IN THE HIGH COURT FOR ZANZIBAR
HOLDEN AT VUGA
CIVIL APPEAL NO. 60 OF 2014
FROM ORIG. CIVIL CASE NO. 130 OF 2011 OF THE LAND TRIBUNAL

IS-HAKA YUSSUF MTUNGO --•--- APPELLANT

VERSUS.

YANGU AMEIR JUMA ------ RESPONDENT.

JUDGEMENT.

On 24th November 2011 Ishaka Yussuf Mtungo (administrator of the shamba of the clan of Mr. Seremalla)who is also the appellant herein filed a suit on trespass to land at the Land Tribunal against Yangu Ameir, the respondent herein. The land in question situates at Jambiani Miuli within the south region. The case was heard by the Land Tribunal and decided in favour of the respondent. Aggrieved by that decision appellant filed this appeal containing two grounds of appeal as follows:

1. The trial magistrate erred in law and in fact for failure to evaluate evidence pertaining to the history of ownership of disputed land and the evidence on record adduced by the plaintiff.

2. The trial magistrate erred in law and in fact in determining that the land in dispute is owned by the respondent basing on evidence of coconut trees alleged to be planted by the respondent.

I will start discussing the objection raised by the learned counsel Othman Ali who appeared for the respondent that the appeal before this court is bad for want of a copy of the decree contrary to Order 46 Rule 2 of Cap 8, which requires memorandum of appeal to be accompanied by a copy of decree and judgement. He supported his submission with the case of Juma Ibrahim Mtale v. K. G. Karmali [1983] TLR 50 where it was held:

> " In absence of copy of decree the appeal was incompetent."

He also referred the court to the case of Fortnatus Masha v. Willium Shija and Another [1997] TLR 41, which also held that absence of copy of decree makes the appeal incompetent.

He further referred the court to the book by B. D. Chipeta; Civil Procedure in Tanzania, A Student Manual at Chapter 31, pages 206 and 207, which also talks on failure to include a copy of the decree in an appeal makes it incompetent.

On the other hand learned counsel Haji Tetere for the appellant objected the objection raised. He was of the view that the appeal did comply with Order XLIV as it included copy of the judgement and decree.

On my side I do agree with the learned counsel Othman that Order XLVI rule 2 of the Civil Procedure Rules Cap 8 requires the memorandum of appeal to be accompanied by a copy of the decree and written judgement desired to be appealed. This Order reads:

> "(2) ...The memorandum be accompanied (unless he appellate court otherwise directs) by a copy of the decree and written judgment (if any) from which it is desired to appeal: ..."

I have gone through the appeal, as was correctly submitted by Mr. Tetere counsel for appellant the appeal before us was accompanied by a decree and written judgement of the Land Tribunal which is the basis of this appeal. For the said reason this appeal did comply with Order XLVI rule 2 of the Civil Procedure Rules. The argument raised by counsel Othman is of no basis and it is hereby dismissed.

Now turning to the first ground of appeal learned counsel Haji Tetere argued that under section 16 of Act No. 7 of 1994 as amended by section 15 of Act No.1 of 2008 the Land Tribunal is required to be informal in hearing cases, but in accordance with the procedure set in Civil Procedure Decree. He continued arguing that when cross-examined by the assessor on 31st January 2013 appellant testified that he has document that proves his ownership to the land and that respondent have trespassed the same. In this

he also referred section 80 of the Evidence Decree that provides for the document attached to the plaint becomes part of evidence and supposed to be taken as judicial notice.

Counsel Tetere also referred the court to page 19 of the proceeding where respondent was saying that he inherited the land from Mamiebuku while in page 25 of the proceeding DW3 admitted that respondent was not related to the person he claimed to have inherited the land. It was Hassan Vuai, the stepfather of the respondent who inherited the land from Mamiebuku.

Learned counsel Othman for the respondent was of the view that decision of the Land Tribunal was correct, as it was given by the majority decision of the Tribunal as shown in page 35 of the proceedings in paragraphs 5 and 6.

In answering the arguments raised by counsels of both sides to this appeal I do agree that The Land Tribunal Act No. 7 of 1994 as amended by Act 1 of 2008 requires hearing at the Land Tribunal to be informal but in accordance with the rules of Civil Procedure Decree Cap 8. These section reads:

> 16. The hearings of the Land Tribunal shall be informal, the objects being to dispense justice promptly between the parties. However, in order to allow for

the organization of the system, a structured hearing, system with pre-trial information and conferences shall be part of the procedure."

"15. Section 16 of the Principal Act is hereby amended by adding the words " but in accordance with the rules of Civil Procedure Decree" after the word " informal."

In relation to section 80 of the Evidence Decree it only dispenses with the necessity of formal proof raising the presumption that every thing in connection with certain document had been legally and correctly done. It means that the document purporting to be recorded as evidence or statement or confessions are genuine, at the same time it means that the documents as to the circumstances under which they were taken, made by the officer who affixed his signature are true and that the said evidence, statements or confession was duly taken. That being the case the presumption under this section shall be drawn only in the case of documents taken in the course of judicial proceeding or in the course of which evidence is or may be legally taken on oath.

This section also talks on the document which was produced to the court to form part of the record which is not the case in the case at hand. This section reads as follows:

> "80. Whenever any document is produced before any court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with the law, and purporting to be signed by any Judge or magistrate, or by any such officer as aforesaid, the court shall presume that the document is genuine; purporting to be made by the person signing it, are true: and that such evidence, statement or confession was duly taken. "

In the case at hand there is no any document that was produced at the trial court by the appellant either under this section or any other provision of the law. The trial court was not empowered to admit evidence that was not produced to the court by the party concerned or his witness. Section 80 of the Evidence Decree is not applicable here.

Counsel Tetere continued arguing in relation to the first ground of appeal that the trial court visited the locus quo on 25th September

2013 but record of visit was not made part of the proceedings of this case, as it ought to be. Here he supported his submission with the case of Mnkodha Twaha v. Wendo Christopher, High Court of Uganda (unreported) that provides for the principles to be followed in visiting the locus quo as:

1. The Judge or Magistrate himself or herself as well as the assessors if any must be present at the locus.

2. All parties, witnesses, advocate if any must be present.

3. Parties and witnesses must adduce evidence at the locus in quo and cross-examination must be allowed by either party.

4. The court must record all proceedings at the locus in quo.

5. The opinion, view, observation or conclusion of the court or assessors be on record.

He continued arguing that principles 4 and 5 of the above cited case were not followed by the trial court, which made the whole

proceeding null and void. He prayed if this court to finds appellant's evidence not sufficient and the suit to be tried de novo.

Counsel for the respondent did not reply the argument as to visiting locus in quo, however I do agree with counsel for appellant that the proceedings of the Land Tribunal did not include the proper record of the visit. The trial Magistrate did not make on the record of the case what took place at the locus in quo. The said visit was only mentioned in the judgement. I also agree with the principles laid down in Mnkodha's case (supra).

In answering this point I asked myself as to whether failure of the trial court to include in the record the said visit of the locus in quo nullifies the whole proceeding. The purpose of visiting the locus in quo is nothing but to enable the court to understand the evidence better. It is not done to seek additional evidence but to clarify doubts, which may have arisen in the course of evidence. This position was discussed in the case of Kyate v. R [1967] EA 815.

Now that being the case and considering the purpose explained above, when the trial court visited the locus in quo it ought to have kept the record of the said visit. Everything that is taking place in a case it has to form part of the record of the case. Failure of doing so is an irregularity.

However the irregularity in this case does not have the effect of nullifying the whole proceeding since appellant had failed to prove

his case. At the trial appellant testified as PW1 but failed to show how he owned the disputed shamba. In his testimony he told the trial court that he has the title deed which proves his ownership of the disputed shamba but the same was not produced as evidence to the court. Even the evidence given by PW1 and PW2 was not enough to prove his case.

Appellant had the duty to prove his case first since he was the one who claim to own the land. Then the visit would just be for purpose of clarification. The position was discussed in the case of Abdul-karim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph [2006] TLR 419 where Court of Appeal of Tanzania stated:

> " It is an elementary principle that he who alleges is the one responsible to prove his allegations."

In the case at hand as was correctly decided by Hon. Zahra appellant have failed to prove his case.

Having said the above I do not find the need of discussing the second ground of appeal since the first ground is enough to dispose the whole appeal. This appeal is therefore dismissed with costs.

Sgd: Rabia H. Mohamed

Judge

29/2/2016.

Court:

Judgment read this 29th February, 2016, in the presence of Counsel **HAJI SOUD MZEE** for Appellant in absence of Respondent's Counsel.

Sgd: Rabia H. Mohamed

Judge

29/2/2016.

I hereby certify that this is a true copy of the Original.

GEORGE J. KAZI
REGISTRAR
HIGH COURT
Z A N Z I B A R.

/Maulid: