IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 253 OF 2023

THOBIAS AWINO DAFFA .....1ST APPELLANT

LETISIA AWINO DAFFA ..... 2ND APPELLANT

VERSUS

PEREZIA JOHN NYAMANGA ..... RESPONDENT

JUDGMENT

Date of last Order: 21/9/2023

Date of Judgment: 29/09/2023

A. MSAFIRI, J.

The two appellants namely Thobias Awino Daffa, (1st appellant) and Letisia Awino Daffa (2nd respondent), initially as the 1st and 2nd applicants respectively, instituted a land dispute against the respondent Perezia John Nyamanga. They filed Application No. 562 of 2020 before the District Land Housing Tribunal of Kinondoni District at Mwananyamala (the trial Tribunal), claiming that the 1st applicant is a rightful owner of a piece of land located at Muungano Road, Kulangwa Street, Goba Ward, in Ubungo District (which was formerly Kinondoni District), in the City of Dar es Salaam. (herein as the land in dispute).

That around August 2020, while the applicants were in their usual course of inspecting the land in dispute, they were astonished to learn that the respondent has invaded the land in dispute and started erecting two rooms house in the area and inserted some beacons in the area.

That, the applicants asked the respondent why she has invaded the land in dispute and she answered that she has purchased the same from the 2nd applicant who is the wife of the 1st applicant. It is stated that the 1st applicant has taken efforts to resolve the matter amicably with the respondent, but to no avail. That, he reported the invasion to the offices of the Street Government and the Ward, but they failed to resolve the matter, hence they instituted the Application at the trial Tribunal.

After hearing of both sides, the trial Tribunal dismissed the Application with costs, the act which aggrieved the applicants and they have lodged this appeal, expressing their dissatisfaction. The appellants have filed their memorandum of appeal with ten (10) grounds of appeal which I will not reproduce all of them here but shall consider them as I determine the appeal.

The hearing of the appeal was conducted by way of written submissions and parties complied with the Court's schedule. The submissions in chief and rejoinder by the appellants were drawn and filed Alls.

by Mr. Pascal L Mshanga, learned advocate for the appellants, while the reply submission by the respondent, challenging the merit of this appeal was drawn and filed by Mr. Benedict Magoto Mayani, learned advocate for the respondent.

The counsel for the appellants argued the 1st ground of appeal separately, consolidated the 3rd, 5th and 7th grounds and argued them jointly, consolidated grounds No. 4 and 8 and argued them jointly, and also consolidated the 2nd, 6th, 9th and 10th grounds of appeal and argued them jointly.

He submitted on the 1st ground that the trial Chairperson erred in law and fact by analyzing the evidence and composing the judgment without taking into account the findings of site visit conducted on 27/2/2023 in the presence of all parties.

Mr. Mshanga submitted that on 27/02/2013, parties and their advocates visited the area in dispute. That the procedures necessary for visiting locus in quo was not properly complied with. That, no notes were properly recorded, and even if they were somehow recorded, they were not read to the parties as required by the law.

He argued that, the parties were not accorded opportunity to testify and or clarify issues arising from the visit. That, no advocate of either

party was accorded room to speak during the visit or after the visit. That, subsequently the Tribunal proceeded to compose judgment. Mr. Mshanga argued that, nowhere in its judgment did the Tribunal consider the crucial findings of the site visit, that it is as if there was no any site visit which was conducted.

He observed that, the jurisprudence has it that once the Tribunal or Court has ordered site visit or visit of locus in quo, it is mandated to consider such findings in its judgment. That, failure to do so is the same as failure to consider crucial evidence tendered b the parties. To fortify his arguments the counsel cited the case of **Joseph Kereto vs. Njachai Maripet and others,** Misc. Land Appeal No. 23 of 2020.

In reply, Mr. Magoto Mayani, averred that, it is trite law that the parties are bound by their own pleadings, hence the appellants by claiming irregularity in the visit, they are departing from their pleadings.

The counsel for the respondent argued that, the appellants have never cited the law or provided a case law that makes it mandatory for the trial Tribunal to include the findings of the site visit in the judgment but what is understood is the fact that the Tribunal can decide the site visit in order to ascertain some things that will help it to reach into sound

decision. He was of the view that the law does not make it mandatory for the trial Tribunal to include the findings into judgment.

Mr. Mayani added that, during the site visit the trial Chairperson let the appellants locate the disputed land and what was discovered was written down by the trial Chairperson.

In rejoinder, the counsel for the appellant mainly reiterated his submission in chief and added that the issue of non-consideration of the site visit findings and irregularities of the visit itself is an issue of law which vitiates the proceedings before the trial Tribunal and which goes to the root of the matter. That, since both parties have submitted on it, this Court has power to adjudicate on it. He pointed that, this Court cannot close its eyes when the lower Tribunal makes serious irregularities on site visit in violation of clear procedures enunciated by case law.

I have gone through the records of the trial Tribunal particularly the proceedings. It shows clearly that on 27/2/22023, the Tribunal visited the disputed land. It is recorded in the proceedings that, the counsels for both parties, and the appellants and respondent were in attendance.

In the records it shows that the trial Tribunal at first recorded that, the applicants (appellants) have failed to show/point the area in dispute. That the 1st applicant showed different area from the one which was Acts.

shown by the 2nd applicant. The records show that after that, Mr. Mshanga advocate for the appellants prayed for the applicants to be given another chance to show the land in dispute and his prayer was granted by the Tribunal.

After that, the records of the proceedings shows that the trial Chairperson recorded the boundaries and measures/size of the land in dispute. Having recorded the boundaries and their size, then the trial Chairperson proceeded to announce the date of reading the opinion of the assessors and the judgment.

The proceedings are silent on any findings, observation, view, opinion or conclusion of the trial Tribunal on the site visit. Even the judgment of the trial Tribunal is silent on the issue of site visit, and the findings of the Tribunal on the visit. It is as if the Tribunal never went site visiting.

This land dispute was among those disputes majorly based on the size of the disputed land, where it is claimed by the 1st appellant that the respondent has encroached 850 square meters of his land which has a total of 1416 square meters.

In my view, since the trial Tribunal decided to visit the locus in quo, then the issue of the size of the land in dispute was not trivial hence it

was important for the trial Chairperson to record the findings of the site visit and also consider them in the judgment as he was making analysis of the evidence.

There are numerous cases where the Court of Appeal has set mandatory procedure to be followed by the courts if they see it necessary to visit the locus in quo.

The Court of Appeal in the case of **Kimoni Dimitri Mantheakis vs. Ally Azim Dewji & 7 others,** Civil Appeal No. 4 of 2018 CAT at DSM (Unreported), while determining on the procedure of visiting locus in quo, it observed that;

> *"Whereas the visit of the locus in quo is not mandatory, it is trite law that, it is done in exceptional circumstances as by doing so, a Court may unconsciously take a role of witness rather than adjudicator.* ***In this regard, where the Court deems it warranted, then it is bound to carry it out properly so as to establish whether the evidence in respect of the property is in tandem with what pertains physically on the ground because*** *the visit is not for the purposes of filling gaps in evidence."*
>
> (Emphasis supplied)

The Court of Appeal went on to rule thus;

> *"In the light of the cited decisions, for the locus in quo to be meaningful,* ***it is instructive for the trial Judge or Magistrate to;*** *One, ensure that all parties, their witnesses and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo; three, allow cross examination by either party, or his counsel; four, record all the proceedings at the locus in quo; and five, record any observation, view, opinion or conclusion of the court including drawing a sketch plan, if necessary, which must be known to the parties and advocates, if any."* (Emphasis added).

In the present matter, the trial Chairperson did not record any observation, view, opinion or conclusion of the Tribunal about the visit of the locus in quo. As observed earlier, even the judgment is silent about the Tribunal's visit of the locus in quo and its findings in relation to the evidence adduced during the trial.

I find this to be a serious irregularity which has the consequence of vitiating the proceedings.

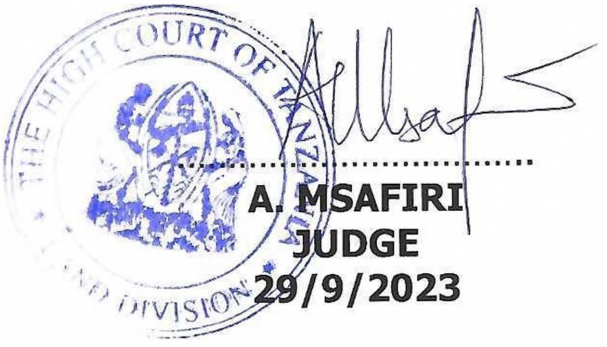
For the analysis and reasons given herein above, I find that the 1st ground of appeal has merit and I allow it. Since the 1st ground is capable Alls.

of disposing of the entire appeal then I see no need to determine the rest of the grounds of appeal.

Invoking the Court's powers under Section 43 of the Land Disputes Courts Act, Cap. 216 R.E 2019, I hereby nullify the trial Tribunal's proceedings with effect from 27/2/2023 when the visit of the locus in quo was conducted, quash the resultant judgment which was delivered on 17/05/2023 and set aside all orders emanating therefrom. The proceedings before the order of the visit in quo have no problem and thus, they are left intact.

For the interest of justice, I remit the case file to the trial Tribunal for completion of the trial by the trial Chairperson and if it will be necessary to visit the locus in quo, it should be done in accordance to the procedures.

The appeal is allowed to such extent with no order as to the costs. Right of further appeal explained.



A. MSAFIRI
JUDGE
29/9/2023