IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT APPEAL

AT MWANZA

MISC. LAND APPEAL No. 14 OF 2021

(Arising from the District Land and Housing Tribunal of Mwanza in Land Appeal No. 61 of 2015 Originating from Application No. 266 from Nyamanoro Ward Tribunal)

ROBERT RWABUTARA----------APPELLANT

VERSUS

JESCA JUMA----------RESPONDENT

JUDGEMENT

Last Order: 10.02.2022

Ruling date: 25.02.2022

M. MNYUKWA, J.

This is land appeal No. 14 of 2021 where the appellant appealed against the decision of the District Land and Housing Tribunal (DLHT) for Mwanza at Mwanza. It appears that, parties are neighbours and their dispute is over the boundaries of their respective pieces of land. The matter was first filed by the respondent in this appeal at Nyamanoro Ward Tribunal vide Application No. 266 of 2012, and the matter was decided in favour of the appellant. She could not find it just, she decided to file

land Appeal No. 61 of 2015 before the DLHT. The DLHT decided in favour of the respondent. The appellant could not see justice and decided to approach this court with two grounds of appeal thus: -

1. That the judgement complained of is against the weight of the evidence on the record of the Ward Tribunal.
2. That the learned appellate Chairperson erred in giving a judgment which did not conclusively determine the rights of the parties hereto.

The appeal was conducted by the way of oral submissions where the appellant afforded the service of Mr. Nasmire learned counsel and the Respondent appeared in person unrepresented.

The appellant learned counsel decided to abandon the 2nd ground of appeal and submitted for the 1st ground that the judgment complained of, is against the weight of evidence on the record of the Ward Tribunal. He avers that the parties are neighbours and their dispute is over the demarcation of peace of land where the appellant claimed the respondent to have encroached to his land. He went on that, the Ward Tribunal determined the matter after receiving evidence and visiting the scene (locus in quo) and decide in favour of the appellant.

He went on that, the respondent appealed to the DLHT that heard the parties and also visited the scene and ordered the respondent to demolish

part of his house that encroaches into the boundaries for the reason that, the area was surveyed therefore boundaries were well known.

He claims that there is no evidence to show that the disputed area is surveyed for the survey authorities which is Mwanza City Council was not called to prove that the area is surveyed.

He cited the case of **Nizar M. H. vs Ladak Gulamali Fazar Mohamed** [1980] TLR 29 where the CAT held that when the court decided to visit the locus in quo, it must show that it was necessary and when visiting, the court is not required to take part as a witness but as an arbitrator. He insisted that, there was no need for the DLHT to revisit the locus in quo for the Ward Tribunal had already visited the area in 2015 and there are possibilities that from 2015 to 2021 things in terms of structure might have changed.

He went on that, the DLHT acted as a witness by showing the beacons and did not disclose who did so. He insisted that the persons responsible for the survey could be of a greater importance if at all were called to testify. He went further that, the DLHT when visited the locus in quo did not follow the procedures as stated on page 31 of the case of **Nizar M. H** (supra) for the records did not show who identified the beacons, and the minutes of the visiting were not read to the parties.

He went on that the Ward Tribunal reached the fair decision and there was no reason for the DLHT to set aside the decision and if at all there was any irregularity in part of the Ward Tribunal the same could have been cured under section 45 of the Land Courts Dispute Act, Cap 216 RE. 2019. He therefore retires praying this court to allow the appeal and the decision of the Ward Tribunal to be restored with costs.

The respondent denied the appellant learned counsel's submission and he kept insisting that the DLHT was right to decide on his favour. She went on that, the survey was done and she was a member of the land dispute resolution committee together with the appellant when the survey was conducted and, in their area, there was no dispute and beacons were kept. He insisted that the decision of the DLHT was proper and therefore prays the appeal to be dismissed.

Rejoining, the appellant learned counsel insisted that the survey was conducted after the decision of the Ward Tribunal and therefore the DLHT was required to call for additional witnesses or conduct an inquiry under section 34(1)(b) and (c) of Cap 216 RE. 2019. He insisted that the issue of the survey was not properly presented before the DLHT.

Having considered the submissions of the parties, I proceed to determine the appeal with one ground that the judgement complained of

is against the weight of the evidence on the record of the Ward Tribunal. It was the appellant learned counsel contention among others that the DLHT had no reason to visit the locus in quo for the same was done by the Ward Tribunal and time had passed and things including structures could have undergone changes.

Going to the records, it is evident that the Ward Tribunal visited the disputed plot and from the evidence gathered they were able to identify the boundaries. The Wart Tribunal also made its findings that the respondent did build over a beacon earlier inserted and the matter was resolved and his building encroaches to the appellant. In due process, it was also the decision by the Ward Tribunal that the area which was surveyed (kurasimishwa) was marked with signs and beacons and it was ordered to be respected. From this point, I am now placed to determine if it was necessary for the DLHT to revisit the locus in quo and if the visit was proper in terms of procedures.

The appellant learned counsel cited the case of **Nizar M. H. vs Ladak Gulamali Fazar Mohamed** [1980] TLR 29 where the CAT held that when the court decided to visit the locus in quo, it must show that it was necessary and when visiting the court is not required to take the part of the witness but to be an arbitrator. He claims that the chairman acted as

a witness and not an arbitrator for the records could not show what was transacted on the scene during the visit.

I am alive that, visiting the locus in quo is not mandatory and it is done only in exceptional circumstances and when done, the procedures must be duly followed. This was stated in the case of **Sikuzani Saidi Mgambo & Kirioni Richard vs Mohamed Roble,** Civil Appeal No. 197 of 2018 CAT (unreported) when referring with authority the cited case of **Nizar M.H. vs. Gulamali Fazal Janmohamed** [1980] TLR 29, where the Court, inter alia stated that: -

> ***"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 witness as may have to testify in that particular matter...* ***When the court reassembles in the courtroom, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporate 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 [Emphasis added].*

See also the recent decision of this Court in **Avit Thadeus Massawe vs. Isidory Assenga,** Civil Appeal No. 6 of 2017 (unreported),

Kimonidimitri Mantheakis vs ally Azim Dewji & Others Civil Appeal No. 04 of 2018 CAT and **Bongole Geofrey & and four Others vs Agness Nakiwale,** Civil Appeal No. 76 of 2015 CAT (unreported).

From the referred cases above, it has been settled that among of the mandatory requirement includes that all parties, their witness and their advocates (if any) must be present and the evidence to be taken properly and recorded. This is important for what transacts at the locus in quo, is the same as in the courtroom for it is the determination of the disputed matter. The appellant learned counsel claims that the DLHT erred for not recording what transpired during the visiting in quo for the visit was used to determine the rights of the parties. Going to the records of the DLHT, it is reflected on page 36 of the typed proceedings that, the visit was scheduled to take place on 28.09.2020 but the proceedings are silent as there was no proceedings to that regard and no coram to indicate that the visit was done.

On the same page, 09.11.2020 the matter was before the chairman who gave brief findings of what they found during the visit. I find this to be improper for the reason that, in absence of the proceedings of what was transacted during the visit, this court could not discern who was present, and what really happened. 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 courtroom to consider the evidence obtained from that visit.

I am in accord with the appellant learned counsel and in the light of the case of **Kimonidimitri Mantheakis (supra)**when the court was faced with a similar situation, it was held that, failure to properly record what transact during the visit is fatal and the omission occasioned the miscarriage of justice for the court sits on the first appeal cannot make a proper evaluation on the entire trial evidence.

In the circumstance, I agree with the appellant learned counsel that, the visit in quo which was relied upon by the DLHT to determine the rights of the parties did not form part of the proceedings and therefore vitiate the whole trial. In view of what I have discussed above, I proceed to nullify the entire proceedings, quash the judgment and order of the DLHT. I hereby order the expedited retrial before another chairman and another set of assessors. I allow the appeal and based on the circumstances, I give no order as to costs.

It is so ordered

THE HIGH COURT OF TANZANIA MWANZA

M.MNYUKWA
JUDGE
25/02/2022

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
25/02/2022

Judgment delivered in presence of the parties

M.MNYUKWA
JUDGE
25/02/2022