IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 429 OF 2023

(Appeal against the judgment and decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 223 of 2015 before Hon. Wambili, Chairperson).

ELIZABETH JACKSON BISWARO (As administratix of the Estate of the late JACKSON MWENDA BISWARO)..... ..... APPLICANT

VERSUS

GODLOVE HOSEA NOMBO.....RESPONDENT

JUDGMENT

Date of last Order: 14/02/2024

Date of Judgment: 29/02/2024

A. MSAFIRI, J.

The appellant therein above being aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the trial Tribunal) in Land Application No. 223 of 2015, she has filed this appeal, advancing the following grounds of appeal;

1. *THAT, the Learned Chairman grossly erred in law and in fact by nullifying the survey made by the surveying authority (Kinondoni Municipal Council now Ubungo Municipal Council) without joining the surveying authority as necessary party.*
2. *THAT, the Learned Chairman grossly erred in law and in fact by not complying with the procedures and guidelines in regard visit to a locus in quo as no witness*

were present nor the respondent advocate was not present (sic) also the surveyor was not present, although the trial Chairman found out that the dispute arose after the survey was conducted at the area, the same prejudiced the appellant.

3. *THAT, the Learned Chairman grossly erred in law and in fact by dismissing the Appellant's counter claim while the same was backed up by evidence and also, the assessor (Prof. Kulaba) who opined that the disputed area belonged to the Appellant.*
4. *THAT, the Learned Chairman grossly erred in law and in fact for failure to evaluate the evidence of the Appellant presented at the Trial, went on ignoring the same and hold that the Respondent has proven his case on balance of probabilities.*
5. *THAT, the Learned Chairman grossly erred in law and in fact by determining the matter in favour of the Respondent while judgment and Decree of the trial Tribunal did not exhaust the description of the suit landed property, contrary to Order VII Rule 3 of the Civil Procedure Code (Cap 33 R.E 2019) although Exhibit P2 has a full description of the disputed plot.*

The appeal was heard orally whereby Mr. Nehemia Nkoko appeared for the appellant while Mr. Cleophas Manyangu represented the appellant.

Initially on 04th August 2016, the now respondent one Godlove Hosea Nombo instituted Application No. 223 of 2015 before the trial Tribunal against the now appellant, one Elizabeth Biswaro, the administratix. He claimed that he is the lawful owner of the farm measuring 51 meters and covering the whole distance between two roads from West to East, located at Mbezi-Luis, Mbezi Ward, Kinondoni Municipality, Dar es Salaam Region.(herein to be referred as the suit property). He said that he

purchased the suit property from one Mwalimu Hassani Bumbo on 5th December, 1999.

That at unknown time and date in the year 2014, the respondent (now appellant) unlawfully encroached the applicant's property and this came to the knowledge of the applicant after survey beacons were seen on the southern part of the applicant's farm. That the respondent has planted two beacons on the southern part of the applicant's farm namely DIK 305 and DIK 309. He said further that the respondent who is his neighbour, has conducted the survey of her piece of land and did not involve the applicant as her neighbour. He believes that if the respondent had involved him while surveying her land, she could have avoided the encroachment. Among other reliefs, he prayed to be declared the owner of the suit property.

During the trial, two issues were framed, first who is the lawful owner of a suit land of 15.5 meters and 3 meters between the applicant and the respondent and second issue was on relief's entitlement.

The applicant (now respondent) testified as PW1 and said that the respondent Elizabeth Biswaro has trespassed into his land. That the land trespassed is measured 15.5 meters by 3 meters size. That he got the suit land from Mzee Mwalimu Hassani Gumbo. He produced a sale agreement which was admitted as exhibit P1. That he bought the area of the size of 51 meters east and west side. He described the boundaries of the suit land.

He said further that in 2014, he noted two beacons planted in his land and discovered that the beacons has encroached into his land and taken off a piece of land sized three meters. That he asked the respondent who replied that she owns the beacons. That after efforts of reconciling with the respondent over the beacons proved futile, he complained to the Director of Kinondoni Municipal and he produced the letter he wrote to the said Municipal. The letter was admitted as exhibit P2. That later, the Director informed him that the respondent was not cooperating hence he decided to institute the case before the Tribunal. He prayed for the order of the Tribunal for the respondent to remove the beacons which encroaches his land. He also pray for the Tribunal to nullify the survey which led to the encroachment.

When he was questioned for clarification by the assessor, the applicant stated that the survey was done by private persons not by the Government.

PW2 was Miraji Mwalimu Bumbo. He said he is the son of Mwalimu Hassani Bumbo who sold the suit property to the applicant on 12/5/1999. That he know the applicant Godlove Hosea Nombo and he saw his father selling the suit property to the applicant and he was a witness of his father during the sale.

The witness said he know the respondent Elizabeth Biswaro. That she moved near to the applicant after his father also sold a plot to her and her

husband in the year 2000. He said that the dispute between the parties started when the respondent fixed a boundary on the water chamber point in the area owned by the applicant.

PW3 was Clement Marshauri who was Land Surveyor of Ubungo Municipal Council. He said that the Municipal received the applicant's complaint letter exhibit P2. He said that after receiving the complaint of the survey done at the respondent's area which resulted into beacons being planted into the applicant's land, the expert from the Municipal was sent to the disputed area accompanied by the applicant. However, the respondent never showed up despite being called to attend the site visit for inspection of the disputed area.

He said further that during the survey of the area, the owner of the surveyed land must involve his neighbours and Street leaders who have to sign a Form No. 92. In cross examination, the witness said that he did not know who surveyed the suit area.

That was the evidence of the applicant who is now the respondent.

On her side the respondent (who is now the appellant) filed her written statement of defence, and denied vehemently the claims by the applicant. She also filed a counter claim in which she claimed that she is the lawful owner of the part of land earmarked by beacons labelled DIK 305 and DIK

309 which is part of the respondent's farm having purchased it in 11th September 2000 from one Mwalimu Hassan Gumbo. Among other reliefs, she prayed to be declared the lawful owner of the suit property.

During the trial, the respondent testifying as SU1, denied to have encroached into the applicant's land as claimed by the applicant. The respondent said that she and her husband started to live near the suit land in 1994. In her oral evidence in court, the respondent stated that she and her husband bought the suit area from Mzee Gumbo in 1998. That the applicant came later and purchased the remaining piece of suit area from the same Mzee Gumbo. However, in her WSD, the respondent stated that the suit area belonged to the family of the late Jackson Mwenda Biswaro and they bought the suit area from Mwalimu Hassani Gumbo way back in the year 2000.

The respondent stated further that in 2015, she received a summons from the Street Government informing her that she has trespassed into the area of the applicant. That in the year 2003, the residents of the area received an order from the District Commissioner that they should survey their pieces of land and they started survey process. She produced a sale agreement which was admitted as exhibit D2. She said that she and her husband agreed with the purchaser to buy the suit area since 1998 but the sale was concluded in 2000 as they were paying in instalments. She prayed

to be declared the owner of the suit property. In cross examination, she denied that the applicant was the first to buy the piece of land on the suit area. She said that the survey of her land was not completed because of the institution of the case at hand.

SU2 was one Vilhem Martin Mzule who said that he is the builder of the house of the respondent and her late husband. That he built the said house at Mbezi Inn and it was in 1998. That he knew the applicant after he purchased a piece of area near the area of the respondent and her husband. That he was present when the applicant was buying his area which was neighbouring the respondent's area. He said that to his knowledge, the dispute between the applicant and the respondent was over the boundary of their areas. He said that the respondent was the first to purchase and occupy her area and the applicant came later after the respondent.

Having gone through the evidence on record, I will determine the grounds of appeal also taking into consideration the submissions of the parties orally on those grounds of appeal.

On the first ground of appeal, the appellant claimed that the trial Chairman erred in nullifying the survey made by the surveying authority i.e. Kinondoni Municipal without joining the survey authority as necessary party.

Mr Nkoko, counsel for the appellant submitted that it was necessary to join Kinondoni Municipal who was the one who conducted the survey as part of the proceedings. That Exhibit P2 was the respondent's complaint letter to Kinondoni Municipal complaining about the survey made by the Council. This shows that it was necessary to join the Council as they were the one who conducted the survey. That the trial Chairman erred in the findings that it was the appellant who conducted the survey and proceeded to nullify the same. The counsel averred that this was contrary to Order 1 Rule 10(2) of the Civil Procedure Code, Cap 33. (herein the CPC). He insisted that Kinondoni Municipal was a necessary party.

Mr Manyangu for the respondent replied that Kinondoni Municipal was never a necessary party. That in determining the factors in determining who is the necessary party, the important factor to look is the nature of the relief claimed and whether in absence of the said party, the court cannot issue executable decree. He said further that by the nature of the claims, both parties claim to have bought the same area. He argued that exhibit P1 which is the sale agreement by the respondent shows the size of the area when the respondent was buying while exhibit D1 by the appellant does not show the description or the size of her area. Mr Manyangu said that the survey was conducted by the private surveyor hence it was engineered by the parties.

Mr Manyangu submitted further that what was pertinent is to prove ownership of the suit area which the appellant failed.

In rejoinder, Mr Nkoko reiterated his submission in chief and added that the counsel for the respondent has misconceived the point when he said that the survey was done privately.

On the issue on whether the survey was done privately or not, it was the evidence of the appellant herself who told the trial Tribunal that the survey was done by a private company known as Hosea who conducted the survey under the order of the Municipal. However, the appellant said that the survey was not completed in her area after the applicant having instituted the case.

Indeed the respondent wrote a complaint letter exhibit P2 to the Municipal Council complaining about the survey and an officer was sent to the suit property. However this does not necessitate joining of the Director of the Municipal as a necessary party. The reason for my finding is that the main issue in the dispute was the ownership of the suit property. Each party claimed ownership of the suit property and presented evidence which the trial Tribunal determined and found that the suit property belonged to the respondent.

I have read Order 1 Rule 10(2) of the CPC. It provides thus;

"The Court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, ***and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added". (emphasis mine).***

Here the question is what was the questions involved in the suit during the trial? The main question during the trial was who was the lawful owner of the suit property? As said earlier, each party presented their evidence before the trial Tribunal which after assessing the evidence, found that the weight of evidence by the respondent was heavier than the one presented by the appellant.

Furthermore, the appellant admitted in her evidence that the survey was done by a private company although under order of the Municipal. The appellant admitted further the survey was not completed due to the dispute.

In such circumstances, was the joining of Kinondoni Municipal as necessary as to render the decree in-executable? In the case of **Mussa Chande Jape**

vs Moza Mohamed Salim, Civil Appeal No. 141 of 2018, CAT at Zanzibar, the Court of Appeal made definition of a necessary party. It held that;

> *"Therefore, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed"*

It is my finding that the joining of the Director of the Municipal Council was not necessary as to render the whole proceedings a nullity. First, the survey was not done by the Municipal, second, the Municipal Officer was called as a witness and gave evidence and as per his evidence, there was necessary procedures which were not adhered by the appellant and the one who conducted the survey, third, the dispute between the parties was on the ownership of the suit property.

The letter of the respondent to the Municipal does not make the Municipal a necessary party to the dispute. Therefore, I find that the trial Tribunal having assessed the evidence adduced, it was correct to nullify the survey without joining the Kinondoni (now Ubungo) Municipal Council as the latter was not a necessary party in the dispute. The survey was done privately and in addition, the Land Surveyor of Ubungo Municipal was summoned and testified as PW3. I find that this was enough evidence and for those reasons, I find the 1st ground to lack merit.

On 2nd ground, Mr Nkoko submitted that the trial Tribunal visited the locus in quo but did not follow the guidelines to be observed during visiting. That this is for the reason that the advocate for the respondent was absent. That even after complete of the visit, the Tribunal did not resume and call the witnesses for any examination or cross examination as per the requirement of the law. To bolster his point, the counsel for the appellant cited the case of **Nshinga Liangwa vs. Joseph Mpori Mwalawa,** Land Appeal No. 49 of 2022, HC at Mbeya (Unreported).

In reply, Mr Manyangu denied the appellant's claim and submitted that on the date of visit at locus in quo, both parties were present in person. The advocate was present. The parties were the parties and also witnesses in their own case. That each party showed his/her own area and the Tribunal was satisfied by the evidence that the appellant had encroached the respondent's land. He urged the Court to dismiss the appeal.

In rejoinder, Mr. Nkoko reiterated his submission in chief.

The procedure to be complied by the court when they decide to visit the locus in quo has been set in numerous cases by the Court of Appeal. In the case of **Kimonidimitri Mantheakis vs Ally Azim Dewji and 7 others**, Civil Appeal No. 4 of 2018, CAT at DSM, the Court of Appeal observed thus;

> " *.....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 proceedings 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".*

This requirements were elaborated more in the case of **Prof. T.L Maliyamkono vs Wilhelm Sirivester Erio,** Civil Appeal No. 93 of 2021, CAT at DSM whereby the Court of Appeal, reiterated their decision in the famous case of **Nizar M.H Ladak vs Gulamali Fazal Janmohamed** [1980] T.L.R 29 on the procedure pertaining to a visit of locus in quo. The Court of Appeal observed that according to their decision in the case of **Nizar M.H Ladak (supra)**, a visit of the locus in quo is not mandatory but where it is necessary to conduct such visit, the court must adhere to the following procedure;

First; the court must attend with the parties and their advocates if any; Second; the attendance of witnesses who may have to testify in that particular matter; Third, further notes should be taken during the visit and; Fourth, all those in attendance should re-assemble in court; Fifth, the notes should be read out to the parties to ensure its correctness.

Having observed the principle or the mandatory procedure necessary to be followed by the court when it has decided to visit the locus in quo, I read through the proceedings of the trial Tribunal to see whether the said procedure was adhered.

According to the records, on 01/7/2022, the Tribunal visited the locus in quo. The parties were present in person and the advocate for the respondent one Habibu Kasimu was also in attendance. There is recorded notes/ observation of the Tribunal at the locus in quo. After that the record shows that there Tribunal issued an order for the parties to submit final submissions and matter to be mentioned on 22/7/2022. On 22/7/2022 parties reported to the Tribunal that they have already filed their submissions and the Tribunal ordered for the assessors' opinion. After that the Tribunal went on to set the date for the delivery of judgment.

The record is silent on whether after visit, the parties reassembled back in court and the court read over the notes/ its observation to the parties to ensure its correctness.

Having gone through the proceedings, I am certain that the procedure set by the Court of Appeal in the above cited cases were not observed in the instant dispute.

Furthermore, I am of the view that considering the nature of the dispute which is on the boundaries of the piece of disputed land between the parties, it was necessary that some of the witnesses should have been in attendance along with the parties who could have been reexamined so as to ascertain that what they testified in court room was in tandem with the reality at the locus in quo. Among such important witness was PW3, Clement Marshauri who was Land Surveyor of Ubungo Municipal Council.

From the above analysis, it is therefore clear that the trial Tribunal did not adhere to the procedure laid down in the above quoted authorities when it visited locus in quo. As it was held in the cited authorities, the omission of the trial Tribunal occasioned injustice and thus vitiated its decision.

In the submissions, the counsel for the appellant have urged the Court to nullify the proceedings, judgment and decree of the trial Tribunal. However since the omission was on the conduct of the Tribunal at the visit on locus in quo, I find that the proceedings before the order of visit have no problem and thus they are left undisturbed.

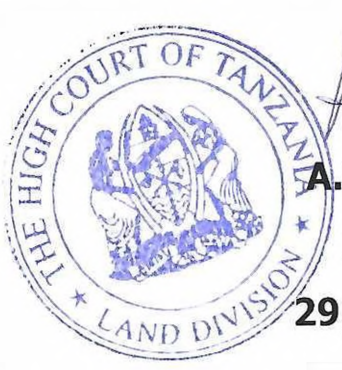
I therefore nullify the trial Tribunal's proceedings with effect from 01/7/2022 when the visit of the locus in quo was ordered, and quash the resultant judgment which was delivered on 12/12/2022.

I hereby remit the case file to the trial Tribunal for completion of the trial and if it will be necessary to visit the locus in quo, then it should be done in accordance with the procedures laid down as provided hereinabove.

For this 2nd ground alone, the appeal is allowed and since the parties did not occasion the omission, I make no order as to the costs.

It is so ordered.

Right of further appeal explained.



A.MSAFIRI

JUDGE

29/02/2024