IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 13 OF 2020

(Originating from decision of the District Land and Housing Tribunal for Arusha, in Land Application No. 31 of 2012)

PHANUEL KISOTA *(Suing as the Legal Representative of the late* ***Syra Mburumburu)*** ..... **APPELLANT**

Versus

JOSEPH MUNGAYA ..... **1ST RESPONDENT**

MATHIAS MUNGAYA .....**2ND RESPONDENT**

WILSON OLE NGARASHI ..... **3RD RESPONDENT**

JUDGMENT

16th February & 29th April, 2022

Masara, J.

1.0 INTRODUCTION

The Appellant is challenging the decision of the District Land and Housing Tribunal for Arusha ("the trial tribunal"), which dismissed his application filed against the Respondents for trespass on a piece of land measuring 2½ acres, located at Ilkiushin Village, Oltrumet Ward, Arumeru District within the region of Arusha ("the suit land"). In the trial tribunal, the Appellant sued the Respondents as the administrator of the estate of the late ***Syra Mburumburu***, who died in 1995. In its decision, the trial tribunal dismissed the application, declaring neither of the parties herein lawful owner of the suit land.

Brief facts culminating to this appeal can be summed up as follows: The Appellant claimed that the late Syra Mburumburu, who lived at Kaloleni was his uncle. His land at Kaloleni was taken by the Government while developing Arusha Town in 1967. He was compensated a farm measuring 9 acres at kwa Bubu Ngaramtoni. That the late Mburumburu was using the farm for cultivation, but he reserved 2½ acres ("the suit land") for grazing his cattle. According to the Appellant, the farm has the following borders: In the north it borders the road heading to Thomas Lendini; in the south it borders one Mungaya Ngarashi; in the east it borders one Babu Nevava and in the west it borders Juma Mburumburu. The Appellant further state that the late Mburumburu was in use of the land until his death in 1995. After the death of the said Mburumburu, his family and children; including, Philemon Siara, Juma Siara and Moiyo Siara, continued using the suit land for grazing cattle until 2008 when the 1st and 2nd Respondents trespassed into the suit land and changed its use by cultivating wheat therein. The Appellant sued the Respondents at Oltrumet Ward tribunal, where the suit land was declared to be the lawful property of the late Syra Mburumburu. The Respondents appealed to the District Land and housing Tribunal where the decision of the ward tribunal was reversed. The Appellant appealed to this Court. This Court (Nyerere, J.), quashed and set aside the judgment and proceedings of the two lower

tribunals and ordered the case to be heard afresh before the tribunal with competent jurisdiction. As a result, the Appellant preferred Land Application No. 31 of 2012 in the trial tribunal, subject of this appeal.

On their part, the Respondents and their witnesses told the trial tribunal that the land belonged to one **Mungaya Ngarashi**, who was compensated after his land at Soweto was acquired by the Government paving way for developing Arusha town in 1967. That the suit land was allocated to the said Mungaya Ngarashi in 1968. According to the evidence on record, Mungaya Ngarashi was the father of the Respondents. That he gave the suit land to the 3rd Respondent in 2008, in a family meeting which was attended by all the Respondents and other relatives. The 3rd Respondent continued using the suit land for cultivating maize and wheat, up to the time of his father's death in March, 2011. That the land allocated to the 3rd Respondent has the following borders: In the north it borders one Patel; at the south side it borders a road; at the eastern side it borders a road and in the west it borders one Philipo. According to the evidence given at the trial tribunal, the 3rd Respondent hired the 1st and 2nd Respondents to cultivate his farm by using a tractor.

After hearing the evidence of both sides, scrutinizing the exhibits tendered and visiting the *locus in quo*, the trial tribunal dismissed the application

because the Appellant, who was the Applicant thereat, failed to prove allocation of the suit land to the late Syra Mburumburu. The trial tribunal also desisted from declaring the 3rd Respondent the lawful owner of the suit land because there was no proof whether the late Mungaya Ngarashi had a valid title over the suit land so as to transfer the same to the 3rd Respondent. The suit land was therefore left in no one's ownership.

That decision did not please the Appellant, prompting the instant appeal. The Appeal was preferred on five grounds of appeal. However, in the course of his submissions, the Appellant abandoned the 1st and 2nd grounds of appeal which challenged the trial tribunal proceedings for failure to sit with assessors and feature their opinion in the judgment. The remaining 3rd, 4th and 5th grounds of appeal are as hereunder:

> *a) That, the trial tribunal erred in law and in fact when it denied the applicant the right to be heard;*
> *b) That, the trial tribunal erred in law and in fact when it failed to abide to the principles of visiting the locus in quo; and*
> *c) That, the trial tribunal erred in law and in fact when it failed to properly evaluate the evidence that was tendered before it.*

For convenience, the above grounds shall be renamed as the 1st, 2nd and 3rd grounds of appeal, respectively.

At the hearing of the appeal, the Appellant appeared in Court in person unrepresented, while the Respondents were represented by Mr Gwakisa

Sambo, learned advocate. The appeal was disposed of by way of written submissions.

2.0 SUBMISSIONS BY THE PARTIES

Submitting in support of the 1st ground of appeal, the Appellant contended that on the date when the matter was fixed for hearing, the chairman decided to close the prosecution evidence in disregard of the medical proof submitted by the Appellant that his advocate was sick on the material date. He added that he had other witnesses he intended to call to prove his case but the tribunal chairman decided to turn a deaf ear against him by closing the prosecution evidence. In his view, that was in breach of the principles of natural justice as enshrined in Article 13(b) of the Constitution of the United Republic of Tanzania 1977 ("the Constitution"). To support his assertion on the strict adherence on the right to be heard, he cited the following Court of Appeal decisions: **M/S Darsh Industries Limited vs M/S Mount Meru Millers Ltd, Civil Appeal No. 144 of 2015** and **Abbas Sherelly and Another vs Abdul Fazalboy, Civil Application No. 33 of 2002** (both unreported).

Regarding the 2nd ground of appeal, the Appellant elucidated that the trial tribunal chairman failed to abide by the principles of visiting a *locus in quo*. He maintained that on the day the trial tribunal visited the *locus in*

quo, the trial chairman refused or neglected to hear the witnesses present thereat; that he only recorded what he observed thereat. Further, that the notes so taken were not read out to the parties and their advocates as required by law so as to make corrections where necessary. To buttress his point on the guiding principles, the Appellant referred to the case of **Nizar M.H Ladak vs Gulamali Fazal Janmohamed [1980] TLR 29.**

On the 3rd ground of appeal, the Appellant averred that he had proved his case by testifying at the trial tribunal on how the land was allocated to the late Syra Mburumburu in 1967, after his land at Kaloleni was repossessed by the Government. He insisted that he had the sketch map containing the names of those allocated land but the same was not admitted by the trial tribunal. Moreover, at the *locus in quo*, there were village leaders who were ready to give evidence on how the land was allocated to the deceased, but the trial tribunal was not ready to receive that evidence. The Appellant prayed that the decision of the trial tribunal be overturned with costs.

Contesting the 1st ground of appeal, Mr. Sambo submitted that on the date the case was fixed for hearing, the Appellant did not inform the trial tribunal about the sickness of his advocate. He added that, even on the date hearing of the defence case commenced, the Appellant or his

advocate did not pray that the order of closing the prosecution case be vacated. Mr Sambo maintained that the Appellant did not hand over any sick sheet showing that his advocate was sick. He admitted that Article 13(1) and (6)(a) of the Constitution provides for fair hearing, equality before the law and rule of law. However, he was in disagreement with the Appellant's submission, stating that such provision cannot be invoked in the appeal under consideration since such right was properly observed. He was also of the view that cases cited by the Appellant on the issue are both unreported, but they were not attached in the submission, therefore cannot be relied upon since he encountered difficulties in retrieving them.

In response to the 2nd ground of appeal, Mr Sambo contended that the trial tribunal was in compliance with the principles of visiting *locus in quo,* because the essence of visiting *locus in quo* does not entail hearing of evidence as it is done during trial. He added that visiting a *locus in quo* aims at correlating the evidence already adduced and the real state of affairs found at the *locus in quo*. To bolster his argument, he made reference to the case of **Dar es Salaam Water and Sewerage Authority vs Didas Kameka, Civil Appeal No. 233 of 2019** (unreported). Mr Sambo maintained that the visit at the *locus in quo* by the trial chairman was done in conformity with the principles enunciated

in **Nizar M.H. Ladak** (supra). According to Mr Sambo, the assertion by the Appellant that the tribunal did not take notes is wrong as such notes ought to be reflected in the proceedings and not in the judgment.

Submitting on the 3rd ground of appeal, Mr Sambo faulted the Appellant's assertion that since he failed to prove his case, the burden shifted to the Respondents. He further contended that since the sketch map that the Appellant intended to rely on was not admitted in evidence, there is no any other documentary proof which presupposes that the case was proved on the required standard. He maintained that since the Appellant complained that the land was allocated to the deceased, he had also an option to call land officer to testify at the trial tribunal. The learned advocate referred to the case of **Bamprass Star Service Station vs Mrs Fatuma Mwale [2000] TLR 390**, which held that court's decision must be based on the evidence before it and not upon any theory put up by the court. Basing on the foregoing submission, Mr Sambo prayed that the appeal be dismissed with costs for being devoid of merits.

In a rejoinder submission, the Appellant reiterated that the Appellant did notify the trial tribunal, on the hearing date, that his advocate was sick but the trial chairman did blatantly ignore it. He added that reluctance by the trial tribunal to adjourn the case to a later date so as to allow the Appellant to bring more of his witnesses to prove ownership of the suit

land led to consequences of which the trial tribunal failed to determine the lawful owner of the suit land. The Appellant fortified that if the appeal is not allowed, the dispute between the parties will be left unattended. It was the Appellant's submission that there is no record in both proceedings and judgment where the trial chairman commented on the visit at the *locus in quo*, which led to injustice on the parties.

3.0 COURT'S DETERMINATION

I have considered the three grounds of appeal on record, the record of the trial tribunal as well as the submissions for and against the appeal. The issues for determination are as presented in the grounds of appeal which I intend to determine the in the order as presented by the Parties in their written submissions.

In the first ground of appeal, the Appellant challenges the trial tribunal for closing prosecution evidence on 15/08/2017 while his advocate was reported sick. On his part, Mr Sambo contends that the Appellant did not hand over any sick sheet of the said advocate. According to the records, Mr Sambo's submission is misleading. The record of the trial tribunal is clear that on 15/08/2017 when the case was fixed for hearing, the Appellant appeared in person. He notified the tribunal that his advocate was sick. The Appellant prayed to tender the sick sheet of his advocate. He is noted to have said:

"Applicant: I have brought sick sheet for him. Here it is."

The counsel for the Respondents objected, stating that the sick sheet did not show whether the advocate was attended as outpatient or inpatient, and that it did not disclose the disease he was suffering from. Categorically, this implies that the sick sheet was handed to the counsel for the Respondents who inspected it. A further proof that the Appellant tendered the medical chit comes from the words of the trial chairman himself in his ruling, where he said:

> *"I agree with Mr. Said Amri that the document produced by the applicant as proof that his counsel is sick is not sufficient to give such proof. As said by the respondent's (sic) counsel it does not show what the applicant's counsel is suffering from. It only shows that the same person was attended and treated and given ED for three days from 13th August, 2017. That said, a prayer for adjournment is refused. And considering that this matter is of long time there is no way I can grant such prayer without reasonable cause."*

The above passage contradicts what was submitted by Mr. Sambo, that the Appellant did not hand over the said sick sheet. It is further noted that on the material date, the counsel for the Appellant was sick, and the trial chairman noted that he had ED of three days commencing from 13/08/2017. Ordinarily, the ED, being of three days, would end on 15/08/2017, the same date the case was fixed for hearing. I do not see What prevented the trial chairman faced that prevented him to adjourn the case for hearing on a later date. In my view, the medical chit was a

conclusive proof that the advocate was sick. Moreover, that was not the first-time adjournment was sought because, as stated by the counsel for the Respondents, the same had been adjourned for more than five times before that date.

As the record bears it, the five times adjournments were not solely based on the Appellant's excuses. Further, the reason that the case was of 2012, does not necessarily mean that it was delayed by the Appellant. It is not disputed that the counsel for the Appellant was sick on the material date. Whether he was attended as outpatient or inpatient that was not the tribunal's concern. The same applies to the type of sickness. As long as the doctor proved that the counsel was sick and that he was exempted from duty for three days, speculations by the trial tribunal were irrelevant. It was prudent upon the tribunal chairman to adjourn the case for a later date, so as to accord the Appellant chance to call his witnesses to prove his case. The reason that the case had taken a long time, is in my view, misconceived because there is no prejudice that the Respondents would suffer for such adjournment. I am aware that cases must be decided within a reasonable time so that rights of the parties can be timely determined. But at the same breath, the maxim *justice hurried is justice denied*, must be accorded weight by those assigned duty to dispense

justice. I associate myself with the holding of the Court of Appeal in the case of **Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Limited, Civil Appeal No. 260 of 2018** (unreported); where it was held:

> *"We also associate ourselves with the principle that justice is better than speed."*

Denial by the trial chairman to adjourn the case, having cognizance that the counsel for the Appellant was sick on the material date, absolutely denied the Appellant the right to be heard. The right to be heard in all respects extends to the right to call witnesses so as to prove one's case. This right is enshrined by our Constitution, particularly, Article 13(6)(a). It is so fundamental in such a way that dispensing with such right vitiates the whole trial. The Court of Appeal in the case of **Mbeya-Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma [2003] TLR 251**, stated:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:*
>
> *(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."*

In addition, I note that there was another anomaly reflected in the trial tribunal's record. On 24/04/2018, when Joseph Mungaya (DW2), Mathias Mungaya (DW3) and Philipo Mungaya (DW4) were testifying, the Appellant was marked absent. It is also indicated that the evidence of the three witnesses was received without being cross examined by the Appellant. That, as well, denied the Appellant the right to cross examine such witnesses which goes hand in hand with the right to be heard. That anomaly also vitiated the proceedings of the trial tribunal.

From what I have discussed above, I entirely agree with the Appellant that he was denied the basic right to be heard. The 1st ground of appeal has merit, it is therefore allowed.

Regarding the 2nd ground of appeal, which challenges the procedure adopted by the trial tribunal while visiting at the *locus in quo*, I do, at the outset, agree with the Appellant that there is no record showing that the trial tribunal visited the *locus in quo* in the proceedings. The record shows that while composing the judgment, the chairman noted that the parties were not at one on the identification of the suit land because they parted ways on the borders of the same. In that respect, he recalled the parties and addressed them on the issue.

It was resolved that the tribunal visits the *locus in quo* on 27/07/2018 at 10:00hrs. On that date, it was not possible to visit the *locus in quo* since the advocates for the parties were not present. The tribunal postponed the visit to 10/08/2018 at 10:00hrs. On that date it was not done because the tribunal motor vehicle had been assigned another official duty. Again, it was fixed on 17/08/2018 at 10:00hrs. The record shows that Mr Daud Saimalie, advocate who was holding brief of Mr Sambo, addressed the tribunal that the case was fixed for mention in view of fixing judgment date. The tribunal went ahead and fixed judgment to be delivered on 01/10/2018 at 11:00 am. On that date, the judgment was delivered. From the above observation, there is no record showing whether the trial tribunal visited the *locus in quo* as planned.

However, in his judgment, the tribunal chairman made reference to what was found at the *locus in quo*. At the beginning of the judgment, he made the following remark:

> *"Parties herein are in dispute over ownership of a piece of land measuring 2½ acres located at Ilkiushin Village at Oltrument Ward in Arumeru District* ***which according to what was observed by this Tribunal at locus in quo*** *is parted with a piece of land occupied by one Philipo Mungaya at West, Lendimi road at north and east, and undisputed piece of land owned by Syra Mburumburu at south."* (Emphasis added)

From the above observation, it is apparent that the trial tribunal visited the *locus in quo*, where the above boundaries of the suit land were gathered. As pointed out above, the proceedings do not feature the day the visit was made. In the absence of the said record in the proceedings, it is hard to know how the record of visiting the *locus in quo* made its way in the judgment. When 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 the Court of Appeal in the case of **Nizar M.H. vs Gulamali Fazal Janmohamed** (supra). It that case it was held:

> *"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, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. 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 the witnesses. We trust that this procedure will be adopted by the courts in future."*

In the case at hand, it is nowhere reflected whether the above guidelines or procedures were complied with since the record that the trial tribunal visited the *locus in quo* is missing in the proceedings. The Court of Appeal

while faced with akin scenario in the case of **Sikuzani Saidi Magambo and Another vs Mohamed Roble, Civil Appeal No. 197 of 2018** (unreported) had this to say:

> *"Now, in the case at hand, as intimated earlier, at best the record of the Tribunal's proceedings only indicated that on 3rd June, 2016 the Tribunal conducted a visit at the locus in quo without more.* ***It is therefore not clear as who participated in the said visit and whether witnesses were re-called to testify, examined and/or cross examined, as no notes were taken and the Tribunal never reconvened or reassembled in the court room to consider the evidence obtained from that visit.*** *We are therefore in agreement with both parties that the Tribunal's visit in this matter was done contrary to the procedures and guidelines issued by this Court in* ***Nizar M.H. Ladak****, (supra). It is therefore our considered view that, this was a procedural irregularity on the face of record which had vitiated the trial and occasioned a miscarriage of justice to the parties."* (Emphasis added)

I subscribe to the above position. Failure to record what transpired during the visit to the *locus in quo* in the proceedings was a procedural irregularity which vitiated the trial and occasioned miscarriage of justice to the parties. The second ground of appeal is, thus, merited. Two grounds of appeal hitherto discussed sufficiently suffice to dispose the appeal before me. However, there is another irregularity that compels me to delve on the third ground of appeal.

In the third ground of appeal, the Appellant's complaint is mainly on the evaluation of evidence adduced at the tribunal. Considering the above

procedural flaws, I will not indulge myself in the evaluation of the evidence. It is noted that the trial tribunal did not determine the dispute between the parties herein, because neither the Appellant nor the 3rd Respondent was declared the lawful owner of the suit land. At page 9 of the typed judgment the chairman made the following remark:

> *"As to issue concerning reliefs in consideration that in terms of section 110 of the Evidence Act (sic), Cap 6 R.E 2002 and on the basis of facts available burden of proof lied upon the prosecution side and such burden was not discharged the only action that will be taken by this Tribunal will be dismissing of (sic) the application before it. However, upon dismissing the application I will not declare the 3rd respondent as lawful owner of the suit land as prayed ..."*

Subsequently, the application was dismissed with costs. Deducing from the above reasoning, it is apparent that neither the Appellant herein nor the 3rd Respondent was declared the lawful owner of the suit land. In other words, the suit land was left in the ownership of none. Undeniably, that was a error. In case the trial tribunal found out that the evidence adduced was insufficient to prove ownership of the suit land, it had mandate to call for additional evidence. The course taken by the trial tribunal can be a source of chaos in the society. I thus agree with the Appellant's submission that the rights of the parties were not determined. Courts are consistently urged to ensure that those who come to court seeking justice have their rights fully determined. Such decision is as well not executable as it was held by the Court of Appeal in the case of **Hamisi**

Mohamed (as the Administrator of the Estate of Risasi Ngawe) vs Mtumwa Moshi (as the Administrator of the Estate of Moshi Abdallah), Civil Application No. 526/17 of 2016 (unreported), where it was held *inter alia*:

> *"In our considered view, although in the cited cases the orders sought to be stayed arose from applications, not suits, the principle is that an order which does not grant a right to any of the parties is not capable of being executed and as such, is similarly not capable of being stayed. As pointed out above, in the present case none of the parties was granted any right as both the applicant's and the respondent's claims in the plaint and the counterclaim respectively, were dismissed."*

Therefore, the decision of the trial tribunal is vitiated as it did not determine the rights of the parties. The case before the trial tribunal chairman was left unattended which is against the principles of fair trial promulgated by the Courts. The Appellant also faulted the trial tribunal for refusing to admit the map containing the names of those who were allocated land at the suit land. That, in my considered opinion, is not, at least given the decision hitherto made in the previous grounds, in the domain of this Court, because the decision whether to admit a document as exhibit is solely in the domain of the trial court or tribunal.

I have also noted that after the appeal was lodged, the counsel for the Respondents raised a preliminary objection that the appeal was time barred. In his submission against the preliminary objection, the Appellant

stated that the appeal was filed on time because he filed Misc. Land Application No. 301 of 2019 in the trial tribunal seeking rectification of the judgment which was incompatible with the decree. He added that the judgment that was rectified was delivered on 13/02/2020 and the appeal was filed on 23/03/2020.

In the ruling of this Court that was delivered on 06/08/2021, the Appellant was ordered to supply the order made pursuant to Misc. Land Application No. 301 of 2019. That was a condition precedent hearing and determination of this appeal. The Appellant did not comply with the order of this Court since there is no order that was brought before this Court in respect of Misc. Land Application No. 301 of 2019, rectifying the judgment on 13/02/2020. That implies that the Appellant defied the Court order. It has been held times and again that Court orders must be respected and complies with. See the decision of this Court in **Tanzania Breweries Limited vs Edson Dhobe & 19 Others, Misc. Civil Application No. 96 of 2000** (unreported).

Now what is the way forward? I have considered the anomalies above pointed out; if I was to go by the ruling of this Court of 06/08/2021, it means that the case will be struck out for being time barred. The remedy available to the Appellant will be applying for extension of time to refile

the appeal. Bearing that in mind, I consider that to be a prolongation of justice. The order made in the impugned ruling cannot be left to stand for obvious reasons: First, the trial tribunal did not determine the rights of the parties as the suit land was left without an owner; second, there is need to have the record cleared in respect of the serious procedural shortfalls above discussed and; lastly, for avoidance of multiplicity of suits. It is on those premises that I felt obligated to determine the appeal on merits, as I have endeavoured to do above.

That said, considering the procedural irregularities pointed out above, by invoking revisional powers bestowed to this Court by section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019], I hereby quash and set aside the proceedings and decision of the trial tribunal. It is hereby ordered that the file be remitted back to the trial tribunal so that an expedited hearing of the case before another chairperson commences. Considering that the anomalies were attributed by neither of the parties, I make no order as to costs.

Y. B. Masara

JUDGE

29th April, 2022