IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA SUB-REGISTRY

AT TANGA

LAND APPEAL NO. 25 OF 2023

BETWEEN

KHALIFAN MOHAMED ..... APPELLANT

AND

SITA LUSANA ..... RESPONDENT

(Appeal from Judgement and Decree of Tanga District Land and Housing Tribunal at Tanga in Land Application No. 74 of 2016)

JUDGMENT

13/03/2024 & 16/04/2024

NDESAMBURO, J.:

In this appeal, the appellant contests the decision of the District Land and Housing Tribunal for Tanga at Tanga (DLHT), which decided in favour of the respondent. The appellant urges this court to uphold his appeal, with costs. On the contrary, the respondent strongly opposes the appeal advocating for its dismissal with costs.

The appeal originates from the appellant's assertion of ownership over plot No. 6 Block "B" MD, situated in Mwahako, Tanga City, acquired

through a lawful purchase transaction from Yunus Bakari Mkomwa in February 2016. Yunus Bakari Mkomwa held a letter of offer for the right of occupancy, dated 4th of June 2007, issued by the Ministry of Land and Human Settlements Development. However, a dispute arose when, in early September of the same year, the respondent allegedly trespassed onto the appellant's property and erected a structure therein, obstructing a public right of way. This obstruction consequently infringed upon the appellant's entitlement to access his residence. The appellant further elaborated that it is the respondent's fence that has encroached onto the appellant's land, with the trespassed area measuring 16 by 14 meters.

The assertion about the ownership of the land and blockage of the path was substantiated by testimony from two witnesses, namely Janeth Walles Mwantimwa, AW2 (a land officer) and Sudi Rashid Maulid, AW3 (a land surveyor), providing evidentiary support for the appellant's claims.

The respondent vehemently refuted the appellant's claims, asserting them to be without merit. He contested any allegations of

trespass onto the appellant's land or obstruction of the public right of way. According to the respondent, his house was constructed within the boundaries of his land, which is delineated as measuring 40 by 40 meters.

The respondent acknowledged being the appellant's neighbour and further asserted that there exists no public way within the disputed area. He informed the DLHT that houses encroaching upon public pathways are distinctly marked with an "x" and were labelled "bomoa" (meaning "demolish" or "remove" in Swahili), yet his house was not among those marked structures.

Furthermore, the respondent testified that he acquired his land from Omary Neno in 2009. At that time, the area had not undergone any survey, and the seller did not provide any information regarding the status of the land. It was only in 2020 that a survey was conducted, but their plots were excluded from the survey due to the ongoing dispute.

His evidence was reinforced by four witnesses Daba Twaha Sarai, RW2, Bakari Kombo, RW3, Musa Sarai, RW4 and Aneth Salvatory, RW5.

iii. *That the learned trial chairperson misdirected herself in law and fact by not considering the evidence that is Exhibit A3.*

iv. *That the Learned trial chairperson most grossly misdirected herself by referring in her judgment exhibits allegedly tendered by one surveyor which were not at all produced during the hearing.*

v. *That the Learned trial chairperson misdirected herself by accepting Exhibit R1 without considering that it had no stamp duty.*

On the first and second grounds of appeal, the appellant is complaining that the DLHT failed to consider the evidence of AW2 and AW3 to the effect that the appellant is the lawful owner of the disputed land and that the disputed land was surveyed in 2006.

The appellant contends that AW2, the land officer, and AW3 the land surveyor should be believed. He asserts that according to Section 14(1) and (2) of the Land Act, Cap 113 R.E 2019, only the land officer is authorized to grant an offer of the right of occupancy. Consequently, the DLHT ought to have believed his testimony, as he demonstrated that plot No. 6 Block B at Mwahako was initially granted to Yunus Bakari Mkomwa in 2007, with the title later being transferred to the appellant.

Furthermore, he contends that the testimony of AW2 was supported by the evidence presented by AW3. AW3 testified that the

disputed land was surveyed in 2006, and during his visit to the disputed area, he observed a building adjacent to the appellant's property, which obstructed the appellant's access to his residence.

Concerning ground number three, the appellant asserts that the trial chairperson neglected to take into account the validity of the letter of offer, Exhibit A3 and the certificate of approval of disposition, Exhibit A4, which were confirmed by the authorized land officer. The appellant argues that this evidence remained uncontradicted during the proceedings.

On the fourth ground of appeal, the appellant argues that the trial chairperson made an error in adjudicating the dispute based on evidence from an exhibit that was not tendered before the DLHT. The appellant contends that the DLHT, of its own accord, decided to summon a surveyor as a witness, who did not visit the disputed area during the DLHT's inspection. The appellant asserts that the surveyor's testimony, claiming that the disputed land, Plots No. 6 and 8 at Block B Mwahako were not within the disputed area, lacks credibility since the surveyor did not physically visit the site. This testimony contradicts the

accounts of AW3, who did visit the area and identified Plot No. 6 Block B Mwahako, a fact corroborated by AW1's testimony as well.

Moreover, the documentary evidence, specifically the town planning drawing, upon which the DLHT relied, was introduced without affording the appellant an opportunity to cross-examine the land surveyor who was summoned by the DLHT during the visit at the locus in quo.

On the fifth ground, the appellant asserted that the DLHT erred in law when it admitted Exhibit R1, the sale agreement wherein the stamp duty was not paid.

In response to the first, second and third grounds of the appeal, the respondent argues that the testimony provided by AW2 and AW3 does not substantiate the appellant's assertions. While their testimony may establish ownership, it fails to demonstrate the issue of trespass.

Similarly, the respondent contends that Exhibit A3 merely confirms the appellant's plot ownership without addressing the issue of trespass. Additionally, the respondent contends that Exhibit A5 demonstrates that

the plot in dispute was unsurveyed at the time of the appellant's purchase. It is asserted that the appellant had a duty to prove his case in accordance with Sections 110 and 111 of the Evidence Act, Cap 6 R.E 2019 and the case of **Barelia Karangirangi v Asteria Nyalwamba**, Civil Case No. 237 of 2017, CAT (unreported).

Regarding the fourth ground, the respondent argued that the document in question, the town planning drawing, was neither admitted as an exhibit nor considered in the judgment.

On the fifth ground, the respondent contends that Exhibit R1 was appropriately admitted as an exhibit. Furthermore, it was not objected to by the appellant during the proceedings, therefore, the appellant is precluded from raising an objection at this juncture.

Having thoroughly reviewed the record of appeal, including the grounds of the appeal and submissions from both sides, the pivotal question for determination is whether the present appeal has merit.

In resolving the above issue, this court would like to commence its examination with the fourth ground of the appeal, which questions the

DLHT's reliance on an exhibit presented by the surveyor, despite the fact that it was not introduced during the hearing. The respondent refutes this complaint asserting that the town planning drawing, was neither admitted as an exhibit nor considered in the judgment. Contrary to the respondent's claim, the DLHT did indeed rely on the report, which encompassed the town planning map and the statement provided by Isaya Clement, the surveyor, in its final decision. Pages 16 to 18 of the decision demonstrate that the DLHT considered the evidential value of this report in reaching its conclusion. Specifically, the report was utilized to establish, among other things, that the disputed land had not been surveyed. Given these circumstances, the crucial question that emerges is whether the DLHT adhered to the proper procedure for conducting the visit to the locus in quo.

After scrutinizing the file, it is evident from the appeal record that on 19th of July 2022, Mr. Eric Akaro, representing the applicant now appellant, requested for the DLHT to conduct a site visit to the locus in quo. Mr. Chanjarika for the respondent did not oppose this request. Consequently, a date was scheduled for the locus in quo visit, slated

16th of September 2022, along with an order for the surveyor to be notified.

On the 16th of September 2022, both parties and their counsels, assessors, and Isaya Clement, the surveyor were present, however, the record is silent as to where the parties convened. During this session, the surveyor stated that plots No. 6 and 8 were not situated in the disputed area and sought additional time for further research and thereby to file a report. The DLHT granted this request and allowed for the submission of his report. Subsequently, the matter was scheduled for mention.

The record further reveals, that on the 13th of December 2022, when the matter came for mention, Mr. Chanjarika requested a judgment date following the reception of the surveyor's report. Subsequently, the matter was scheduled for the assessors' opinions, followed by the scheduling of the judgment date.

Although the record does not explicitly indicate that the locus in quo was visited on the 16th of September 2022, however, the evidence from the proceedings of the 20th of October2022, a letter by the DLHT

to the Municipal Director with Reference No. Appl./24/2026/02 dated 6th of November 2022 and the DLHT decision on page 16 prove that the visit in locus quo occurred on that date. As previously mentioned, on that date, the matter was adjourned to await the report from the surveyor, which was subsequently received on the 13th of December 2022, as indicated by the DLHT's stamp.

Initially, the counsel's prayer was solely for a site visit, yet the DLHT, despite granting this uncontested request, issued an order requiring the attendance of the land surveyor. It is important to note that, this surveyor was permitted to present his statement and submit documentation without being sworn in. Additionally, the DLHT strangely relied on the submitted document without it being formally admitted into the evidence.

This court acknowledges that tribunals or courts are not obligated to conduct visits at the locus in quo. However, when they opt to do so, adherence to established guidelines and procedures becomes imperative. There are various authorities, among them is the decision of

the Court of Appeal in **Kimonidimitri Mantheakis v Ally Azim Dewji and 7 Others**, Civil Appeal No. 4 of 2018 which held:

> *"Visit in locus in quo is not mandatory, it is done only in exceptional circumstances whereas the court may unconsciously take the role of witness rather than adjudicator. In this regard, where the court deems it warranted, then it is bound to carry it out properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because the visit is not for the purposes of filling gaps in evidence*".

The established guidelines and procedures for conducting visits to the locus in quo have been delineated in various cases, including precedent set by the Court of Appeal in the case of **Nizar M. H. v Gulamali Fazal Jan Mohamed** [1980] TLR 29, the it was held:

> *"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 courtroom, 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."

In **Kimonidimitri Mantheakis v Ally Azim Dewji and 7 Others**, (supra) the Court of Appeal held that:

*"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** records 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"*

In the current appeal, the proceedings indicate that the locus in quo visit took place on the 16th of September 2022, with the presence of

both parties and their advocates, as well as Isaya Clement, the land surveyor. Interestingly, the land surveyor who attended the locus in quo did not appear as a witness but he was allowed to give his statement and later filed a report. Despite this procedural irregularity, the record does not indicate whether he underwent cross-examination by either party. Additionally, there is no information regarding what occurred at the locus in quo aside from the statement of the land surveyor. Furthermore, the record does not indicate whether the DLHT reconvened in the courtroom to present the notes or statements taken at the locus in quo to the parties and their advocates.

As indicated earlier, the surveyor filed a report, which the DLHT relied upon in reaching its decision, even though it was not tendered as evidence during the proceedings. All the aforementioned points underscore that the visit to the locus in quo and the admissibility of the report was riddled with procedural irregularities. These deviations from proper procedure ultimately compromised the integrity of the trial process and led to a miscarriage of justice for all parties involved.

This ground alone warrants the determination of this appeal. Consequently, in the interest of justice, the appeal is allowed. The proceedings of the DLHT are nullified, the judgment is hereby quashed, and the subsequent orders are set aside. I order an expedited retrial before another chairperson and a set of new assessors. Considering the fact that the parties are neighbours, each party shall bear its respective costs.

It is so ordered.

DATED at **TANGA** this 16th April 2024.

H. P. NDESAMBURO

JUDGE