any incapacity, fraud (actual or constructive) or any misrepresentation to render the sale agreement voidable at her option. He added that the appellant when she was cross examined admitted that, she knew to write and read. He spiritedly argued that the instant ground is nothing but seek a refugee to avoid her liabilities let it be rejected.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the appeal for lack of merits.

I have revisited the evidence and submissions of both sides now, I am in position to determine the appeal. In my determination, I will consolidate the first and second grounds together because they are interrelated. The third ground will be determined separately. I have opted to start with the third ground of appeal.

On the third ground, the appellant's counsel is complaining that the tribunal faulted itself for failure to *visit locus in quo*. The parties are locking horns on the issue of the measurement of the suit land. The appellant's counsel claimed that the Hon. Chairperson did not see the importance of *visiting locus in quo* for the purpose of ascertaining the difference in measurements between "M" and "*Miguu*".

Reading the evidence on record, I noted that PW1 Mariam Kalengela testified to the effect that the suit land was measuring 20 footsteps x 15 footsteps and the sale agreement states that *ukubwa wa eneo ni* 20 m x 15 m.

Victoria Swai (DW3) testified to the effect that she bought the suit land from the appellant on 14th November, 2014 to a tune of Tshs. 6,500,000/=. DW3 testified that the measurement of the suit land is 20 meter x 15 meters and DW2 verified the said measurements. DW3 testified that during the sale process DW2 was not present and when he measured the suit land DW3 was in Dodoma. In my considered view, since the testimonies of PW1 and DW3 were different and DW2, the person who measured the suit land did not witness the sale agreement I find it was crucial for the Chairman to visit locus in quo to ascertain the proper measurement of the suit land considering the fact that there might be a misunderstanding in measuring the suit land.

The record further reveal that DW2, the respondent's witnesses; is the one who measured the suit land although he did not witnessed the sale agreement. Phylo Steven (DW1) witnessed the sale agreement and he claimed that the suit land was measuring 20 meter x 15 meters.

PW1 when cross examined she testified that the one who surveyed the suit land was Gabriel Massawe (PW3) and the same was measuring 20 footsteps (M) x 15 footsteps (M). PW3 testified to the effect that he conducted a survey and installed pillars along the boundaries. He measured 20 footsteps x 15 footsteps. Latifa Chulaka (PW2) witnessed the sale agreement and she testified to the effect that the suit land was measuring 20 footsteps x 15 footsteps. Mohamed Kanoga (PW4) the appellant's witness also testified to the effect that the suit land measuring was 20 footsteps x 15 footsteps.

I understand that visiting a *locus in quo* is not mandatory and depends on the circumstances of each case. The circumstance of the instant case, the evidence on record are confusing. Thus, in my view this is a fit case which requires the court to ascertain itself to verify the evidence of the parties considering the fact that the parties have two different measurements. The repurpose of *locus in quo* is to examine the suit property in depth, therefore the Tribunal was required to visit locus in quo to collect further evidence to assist the Chairperson in reaching a fair decision.

In the case of **Yeseri Waibi v Edisa Lusi Byandala** [1982] HCB it was held that the practice of **visiting** the **locus in quo** is to check on the evidence given by witnesses and not to fill the gap for them or [the] court may run the risk of making itself a witness in the case.

For the aforesaid findings and considering the circumstances at hand, I fully subscribe to the submission made by the counsel for the appellant that it was important for the District Land and Housing tribunal to visit *locus in quo* to clear the ambiguity of the suit land measurement.

In view of the aforesaid, I find the third ground of appeal merited and it is sufficient to dispose of the appeal and as such, I shall not belabour on the remaining two grounds raised by the appellant.

Following the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional powers to this court and proceed to revise the proceedings of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.386 of 2018 in the following manner:-

1. I quash and set aside the Judgment, Decree and the proceedings after the closure of the Defence Case dated 7th September, 2021 of

the District Land and Housing Tribunal in Land Application No. 386 of 2018.

2. I remit the case file to the District Land and Housing Tribunal for Kinondoni at Mwananyamala and order the Tribunal to visit *locus in quo* to ascertain the measurement of the suit land.

3. The Chairperson to compose a new Judgment within 6 months from the date of this judgment.

4. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 20th September, 2022.

A.Z.MGEYEKWA
JUDGE
20.09.2022

Judgment delivered on 20th September, 2022 in the presence of Mr. Stephen Mosha and Mr. Nicodemus Agweo, counsels for the appellant.

A.Z.MGEYEKWA
JUDGE
20.09.2022

Right of Appeal fully explained.