IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC. LAND APPEAL NO. 23 OF 2020

(Arising from Land Appeal No. 04 of 2019 Arusha District Land and Housing Tribunal and Original Selela Ward Tribunal in Land Complaint No. 5-13 of 2018)

JOSEPH KERETO.....APPELLANT

VERSUS

NJACHAI MARIPET.....1ST RESPONDENT

NARONYO NAING'OISHO.....2ND RESPONDENT

TILIPIT ORBESANI.....3RD RESPONDENT

SAPURO NAGOTO.....4TH RESPONDENT

NJOOKI NAING'OISHO.....5TH RESPONDENT

LAANDRE NIILIANG'.....6TH RESPONDENT

NGOPIRO LEKERIKA.....7TH RESPONDENT

KITU YA LEKERIKA.....8TH RESPONDENT

KAIKA LEKERIKA.....9TH RESPONDENT

JUDGMENT OF THE COURT

20/5/2021&2 22/07/2021

GWAE, J

The respondents named herein successfully filed a dispute against the appellant as named above before Selela Ward Tribunal (trial tribunal). Aggrieved by the trial tribunal's decision, the appellant filed an appeal in the District Land and Housing Tribunal for Arusha at Arusha (hereinafter to be referred to as the

appellate tribunal) where he also lost. Still aggrieved, the appellant knocked the doors of this court as a second bite armed with one ground of appeal, to wit;

> "That, the appellate tribunal erred in law and fact by upholding the decision of the trial tribunal that the respondents are lawful owners of the disputed land while the evidence on record shows that they had failed to prove the same

Brief facts giving rise to the dispute between the parties are as follows; that in the year 2006 the Mbulu District Commissioner gave his directive that the appellant be allocated a parcel land so that he could shift his livestock. The appellant was subsequently allocated a piece of land measuring 70 x 140 paces for erecting a kraal. That, sometimes in 2007, forty-two (42) persons including the respondents except 6th respondent who bought his parcel of land from one Oyari Ngoro were allocated parcels of land at Ranchi hamlet by Selela Village Council, each person was allocated a piece of land measuring 20 x 40paces. According to the respondent, the appellant thereafter invaded the respondents' parcel of land by making development including erecting a residential house despite the respondents' efforts restraining him from making the same. It is therefore at this juncture when the respondents instituted the dispute against the appellant.

This appeal was disposed of by way of written submission after the parties' advocates namely; Joshua Minja and Mr. Yonas Masiana Laiser for the appellant and respondent respectively had sought and obtained leave of doing so.

Supporting the appeal, the counsel for the appellant argued that the respondent did not prove their case to the balance of probabilities as required under section 110 (1) of Tanzania Evidence Act, Cap 6 Revised Edition, 2019 (TEA) and judicially emphasized in the case of **Felix Shirima v. Mohamed Farahani and another** (1983) TLR 228 and that the procedure in visiting locus in quo were not adhered to. He added that there was no documentary evidence that was produced in the trial tribunal as rightly observed by the appellate tribunal chairperson.

Opposing the appellant's appeal, the respondents' counsel seriously argued that the evidence adduced before the trial tribunal was properly analyzed leading to well-reasoned decisions of the tribunals below and that the trial tribunal was not bound by rules of evidence or procedures in determining disputes as provided under section 15 (1) & (2) of the Ward Tribunal Act, Cap 206 Revised Edition, 2002 which was redecorated by a judicial decision in the case of **Abdi M. Kipoto vs. Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017 (Unreported) where the Court of Appeal held that the ward tribunal, in terms of

Cap 206, is not only bound by rules of evidence but also regulate its own procedure.

In his rejoinder, the appellant's advocate reiterated his submission in chief insisting that the locus in quo was not properly conducted and that the respondents were duty bound to produce documentary evidence as proof of their ownership. He then prayed for an order quashing the concurrent decisions of the trial and appellate tribunal with costs.

I have carefully examined the records of both tribunals as well as parties' written submissions. I wholly agree that a party who with a legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities as was correctly argued by the appellant and judicially stressed by the Court of Appeal in **Barelia Karangirangi vs. Asteri**, Civil Appeal No. 237 of 2017 (unreported) and **The Manager, NBC, Tarime v Enock M. Chacha** (1993) TLR 228

Carefully, probing the record of the trial tribunal especially the said testimonies of the witnesses who were said to be village leaders, namely; Joseph Nailenya, Letema Lengenyiki and Samwel Mepalari, I am unable to confidently hold that the said testimonies are worthy for judicial consideration. I am of the stand simply because the deemed evidence of the said three persons is only

reflected in a letter dated 18th January 2019 written by the ward tribunal chairperson and addressed to the Chairperson of the District Land and Housing Tribunal- Arusha. More so, the purported testimonies of the said persons is neither found in the hand written proceedings nor in the typed proceedings nor in the trial tribunal decision.

Despite the fact that the ward tribunals are not bound by rules of evidence or procedures and that, they are mandated to regulate their procedures as rightly demonstrated by the Court of Appeal in **Abdi M. Kipoto vs. Chief Arthur Mtoi** (supra) yet they cannot simply abstain from recording the evidence adduced by witnesses during hearing of the cases in chamber or at the locus in quo. How can a testimony of a witness be depicted in the judgment or a letter without it being reflected in the record? That is not proper as the same can easily occasion a miscarriage of justice.

Failure to record the evidence and the same not being reflected in the trial court or tribunal proceedings except in the said letter is, in my increasingly view, amounts to a serious irregularity which cannot be cured by the principle of overriding objective enshrined by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 (Act No. 8 of 2018) and provision of section 45 of the District land Disputes Act, Cap 216 Revised Edition, 2019.

The holding above is capable of vitiating the trial tribunal proceeding however I would also wish to address the issue on the visiting locus in quo. Though there is no law requiring a trial court or tribunal to visit the locus in quo however when there is lacuna as to size, uncertainty as to a land in dispute or boundary and related issues, it is advisable to visit the locus in quo and after visiting the locus in quo, there ought to be additional evidence at the locus in quo, brief note be made and read to the parties as well as rough sketch map if need arises and other related issues to form part of the trial tribunal proceeding.

The judicial direction was given by the Court of Appeal in the case of **Bobu Mohamed vs. Hamisi Amiri**, Civil Appeal No. 99 of 2018 (unreported) where it was held and quote;

> "There is no law which is forcefully and mandatorily requires the court or tribunal to conduct a visit at the locus in quo, as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify the evidence adduced by the parties during trial ... If for example it finds that the procedure in the tribunal was faulted, the it will order for a fresh visit"

In our present matter, the procedures are to be faulted as no evidence that was recorded regarding visitation except in the purported proceedings (letter addressed to the DLHT's chairperson), no brief notice that was made nor was a rough sketch map that was drawn

In the final result, this appeal has merit and it is hereby allowed. The judgments and orders of the trial tribunal and that of the District Land and Housing Tribunal are quashed and set aside. The matter be retried by different set of ward tribunal's members or DLHT depending on the current value of the disputed pieces of land. As the error was not caused by either party but the trial tribunal, each party shall bear its costs of this appeal and those incurred in the tribunal of first instance and the appellate tribunal.

Order accordingly.

M. R. GWAE,
JUDGE
22/07/2021