

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

LAND APPEAL NO. 319 OF 2023

(Originated from Land Application No. 76 of 2019 Ilala District
Land and Housing Tribunal)

**CHRISTINA MWAMENGO.....1ST APPELLANT
ABUBAKAR ABDALLAH MAGOMBA.....2ND APPELLANT**

VERSUS

**FUNGO GODLOVE BENSON.....1ST RESPONDENT
ROZENA FUNGO.....2ND RESPONDENT
KASELE KWIKIMA.....3RD RESPONDENT**

JUDGMENT

09th to 17th October, 2023

E.B. LUVANDA, J

The First and Second Appellant named above, are challenging the decision of the trial Tribunal decreeing infavour of the First Respondent above named, over a suit plot.

Going by the pleadings, proceedings and evidence presented by all parties to the dispute, it is imperative to preface the brief facts as a matter of landing to an appropriate and equitable justice.

The First Respondent (claimant at the Tribunal) purchased land located at Kifuru Street Kinyerezi Ward, measuring 17x17x18x34, 26 metres

(pentagon shape form) from the Third Respondent on 26/03/2017 as per a sale agreement exhibit M1.

In 2019 when the First Respondent was about to develop his plot, he revealed it was encumbered, in a sense that the same plot was vended by the same Third Respondent to the First Appellant via a sale agreement dated 06/10/2016 part of exhibit D2, showing a size of a plot on the east, west, south and north to be 20x20x16x16 (rectangle).

According to the First Respondent he revealed that the plot of the First Appellant had encroached three third of his plot. The First Respondent sued the First Appellant along the Third Respondent (the vendor), vide an application filed on 15/03/2019.

Thereafter the First Respondent discovered that while the suit was subjudice, the First Appellant disposed her plot to the Second Appellant on 15/09/2018 as per exhibit D1 or part of exhibit D2.

Meantime in his defence, the Third Respondent alleged that they had initial sale agreement with the First Appellant for a plot valued Tshs 1,300,000/= and after the latter failed to pay a full consideration, the agreement was frustrated and he re allocated her an alternative plot near a plot which he (Third Respondent) vended to the First Respondent. The Third Respondent accused the First Appellant to had encroached the area

of the First Respondent. Upon inquiry, the Third Respondent revealed the First Respondent had disposed his plot to one Mussa Hamisi Madili (DW4), whom the First Respondent had named being his neighbour on the right hand side of his plot. DW4 confirmed to have purchased a plot from the First Respondent measuring 16x20 being half of the First Respondent's plot on the top, according to DW4 the remaining plot, the First Respondent vendored it to one Alphonse (soldier), who has constructed a house. The Third Respondent alleged to have failed to settle the matter out of court, following this new development. The Third Respondent heaped blame to the First Respondent that he is intending to benefit twice. On cross examination, the Third Respondent confessed that it is not the entire area which he vendored to the First Respondent which is encumbered by this dispute.

In the memorandum of appeal, the Appellants raised four grounds of appeal. However for purpose of determining this appeal, I cherry pick the third ground of appeal; thus, the trial Tribunal was misconceived to determine the matter without visiting the *locus in quo*.

Mr. Bitaho Baptister Marco and Mr. Emmanuel Gikaro learned Advocates for the Appellants arguing for the third ground of appeal, they submitted that during hearing, the Tribunal arranged to go for the visit of the suit property so as to identify exactly the suit property, but the Tribunal did

not manage to go to the site, instead the Tribunal proceeded to hear the matter without ascertaining the exactly suit property location. They submitted that at a trial, the Third Respondent testified that he sold two pieces of land including the suit property to two different purchasers, one being the First and Second Respondents and the other being the First Appellant, arguing this suffices to convince the Tribunal to go to the site to identify the suit property, but the Tribunal ignored and proceeded to hear the matter in obscurity. They cited the case of **Avit Thadeus Massawe vs. Isdory Assenga, Civil Appeal No. 6/2017, CAT Arusha.**

In reply, Helmes Marcell Mutatina learned Counsel for the First and Second Respondents submitted that visiting the *locus in quo* is in the discretion of the Tribunal, argued nowhere in the provision of the Regulations of the District Land and Housing Tribunal (sic, The Land Disputes (The District Land and Housing Tribunal) Regulations, GN 173 of 2003) mandatorily for the visit of *locus in quo*. He submitted that the trial Chairperson judiciously exercised the discretion of visiting the *locus in quo* more than twice. He submitted that for reasons best known to the Appellants in corroboration with the Third Respondent, all the time they halted the process of visiting the *locus in quo*. He submitted that the trial Chairperson could not force parties to visit the *locus in quo*. He cited the

case of **Dar es salaam Water & Sewerage Authority vs. Didas Kameka & 17 Others**, Civil Appeal No. 233/2019 CAT Dar es Salaam, for a proposition that it is not mandatory to visit the *locus in quo*. Also **Nizar M.H. Ladak vs. Gulamali Fazal Janmohamed** [1980] TLR 29. He distinguished **Avit Massawe** (supra) arguing that there it was on how to clean the air when the witnesses differed on where exactly the suit property is located, which is not an issue in the matter at hand.

Arguably visiting the *locus in quo* is within the discretion of the Trial Tribunal after making assessment of the evidence presented before it, of course visiting at the site is not mandatory. In **Didas Kameka** (supra) at page 29, it was held, I quote,

*"We are mindful of the fact that there is no law which forcefully and mandatorily requires court or tribunal to inspect a locus in quo, as the same is done at the discretion of the court or tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. This Court has had occasion to discuss this issue in the land mark case of **Nizar M.H. Lada vs. Gulamali Fazal Johnmohamed** [1980] TLR 29. In which the Court interalia held that:-*

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

To my view the nature of evidence presented in this case as per recap above, present or fall with the domain of exceptional circumstances which necessitate the Tribunal to visit the *locus in quo* to verify what was being asserted by the parties in their testimony at the trial.

This can be evidenced by the wording of the Tribunal made prior commencement of the hearing on 12/04/2021, I reproduce,

Tribunal: *The matter is for commencement of hearing of the applicant's case.*

Mtatina: *We have one witness, we are ready.*

Tribunal: *According to the pleadings, this case can be settled upon visit locus in quo, so before hearing, it is prudent to make a visit, so the hearing is adjourned, after the visit locus in quo is fixed.*

ORDER: *Visit 21/05/2021 at 10:00 hours.*

When the matter come on 21/05/2021, the Tribunal vacated the order for visiting the *locus in quo*, after Mr. Mtatina learned Counsel for First Respondent herein informed the Tribunal that parties were on disagreement regarding the order for visiting the locus in quo. Therefore, the argument of the learned Counsel for First and Second Respondent who argued that it is the Appellant who colluded with the Third Respondent to frustrate the visiting in quo for more than twice, is quietly misleading. This is because, it is the learned Counsel for First and Second Respondent who opposed the move and order of the Tribunal to visit the *locus in quo*.

The exceptional circumstances for visiting the *locus in quo*, in this matter can also be ascertained from what Tribunal members (assessors) had opined. The wise assessor Jokha Lendi, made the following opinion at item 2,

"2 mgogoro wa eneo bishaniwa umesababishwa na mdai na mdaiwa Na. 1"

The wise assessor Mwakalasya, T made the following opinion,

"Katika kupitia maelezo ya kina ya wadaawa, mdai na mdaiwa Na. 1, kila mmoja kwa wakati wake tofauti na nia tofauti wamefanya mgogoro huu ufikie hapa kwa utata mkubwa".

In view of the above, I quash the judgment and set aside the order dated 21/05/2021. And I direct the learned trial Chairman to visit the *locus in quo* for the First Appellant (Christina Mwamlengo DW1) to locate physically her area purchased from the Third Respondent measuring 20 (on the East), 20 (on West), 16 (on the South) and 16 on the North as depicted in a sale agreement dated 06/10/2016 (part of exhibit D2); Likewise the First Respondent (Fungo Godlove Benson PW2) to locate his area he purchased from the Third Respondent measuring 17x17x18x34, 26 metres as depicted in his sale agreement exhibit M1. Also the Third Respondent (Kasele Kwikima, DW3) to appear at the site to exhibit Plot vended to the First Appellant and First Respondent. Assessors, if they are available according to the law, should also participate and thereafter opine afresh. In that way their opinion given on 22/05/2023 are discarded.

Thereafter, the learned Chairman should ensure that a fresh judgment is composed and delivered to parties, within ninety days counting from a date hereof.

For clarity, the testimony adduced in the proceedings remain intact.

The appeal is allowed to the extent explained above. I make no order for costs.



E.B. LUVANDA
JUDGE
17/10/2023

Judgment delivered through virtual court at 09:44 hours, where neither Mr. Bihatao Baptister Marco and Mr. Emmanuel Gikao for Appellants nor Helmens Marcell Muitatina learned Counsel for First and Second Respondent attended.



E.B. LUVANDA
JUDGE
17/10/2023