**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**
**DODOMA DISTRICT REGISTRY**
**AT DODOMA**
**LAND APPEAL NO. 65 OF 2022**

(Arising from the District Land and Housing Tribunal for Iramba in Misc. Land Application No. 132 of 2021)

**JUMANNE DAFI.....APPELLANT**

**Versus**

**HASSAN FURAI..... 1ST RESPONDENT**
**RAMADHANI FURAI.....2ND RESPONDENT**
**ISSA FURAI.....3RD RESPONDENT**
**EMMANUEL KIDANKS FURAI.....4TH RESPONDENT**
**HASHIMU HASSANI.....5TH RESPONDENT**

## JUDGMENT

Date of Last Order: 08th December 2023.
Date of Ruling: 19th January 2024.

**MASABO, J:-**

The appellant herein is aggrieved by the decision of the District Land and Housing Tribunal for Iramba (the trial tribunal) in Misc. Land Application No. 132 of 2021 in Land Application No. 43/2021 dated 23rd February, 2023. According to the trial tribunal's record, in the said case, the parties were contending over 20 acres of land formerly owned by the late Furai Kijoji who died intestate on 1st January 1977. After his demise, the land remained unadministered until in 2019 when the first respondent petitioned and was appointed as an administrator of the estate by Ilongero Primary Court vide Probate Cause No. 2 of 2019. It was alleged further that, in executing his administrative roles, the first respondent distributed the deceased's land to heirs. The first respondent was given 4

¾ acres, the second respondent was given 4 ¾ acres, the third 4 ¾ acres, the fourth respondent had 4 ¾ acres, the fifth respondent 1 acre and the appellant was given 6 ¾ acres for his mother who is now deceased. Unhappy with his share, the appellant trespassed into the respondents' land, hence the suit. After hearing the parties and assessing the evidence adduced, the trial tribunal decided in favour of the respondents.

Aggrieved by the decision, the Appellant knocked on the doors of this court armed with the following grounds of appeal: **one,** the trial Chairman erred in law and fact for its failure to assess and analyse the evidence adduced before it, **two,** the trial Chairman erred in law and fact for deciding in favour of the respondents basing on the fact that respondents acquired disputed land through inheritance from the late Furai Kijoji without considering evidence from the Appellant that he acquired his plot after clearing the bush and he did not inherit the disputed land, **three** , the trial Chairperson erred in law and fact by entering a judgment in favour of the Respondents while he escaped the necessary and important task of visiting the locus in quo.

On 07th of November, 2023 when this appeal was scheduled for hearing, the appellant and the first respondent appeared in person, unrepresented. The second, third, fourth and fifth respondents didn't appear although they were served. The matter was heard *ex parte* them. Submitting in support of his appeal the appellant stated that the claim against him was for twenty acres but he does not have such acres. All he has is four (4)

acres which he acquired in 1973 by clearing a bush. He proceeded that, during trial he asked the trial chairman to visit the locus in quo but he did not as he said there was no need for that. Concluding his brief submission, he prayed this court to visit the locus in quo. He also added that the appeal should not be decided in the respondents' favour as they rendered no evidence in support of their testimony.

In reply, the first respondent submitted that appellant is his nephew. His mother was divorced when he was only seven years. His father did not take him. Hence, he remained with his mother and they both lived at the late Furai Kijoji's home who was the father to the appellant's mother and he was raised there. Surprisingly, when he grew up he started to sue his uncles who are the respondents herein.

On the failure to visit the locus in quo. It was submitted that, the trial tribunal did not visit the locus in quo because the respondents produced all the necessary documents in proof of their ownership of the suit land, hence there was no need for visiting the locus in quo. The appellant had no land as upon reaching the age of seven he was to go to his biological father's land but he did not. Besides, the appellant was given six acres after distribution of the deceased's land but still he was not satisfied. On the issue that no evidence was adduced to prove that the respondents' ownership of the disputed land, he submitted that, it is with no merits as two witnesses testified in support of the respondents' evidence. He concluded by praying that the appeal be dismissed and the appellant should go to his paternal uncle and make his claim.

In rejoinder, the appellant argued that the respondents' submissions are without merit as the land is his. He cleared it and even during the life time of the respondents' father he was owning the farm and they have been troubling him with many cases.

I have carefully considered the grounds of appeal in the light of the records of trial tribunal which I have thoroughly read alongside the submissions by the parties. The first two grounds of appeal set out by the appellant in his memorandum of appeal revolve around the failure of the trial court to properly evaluate, assess and analyze the evidence as and the consequences thereto. It has been argued that, in consequences to the trial tribunal's failure to properly evaluate the evidence, it wrongly decided the suit and held that the suit land belonged to the respondents. The third ground of appeal concerns the trial tribunal's failure to visit the locus in quo. I prefer to start with this ground as it is a pure point of law hence straight.

As all parties agree that the trial tribunal made no visit to the locus in quo the sole question for determination is whether the omission was fatal and if so, whether it rendered the proceedings incurably defective and a nullity. Luckily, this is not the first time such issue has been raised. It has been dealt with in numerous cases and the apex court, the Court of Appeal of Tanzania, has extensively addressed this issue in a plethora of authorities. Elucidating the purpose of visiting the locus in quo in the case of **Avit Thadeus Massawe vs. Isidory Assenga**, Civil Appeal No. 6/2017 [2020] TZCA 364 TanzLII, the Court of Appeal instructively held that, visit to the locus in quo is mainly meant to clear the doubts arising

from conflicting evidence in respect of the location at which the suit property is located. It stated:-

> Since the witnesses differed on where exactly the suit property is located were satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of **Evelyn Even Gardens NIC LTD and Hon. Minister, Federal Capital Territory and Two Others,** Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the locus in quo. The factors include:
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> 1. Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another of evidence (see **Othiniel Sheke vs. Victor Piankshak** (2008) NSCQR Vol. 35
> 2. The essence of a visit in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see **Asokile vs. Adeyeye** (20110 17 NWLR (Pt 1276) p. 263.
> 3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo

(see **Ezemonye Okwara vs. Dominie Okwara** (1997) 11 NWLR (Pt, 527) p 1601.

4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims.

In the case of **Nizar M. H. Ladak vs. Gulamali Fazal Jan Mohamed [1980] T.L.R. 29,** the Court of Appeal 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 role of a witness rather than an adjudicator.

In line with the view above, the then Eastern African Court of Justice dealing with a similar matter in **Mukasa vs. Uganda** [1964] EA 698, it previously held that: -

> A view of a locus in quo out to be, I think, to check on the evidence already given and where necessary, and possible, to have such evidence particularly(sic) 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. That the trial Tribunal didn't visit the land in dispute.

Also, this court had the following to say in the case of **John Chuma vs. Pastoli Lubatula and Others, Land Appeal No. 9 of 2019 [2020] TZHC 2358** (TanzLII):

> These visits are intended to get a visual appreciation of the area in contention and check the accuracy of the evidence given in the course of the trial. Invariably, this happens after the parties have closed their cases. The legal holdings are to the effect that, the Court or tribunal must exercise great caution when doing that, in order not to constitute itself as witness in the case.

What is discernible from these authorities is that, the visit to the locus in quo is not a mandatory requirement. It is done sparingly in exceptional circumstances stated above. What remains to be answered therefore, is whether in the present case such circumstances were demonstrated. Having examined the record, I am convinced that the circumstances necessitating the visit existed because, first, from the evidence it remained unresolved whether the suit land is 20 acres or only 4 acres. Whereas the respondents and their witnesses stated that the suit land was 20 acres, the appellant and his witnesses all stated that the appellate have only 4 acres. The visit could have revealed whether, indeed the 20 acres existed and if so, whether the 4 acres are within the 20 acres or the 6 acres allegedly devolved to him by way inheritance. The fact that these matters remained unanswered, left the dispute unresolved and implicitly rendered the execution of the tribunal's order utterly cumbersome. To the extent above, the third ground is found to have merit.

Turning to the first two grounds of appeal, it is a trite law that, in civil litigations, the burden of proof lies on the party who desires a court to believe him and pronounce judgment in his favour. Section 110 provides as follows:

> 110. Whoever desires any courts to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those fact exist.

It is similarly trite that, the standard of proof in civil cases is on the balance of probabilities as opposed to proof beyond reasonable doubt which is the standard in criminal cases. These two cardinal principles have been echoed in numerous cases including in **Hemedi Said vs Mohamed Mbilu** [1984] TLR 113 and in **Antony M. Masanga vs. Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 [2015] TZCA 556 (TanzLII). In the latter case, the Court of Appeal lucidly stated that;

> It is a common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and standard in each case is on the balance of probabilities.

In the case at hand, the respondents were the ones claiming the appellant has trespassed into their 20 acres of land. Therefore, they had a legal burden to prove that the land is indeed theirs. In their testimonies they stated that the suit land belonged to their late father who died in 1977 but bothered not to state how he acquired it. On other hand the respondent testified to the effect that he acquired the land by clearing the

bush in 1973 when he was sixteen years old. His land comprises of 4 acres only and the neighbors to the same are Saidi to the northern part, Ladislaus Gabriel to the Southern part, Kijanga Laurent to Eastern part and Rashid Adam to the west. The Rashid Adam and Said testified as DW2 and DW3 respectively. They corroborated the evidence of the appellant as their neighbor and stated that, when they moved to the area in 1982, they found the appellant occupying the 4 acres and since then, he has remained in its occupation. Counting from 1982 when these two witnesses found the appellant occupying the 4 acres to 2021 when the respondents sued him in the trial tribunal, it is obvious that 39 years had lapsed. And, when the time is reckoned from 1973 when the appellant allegedly acquired the land or in 1977 after the demise of the respondent's father who, as per the respondents, was the owner of the suit land, it would follow that, the appellant had occupied the suit land for longer periods of 48 years or 44 years. Thus, assuming, as alleged by the respondent that he was a trespasser, the longevity of his uninterrupted adverse possession has earned him a protection of the law as an adverse possessor. In the foregoing I have found the first and second ground to have merits and I allow them.

In totality of the above, this appeal is allowed. As the parties are close relatives, I have found it just and fair not to order costs.

**DATED** at **DODOMA** this 19th day of January, 2024.

THE HIGH COURT TANZANIA

**J.L. MASABO**

**JUDGE**