

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA LAND APPEAL NO. 2871 OF 2024 (Originating from the Judgment of
the District Land and Housing Tribunal for Mbarali at Rujewa, Honourable A. Mapunda,
Chairperson, dated 30th November, 2023 in Application No. 265 of 2020) GOD
MLIGO.....1ST APPELLANT ANYENSI
MHIJI.....2ND APPELLANT VERSUS JAPHET
MWAUNGA.....1ST RESPONDENT MARIO T.
MHIJI.....2ND RESPONDENT

JUDGMENT

Date: 13 June 2024 & 30 July 2024 SINDA, J.: The appellants are aggrieved and wish to challenge the decision of the District Land and Housing Tribunal for Mbarali at Rujewa (the DLHT). The brief facts of the case are that it is alleged that the first respondent herein bought the land located at Warumba village, Imalilo Songwe ward, in 1 Mbarali District within Mbeya region (the Disputed Land), from the second respondent. The first appellant also alleged that he bought the Disputed Land from the second appellant and her husband. The first respondent successfully sued the appellants for trespass. Dissatisfied with the decision of the DLHT, the appellants brought this appeal on the following grounds:

1. That the Trial District Land and Housing Tribunal erred in law and facts by holding that the disputed piece of land belonged to the second respondent before selling the same to the first respondent without taking into account that the boundaries of the land sold to the 1st appellant and that which was sold to the 1st respondent were quite different, signifying two different pieces of land.
2. That the Trial District Land and Housing Tribunal erred in law and facts by holding that the disputed piece of land belongs to the 1st respondent by relying solely on the Appeal Judgment of the District Land and Housing Tribunal that had given victory to the 2nd respondent, disregarding the fact that appellants were not parties to the said case.

3. That the Trial District Land and Housing Tribunal erred in law and facts by ignoring the 1st appellant's defense evidence that he had used the 2 disputed land undisturbed for 14 years consecutively, to wit; from 2006 to 2020 when the 1st respondent started to claim that the land is his.
4. That the trial District Land and Housing Tribunal grossly erred in law and facts by its failure to properly analyze the evidence that was adduced before it, which was overwhelmingly in favour on the 1st appellant, hence arriving at unjust decision. The appeal was by way of written submissions. The appellants were represented by Mr. Gerald Clement Msegeya, learned counsel and the respondent was represented by Ms. Jenifa Joely Silomba, learned counsel. In his submission in chief, Mr. Msegeya argued on the first ground of appeal that the institution of suits at the DLHT are commenced by completing a statutory form, in which the description of the suit land must be clearly stated. He cited regulation 3 (2)(b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN No. 174/2003. It was further the counsel's submission that looking at the application filed at the DLHT by the first respondent and the Written Statement of Defense (the WSD) filed by the first appellant, the boundaries of the Disputed Land are different. Yet, the DLHT held that the second respondent was the owner 3 of the Disputed Land before selling the same to the first respondent. Since, parties are bound by their pleadings, arguments in court as well as decisions thereon must be based on the pleadings. The counsel added that this being a serious irregularity, the DLHT should have taken note of the differences suo moto and proceed to order the DLHT to visit Locus in quo to ascertain the boundaries of the Disputed Land. Arguing on the second ground, Mr. Msegeya submitted that in general, judgments particularly on suits founded on trespass which is tort, cannot bind parties who were not parties to the case. He referred to page 5 line 4 to 8 of the typed judgment. In the referred pages, the counsel added that the trial chairman relied on Exhibit D2 which is a copy of the judgment of the DLHT for Mbeya between Mohamed Ngomango vs. Malio Mhiji, Appeal No. 99/2012. He added that the appellants in the matter at hand were not parties in the said case, as such they could not be bound by it. In support, he cited the case of Masumbuko Kolowesya Mtabazi vs. Dotto Salum Chande Mbeya, Civil Appeal No. 44 of 2013, Court of Appeal of Tanzania in Dar es Salaam. The counsel further contended that the appeal judgment of the DLHT relied upon by the DLHT Chairman does not describe the location and boundaries 4 of the said Disputed Land. He added even the purported hand over declaration by Mohamed Ngomango to Malio Mhiji is full of discrepancies, yet the Honourable Chairman ruled in favour of the respondents despite the contradictions of the two documents. Submitting on the third ground, Mr. Msegeya argued that the first appellant bought the Disputed Land in 2006, and there is evidence to that effect. On the other hand, the first respondent claimed to have bought it in 2020. He added if it was indeed the same land, then there was no land to sell to the first respondent in 2020 because the same had already been bought by the first appellant. Concerning the fourth ground, the appellant argued that had the DLHT chairman carefully analyzed both oral and documentary evidence, he would not have held that the land belonged to the second respondent. This is

because the admitted the exhibits which were admitted and marked Exhibit P2 collectively, contradict each other. He added this being the first appeal, this Honourable court should re-evaluate the entire evidence on record and if warranted, arrive at its own conclusion. For emphasis the counsel cited the case of D.R. Pandya vs. Republic [1957] EA336. 5 In her reply to the submission, Ms. Silomba submitted on the first ground of appeal that there was no dispute in relation to the location and boundaries during trial to invite Locus in quo. That all witnesses as quoted at page 4 paragraph 1 of the DLHT judgment testified referring to the Disputed Land. The same DLHT judgment described the Disputed Land at page 1 by identifying the neighbors bordering the Disputed Land which suffice to demarcate, identify and locate the Disputed Land contrary to the appellant's submission that the boundaries of the Disputed Land are different. In opposition to the second ground, Ms. Silomba was of the view that the DLHT chairperson found the Exhibit D2 and other evidences adduced by the respondents more convincing compared to the mere claim of right over the Disputed Land adduced by the appellants. She added that the DLHT chairperson was guided by the required standard of proof that is on balance of probabilities. She referred to the case of Paulina Samson Ndawavya vs. Theresia Thomas Madaha, Civil Appeal No. 53 of 2017 (unreported). Arguing on the third ground, Ms. Silomba submitted that it is alleged that the first appellant used the land for 14 years before the first respondent. Ms. Silomba contended that the mere use of the Disputed Land for a long time does not give an automatic claim of right of ownership. That there are 6 peculiar features for a person to obtain the right of occupancy. The counsel cited the cases of Moses vs. Loregrove [1952] 2 QB 533 and Hughes vs Griffin [1969] 1 All ER 460 [TANZLII]. The counsel added that the issues discussed at the DLHT was on who acquired a good title. As both the first respondent and first appellant bought the Disputed Land from previous owners that is the second respondent and second appellant. Ms. Silomba stated that in order to ascertain the truth the DLHT inquired on who had a good title to dispose of the Disputed Land as provided in the case of Yusuph Selemani Kimario vs. Administrator General and Others, Civil Appeal No. 266 of 2020, CAT at Dar es Salaam. Ms. Silomba further contended that the DLHT found that the second respondent who presented Exhibit D2 is the one having good title to which he later disposed to the first respondent. Submitting on the fourth ground the counsel insisted that there was proper analysis of evidence adduced at the DLHT. She argued that the matter at the DLHT was never on the agreement for acquisition of the Disputed Land. She stated that the matter was to determine ownership of the Disputed Land and who acquired good title from the previous owners. The DLHT satisfied itself that the first respondent did acquire good title from the second respondent. In his rejoinder submission, Mr. Msegeya maintained that the boundaries described in the application and those described in his WSD are different. That, even the DLHT judgment and the purported hand over note do not describe the location of the Disputed Land and the demarcations. He stated further that DW3 when cross examined at the DLHT said that he had not brought any document which describes the Disputed Land. He claimed that the land was his before selling it to the first respondent. He further asked the DLHT to visit the Disputed Land to ascertain boundaries. The counsel referred to paragraphs 9 and 10 at page 39 of the proceedings. Furthermore, he stated that the

appellant's evidence carried more weight than that of the respondents, because first, Exhibit D2 does not show the boundaries and it was erroneous for the DLHT to base on the same to enter judgment in favour of the first respondent. Secondly, the appellant has used the Disputed Land undisturbed from 2006 to 2020, as clearly evidenced by DW4 and DW5 in the proceedings. 8 On the third and fourth grounds, the counsel rejoined that Exhibit D2 relied upon by the Hon. DLHT Chairman, did not state whether the Disputed Land was the same with the land that had been bought by the first appellant. The counsel further stated DW2 failed to establish through Exhibit D2 because it does not show the boundaries. Thus, the second respondent through Exhibit D2 cannot be said she had a good title to pass to the respondent. I have gone through the submissions from both sides and the records of the DLHT. Starting with the first ground of appeal, on matters concerning boundary. After going through pages 13, 28, 38 and 41 of the proceedings of the DLHT, the first appellant argued that the first respondent's neighbors are different from his own. He specified that he is not bordered with Mohamed Ngomango. The second appellant stated the neighbors to the Disputed Land are Mbagaya, Rozalia, Semasaga, Mpwaga and Mboga Salongwe. On the other hand, the first respondent stated that his neighbors to the Disputed Land are Mohamed Ngomango to the south, Mboga Salongwele to the west, Bruno Mpwaga to the east and Mbagaya to the north. Whereas the second respondent stated his neighbors are Mausen Mbaganya to the left, 9 Joseph Ngomango to the right, Bruno Mpwaga to the north and Mbogasalongwele to the south. Evidently so, the neighbors to the Disputed Land differ in accordance to the appellants' and respondents' evidence. Accordingly, I agree with the submission by Mr. Msegeya that there was a need for the DLHT to determine the boundaries and neighbors of the Disputed Land. Failure to do so brings uncertainty towards several phenomena related to the Disputed Land in question. For instance, its physical location and reliability of the witnesses. One might even suggest that the conflict involves two separate pieces of land. Thus, the only way to go about such challenges is through conducting locus in quo. In the case of *Avit Thadeus Massawe vs. Isidory Assenga*, Civil Appeal No. 6 of 2017, Court of Appeal at Arusha, that held: "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 the 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:

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 10 evidence is in conflict with another evidence (see *Othiniel Sheke vs. Victor Plankshak* (2008) NSCQR Vol. 35, p. 56.
2. The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see *Akosile vs. Adeyeye* (2011) 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. dominic 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.” I find the above principles, especially principle number two (2), very relevant not only in relation to the first ground of appeal herein but also very crucial in providing general guidance to our courts in the event that courts in their own accord or upon request by either party to a case decide to exercise their discretion to visit the locus in quo. As observed, the evidence on record was relatively sufficient but unfortunately not enough to determine the matter justly. There is a need of clarity and certainty in view of the conflicting evidence in respect of the 11 boundaries and neighbors of the Disputed Land. Proper identification of the Disputed Land is crucial and of great importance. Since, the Disputed Land is allegedly to be one and the same, then it was expected that the boundaries and the neighbors to be the same. That being said, I find the first ground of appeal with merit and therefore do not wish to discuss the remaining grounds. I hereby remit the case file to the DLHT and direct the same to conduct Locus in quo so as to take additional evidence in respect of the boundaries and the neighbors surrounding the Disputed Land. The appeal is hereby allowed to an extent. Since the DLHT could have raised the matter of Locus in quo suo moto, there are no order as to costs. Right of appeal explained. DATED at MBEYA on this 30 day of August 2024. A. A. SINDA JUDGE 12

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