THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 18 OF 2022
(Arising from Land Appeal No. 82 of 2021 of the District Land and Housing Tribunal for Mbeya at Mbeya, originating from Ilembo Ward Tribunal Land Case No. 6 of 2021)

ANETH MILION MWASILE.....APPELLANT

VERSUS

KAILA MAWINGU.....RESPONDENT

JUDGMENT

Dated: 3rd November & 21st December, 2022

KARAYEMAHA, J

The proceedings that bred the instant appeal were commenced in the Ilembo Ward Tribunal (WT) in Land Case No. 85 of 2021 in which the appellant's prayer for a declaration that the shamba (suit land) belongs to her was dismissed. The WT's decision further declared the appellant the trespasser.

In terms of the appellant's evidence adduced at the WT, the respondent controlled the suit land which was not his. On the other hand, the respondent testified that the appellant was given seven (7)

farms by her father but sold them all. On charity reasons, he gave her the farm left to him by his mother. Shamelessly, she sold it. Greedy has now made her claim the suit land which is not her property. The respondent declined to give her the suit land. That behaviour aggrieved the appellant who enlisted the intervention of the WT.

As stated earlier on, the WT found the respondent's evidence plausible and resonating, hence its decision to declare him the lawful owner of the suit land. This decision did not go well with the appellant. She unsuccessfully appealed to the District Land and Housing Tribunal for Mbeya at Mbeya (the DLHT). Undoubted, she made a decision to institute the instant appeal which has five grounds of appeal, which for reasons to be apparent shortly, I shall not reproduce them in this judgment.

Disposal of the appeal was done through written submissions filed by the parties pursuant to a schedule drawn by the Court on 29/9/2022.

In deciding this appeal, I propose to dwell on the point of law raised by the appellant in her submission that conditions for visiting the *locus in quo* were not complied with. This course is predicated on the fact that given the circumstances of this matter; determination of this

issue disposes of the entire appeal without considering grounds of appeal.

The appellant contended that apart from the WT visiting the *locus in quo,* it did not comply with the requirements of the law articulated in the case of **Kimonidimitri Mantheakis vs. Ally Azim Dewji & 14 others,** Civil Appeal No. 4 of 2018. She contended citing the proceedings recorded at the *locus in quo* that conditions put in place were side-lined.

In his reply, the respondent contended that all the conditions set forth in the case **Kimonidimitri Mantheakis** (supra) were complied with to a letter by the WT. He, therefore, implored on this court to disregard the appellant's contention.

Re-joining, the appellant emphasized that the WT did not give her a chance to cross-examine witnesses and that witnesses did not give their evidence on oath. The conduct of the WT at the *locus in quo* inclines the appellant to argue that justice was buried.

I have carefully read the proceedings of the WT and discovered that there was a visit of the *locus in quo*. As the record stands to witness, there was no order, after both parties had closed their respective cases, for visiting the *locus in quo*. Given the nature of the

evidence and with a view of resolving the dispute between the parties, I doubt whether there was in the first place a necessity to visit the *locus in quo*. The question is what was the members of the WT going to check on the evidence that was already given. There was no evidence showing that there was a dispute on the location of the land or measurements. The appellant did not in the first place describe the location of the land in dispute. That was a serious shortcoming in her evidence and particularly in her complaint. It is, however, worthy note that a visit to the *locus in quo* is significant in resolving issues relating to location of the disputed land, boundaries and physical features of the disputed land. This position was reiterated in the case of **Avit Massawe vs. Isidory Assenga**, CAT-Civil Appeal No. 6 of 2017 (unreported). The purpose is to see objects and places referred to in evidence physically and clear doubts arising from conflicting evidence if any about physical objects. See the case of **Kimonidimitri Mantheakis** (supra). In **Avit Massawe** (supra) which it was held:

> *"The essence of a visit to locus in quo in land matters includes location of the disputed land the extent the boundaries and boundary neighbour, and physical features on the land."*

The message we scan from that decision is that tribunals and Courts of law of any hierarch are bound to follow the laid down procedures when determining rights of parties. In this case, since the WT was determining rights of parties regarding ownership of the suit land, it was necessary to abide by the conditions for visiting the locus in quo. It was first to ask itself whether it was necessary to visit the *locus in quo*. Secondly, it had a duty to conduct the proceedings at the *locus in quo* guided by the conditions set forth in the case of **Kimonidimitri Mantheakis** (supra) and **Avit Massawe** (supra) and make sure that witnesses give evidence on oath.

A review of the trial proceedings which takes me to page 6 of the hand written proceedings, gives a clear picture of what transpired at the *locus in quo*. The following excerpt provides the position:

> *"Ushahidi was watu waliofika eneo la mgogolo (sic)*
>
> 1. *Yohana Willisoni – hili shamba alikuwa analitumia Mawingu kwa sasa analima huyu dada.*
> 2. *Yisega Mbunile – hili samba la Mawingo kwa sasa anaye litumia ni la Kaila amelitumia kwa muda mrefu.*
> 3. *Mcona Kanandi – hili shamba ni la Mawingu kwa sasa ni la Kaila.*
> 4. *Yusufu Fungameza – Mama Siri alikuwa analima ila kwa sasa siwezi jua maana Kaila ndiye analima kwa muda mrefu.*

5. *Mwenyekiti wa kitongoji Hamsoni Nkofwela – anayelima ni mzee Kaila Mawingu amelima kwa muda mrefu alikolikuta ndiyo siwezi jua amelima zaidi ya miaka kumi na tano."*

Undisputedly, after the *locus in quo* was visited and the needed evidence gathered the record is clear that parties to this case were not accorded a chance to cross-examine witnesses. The record is also silent on whether the WT re-assembled in the court room, and have or cause all notes taken out incorporated. The record is also clear that the respondent did not attend because his name is not in the list of people who attended at the *locus in quo*. Similarly, there is no reason given as to why he did not attend. This was fatal to the evidence take at the *locus in quo* and in my considered view it is incurable.

My considered view takes a cue with the case of **Nizar M. H. vs. Gulamali Fazal Jan Mohamed** [1980] TLR 29 which explained the procedure to be followed at the *locus in quo*, which in my view need to be comprehended, as follows:

> *"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 much each witness as may have to testify in that particular matter, and for*

instance if the size of a room or width of road is a matter in issue, have the room or road 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. Witnesses then have to give evidence of all those 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. We trust that this procedure will be adopted by the courts in future."

Guided by the above authority and on the clear reasons that the WT committed serous errors at the *locus in quo* by not complying with mandatory procedures, and unfortunately, this anomaly did not get the attention of the 1st appellate Tribunal, I deliberately refrain from dealing with the merits of the case. This is because I am satisfied that errors committed vitiate the trial at the *locus in quo*.

Another apparent anomaly that is apparent on the face of the record is that proceedings of the WT were not signed by the adjudicators instead they were signed by parties or witnesses and some proceedings, especially those conducted at the locus in quo were not signed at all.

The pertinent question which falls for determination and decision is whether or not the members of the Ward Tribunal appended their signatures to the proceedings. The record is clearer that the appellant gave her evidence on 20/07/2021 and signed after giving her evidence. After the respondent had cross-examined her, and the assessors had put questions for clarification, no one signed. It is also apparent that after the respondent had testified on the same date, he signed in the proceedings. The appellant did not cross-examine him, she only conceded to what the respondent said and she was let to sign. The record shows that after each witness had finished to testify, they were allowed to sign. Similarly, after cross-examination, the person who cross examined was left to sign and some proceedings were left unsigned. Similar fate befell on the proceedings taken at the *locus in quo*. The record reveals further those members of the Ward Tribunal signed only on the judgment. It is my humble observation that the anomaly is substantial and not a minor one.

The next issue for consideration is what is the remedy. In this case proceedings were not signed by the members of the WT which in my considered view is an incurable irregularity. It goes to the very root of

the matter. I say so because it is not clear who recorded the proceedings. Was it the WT or parties to the dispute or witnesses.

Failure to append a signature to the proceeding has caused unhappiness to the Court of Appeal which has never condoned to it. Indeed, it has been termed as an incurable irregularity which results into nullifying the whole proceedings. This position was underscored in **Iringa International School vs. Elizabeth Post,** Civil appeal No. 155 of 2019, whereby the Court of Appeal endorsing its earlier decisions in **Yohana Mussa Makubi & another vs. Republic**, Criminal Appeal No. 556 of 2015, **Sabasaba Enos @ Joseph vs. Republic**, Criminal Appeal No. 411 of 2017, **Chacha s/o Ghati @ Magige vs. Republic**, Criminal Appeal No. 406 of 2017 and **Mhajiri Uladi & another vs. Republic**, Criminal Appeal No. 234 of 2020, emphasized on the importance of the Judge or Arbitrator to append signature at the end of the witness' testimony. It was held, *inter alia,* that:

> *"... in the absence of the signature of the trial [Judge] at the end of the testimony of every witness;* ***firstly,*** *it is impossible to authenticate who took down such evidence,* ***secondly,*** *if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellant's counsel,* ***thirdly,*** *if the authenticity is questionable, the genuineness of such proceedings is not*

established and thus; ***fourthly,*** *such evidence does not constitute part of the record of trial and the record before us".*

I fully subscribe to this position. In view of the above guiding position of the law, it is impossible to ascertain whether members took witnesses' testimonies. Since the authenticity of the proceedings is questionable, it goes without saying that evidence purported to be witnesses' testimonies do not constitute part of the trial at the WT, the record before the 1st appellate Court and this Court.

In view of the two ascertained anomalies in the proceedings, I find that they fully vitiate the proceedings of WT. Consequently, they are hereby quashed. Furthermore, judgments of the lower Tribunals and orders thereto are set aside.

Having quashed the proceedings and set aside the above stated judgments and orders thereto of the lower Tribunals, I would, naturally, have directed for a trial *de novo*. However, with the advent of the recent amendments made to the Land Disputes Courts Act Cap. 216 by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021, powers of the Ward Tribunals to adjudicate on land disputes have been immensely stripped off. I find it not practicable to order the suit to be tried *de novo.*

In these circumstances, I direct any of the parties who wishes to pursue the claim to file a fresh land application in accordance with the current procedure. I further hesitate to condemn either party to pay costs because the apparent anomalies were caused by the lower Tribunals hence no part is to benefit from them. Therefore, each part to bear its own costs.

It is so ordered.

DATED at **MBEYA** this **21st** day of **December, 2022**

J. M. KARAYEMAHA
JUDGE