IN THE HIGH COURT OF UNITED REPBUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL No. 320 OF 2023

(Arising from the decision of the District Land and Housing Tribunal for Ilala in Land Application No.36 of 2016, delivered on 24th April 2023 by Hon M. Mgulambwa - Chairperson)

LILIAN OGWALI.....APPELLANT

VERSUS

GERALD MWACHA.....1ST RESPONDENT

MODEST MARWA.....2ND RESPONDENT

ALOYCE MNYAWAMI.....3RD RESPONDENT

JUDGMENT

11th March 2024 & 17th April 2024

L. HEMED, J.

At the District Land and Housing Tribunal for Ilala (DLHT), **GERALD MWACHA**, the herein 1st Respondent, presented a suit in the form of Land Application No.36 of 2016 against **MODEST MARWA** (the 2nd Respondent), **LILIAN OGWALI** (the Appellant herein) and **ALOYCE MNYAWAMI** (the 3rd Respondent). In the said suit the claim was that the herein Appellant, 2nd and 3rd respondent had invaded into his piece of land located at Bangulo Mwembe Kiboko, Pugu – Ilala District. The cause of action as per application form presented before the DLHT was thus-

> *"That on a about (sic) 19/07/2013 a piece of land, the property of the applicant, was invaded by the 2nd & 3rd respondents who claimed that the same (land) was sold to them by the 1st respondent and, the respondents have unlawfully erected two houses on the said land. The size of the land is ½ of an acre, and was originally sold to the applicant by the 1st respondent"*

The said suit was contested as all respondents filed written statement of defence. In the course of proceedings, amicable settlement was reached between the then Applicant (Gerald Mwacha) and the 3rd Respondent (Aloyce Mnyawami). The trial proceeded between the 1st Respondent, 2nd Respondent and the Appellant herein and ended in favour of the herein 1st Respondent who was declared the lawful owner of the disputed piece of land measuring ½ an acre. Aggrieved by such decision, the Appellant knocked the gates of this court with a Memorandum of Appeal containing the following grounds:-

> *"1. That, the Honourable Trial Tribunal erred both in law and fact by allowing counsel for both parties to assume the role of a witness of the locus in quo by showing the demarcation while the said advocates on record were not witness and did not take any oath.*

2. That, the Honourable Trial Tribunal erred both in law and fact by receiving evidence of PW1 (1st Respondent) and DW1(Appellant) at the locus in quo without oath.

3. That, the Honourable Trial Tribunal erred both in law and fact by denying the Appellant her right to cross examine PW1(1ST Respondent) after the said PW1 gave evidence at the locus in quo and showed the purported demarcation.

4. That, the Honourable Trial Tribunal erred both in law and fact by finding that the 1st Respondent is the rightful owner of the disputed piece of land and that the appellant is a trespasser."

It should be noted that the matter at hand proceeded without the attendance of the 2nd and 3rd respondents who failed to attend despite being duly served by way of publication in Mwananchi News Paper of 5th January 2024. The non-appearance of the 3rd Respondent may probably be because his dispute with the 1st Respondent had amicably settled while the matter was still pending at the trial Tribunal.

The matter was heard by way of written submissions that were timely filed by the learned counsel for both parties. The Appellant was represented by **Mr. Wilson Edward Ogunde**, while the 1st Respondent enjoyed the service of **Mr. Job Kerario**, learned counsel.

The learned counsel for the Appellant consolidated and argued together ground 1, 2 and 3 because all of them fault the visit at the *locus in quo*. It was stated that on the date of visitation, Mr. Kerario and the 1st Respondent (PW1) were present at the *locus in quo* and both of them showed the disputed land. He averred that Mr. Kerario, advocate was not a witness as such he had no right to show demarcations of the disputed area because by so doing he stepped into the shoes of witness. He added that Mr. Kerario did not take oath that he could not be cross-examined.

He argued further that the duty of advocates at the *locus in quo* is only to examine witnesses and not to step into the shoes of witnesses. In his opinion, proceedings at the *locus in quo* is akin to hearing of the case and cannot be conducted contrary to what is taking place in the court room.

Mr. Ogunde also asserted that all parties, although they were present at the *locus in quo*, the record shows that they did not give evidence under oath. His view was that by not giving evidence under oath, their evidence should not have been relied upon by the court.

Another anomaly about the visit of *locus in quo* as pointed out by the counsel for the Appellant was that, the Appellant was not availed with the opportunity to cross examine DW1. Mr. Ogunde was of the opinion that the Appellant was denied the right to be heard and thus vitiating the decision of the trial Tribunal. The learned counsel for the Appellant relied on the decision of the Court of Appeal in **Kimonidimitri Mantheakis v.Ally Azim Dewji and 7 others,** Civil Appeal No.4 of 2018.

In reply thereto, Mr. Kerario who was advocating for the 1st Respondent refuted by stating that the advocate of the 1st Respondent never turned himself into a witness by giving evidence for his client about the boundary between the appellant and the 1st Respondent is pieces of land during visit of the *locus in quo*. He stated that, the purpose of going to the *locus in quo* was not to authenticate boundaries between the parties rather, for the court to satisfy itself about the existence and the sizes of the pieces of land which had been mentioned in evidence in court and the extent of the alleged trespass.

In the opinion of Mr. Kerario, what was said by the parties at the *locus in quo* was not a fresh evidence, rather it was a matter of clarification

of the existence of the land in dispute. In his view, parties needed no oath in order to say a word at the *locus in quo*. He ended urging the court to find no merits in the 1st, 2nd and 3rd grounds of appeal.

Having deeply gone through the rival submissions of the learned counsel for both parties, let me turn to assess the merits of the 1st, 2nd and 3rd grounds of appeal in regard to what happened to the visitation of the *locus in quo*. I must state at the outset that, a visit of the *locus in quo* is not mandatory and it is done only in exception circumstances.

Where the court thinks necessary to conduct such visit, the court/tribunal must conduct that visit with the parties and their advocates, if any, and such witness who may have to testify in the particular matter. The court/tribunal is obliged to take notes during the visit of the *locus in quo*. This was said and insisted by the Court of Appeal of Tanzania in **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed** [1980] T.L.R 29, thus:-

> *"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 such witness as may have to testify in that particular matter, and for instance if the size of a room or width of the road is a matter in issue; have the room 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. Witness then have to give evidence of all 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."

The above proposition was echoed in the case of **Prof.T.L. Maliyamkono v. Wilhelm Sirivester Erio**, Civil Appeal No.93 of 2021. In this case the CAT, among other things, insisted the importance of recording evidence and whatever transpired at the *locus in quo*.

Going through the records of the trial Tribunal, I have realized that visit of the ***locus in quo*** was conducted on the 24th February,2023. Parties and their respective advocates appeared. The trial Tribunal also recorded what transpired at the *locus in quo* as it also drew the sketch map of the suit land. However, according to the records, it appears the advocates and

the parties participated in showing the demarcation of the disputed land. The proceedings readth as follows:-

"24/02/2023

Akidi: M.Mgulambwa

Wajumbe: Matimbwa & Fanisa

Mdai- Yupo Mr. Kerario/w

Wadaiwa 1. Hayupo

2. Yupo-Mr. Ogunde/w

3.Hayupo

Karani: Alice

Baraza: Tumekuja kutembelea eneo huku Pugu Banyuto Wadaawa watuoneshe eneo bishaniwa.

Sgd. 24/02/23

Mdai na Mr. Kerario.

- *Eneo bishaniwa ni lote likiingiza nyumba 2 za wadaiwa no.2 na 3.*

Mdaiwa no.2 na Mr. Ogunde.

- *Eneo lenyewe ni hili lote tukihesabu 20 X 20 mita na mipaka iliyowazi ni miti.*

Wazee:

Tumeona eneo bishaniwa na kuelewa.

Baraza:

Eneo bishaniwa tumeliona na kuelewa vizuri. Nyumba ya mdaiwa no.2 imekamilika na anaishi huko na nyumba no 3 imeonekana pia haijaisha ila iko usawa huohuo was mdaiwa No.2.

Naweka mchoro unaoonesha eneo bishaniwa tulivyoliona.

Sgd. 24/02/2023"

From the above proceedings, I have noted the following; **One**, the advocates and their respective parties participated in showing the suit properties; **Two**, the witnesses who were called to show the demarcation, did not take oath before adducing evidence in showing the demarcation; and **Three,** the advocates never got the opportunity to cross examine the witness.

The way the proceedings of the *locus in quo* visitation are couched, it appears as if the advocates also participated in showing the boundaries of the suit property. I am at one with Mr. Ogunde's

contention that the role of an advocate at the *locus in quo* is only to examine the witnesses and not to participate as witnesses. It was thus a fatal mistake to record the advocate as participants in showing the suit property and the respective boundaries.

As aforesaid, the parties showed the demarcation of their respective pieces of land without taking an oath. I have also noted from the judgment of the trial Tribunal, at page 4 of the typed judgment that, such evidence was used in deciding the dispute. The question is whether it was fatal. In **Kimonidimitri Mantheakis v.Ally Azim Dewji and 7 others,** Civil Appeal No.4 of 2018 the CAT had this to *say in regard to visit of locus in quo:-*

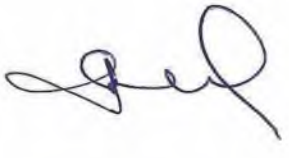
> *"...for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: **one**, ensure that all parties , their witnesses, and advocates (if any) are present. **Two**, **allow the parties and their witnesses to adduce evidence on oath at the locus in quo**; **three**, allow **cross-examination by either party, or his counsel**, **four**, record all the proceeding at the locus in quo; and **five,** record any observation, view, opinion or conclusion of the court including drawing a sketch plan if*

necessary which must be made known to the parties and advocates, if any." (Emphasis added)

In the instant case the trial chairperson drew the sketch map and recorded views and observation. However, in taking evidence of the parties at the *locus in quo*, there was no oath taken by the parties before adducing evidence. I have also noted that the advocates were not availed with the opportunity to cross-examine those who were called to show the demarcations of the suit landed property. In my firm view, this was a fatal error, which rendered the entire process of visiting the *locus in quo* a nullity.

From the foregoing, I find merits in the 1st,2nd and 3rd grounds of appeal and suffice to dispose the entire appeal. In that regard, I cannot labour to determine the 4th ground as by doing so it will only have the meaning of an academic exercise. In the upshot I make the following orders:-

1. The proceedings from 24th February 2023 (visiting *locus in quo*) to the date of concluding Land Application No.36 of 2016, the judgment and decree are hereby quashed;



2. The case file is remitted to the trial Tribunal for completion of the trial. If it will be found necessary to visit the *locus in quo*, it will have to be done in accordance with the procedures laid down in **Kimonidimitri Mantheakis v. Ally Azim Dewji and 7 others (supra)**; and

3. Each party to bear its own costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 17th April 2024

L.HEMED

JUDGE