IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL No. 27 OF 2022

(Originating from the District Land and Housing Tribunal for Katavi at Mpanda in Land Application No. 40 of 2021)

BENJAMIN MAKALA KINGU.....APPELLANT

VERSUS

AYUBU FIDELI CHANIKO.....1ST RESPONDENT

BOSCO NYABUYUGI .....2ND RESPONDENT

JOSEPH JANUARY MKOMBO.....3RD RESPONDENT

JUDGMENT

05/02/2024 & 25/04/2024

MWENEMPAZI, J.

The appellant in this appeal was aggreived by the decision of the District Land and Housing Tribunal of Katavi at Mpanda (trial tribunal) and thus filed this appeal to this court, which consists of four (4) grounds, which are as follows hereunder;

i. *That, the trial tribunal erred in law and fact by recognizing that the suitland previously belonged to the appellant being the first owner, but failed to recognize that the 1st respondent invaded the same.*

ii. *That, the trial tribunal erred in law and fact by visiting locus in quo without adhering to the mandatory procedures of locus in quo visit, worse enough using evidence obtained without following procedures at locus in quo to determine the dispute before it.*

iii. *That, the trial tribunal erred in law to declare the 1st respondent as the lawful owner of the suitland while he did not prove his mode of acquisition of the suitland was lawful even his contract dated 20/08/2020 was full of anomalies which went unresolved by the trial tribunal.*

iv. *That, the trial tribunal erred in law and fact by holding that the suitland belongs to the 1st respondent while the evidence of the 1st and 2nd respondent was contradictory.*

And that, he prays for this appeal to be allowed, the judgment and decree of the trial tribunal e quashed and set aside, and the appellant be declared the lawful owner of the suitland, costs of this suit be borne the respondents and any other relief the court deems fit to grant.

The story behind this appeal is that, the appellant had sued the respondents at the trial tribunal for vacant possession of the disputed land

which he acquired by buying it from the late January Peter Mkombo whose estate is being administered by the 3rd respondent which is measured ¼ acres. In his astonishment, the 1st respondent invaded the disputed land claiming that he had bought the disputed land from the 2nd respondent and that his efforts of requiring the 1st respondent to vacate the disputed land peacefully has failed and hence the suit at the trial tribunal.

When this matter was scheduled for hearing, the appellant had no legal representation and so he appeared for himself, similarly, the respondents represented themselves as they too had no legal representation. However, the appellant prayed for leave of this court that the hearing should be in written form, a prayer which was not objected by the respondents and it was blessed by this court by granting it.

Submitting in support of the grounds of appeal, the appellant submitted that he prays to add another ground which he noticed after being supplied with the proceedings in which it is significant irregularity, and, that as long as it is a point of law, it can be raised at any stage and he prays to raise it. He then stated as a fifth ground as follows;

5. That, the trial tribunal erred in law to receive the exhibits without the same being read out.

He proceeded that, starting with this ground, it is clear that all exhibits received by the tribunal are which EXHIBIT SM1, EXHIBIT SM2, EXHIBIT

SM3, EXHIBIT AF-1, EXHTBIT AF-2, EXHIBIT AE-3, EXHIBIT AF-4 were received without being read out after admission per the typed proceedings, he referred his point is to the case of **Robinson Mwanjisi & Others vs Republic [2003] TLR 218** which insists that the documentary exhibits ought to be read out after their admission, the remedy of this anomaly is expungement of all those improperly received exhibits.

He added that, failure to read-out the said exhibits have prejudiced the appellant because he didn't get to know the contents of the exhibits for the purposes of cross examination,

Thereafter, he submitted on ground no. 2 that, it is the trite law that visits of locus in quo are not mandatory, however when the same is conducted the procedure governing such visits should be adhered to, and he referred me to the case of **Sikuzan Saidi Magambo & Another vs Mohamed Roble (Civil Appeal 197 Of 2018**) [20191] TZCA 322 (1 OCTOBER 2019) which held at page 5 quoted in extenso;

> *"...we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the locus in quos as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during*

trial. However, when the court or the tribunal decides to conduct such a visit, there are certain guidelines and procedures which should be observed to ensure fair trial...."

The appellant that, the guidelines in locus in quo visit was restated in the case of **Nizar M. H Vs Gulamali Fazal Janmohamed [19801] TLR 29,** where the court inter alia stated that:

*"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... 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 witnesses. We trust that this procedure will be adopted by the courts in future."*

(Emphasis added)

He clarified further that, in the present matter the witnesses testified at locus in quo day on 30/4/2023 from page 34-35 of the typed proceedings who testified without giving oath, yet their evidence was used by the tribunal in making final decision contrary to the position of the law that evidence of witnessed must be given under oath as per the case of **Iringa International School vs Elizabeth Post** (Civil Appeal 155 of 2019) [2021] TZCA 496 (20 SEPTEMBER 2021) which at page 5 held that;

> *"As to what is the effect of omitting to administer oath to witnesses before they give their evidence, the law is settled. The requirement for witnesses to give evidence under oath is mandatory and the omission to do so vitiates the proceedings"*

In his view, since the tribunal took evidences of witnesses at locus in quo without oath/affirmation, and also the Chairperson did not sign at the end of the testimony of every witness who testified at locus in quo, the whole proceedings are vitiated.

That his stance is also supported by the case of **Manaseh Jason vs Anna Msuya** (Land Case Appeal NO.45 OF 2022) [2023] TZHC 17532 (25 MAY 2023) at page 16 which held that;

> *"Moreover, I have noted that even the parties' **evidence adduced at the locus in quo was not taken under***

oath *as envisaged in the case of Kimonidimitri Mantheakis (supra). I am of considered opinion that the noted irregularities are fatal."*

[Emphasis Supplied]

He added that, same stance was stated in the case of **Kimonidimitri Mantheakis Vs Ally Azim Dewji & Others** (Civil Appeal No. 4 of 2018) [2021] TZCA 663 (3 NOVEMBER 2021) at page 8 which held that;

"The light of the cited decisions, 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"*

{Emphasis Supplied}

The appellant proceeded further that, the last anomaly on locus in quo visit is that the proceedings does not depict that evidence obtained in locus

in quo was read out before parties as per the directives of the case of **Nizar M.H. vs Gulamali Fazal Janmohamed** (Supra). That this anomaly is vivid in page 36-37 of the proceedings, which does not indicate that the evidence obtained at locus in quo was read out before the parties, and that the parties were invited to comment on the same. That, all these anomalies vitiated the proceedings.

Submitting for the 4th ground, the appellant submitted that the contradiction is on Plot number, the 1st Respondent stated that he bought the suitland with Plot. No. 2325 as quoted herein extenso;

"Nilifanya biashara ya uwanja na Ndugu Bosco Nyabuyugi 16/08/2020 eneo la Kazima Lingini uwanja wenye namba 2325 "FF" (Page 23 of the proceedings)

That, this was contrary to what was testified by the 1st Respondent in his evidence who testified that the suitland did not have plot number, as the Land department did not issue the same (See page 30) as quoted hereunder;

"Plot namba zilikuwa bado kuletwa huko Ardhi"

On top of that even the contract (EXHIBIT AF- 2) which was witnessed by the lawyer did not have the Plot number, it was written dash (.....)

He clarified that; the effect of material contradiction of the evidence is to make the case of a party dismantled as per the case of **Hamisi Mbwana Suya Versus Republic** [2017] T.L.R 160, and that he prays for this Honourable court to discard the evidence given by these witnesses as they are contradictory on the material point.

He added that, in the case of **Hamisi Mbwana Suya** (Supra) where it was held that;

> *".....it. is only where the gist of evidence is contradictory then the prosecution case will be dismantled."*

More over, given the contradiction existing it was incumbent for the 1st and 2nd Respondent to call their lawyer who witnessed the sale agreement to clear the contradiction, failure to do so entitled the trial tribunal to draw adverse inference per the case of **Augustine Ayishashe Vs Sabiah Omar Juma** (Civil Appeal 353 OF 2019) (2023] TZCA 107 (13 MARCH 2023) where it was held that;

> *"Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first account of the matters of controversy and throw light on them and who can refute all allegations of the other side, it* ***is legitimate draw an adverse inference***

against the party who has not produced such a principal witness"

The appellant added that, it is vivid that there was dispute on part of plot number not being written in the 1st and 2nd Respondent's contract, and only the lawyer who witnessed the contract was on position to clarify the same, on page 24 of the typed proceedings, and he cross examined the 1st Respondent on the same aspect as quoted hereunder;

"Mkataba kutolewa bila namba ni kosa la kiofisi."

He winded up this ground by submitting that all the shortfalls he outlined above, makes the case on the side of the 1st and 2nd Respondents to be unproven to the required standard of balance probabilities.

Coming to the 3rd ground of appeal, he submitted that it is the trite law that the one who alleges must prove, in the present case the appellant discharged his burden of proof on his mode of acquisition of the suitland stating that he bought the same from the late January Peter Mkombo, meanwhile the 3rd Respondent being an Administrator of the late January Peter Mkombo, the evidence was corroborated by SM4 from page 31-33 of the proceedings, it is a trite law that proof of civil cases is on bases of balance of probabilities per the case of **Godfrey Sayi vs Anna Siame** (As A Legal Representative Of The Late Mary Mndolwa) 2017 T.L.R 136 (CA) which held that;

"In civil proceedings the party with legal burden also bears evidential burden and the standard in each case is on balance of probabilities"

In relation to this case at hand, the appellant submitted that, the Respondent never reached the said standard because his evidence was full of contradiction and he failed to put clear through evidence on his mode of acquisition of the suitland as it was narrated in this submission.

Lastly submitting on the 1st ground of appeal, the appellant submitted that in its judgment at page 7 the trial tribunal conceded that the Suitland previously belonged to the Appellant, and he prayed to quote 1st paragraph of page 7 as follows;

"...Hakuna ubishi kwamba Mwombaji alinunua eneo hilo la mgogoro mwaka 2010 jambo hili limethibitishwa na Mwombaji, Mjibu maombi wa tatu na majirani..."

That, in a bid of recognizance that the suitland belonged to the Appellant, the tribunal went on to state that...;

"Hoja inayohitaji majibu ni kama Mwombaji anastahili kubaki na eneo lake lote hata baada ya upimaji..."

He added that his side is of the strong view that in absence of prompt compensation as envisaged under the law specifically section 3(g) of The

Land Act Cap 113 R.E 2019 any alienation of the land from the Appellant is invalid.

He insisted that, it is was the position of the tribunal that the Appellant had customary right of ownership, if that is the case then the law prohibits any alienation of Appellant's land without compensation being duly paid as per the case of **Evarist Magoti vs Omari Rwechungura Kakwekwe** (Misc. Land Appeal 6 of 2021 [2021] TZHC 7367 (25 NOVEMBER 2021) at page 11 and 12 as quoted hereunder in extenso;

> *"Since there is no evidence indicating that the appellant was compensated as required by the law and as it was directed by the issuing authority, this court is of the firm view that the DLHT wrongly held that the title to land did pass from the appellant to the respondent and therefore it can be said lawfully that the appellant right of occupancy over the suit did pass to the respondent for a mere title." (Emphasis Supplied)*

He again referred a case with similar stance in **Berabera Ujamaa Village vs Abubakari Bura (1983) T.L.R 219** {MC} where it was held that;

> *"It is a fundamental human right that no man shall be deprived of his property without adequate compensation. That right is inalienable and is recognized by every civilised*

society including our own. Some societies insist not merely on adequate compensation but adequate and prompt compensation in theoretical terms right to compensation may be traced to the Concept of ownership....."

He insisted further by referring the case of **Lalata Msangawale vs Henry Mwamlima (1979) No. 3** (HC) which held that;

".....The appellant being the owner of the disputed land and crops thereon, should have been paid compensation for unexhausted improvements"

Winding up, he submitted that on the strength of the above precedents and that being the position of the law, he is of the view that trial tribunal after recognizing the Appellant as the customary owner of the suitland it had to direct its mind on whether there was prompt compensation that was paid to the appellant, in absence of that any subsequent allocation of the suitland is ineffectual.

That, even the so called "makubaliano ya kusogezana" which were referred by the trial tribunal cannot supersede the law which requires the previous owner/ customary owner to be paid compensation. Depending on the submission he made and the authorities he had cited, the appellant prays for this appeal to be allowed and be declared the rightful owner of the suitland.

Responding to the submission made by the appellant, the respondents jointly submitted that, they have gone through the grounds of appeal at length and found that they are of no merits and substance, that the appellant also has annexed arrays of cases which are not related to the case, whereby the Respondents thereby reply to it to the effect as follows;

Strating off by submitting for the 1st ground of appeal that, indeed it goes with no any argument that formerly the suit premise belonged to the Appellant but later on part of it was relocated from him by the Mtaa Assembly which decided to add value to their land through planning it.

That, this power is endowed to them through the provision of section 19(1) (a) (b) of the Urban planning Act CAP 8 RE 2019 which provides that;

> *"preparation of a detailed planning scheme by planning Authority shall (a) Initiate the process by passing a resolution of intention to prepare a detailed Planning scheme."*

(b) Convene a meeting of all stakeholders including land holders, public and private Institutions Community based Organizations and Non Governmental Organizations in the area to be affected, and that was what was done in the course of the 1St Respondent to acquire the Suitland.

That, it is the Mtaa assembly which passed the Resolution of Kusogezana, it is also the same resolution which declared each land holder to get one plot and since the 1st Respondent's land was affected by infrastructure, the road, he was allocated that Land.

Submitting against the 2nd ground of appeal, the respondents argued that, visiting Locus in quo is not a mandatory procedure for courts/Tribunals to make the last decisions of cases, rather it is a discretionary power endowed in the Courts/Tribunals to control their procedures, that it is Governed by section 95 of the Civil procedure Code, [CAP 33 RE 2019]. Evidence obtained there can either be used or neglected whether taken under Oath or not, it was revealed in the case of **Bomu Mohamed vs Hamis Amiri Civil Appeal** No. **99 of 2019** (Unreported) at page 10 where it was held that:-

> *"We now come to the Issue of Locus in quo, in the first place we would like to keep it clear that a visit to the locus in Quo is purely on the discretion of the Court. It is done by the trial Court when it is necessary to verify evidence adduced by the parties during trial. There is no law which forcefully and mandatorily requires the Court or Tribunal to conduct a visit at the locus in quo."*

That, having clarified so above, the Appellant' ground two of his Appeal dies a natural death.

The respondents then argued against ground 3 that, the 1st Respondent proved his case beyond reasonable doubts and quenched the need of the learned Tribunal chair man and thus decided in his favour,

That, it is very clear in the face of the law that the 1st Respondent tendered a sale agreement between him and the 2nd Respondent which was admitted in the Tribunal as Annexure AF-1 , that he also tendered an Identification letter from the Mtaa Authority to the Municipal land department introducing him to the land Office authorities that the plot belongs to him which was admitted as ANNEXTURE AF-2, thereafter he was supplied with a letter of offer by the land Office and it was Admitted as ANNEXTURE AF-3 and in the last resort the land office gave him a building permit which also was admitted in the Tribunal as Annexure AF-4 which proof then was needed beyond those supplied?

They added that, in a bid to clear the appellant's doubts we refer him to the case of **Mwalimu Omary and another vs Omary Bilal [1990] TLR 9** the Court held;

> *"Once an area is declared an urban planning area and the land is surveyed and plots demarcated whoever occupies the land under customary law has to be quick to Apply for*

right of Occupancy. If such person sleeps on such right and the plot is given to another, he becomes a squatter and would be entitled to nothing."

Finally going to the 4th ground of appeal, they submitted that the Respondents do not hesitate to state that there were no any contradicting evidences, each and every thing was very audible in the face of law to attract the attention of the Learned tribunal chairman to decide in favour of the 1st Respondent. The respondents pray for this appeal to be dismissed with costs.

In rejoinder, submitting for ground number 1, that, the 1st and 2nd respondents through their submissions had agreed that the suitland belonged to the appellant. The appellant then prayed to quote the 3rd page, 2nd paragraph of their submission as follows;

"Indeed, it goes with no argument that formerly the suit premise belonged to the Appellant"

He added that, this admission proves that even the 1st and 2nd respondents themselves have knowledge that the appellant was the owner of the suitland, that his concern and lamentations on this ground was on the procedures invoked to alienate this land from the appellant. That, the respondents have tried to mislead this Honourable Court that Section 19(1)(a) and (b) of the Urban Planning Act Cap 8 R. E. 2019, gives

the power to Mtaa Assembly to alienate the appellant land while that is not true. Thereafter, he maintained what he had submitted in his submission in chief.

On the 2nd ground of appeal, the appellant rejoins that his contention was not that locus in quo visit is discretional or not, but his complaint was that the procedure for the locus in quo visit was not observed when the tribunal visited locus in quo something which has not been replied by the respondents, by stating how the tribunal correctly observed the locus in quo visit procedure.

The appellant then referred the case of **Bomu Mohamed (supra),** which was cited by the 1st and 2nd respondents, it is not applicable because the intention of the appellant in this ground was to challenge the legality of the procedures embarked by the tribunal after a visit, but not as the 1st and 2nd respondent had submitted.

Rejoining on the 3rd ground of appeal, he submitted that, the 1st and 2nd respondents did not elaborate anything substantial to prove how they acquired the suitland legally, that to say the case was proved beyond reasonable doubts is not right because in civil cases, they are decided on the balance of probabilities.

He added that, the sale agreement referred to is illegal exhibit because as he submitted in chief, procedures of tendering the same was not

properly observed as the same was not read-out loud after admission, hence it cannot be relied upon to prove the ownership as the 1st and 2nd respondents intends to.

Rejoining on the last ground, as he submitted in chief stating that the respondents' evidence was contradictory which could not entitle the 1st respondent's decree, even the decree issued did not state the specifications as the requirement of the law.

Basing on his submission, the appellant reiterates his prayers he made during his submission in chief.

After going through the submissions from both sides, grounds of appeal and the reply to the same, and the records of appeal, it is my firm holding that the only issue here is ***whether this appeal is meritous before this court.***

First and foremost, the function of the first appellate court is to re-appraise (re assess) the evidence on the record and draw its own inferences and findings having regard to the fact that the trial court had an advantage of watching and assessing the witnesses as they gave evidence.

In doing so, only the first ground of appeal suffices to determine this appeal amicably as it thoroughly touches the core of the misunderstanding between the two sides.

It is in the records that, the appellant testified to have bought the suitland from January Peter Mkombo and this fact was also mentioned by the 3rd respondent. It is also in the records that no witness from either side that denied the appellant never owned the suitland, as seen at pages 16-20 and 31 of the proceedings of the trial tribunal. Therefore, both sides did agree that the appellant customarily owned the suitland.

The misunderstanding started when the authority decided to ***survey and demarcate*** the plots including the suitland. Whereas, it is in the records that the 1st respondent legally bought his piece of land close to the suit land from the 2nd respondent, in which after being *surveyed and demarcated*, it was noticed that his land has encroached on to the road and so they moved him to a piece of the appellant's piece of land. See pages 16 and 27 of the trial tribunal's proceedings.

It is therefore the reasoning of the trial tribunal that, the piece of land that is owned by the appellant under customary law it is there only with different measurements, but since the appellant was not present during the whole process of *surveying and demarcating* the plots, that is why he claims to be invaded by the 1st respondent. The trial tribunal rightly quoted

the decision in **Mwalimu Omary & Another vs Omary Bilal** (supra) which was also cited by the respondents, that;

> *"Once an area is declared an urban planning area and the land is surveyed and plots demarcated whoever occupies the land under customary law has to be quick to apply for right of Occupancy. If such person sleeps on such right and the plot is given to another, he becomes a squatter and would be entitled to nothing."*

From the above quotation, it is evident that the quoted case by the trial tribunal and the respondents resembles the case before me, this makes me quote the reasoning of the presiding learned High Court Judge Masanche (as he then was) as he delt with the situation which confronted him.

He said;

> *"A custom is extinguished and he thereby becomes a "squatter" on an area being declared a planning area. I understand that passage to mean that a squatter, in an area declared a planning area would not be thrown out mercilessly. He would be entitled to something, say, some compensation but that does not mean that the two can co-exist. This view, I would venture to say, finds support in a*

*passage by two learned authors R.**W. James** and **G.M. Fimbo** in their treatise **Customary Land Law of Tanzania: A source book**, at page 592, where they say this; about squatters: It is normal for the Government to compensate squatters on town land, when any occupied portion is required. The legal necessity to pay compensation is uncertain, it is arguable that persons occupying town land without any grant are using such land under customary law, for a right of occupancy "is defined as" a title to the use and occupation of land and includes the title of a native or community lawfully using or occupying land in accordance with native law and custom (section 2 of Cap 113). So, squatters, in the eyes of the law, I repeat, cannot equate themselves to any person holding a title under right of occupancy even where that squatter is there under customary law. Once an area is declared an urban planning area, and land is surveyed and given plots, whoever occupied the land even under customary law would normally be informed to be quick in applying for rights of occupancy. If such person sleeps on such a right and the plot is given to another, the squatter, in law, would have to move away and in law, strictly would not be entitled to*

anything. However, as the learned authors R.W. James and G.M. Fimbo say, governments have always compensated such going away squatters for their unexhausted improvements. And I agree with these learned authors when they say that these compensations are made (at least after 1967), probably, with in mind the sentiments of Mwalimu Nyerere in his book ***Uhuru na Umoja*** *at page 53-54 where he says: Land is a free gift from God to all His living things to be used now and in the future. When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need... By clearing that ground, I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever A takes then this piece of ground must pay me for adding value to it through clearing it by my own labour."*

I need not to add more, the appellant herein as a squatter has the right of applying for the rights of occupancy over his plot, as the 'Mtaa Assembly' never reallocated another person on his plot as per the records before me, meaning the appellant's plot is not in dispute.

I wish to sign out with the last statement of the trial tribunal's chairman found at page 08 of his judgment, that;

> *".....Muombaji katika eneo ambalo amejenga nyumba halipo katika mgogoro ni wazi kuwa nyumba hiyo ipo katika kiwanja kilichopimwa ambacho hakijafuatiliwa na mipaka yake kujulikana. Ni maoni yangu mwombaji afuatilie kiwanja chake hicho chenye nyumba na akubaliane na yale waliyokubaliana wananchi wote hata kama hakuudhuria katika kikao."*

As quoted in black and white, I find this appeal to lack merits and consequently proceed to dismiss it with costs. The decision of the trial tribunal is hereby upheld.

It is so ordered.

Dated and delivered at Mpanda this 25th day of April, 2024.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

T. M. MWENEMPAZI

JUDGE