IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

LAND APPEAL NO. 31 OF 2023

(Originating from Land Application No. 69 of 2018 from the District Land and Housing Tribunal for Arusha at Arusha)

MANINGO NG'ENET ..... APPELLANT

VERSUS

ALAKARA NG'ENET ..... RESPONDENT

JUDGMENT

16th October 2023 & 08th February 2024

MWASEBA, J.

This appeal arises from the judgment and decree of the District Land and Housing Tribunal (DLHT) for Arusha at Arusha in application No. 69 of 2018 (herein to be referred to as the trial Tribunal). Briefly, the Respondent herein sued the Appellant herein before the trial Tribunal praying for the following; a declaration that the Respondent is the lawful owner of the suit property, an order for eviction of the Appellant, his assignees, agents, or other persons deriving interest from the Respondent in relation to the suit property located at Enguiki Village

within Monduli District, an order that the Respondent be restored in the suit property, an order for permanent injunction against the Appellant his assignees, agents or other persons deriving interest from the Respondents from the suit property. He further prayed that the Appellant be ordered to pay general damages at a rate to be assessed by the Honourable Tribunal but not less than Tshs 15,000,000/=, costs of the application and any other order as the honourable Tribunal would deem fit to award.

Upon full trial, the trial Tribunal concluded that the Respondent is the lawful owner of the suit property, an eviction order was issued against the Appellant and his assignee from the suit property, an order of permanent injunction was issued against the Appellant and he was also ordered to pay costs of the suit. Dissatisfied by the said decision, the Appellant appealed to this court armed with five grounds of appeal hereunder reproduced:

1) *That the trial tribunal erred in law and fact for declaring the respondent the lawful owner of the land which is not the land in dispute according to the pleadings.*
2) *That the Trial Tribunal erred in law and fact for declaring the respondent the lawful owner of the land which he failed to prove its existence.*

3) *That the Trial Tribunal erred in law and fact for visiting locus in quo contrary to what the law requires when visiting locus in quo.*

4) *That the trial Tribunal erred in law and fact for failure to evaluate properly the evidence adduced by both parties to the suit and hence reached an erroneous decision.*

5) *That the Trial tribunal erred in law and fact for failure to accord the Appellant herein the right to a fair hearing.*

Hearing of the appeal was by way of written submissions, whereas both parties complied with the submission schedule save for the rejoinder submission. Mr. Amani Erald Mkwama, a learned advocate, appeared for the Appellant, while Mr. Nicholaus Ntasikoi Senteu, a learned advocate appeared, drafted, and filed documents on behalf of the Respondent.

Submitting in support of the appeal, the counsel for the Appellant argued in respect of the first grounds of appeal that, comparing the description of the land pleaded and the description of the land found in the judgment, one will find there is a big different between the two in all aspects beginning with the boundaries and also the size of the land. The land that is found in the judgment came into existence on the 5th day of November 2022, when the tribunal visited the land that was in dispute. The visit was done after the closure of the case, and also the opinion of

the assessors was already delivered. So, there was no room for any other evidence. The Appellant's counsel was of the view that contrary to what was pleaded, the trial tribunal determined the issue of ownership of land, which wasn't part of the pleadings or evidence and wasn't even part of the opinion of the assessors.

Mr. Mkwama explained further that, according to **Regulation 3(1) of The Land Disputes Courts (The district Land and Housing Tribunal) Regulations**, 2003, proceedings before the tribunal shall commence by an application filed. More to that, **Regulation 3(2) (b)** of the same law requires, among other things, the application to contain the address of the suit premises or location of the land in dispute to which the application relates and depending on several decisions of the court the same shall also contain boundaries of the suit premises if it's not a registered land as well as the estimated value of the land by virtue of **Regulation 3(2)(d) of The Land Disputes Courts (The district Land and Housing Tribunal) Regulations.**

Based on the above-cited regulations, the land which was supposed to be declared as the property of the Appellant or Respondent herein was the one which its information is found under paragraphs 3 and 4 of

the amended application, but surprisingly, the trial tribunal declared the Respondent the owner, of the land which wasn't part of the pleadings.

It was the claim by the Appellant's counsel that, in our jurisdiction, it's well known that parties to any suit are totally bound by their own pleadings, to mean what is to be determined shall be conformed from what was pleaded and prayed for before the court of law. For this, reference was made to the case of **Barclays Bank [T] Ltd v. Jacob Muro,** Civil Appeal No. 357 of 2019**, James Funke Ngwagilo v. Attorney General** [2004] TLR 161**, Lawrence Surumbu Tara v. Hon Attorney General and 2 Others,** Civil Appeal No. 56 of 2012, **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others** Civil Appeal No. 38 of 2012**,** and **National Insurance Corporation v. Sekulu Construction Company** [1986] T.L.R 157. Thus, he prays that this court finds merit in the appeal and grants the prayers sought.

Mr. Mkwama argued jointly the 2nd and 3rd grounds of appeal and submitted in respect of visitation of the *locus in quo* that the essence of visiting *locus in quo*, as ruled by the court in different cases, is to eliminate minor discrepancies as regards the physical condition of the land, and it's not meant to afford a party an opportunity to make a

different case from what he/she claimed. He added that the aim is to ascertain whether what was pleaded and evidenced by the claimant matches exactly what is found in the field. Surprisingly, the chairperson allowed the Applicant to create a new piece of land that didn't match what was pleaded and testified before the trial tribunal.

The Appellant's counsel further submitted that what was done by the trial tribunal contradicts the requirements of the law when visiting *locus in quo*. He referred this court to the cases of **Nizar M.H v. Gulamali Fazal Johnmohamed** [1980[TLR 29, and **Avit Thadeus Massawe v. Isidory Assenga,** Civil Appeal No. 6 of 2017 to support his argument.

Arguing the 4th and 5th grounds of appeal jointly, the Appellant's counsel submitted that the respondent, who was the applicant at the trial tribunal, paraded three witnesses including himself. In his testimony, he claimed that he was given the peace of land in 1982, and sometimes he said he was given it in 1974. So, it is not clear on which year among the two he acquired the said piece of land. Further, PW2 narrated that the land in dispute had a house, but she did not mention the time within which the Respondent began to live in the said house. Regarding the testimony of the PW3, she claimed that the disputed land

is her own property. In evaluating the said evidence, one will note that the said evidence is irrelevant, uncorroborated, contrary to what was pleaded, and does not in any way prove ownership of the land in dispute to be for the Respondent.

Mr. Mkwama further complained that the records of the trial tribunal reveal that the Appellant testified through a sworn interpreter for failure to understand and speak the languages of the court to mean Swahili or English, but the trial tribunal issued several orders against the Appellant including closing of his evidence for failure of his advocate to appear twice without recording how the same was elaborated to the Appellant an act which violates the constitutional right of a fair trial.

In reply, the counsel for the Respondent submitted in respect of the 1st and 3rd grounds of appeal that, in his Written Statement of Defence, the Appellant, who was the Respondent before the trial tribunal, disputed the boundaries of the suit land. So, there was a genuine reason for the tribunal to visit a *locus in quo*. He clarified that the visitation of the suit land by the trial tribunal is not a mandatory issue but rather a discretional matter. Thus, in visiting the *locus in quo,* the trial tribunal was properly guided by the law by following the principles underlined in the cases of **Joseph Kereto v. Njachai Marlpet & 8 others,** Misc.

Land Appeal No.23 of 2020 |2021 TZHC at Tanzlii, and **Nizar M.H v. Gulamali Fazal John Mohamed** [1980] TLR 29.

Responding to the 2nd and 4th grounds of appeal, the Respondent's counsel submitted that, before the trial tribunal, the Respondent and her witnesses managed to prove how the Respondent obtained the suit land by being given by her mother and the same could not be objected by the Appellant herein hence the Respondent managed to prove its case on the standard required. The counsel for the Respondent also distinguished the cases cited by the Appellant by stating that they do not apply to the current appeal.

Responding to the 5th ground, the Respondent's counsel submitted that it is the position of law that the nonappearance of the advocate without any reason does not bar the tribunal from proceeding with the hearing. That there was no denial of the right to be heard on the side of the Appellant and the failure of the Appellant to summon more witnesses did not amount to an unfair hearing. Based on the submission made, the Respondent prays that the appeal be dismissed with costs.

I have considered the record of the trial Tribunal, grounds of appeal, and submissions for and in contest of this appeal. I will deliberate on the grounds of appeal by not adopting a sequence from

that adopted by the parties. Rather, I will deliberate on the grounds of appeal by adjudicating the 1st and 3rd grounds jointly, as they relate to the visitation of the *locus in quo* and the naming of the disputed land in the parties' pleadings. I will then deliberate on the 5th ground of appeal which the Appellant claims that he was denied a right to a fair hearing and I will finalise with the 2nd and 4th ground of appeal which deals with the evaluation of evidence and whether the trial tribunal was correct to rule out that the Respondent was the lawful owner of the suit land.

Starting with the 1st and 3rd grounds of appeal, the Appellant faults the trial tribunal record on account that it declared the Respondent a lawful owner of the suit land, which was not pleaded in his amended application, and that the visitation of the *locus in quo* was contrary to the requirement of the laws.

As was rightly submitted by the counsel for the Appellant and pursuant to **Regulation 3 (1) and (2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulation,** 2003 an application before the trial tribunal must contain the address of the suit premises and its location. Upon reading the amended application filed by the Respondent before the trial tribunal under paragraph 3 of the said application, it is the finding of this court that the Applicant, now

Respondent, managed to state the location and address of the suit land as what the law directs.

It is important to note that the trial tribunal, in the course of composing its judgment, noted that there was a need to visit the *locus in quo* so as to ascertain the real boundaries of the suit land. On pages 32 and 33 of the trial tribunal proceedings it was stated that and I quote for ease of reference:

> *" AMRI : Baada ya kusoma nyaraka za msingi wa mgogoro (pleadings) na ushahidi wa pande zote katika maandalizi ya kuandika hukumu nilibaini kuwa kuna ubishi baina ya wadaawa juu ya utambuzi wa ardhi ya wadaawa katika swala la mipaka ya ardhi hiyo lakini ubishi huo haukuwekwa kama sehemu ya viini vya kutolea uamuzi ... Kwa maoni yangu ubishi huo kuhusu mipaka ya ardhi ya daawa hauwezi kutatuliwa bila ya Baraza kutembelea eneo lenye mgogoro na kujionea kwa macho mipaka hiyo pamoja na kujiridhisha kuhusu ukweli wa mipaka iliyoelezwa kwa kupata maelezo kutoka kwa wapakani wenyewe kama watakuwepo katika eneo husika.... "*

The above-quoted phase is what attributed the trial tribunal to visit the *locus in quo*. On page 34 of the trial tribunal proceedings, the record reveals that after visitation was done, boundaries and demarcation of the suit land were noted down by the trial tribunal. Later on, parties were

called to verify all that was recorded and on the sketch map drafted thereto. On page 35 of the trial tribunal proceedings, both the Appellants counsel and the Respondent verified, and I hereunder quote,

> ***"Wakili Amani Mkwama:***
>
> *Mh, kilichoandikwa kwenye ramani ni sawa na hali halisi.*
>
> ***Mleta Maombi:***
>
> *Mh, hicho kilichooneshwa ni sawa. Hakuna tofauti"*

With the above-quoted phase, then, it cannot be said that the trial tribunal erred in the procedure for visitation of the *locus in quo* or that new boundaries of the suit land were set as both parties were addressed on the said issue and responded positively thereto.

I am mindful of the fact that visitation of the *locus in quo* is done at the discretion of the court or tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. This Court has had occasion to discuss this issue in the landmark case of **Nizar M.H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29, in which the Court *inter alia* held that:

> *"It is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so a court may*

unconsciously take the role of a witness rather than adjudicator."

An ample example of the above situation may be found in the case of **Mukasa v. Uganda** [1964] EA 698 in which the erstwhile East Africa Court of Appeal had an occasion to discuss a similar issue on page 700 where it held:

> *"A view of a locus in-quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence. "*

Subscribing to the above-cited authorities and applying the same principle in the current appeal, this court is of the firm view that the trial tribunal correctly adhered to the law and procedure during the visitation of the *locus in quo* and parties were availed with an opportunity to verify all that noted down at the visitation, and both responded. That being said I find no merit to the 1st and 3rd grounds of appeal.

Regarding the 5th ground of appeal, the Appellant claims that he was denied his right to a fair hearing on the basis that the proceedings proceeded in the absence of his advocate, and being not familiar with Swahili language he could not follow the proceedings properly. The determination of this issue will not detain me. Much as the trial tribunal record reveals that the appellant was represented, his advocate did not enter an appearance on several occasions, and despite several adjournments, he still could not appear. Then, on 03/08/2022, the trial tribunal closed the Appellant's case and proceeded to another stage of receiving the assessor's opinion. Thus, I find that no injustice was done at the trial tribunal.

It is, however, important to note that court orders should be respected and complied with and that the court should always exercise firm control over proceedings and not condone failures by a party to respect and comply with court orders; otherwise, it will set a bad precedent and invite chaos in court during the administration of justice. That being said and done the 5th ground of appeal is devoid of merit

Now turning to adjudicate on the 2nd and 4th grounds of appeal. It is a settled principle of law that, in civil cases, the burden of proof lies on

the party who alleges anything in his favour, see the provisions of **Sections 110 and 111 of the TEA** which among others state:

> *"110. Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."*

It is the respondent who initiated an application before the trial tribunal against the Appellant herein claiming that he is the lawful owner of the suit land. Then, it is the Respondent who is duty-bound by law to prove the means and mode of his acquisition of the suit land.

The Court of Appeal in the case of **Mexon's Investment Limited v. DTR Trading Company Limited,** Civil Appeal No 91 of 2019 CAT at Dar es Salaam (unreported) cited with approval its decision in the case of **Barclays Bank v. Jacob Muro**, Civil Appeal No 357/2019 (Unreported). In the latter case, the court cited with recognition and approval the passage of the article by Sir. Jack J. H Jacob Titled, **"The Present Importance of Pleadings"** that:

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is*

bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. ***The court itself is bound by the pleadings of the parties as they are themselves. It is not part or the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.*** *Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."*

From the above quotation, a fair and impartial court/tribunal is not allowed to come out with new issues not pleaded or grant relief not pleaded by parties in their pleadings or argued before it. Again, the bold quoted paragraphs insist on the issue that the court and or tribunal itself is bound by the party's pleadings as they themselves. That means a tribunal or court cannot adjudicate upon a matter that was not raised or pleaded by a party to the suit.

I have carefully revisited the trial tribunal record; the Respondent pleaded to be the lawful owner of the suit land and drove his ownership from his mother that immediately after his marriage in the year 1982,

his mother gave him the suit land. That being the brother and the relative to the Respondent, he handled the suit land to use for cultivation in the year 2010, and it wasn't until 2017 that the Respondent wanted back the suit land, but the Appellant could not handle the suit land to the Respondent.

The Respondent witness, in one way or the other, supported the respondents' pleadings such that PW1, the Respondent himself, testified to have acquired the suit land way back in the year 1982 while the Appellant was still a minor and of young age. All of the children, including the Appellant, were given pieces of land, and since the Appellant was the last son and according to the customs and norms of the Maasai tribe, the last born was to inherit from his mother's share, and the Appellant had inherited his share different from that of the Respondent. The evidence by PW2, the parties' relatives, supported the evidence of the Respondent, and the evidence of PW3, the wife of PW1, collaborated with PW1's evidence and insisted even that the suit land was her own property as it was owned by her husband.

On the Appellant's side, starting with his Written statement of defence, he generally made a general denial of the Respondent's claims against him and made a prayer that he be declared as a lawful owner of

the suit's land. In his pleadings, the Appellant did not plead on how he came into possession of the suit land, whether through inheritance and or a gift from his mother, but in his evidence, he came out with a new version of the story that by virtual of being the last born he obtained the suit land from its mother. As initially stated above parties are bound by their pleadings. The fact that the Appellant failed to initially plead on his mode of acquisition of the suit land then the evidence that he obtained from his mother to me is an afterthought.

In conclusion, it is my firm stand that the Respondent, before the trial tribunal, managed to discharge the burden under **Sections 110 and 111 of the Evidence Act,** Cap. 6 R. E 2019, by proving the case in his favour. See also the decision of the Court of Appeal of Tanzania in the case of **Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama,** (Civil Appeal No. 305 of 2020) [2021] TZCA 699 (29 November 2021).

In the final analysis and considering all that has been elaborated above, the appeal is devoid of merit, and it is hereby dismissed with no order as to costs since the parties are blood-related. The Trial Tribunal decision is hereby upheld, save for the costs of the case.

Order accordingly

DATED at **ARUSHA** this 8th day of February 2024

N.R MWASEBA

JUDGE