IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 225 OF 2021

DANIEL MWAMBE ..... APPELLANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY (TANESCO) ..... RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate's Court of Dar-es-Salaam at Kisutu)

(V. Mwaikambo, SRM)

Dated 31st day of January 2020

In

(Civil Case No. 297 of 2017)

JUDGMENT

Date: 10/10 & 08/11/2022

NKWABI, J.:

The respondent fixed an electrical transformer near the dwelling house of the appellant. It perplexed the appellant who decided to enlist the respondent to remove the transformer. He wrote two letters to the respondent but they were not replied to. The respondent called a meeting with the residents of the area but the appellant did not attend.

Then the appellant sued the respondent in the trial court asking the trial court to grant him the following orders:

1. The defendant to abate interference over the plaintiff's land.

2. Perpetual injunction against interfering with plaintiff's land.
3. Costs of the suit, and
4. Any other relief the trial court may deem fit and just to grant.

After going through the evidence, the main issue for consideration and determination by the trial court was whether the defendant interfered with plaintiff's land by constructing and fixing the transformer. The trial magistrate was of the view that to determine the issue, the question of ownership is inevitable for the reason that the court should be satisfied that, the land, said to be interfered is the plaintiff's property. The trial magistrate therefore held that the proper avenue for the plaintiff to lodge his claims was land tribunal. She then dismissed the suit for want of jurisdiction.

The appellant was unhappy with the decision of the trial court. He thus, preferred this appeal to this Court. He has four grounds of appeal as follows:

1. That the honourable trial magistrate erred in law and fact in dismissing the suit for want of jurisdiction.
2. That the trial magistrate erred in law and fact in vacating the order to visit locus in quo without giving any reason and affording parties an opportunity to address the court on the said issue.

3. That, the honourable trial magistrate, erred in law and fact in re-opening a question of jurisdiction that had already been disposed by her predecessor for which her hands were tied and she had no jurisdiction to overrule the decision of the predecessor.
4. That without prejudice to the afore going the honourable trial magistrate erred in law and fact in raising and determining the question of jurisdiction without affording opportunity for the parties to be heard.

The appellant prayed for the following orders:

a. The appeal be allowed and whole judgment and proceedings of the trial court be quashed.
b. Costs of the appeal be awarded to the appellant and
c. Any other reliefs the honourable Court may deem fit and proper to grant to the appellant.

The appeal was disposed of by way of oral submissions. Mr. Edson Kilatu and Ms. Evodia Beyanga, advocated for the appellant while the Respondent had the services of Mr. Steven Urassa, learned Senior State Attorney. It was Mr. Kilatu's contention while arguing the 1st, 3rd & 4th grounds of appeal

that the case was wrongly dismissed on a ground that the trial court had no jurisdiction to determine the case on the reason that the matter was a land matter to be decided by a land court.

He stated, the jurisdiction issue had been raised and determined by the trial court in a preliminary objection. Mr. Kilatu backed his arguments by the decision in **Leopold Mutembe v. Principal Assistant Registrar of Titles, Ministry of Land, Housing & Urban Development,** Civil Appeal No. 57/2017, CAT (unreported) at Page. 15. He thus, opined that Hon. Mwaikambo was functus officio. Mr. Kilatu also added that the ground too was raised suo motu and parties were not afforded a right to be heard.

Responding to the submissions made by Mr. Kilatu, Mr. Urassa stated that in principle, he supported the 3rd ground of appeal. He however, differed with Mr. Kilatu's prayer. He contended, parties were heard on the issue of jurisdiction, but the trial magistrate gave decision suo motu. In respect of costs prayed for, he objected the prayer because the ground for dismissal of the case was raised by the court itself.

Since parties were heard, and evidence had been received, Mr. Urassa prayed the Court to allow the appeal and order that another magistrate

delivers a judgment. He exemplified **David Mwanga Nabwi V. Paul Kachemba and Another,** Civil Appeal No. 16/2021 in which the High Court returned the case file to the trial court for determination and no order of costs was made.

In a short rejoinder, Mr. Kilatu asserted that costs should be granted, as the irregularity was very clear, yet the counsel for the respondent allowed submission to proceed. He added that the counsel for the respondent ought to have admitted the appeal.

Though both counsel were in agreement that I order that another judgment be delivered by another magistrate, I do not purchase the argument for the following reasons:

First, this Court has power to evaluate the evidence that is on the record and come to its own findings. This approach is supported by **Jafari Musa v. DPP,** Criminal Appeal No. 234 of 2019, CAT (unreported) it was stated that:

> *"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive*

jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."

If one reads between the lines the judgment of the trial court, one will see that the trial magistrate in the judgment, was evaluating the evidence. Admittedly, in her evaluation of the evidence, she misdirected herself and fell into a trap on jurisdiction of the court. That misdirection does not warrant this Court to order that another judgement be composed and delivered. The cited case of **David Mwanga Nabwi** (supra) is inapplicable.

The fall into the trap started when the trial magistrate entertained the view that the question of ownership is inevitable for the reason that the court should be satisfied that, the land, said to be interfered is the appellant's property. In my view, there was no any dispute over ownership of land upon which the trial court was called upon to adjudicate, but only the scene where the alleged tortious act of fixing the alleged dangerous transformer was dangerous to property and persons living in the house of the appellant. More

so because the respondent was not alleging was the owner of the piece of land on which the transformer was fixed.

On my evaluation of the evidence on the appellant's side, I find that the appellant was unable to prove his allegation that the transformer was dangerous to his properties or persons. There is no any expert opinion but an opinion from a person with no any expertise in the field. He merely made statement that he had ever seen one or two transformers explode. Further to that the transformer was fixed outside the fence of the appellant. It is difficult to imagine that there would be danger to the property and persons in the circumstances.

Turning to the evidence of the respondent, it is more convincing that the transformer is very safe and less noisy. That was as per DW1 who is an electrical engineer. DW1 was quoted to have said:

> *"The transformer is fixed in front of the house of the plaintiff. It is about 2 meters from the fence of the house of the plaintiff. It is about 2 meters from the fence of the house of the plaintiff. ...What I can say is that transformer is not dangerous and not capable of exploding."*

DW2 the street chairperson testified that the residents of the area were fully involved in the decision making on where the transformer would be fixed and where it was fixed. In the premises, I find that the appellant failed to honor his obligation to prove his case on the balance of probabilities. He offended the decision in **East African Road Services Ltd v. J.S. Davis & Co. Ltd.** [1965] E.A. 676 in which the erstwhile Court had these to say:

> *"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant."*

Therefore, the appellant cannot be granted the reliefs he prayed either in this Court or in the trial court.

Next, there is also the complaint that the trial magistrate erred in law and fact in vacating the order to visit locus in quo without giving any reason and affording parties an opportunity to address the court on the said issue.

It was the contention of Mr. Kilatu on this complaint that the trial court had ordered for visiting the locus in quo, so it was a right. He further explained that to vacate from the order, the court ought to have given the parties a right to a hearing. He added, no reason was assigned for vacating from the

trial court's previous order. In the circumstance, Mr. Kilatu prayed the appeal be granted, the decision of the trial court be quashed with costs and any other reliefs.

In respect of visiting the Locus in quo, pointed out Mr. Urassa, it is the duty of the court to regulate its proceedings. He acknowledged that parties were not heard in respect of the reversal of the order for visiting the locus in quo. Mr. Urassa prayed the judgment be quashed and the case file be remitted to the trial court for decision on merit.

It was however the contention of Mr. Kilatu on rejoinder submission that as to visiting the locus in quo, regulating proceedings should not go as far as occasioning injustice. He prayed that the trial court visits the locus in quo.

I have already refused the prayer to remit the file back to the trial court for decision on merit because I found the trial court merely misdirected itself on the evidence. I have closely examined the vying arguments in respect of the aborted visit to the locus in quo. in my view, the trial magistrate cannot bear the blame all alone. Parties to this suit were represented by counsel who did not press for visiting the locus in quo as if they had forgotten that there was such an order, and as officers of the court ought to have assisted the court

to have proceedings free of irregularities. On this approach, I am guided by **Charles Bode v. R.,** Criminal Appeal No. 46 of 2016 (unreported) the Court of Appeal stated that:-

> *"Nonetheless with the introduction of section 3A in the Appellate Jurisdiction Act Cap. 141 R.E. Act No. 8 of 2018 whereby the Court is required to basically focus on substantive justice, the question which we had to ask ourselves here, is whether the failure on the successor Judge to explain to the appellant about his rights occasioned him any injustice. Regard being had to the fact that, the appellant was throughout the trial of this case represented by a learned counsel, we entertain no doubt as it was for the learned State Attorney that, no injustice at all was occasioned."*

Also, I being highly inspired by two decisions of this Court in **Joseph Kimera v. Idd Hemedi** [1968] H.C.D. No., 355 Seaton J. as he then was, and in **Ibrahim Ahmed v. Halima Guleti,** [1968] HCD No. 76. (PC), Cross J., as he then was, held:

"The District Court erred. The question for a court on appeal is whether the decision below is reasonable and can be rationally supported: if so the lower court decision should be affirmed. The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win. "Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence."

I do not think that the omission occasioned any injustice or miscarriage of justice to justify this Court's interference and quash the entire proceedings. Lest it be forgotten, litigation has to come to an end. The position of this Court too is strengthened by what actually ought to be done by a court where it visits a locus in quo as was noted in the case of **Nizar M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] T.L.R. 29 CAT:

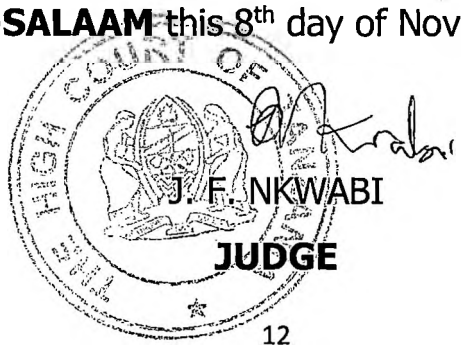
When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses

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."

On this respect, I think that it is trite law that where an irregularity does not occasion miscarriage of justice, a retrial cannot be ordered. The counsel of the appellant did not establish how was the visit to the locus in quo would help to sustain his case.

That said and done, I dismiss the appeal. Each party shall bear their own costs. It is so ordered.

DATED at **DAR-ES-SALAAM** this 8th day of November, 2022.



J. F. NKWABI

JUDGE