IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND APPEAL NO 103 OF 2022

(Originated from the Land Case No 45 of 2017 for the District Land and Housing Tribunal for Singida)

MUSSA MSINDA ..... FIRST APPELLANT

JUMA RAMADHANI NJIKU

(Administrator of Estate of Ramadhani Njiku)**.....SECOND APPELLANT**

TELESPHORI BASIL MISANGA

(Administrator of Estate of Basili Misanga)**.....THIRD APPELLANT**

SHABANI MASONGA.....FOURTH APPELLANT

KHWEMA YUNDE ..... FIFTH APPELLANT

VERSUS

MURA OMAR..... RESPONDENT

JUDGMENT

Date of the last order: **15/02/2024**

Date of Judgment: **04/03/2024**

LONGOPA, J.:

This is an appeal arising from the decision of District Land and Housing Tribunal (DLHT) for Singida in Land Application No. 45 of 2017 dated 18/11/2022. The Tribunal entered judgment and decree in favour of the

respondent herein against the appellants for trespass to land at Ughaugha Village "A" in Unyamikumbi Ward within Singida District in Singida Region. Originally, there were a total of five respondents before the Tribunal against whom the judgment and decree were entered. However, in course of hearing of this appeal, it is only the second and third appellants who appeared and filed an amended petition of appeal dated 13th March 2023. The duo appellants are challenging the whole of the decision of the Tribunal on the following grounds, which are reproduced hereunder for easy of reference:

1. *The learned Chairperson erred to entertain the matter against the deceased. The respondent did tell any reason as to why and how the deceased are using and they were preventing him from using the land claimed they hired from his mother while they are in graves.*
2. *The the learned chairman erred by failure to find the respondent departed from his claim as present in Land Case No 45 of 2017. What he told the is not the same as what is written in his application.*
3. *That the learned Chairperson failed to apprehend, analyse and evaluate the evidence before her.*
4. *The learned chairperson erred by failure to go to visit the land in dispute. She missed physical evidence which could enhance oral evidence and substantiate the same.*

5. *The learned chairperson erred to deny the appellants a copy of proceedings as the applied the same before the judgment was delivered. The evidence given in the judgment is not the same to that given during the hearing of the matter. The chairperson bent/omitted some evidence.*
6. *The learned chairman erred to deny the appellants their right to argue against (rebut) the evidence from the respondent. She became harsh and adamant that the appellants should give their explanation and never touch on other side.*

On these grounds, the appellants prayed for the following orders, namely:

(a) That this appeal be allowed.

(b) The judgment of the District Land and Housing Tribunal for Singida be set aside and the appellants be declared the lawful owners of the disputed land.

(c) Costs of this appeal be borne by the respondent

(d) Any other relief that this Court may deem fit and just to grant.

On 15th February 2024, the parties appeared before me for viva voce hearing of this appeal. The appellants appeared in person while the respondent enjoyed the legal services of Mr. Denis Odhiambo, learned advocate.

It was argued that the appellants filed six grounds of appeal as appears in the Petition of Appeal. According to the appellants, the first ground of appeal is just a matter of logic. It was submitted that as the persons who allegedly leased the land are dead, it is illogical to claim that they are still trespassing to that land.

It was further argued that the Chairperson of the Tribunal erred in law to to believe that the deceased were still contesting on ownership of the land alleged to have been leased for farming. Logically, the respondent is claiming the land that owned by the deceased and not the one alleged to have been leased.

In respect of the second ground, appellants argued that respondent departed from his pleadings thus the Chairperson erred by entertaining the matter while the respondent had departed from his own pleadings. It was the appellants view that the respondent was required to substantiate the issues he filed in Court and not raising any other new issues. There were two aspects: first, the departure from inheritance to grant of the said land. Second, timing in the use of land from 1975 to 2008 while in evidence the same stated is 1990 to 2006. These timings are not the same.

The appellants cited Order VI rule 7 of the Civil Procedure Code, Cap 33 R.E. 2019 proscribes any party from departing from his pleadings except when there is amendment of the same. The respondent never obtained any permit to amend the pleadings. Also, the case of **Yara Tanzania**

Limited vs Ikuwo General Enterprises Limited, Civil Appeal No. 309 of 2019 CAT was cited to cement this point regarding variance between pleadings and evidence thus they urged this Court to disregard the same for departing from pleadings.

On the third ground, appellants submitted that analysis of evidence by trial Tribunal is lacking. The Tribunal failed to analyse the evidence. It was argued that the Tribunal failed to recognise that the respondent had no capacity to institute proceedings for lack of capacity of locus standi as he was not the administrator of the estate of the land of late Omari Sima.

The case of **Kanan Said Aljabir vs Nevumba Salum Mhando,** Land Appeal No. 81 of 2021, HCT Dar es Salaam, where Mgeyekwa, J stated that the issue of locus standi is a matter of law. The tribunal can raise it even if the parties have not raised it. As such, it is argued that the DLHT erred to entertain the person without locus standi. This was also the decision in **Lujuna Shubi Balonzi versus The Registered Trustees of Chama cha Mapinduzi** [1996] TLR 208 CAT stated that locus standi is governed by common law, Plaintiff/applicant must demonstrate locus standi.

Further, the appellants challenged the absence of evidence that land was leased to the appellants and that respondent was granted that land by his late father during his lifetime. It was argued that witnesses for the respondent did not state even the boundaries of the disputed land. On the

other hand, all defence witnesses except SU 4 refuted the claims and stated belonged to appellants as they inherited from their late great grandfather called Mangi.

On 4th ground relating to the visit in locus in quo, it was submitted that it was necessary in the circumstances of this matter for DLHT to visit the locus in quo. It was argued that Tribunal erred by not visiting the scene to verify the evidence of the parties, there was a need to visit the scene to gather physical evidence on marks in the disputed land.

The Nigerian case of **Everlyn Garden NIC Limited vs Hon. Minister Federal Capital Territory and two others,** Suit No. FCT/HC/CIV/1036 of 2014 (Nigeria) was cited as a demonstration of the importance of visiting locus in quo in land matters for the court/tribunal to satisfy itself on description of the land to include location of the land, extent, boundaries and neighbours and physical features on the land.

It was submitted that on 5th and 6th grounds of appeal there was omission of evidence. The tribunal erred to omit important evidence namely that of SM 4 and SU 4. SM 4 stated that the land in dispute belonged to the appellants and that the respondent used the same to keep livestock as that land belonged to their maternal uncles while SU 4 stated that he had never leased any land. These pieces of evidence were left out.

In the case of **Credo Siwale versus Republic**, Criminal Appeal No. 4 of 2014, the Court observed that if the inferior court misdirected itself is abuse of discretion. The decision becomes arbitrary. The judgment of DLHT is therefore not correct as it was arbitrary.

In the end, the appellants pray that, this Court be pleased to quash the proceedings of DLHT and set aside the judgement and drawn order thereof; costs of this case be borne by the respondent; and any other orders as this court may deem fit and just to grant.

On the other hand, the respondent argued against the grounds of appeal. On the 1st ground, it was submitted that the deceased persons were represented by administrators of estates of late Ramadhan Njiku and Basil Misanga. These were the appellants Juma Ramadhani Njiku representing the estate of late Ramadhani Njiku and Theresphory Misanga representing the estate of late Basil Misanga. It is these appellants who filed Written Statement of Defence and gave evidence on their behalf. It is administrators of the estates that are pursuing the rights of duo deceased persons.

It is argued that page 2 of the judgment indicates that issues were framed to establish ownership of the land in question. It is these issues that made the administrators testify in DLHT to answer the issues drawn by the Tribunal.

Evidence of SM 2 one Jumanne Hassan at page 3 of the judgement indicated that he was a Village Executive Officer (VEO) and the respondent

did report in 2008 about his land being invaded by the appellants. The invaders admitted before the VEO to have leased the same. Ownership of that land in question was well established. The DLHT found that the land belonged to the respondent to this appeal. Thus, the first ground of appeal should be dismissed.

On the 2nd ground of appeal regarding departure by the respondent, it was submitted that respondent brought evidence to establish the ownership of that land and the appellants had an opportunity to cross examine the respondent on ownership. It was argued that the appellants have not indicated anything contradicted testimony of the respondent. The Tribunal had focused on the evidence that who was the rightful owner of the land and if the appellants were invitees to that land through leasing the same. There were no departures at all.

On the 3rd ground on recording, appreciating and analysis of evidence, it was submitted that DLHT had analysed the available evidence to reach its findings after hearing both sides. The DLHT also received the opinion of assessors who concurred that the disputed land belonged to the respondent. This Court was referred to the contents of the judgment in pages 7,8 and 9 reveal the analysis of the issues by the DLHT.

It was argued further that on locus standi, the respondent had a locus as reflected on page 3 of the judgment that the respondent was given land by his father *inter vivos* as the land was transferred to the

respondent at the time when the giver was still alive in 1990. As such, it was submitted that there was no need of administrator as the land has already been transferred to the respondent. The issue of locus standi has no merits whatsoever.

On the 4th ground, it was submitted that visit in locus in quo by the Tribunal was not required. The circumstances of the case did not the visit the *locus in quo* as there was clear evidence that disputed land belonged the respondent. There was nothing to warrant the visit in locus in quo.

There was only a dispute on ownership of the disputed land and not boundaries that would have necessitated visit in locus in quo. The Nigerian case is not applicable in Tanzania. There is nothing to justify use of that case. It should be disregarded.

It was argued that the owner is entitled to lease any part of his land. There was no need to visit the locus in quo. The appellants never requested the tribunal to visit the locus in quo. Neither of the parties requested the Tribunal for visit the *locus in quo*. The evidence of SM 2 who was the VEO assisted the DLHT to know the issue and description of the land in question as SM 2 knew the description of that land and appellants had once admitted before him that the land belonged to respondent as they only leased the same.

On the 5th ground, it was submitted that there is nothing omitted in the evidence as the judgment reflects what is in the proceedings. It is not true as all the evidence was recorded and reflected in the proceedings and judgment. If there was anything of bias nature, the appellants ought to have complained and prayed the recusal of the trial chairperson.

It was further reiterated that the other respondents at DLHT have not been party to this appeal. There is nothing in evidence of the 1st and 2nd appellants that was disregarded. The other appellants were satisfied by the decision that is why they are not part to this appeal. There is no evidence that appellants were refused in proceedings before the DLHT. This appeal is within this Court because the appellants were availed/ given judgment and proceedings. They have never lamented to have missed any of the two documents in preparation for the appeal. As such, the respondent prayed for the dismissal of the appeal for lack of merits with costs.

I have considered the grounds of appeal, record of the trial Tribunal and submissions from both parties to this appeal keenly to be able to determine merits or otherwise in this appeal. I shall address the grounds to find out the merits of the appeal.

The first ground is on contention that the respondent sued the deceased person thus trial Tribunal erred to entertain the application. In addressing this aspect, it is necessary to state that not all proceedings terminate on death of the defendant. There are certain categories of

proceedings that survive the demise of the party to the case. It is the estate of the deceased that takes over the proceedings whether the plaintiff or defendant.

Order XXII of the Civil Procedure Code, Cap 33 R.E. 2019 recognises effects of death and abatement of suits. Generally, it is personal claims that abate with the death of a party to a case. However, suit on properties i.e. suits *in rem* survives the death of the party to the case. A personal representative in form of administrator of the estate or executor of the will normally takes over the case.

The record indicates that on 30th May 2017 when the proceedings were instituted, all the appellants were sued on their own names whereas Shaban Masonga was appearing through a representative one Said Shaban). All the appellants were surviving at this time. That is why a joint Written Statement of Defence was filed for 2nd, 3rd, 4th and 5th respondents in the DLHT.

This Court is aware that instituting a case against a deceased person amounts to nullity. That was a decision in the case of **Juma A. Zomboko and 42 Others vs Avic Coastal and Development Co. Ltd & 4 Others** (Civil Application 576 of 2017) [2021] TZCA 3541 (16 November 2021) (TANZLII), where the Court of Appeal, at pp. 10-11 stated that:

The position of the law is that a suit filed in the name of a dead person is a nullity. We subscribe, in that regard, to what was held by the High Court of Tanganyika in the case of ***Babubhai Dhanji v. Zainab Mrekwe*** *[1964] 1 EA 24. In that case, Law, J. held as follows on that aspect: -"a suit instituted in the name o f a dead person is a nullity."*

My perusal of both proceedings and judgment, I have noted that records reveal a different scenario. The proceedings on pages 1 -28 can summed up as follows: First, at the time of institution of the Land Application No. 45 of 2017, all the parties were surviving. None of the appellants was dead at that material time. Second, on demise of one Basil Misanga, the administrator of the estate one Telesphori Basil Misanga took over to defend the matter on behalf of estate of late Basil Misanga. Third, from 29/11/2021 Mr. Juma Ramadhan Njiku was appearing in the Tribunal as a personal representative of one Ramadhani Njiku by virtue of special power of attorney which was dully registered under the Registration of Documents Act. Fourth, the Land Application No. 47 of 2017 was amended in 2021 to replace the estate of the 3rd appellant with administrator of the estate. Fifth, between 02/03/2022 to 13/7/2022, family of the 2nd appellant was granted by the Tribunal a period three months to conclude the appointment of the administrator of the estate. Sixth, the hearing of the matter commenced on 05/09/2022 when all the processes of appointment of administrators for estates of the 2nd and 3rd appellants at the Tribunal were complete.

It happens that the appellants before this Court are the same administrators who participated in proceedings in the Tribunal on behalf of the respective estates of 2nd and 3rd respondents in the trial Tribunal. They fully represented the estates of the deceased Ramadhani Njiku and Basili Misanga.

The litigation on ownership of land normally survives the death of the party to the case. In the instant appeal the dispute is on land matters, particularly ownership. The interests on land held by the deceased normally devolve to the surviving heirs of that estate. In the case of **Godwin Charles Lemilia vs Slim Ndikoko & Another** (Civil Appeal 28 of 2016) [2016] TZCA 628 (2 August 2016), at page 5 the Court of Appeal stated that:

> *It is also true that as the suit related to property interests, the interest to sue survived to the appellant, in terms of OXXII rr. 1 and 2 of the CPC, it also survived against the defendants/respondents. As the matter of the first respondent/defendant death is not disputed, we agree with Mr. Maro that under 0 XXII r. 4(1) a legal personal representative of the first respondent ought to have been made a party to the action, if the court was moved to do so.*

It is pertinent to state at this juncture that dispute between the appellants and respondent related to trespass to land i.e. ownership of the land. It is on record that the trial Tribunal having realized the need to adhere to the governing law on death and abatement of suits it had at certain points adjourned the hearing for ninety days to allow the appellants to complete the administration of estate proceedings for a legal representative to be joined in the proceedings as revealed at pages 25 to 28 of the proceedings. This was in line with the decision in the case of **Godwin Charles Lemilia vs Slim Ndikoko & Another** (*supra*).

It is the findings of this Court that according to record as revealed in contents of the proceedings there is no indication at any point in time, that the respondent did initiate a land case/application against the deceased. Respondent instituted the application when all the parties were living. However, on demise of some of them the matter was adjourned to allow completion of appointment of administrators of the estates who were joined in the application in those respective capacities. Thus, assertion regarding the case being against the deceased is a far-fetched aspect. The surviving heirs of the deceased estates are the one defending ownership over the disputed land. It is so because landed property ownership/ use rights survived the demise of the original occupiers of that disputed land.

Indeed, the surviving heirs of the appellants namely second and third appellants continued to claim that disputed land belongs to them. It is on this account I cannot agree with the submission by appellants that if the

land was leased it would have automatically reverted to the respondent. The continued claims by the appellants that disputed land is their clan land having inherited from the great grandparents is what made this matter to reach at this stage. The first ground of appeal is destitute of merits.

The second ground of appeal relating to departure of the respondent from his pleadings. It is true that under the law of Tanzania departure from the pleadings is not allowed unless leave is granted. To appreciate whether there is departure or otherwise, it is important to underscore the analysis of departure from pleadings. Departure from pleading would mean that the party states facts in the pleadings which are not at all supported by the evidence adduced. For instance, a person pleads ownership over land was through purchase from a third person while in evidence the same person testifies to the effect that such land was acquired vide inheritance or gift inter vivos. That would amount to departure as there is variance as to the mode of acquisition of that land.

In the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others** (Civil Appeal 38 of 2012) [2017] TZCA 153 (8 March 2017), Court of Appeal of Tanzania, at pp. 9-10 stated that:

> *It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties*

to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight.

In the instant appeal, the respondent alleged that the appellants have trespassed to his land which he obtained from his late father during his lifetime. That was vehemently disputed by the appellants herein save for the 5th respondent in the Tribunal who had maintained that she leased the land to the appellants for temporary use in two seasons on exchange with some millet. Such lease was during the time the respondent was prevented by inability due to sickness and had to attend healing and medication at a different place.

My perusal of the contents of the Amended Application No. 45 of 2017 dated 06/12/2021 on claims and reliefs sought, the issues raised, and evidence tendered reveal that all are in concurrence. Reliefs claimed were that applicant (respondent herein) be declared lawful owner of the land; 1st, 2nd, 3rd and 4th respondents (appellants herein) give vacant possession and hand over the land to the applicant in the Tribunal, costs of the application and any other reliefs that the Tribunal would deem fit and just to grant.

Evidence tendered in Court should answer the issues raised by the court to address the contentions by the parties. The evidence of the respondent was to the effect that he was given that land by his father *inter*

vivos in 1990 prior to his demise in 1994. It was the 5th appellant who in absence of the respondent leased the land to the 1st to 4th appellants. That evidence was corroborated by SM 2 Jumanne Hassan Mtipa who was the Village Executive Officer that in 2008 parties went to his office whereby appellants admitted having leased the land belonging to the respondent and they promised to return such land to rightful owner upon harvest. SM 3 testimony was to the effect that such disputed land belongs to the respondent and appellants came in by way of leasing the land. SM 4 also reiterated that respondent was given that land by their late father Omari Sima during his lifetime in 1990. Totality of evidence of the respondent tally with the issues raised and the claim. The evidence does not depart from establishing the ownership question over the land.

I am satisfied that the evidence tendered by the respondent herein reflects the claim regarding ownership of the disputed land. It points out clearly on how the land came into his ownership and the way the appellants herein encroached the same having leased it from the fifth appellant.

In the case of **Barclays Bank T. Ltd vs Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020) (TANZLII), at page 11 the Court of Appeal observed that:

> *We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their*

own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored - see James Funke Ngwagilo v. Attorney General [2004] TLR 161. See also Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others, Civil Appeal No. 56 of 2012; and Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others, Civil Appeal No. 38 of 2012 (both unreported).

According to this decision, evidence that does not support the claim should be discarded. It means that if the evidence is tendered to support pleaded facts such evidence can not be regarded to be in variance with the pleadings.

In the case of **Agatha Mshote vs Edson Emmanuel & Others** (Civil Appeal 121 of 2019) [2021] TZCA 323 (20 July 2021), Court of Appeal at pages 21-22, stated that:

It is settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. This entails a party parading the evidence to prove or support what he has pleaded bearing in mind, as earlier stated that, he who alleges has a

burden of proof as stipulated in section 110 of the Evidence Act [CAP 6 RE.2002]. The question to be addressed is if the appellant did prove to be the lawful owner of the disputed land at the required standard.

The evidence on record reveals nothing else than the fact that all evidence of the respondent herein is directed to the one and the same direction that he is the owner of the disputed land. In fact, he managed to establish that he acquired the land from his father during the lifetime of his father in 1990. The respondent continued to use the land until sometimes in 2006 when he became sick thus left the village for traditional healing and treatment. Further, the evidence of a former Village Executive Officer who once resolved the matter after respondent herein reported to the village leadership that the appellants have trespassed to his land cemented the cause for respondent's ownership of disputed land.

It is trite law that there cannot be departure from pleadings in the circumstances where all the evidence tendered support the claim of the property in question and address the issues raised by the Court for that matter. Departure occurs when the evidence and pleadings are at variance. As I have pointed out, there is no variance at all between the claims in the pleadings and evidence tendered. In the upshot, the second ground of appeal lacks merits, and I shall proceed to dismiss it.

The third ground of appeal focused on failure to apprehend, analyse and evaluate the evidence. This ground is couched on the lack of locus standi on part of the respondent and absence of evidence regarding the lease of the land. Was the respondent entitled to file land application against the appellants? The answer seems to be in the affirmative. Reasons are lucid and straightforward. Evidence of SM 1 that he was given the land by his father during the lifetime of his later father in 1990. It is corroborated by SM 2 who testified to have once resolved the matter by appellants agreeing to have leased the land belonging to the respondent while he was working as VEO. SM 3 reinforced that use of land by the appellants resulted from leasing the land belonging to the respondent during his sickness. They were leased by fifth appellant. SM 4 also testified that respondent was granted that land by their later father during his lifetime in 1990.

The evidence on record is clear that the respondent was given the disputed land by his father *inter vivos*, he continued to use the same up to 2006 when he became sick and travelled to sick traditional treatment and healing and the fifth appellant supports the evidence of the respondent to have leased the land to the appellants. It is evident therefore that he had locus standi to initiate the proceedings against the appellants to protect his interests on ownership of the land.

The available evidence is in line with the decision in **Allan Mng'ong'o & Another vs Christina Kimela** (Misc. Land Application 17 of 2021) [2022] TZHC 389 (10 March 2022), the High Court observed that:

> *Three elements must be proved for acquisition by gift inter vivo. One, the Donor must show that he actually intends to make a gift; Two, the Donee must accept the gift made to him or her. Three, there must be actual delivery of the property immediately the gift is given.*

There is no dispute that respondent was given the land as a gift inter vivo in 1990 by his father was the owner of the land. Also, there is no doubt that respondent accepted the gift and took over ownership of that land. Further, respondent continued use of the land since then to 2006 when he became sick. As a result, the appellants leased the land from the fifth appellant during the absence of the respondent. That is why on recovery from sickness the respondent went to the village office to claim whereas the appellants admitted having leased the same and promised to vacate upon harvest of their cultivated crops.

On the other limb regarding apprehending, analysis and evaluation of evidence, it is one record that: First, the trial chairperson summarized the evidence of applicant and respondents at pages 2 to 7 of the Judgment of the Tribunal. Second, the analysis of the evidence is seen on pages 8 and 9 of the judgment addressing each of the framed issues. Third, the

Chairperson provided determination on each issue in accordance with available evidence on record.

As I have demonstrated above, the evidence of leasing the land by the appellants was demonstrated by testimonies of SM 1, the respondent; SM 2, the VEO who had resolved the matter immediately upon recovery of the respondent from sickness, SM 3 and SU 4 who is the fifth respondent. In fact, the fifth appellant cemented that the land was leased to the to the appellants for them to cultivate for only two seasons on exchange of millets.

I have perused the judgment of the trial Tribunal to satisfy myself on the validity of the ground of failure to apprehend, analyze and evaluate evidence. It is certain that the trial Tribunal managed to apprehend, analyse, and evaluate evidence satisfactorily to warrant determination of each of the raised issues. It the analysis and evaluation of evidence in the matter that made the trial Tribunal reach to fair and right determination of the issue before it.

It was on strength of the evidence on record that trial Tribunal found that the respondent was the rightful owner of disputed landed property in question at Ughaugha village in. Needless to state that available evidence tilted towards the respondent's side to have the right to the land. That is the reason trial Chairperson found in favour of the respondent herein.

The decision in case of **Hemedi Saidi v. Mohamed Mbilu [1984] TLR 113**, the High Court (Sisya, J.) observed that a party whose evidence is weightier than the other party, that party is entitled to the decision of the Court.

The Land Application No 45 of 2017 before the trial Tribunal was established on balance of probabilities that the respondent had managed to prove his case against the appellants on ownership of the land in question. Indeed, the Chairperson's findings are in concurrence with the opinion of both assessors who were of settled opinions that the respondent is the rightful owner of the disputed land as his evidence established categorically that he is entitled to that land. At this point, the third ground of appeal collapses naturally for lack of cogent reasons.

Failure of trial Tribunal to visit of the locus in quo is another ground of appeal fronted by the appellants. The appellants though note that visiting the locus in quo is not a mandatory legal requirement in determination of land cases, yet they argued that the Tribunal missed an opportune moment to verify the evidence of the parties, as well physical features of the land in question and marks of the same.

In the case of **Avit Thadeus Massawe vs Isdory Assega** (Civil Appeal 6 of 2017) [2018] TZCA 357 (13 December 2018), the Court of Appeal stated that:

We have endeavored to demonstrate on the need to visit locus in quo, the procedure to be observed thereat and the precaution to be taken by the judge not without a purpose. We have observed above that the evidence on record was insufficient for the Court to determine the appeal justly, with clarity and certainty in view of the conflicting evidence in respect of the location of the suit property. We are of the view that this is a fit case for the trial court to exercise its discretion to visit the locus in quo. Had the trial court done so the question regarding where the suit property is located would have either not arisen or would have been easily determined.

In accordance with this decision of the highest court of the land, visit of locus in quo is within the discretionary mandate of the Court. Also, it can be invoked on exceptional circumstances that court considered necessary to visit the *locus in quo* on its own motion or on the request of the parties.

Also, in **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal 197 of 2018) [2019] TZCA 322 (1 October 2019), the Court of Appeal observed that:

As for the first issue, we need to start by stating that, ***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 quo, 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. Some of the said guidelines and procedures were clearly articulated by this Court in the case of Nizar M.H. v. Gulamali Fazal Janmohamed [1980] TLR 29.*

In the circumstances of the matter at hand, there was no dispute as to the location of the land, size or boundaries of the piece of land in question. The only major dispute was who is the owner of the land in question and if the appellants leased that land from the respondent.

I concur with submission by the respondent that given that the visit *locus in quo* is not a mandatory requirement of the law in determination of land cases, trial Tribunal cannot be blamed for not ordering visit the *locus in quo.* My perusal of the record reveals nothing from the parties to the Land Application No. 45 of 2017 regarding any prayer being made for visit the *locus in quo.* Simply, parties were satisfied that available evidence would suffice to determine the matter before the trial Tribunal conclusively without a need for visit the *locus in quo.*

It goes without saying that a Court or tribunal cannot be blamed for failure to exercise discretionary powers when in its opinion there was no need to exercise such judicial discretion. The trial Tribunal was versed with ample evidence from both parties to ably resolve the dispute. At this juncture, I shall dismiss the fourth ground of appeal for being devoid of merits.

The fifth and sixth grounds of appeal were argued jointly. First, the appellants asserts that they were denied copy of proceedings. Second, there is omission of evidence. Third, denial of the appellants to argue against/rebut the evidence of the respondent.

Allegations on these two grounds tend to create an impression that the trial Tribunal was biased for not affording the right to be heard to the appellants. Allegations of this magnitude calls for serious evidence to establish as they can vitiate the decision.

In the case of **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015), the Court of Appeal stated that:

> *It appears therefore that the respondents were not afforded the right to be heard (audi alteram partem) on that aspect. In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an "adequate opportunity" to be heard so as*

to achieve the quest for a fair trial. See the case of ***The Judge i/c High Court Arusha & Another v. N.I.N. Munuo Ng'uni*** *[2006] T.L.R. 44*

Evidence on record is detailed that the parties were afforded adequate opportunities in hearing of this case. The appellants were fully accommodated. First, always where there was a need for appointment of the administrator of estate of the late Ramadhani Njiku and Basil Misanga the Tribunal adjourned the matter to give them ample time. Second, all the witnesses of the respondent were cross-examined by the appellants during the time of giving their respective testimonies. Third, all the appellants were accorded equal opportunity to present the defence evidence. Fourth, upon delivery of the judgment the right of appeal was fully explained to the parties.

It can be concluded on the aspect of affording opportunity to the appellants in terms of the fair trial, there is no iota of evidence that at any point in time any party was denied such right. Record is straightforward and clear from any ambiguities that such rights were fully accorded to the appellants at every stage of the proceedings. That is why pages 5-7 of the judgment contains summary of evidence of the appellants. The whole detailed evidence is covered in the proceedings in pages 42-55. Indeed, the right to be heard was observed to the letter. There is nothing to warrant finding otherwise.

Regarding the proceedings, there is no evidence on record that appellants were denied copies of either the judgment or proceedings. It is on record that when the appellants applied the same were supplied and receipted as per government circulars. There is Government Bill and Payment Receipt in the name of Basili Misanga that validates the payment for copies of judgment. There is nothing indicating that appellants were denied the record of the Tribunal. It is unpalatable for the appellants to raise unsubstantiated claims against the trial Tribunal.

Omission of the evidence is another limb of this part of the grounds. I should hasten to state that judicial proceedings are regarded as authentic documents that should not be impeached easily. The Tribunal's judgment contains summary of testimonies of both parties as they appear in the proceedings from pages 30-55 of the Tribunal's proceedings. There is nothing omitted as all relevant evidence is contained in the record.

It is not convincing to poke holes on the record available in the matter on flimsy reasons by the appellants. The allegations leveled against the trial Tribunal have nothing to do with the truth of the matter. Such allegations are afterthoughts realizing the hurdle the appellants are facing to convince this Court to quash the proceedings and set aside the judgment. That is an uphill task which require concrete evidence. I hereby dismiss the fifth and sixth grounds of appeal for lack of merits too.

As the appellant has not shown any cogent reasons for this Court to depart, the appeal before this Court deserves nothing other than dismissal on its entirety for being preferred without any merits whatsoever. This Court's re-evaluation of the available evidence on record is in concurrence with the judgment of the trial Tribunal that respondent deserved to be declared lawful owner of the disputed land on strengths of the evidence tendered.

I am of the settled view that the trial Tribunal was correct in deciding in favour of the respondent as the available evidence on record indicates that respondent managed to successfully establish before the Tribunal that the land in question belonged to him.

That said and done, this court finds that there are no merits in the appeal. The appeal is destitute of any cogent merits thus deserves dismissal for being preferred unmeritoriously. The findings of the trial Tribunal that the respondent is the rightful owner of the disputed land in dispute is upheld. In the end, the appeal is dismissed in its entirety for lack of merits with costs.

It is so ordered.

DATED at **DODOMA** this 4th day of March 2024.

E.E. LONGOPA
JUDGE
04/03/2024