

TANZANIA / JUDGMENT

wemaeli juma mlay vs anderson kimath and 2 others 2024 tzhc 651 4 march 2024

COURT
TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI LAND APPEAL NO. 48 OF 2023 (Originating from Land Application No. 88 of 2021 of the
District Land and Housing Tribunal for Moshi at Moshi) WEMAELI JUMA
MLAY..... APPELLANT VERSUS ANDERSON
KIMATH.....1ST RESPONDENT NICHOLAUS
LEMWELI.....2ND RESPONDENT GOODLUCK
LEMWELI.....3RD RESPONDENT

JUDGMENT

28/01/2024 & 04/03/2024 SIMFUKWE, J. This appeal emanates from the decision of the District Land and Housing Tribunal of Moshi (Trial Tribunal) in Land Application No. 88 of 2021. 1 According to the records of the trial tribunal, the appellant herein instituted a land dispute against the respondents herein claiming that in 2016 the respondents trespassed into her land located at Kiomu Village, Msufini hamlet, Kahe Mashariki Ward within Moshi District in Kilimanjaro region. Before the trial tribunal, the appellant alleged that they acquired the suit land from her mother- in law, Nosidai Lendo in 1995. That, in 2002 when her husband passed away, the respondents trespassed in the said land whereas the first respondent built a Well in the disputed land while the 2nd and 3rd respondents crossed the boundaries. In their joint amended written statement of defence, though the respondents admitted to be neighbours to the disputed land, they denied to have invaded the appellant's land. At the hearing, the trial tribunal raised three issues as follows:

1. Who is the lawful owner of the disputed land between the applicant and the respondents
2. Whether the respondents trespassed the disputed land
3. To what reliefs the parties are entitled to 2 Upon full trial and visiting the locus in quo, the trial tribunal decided in favour of the respondents herein. Being aggrieved by the said decision, the appellant preferred the instant appeal on the following grounds:
 1. That, the Honourable Trial Tribunal erred in law for reading the opinions of assessors in absence of the Appellant herein

2. That, the Honourable Trial Chairman erred in law and in fact for failure to allow the Appellant or her Advocate to cross-examine the Respondents while her Advocate had requested the same to be done during the visiting of locus in quo.
3. That, the Honourable Trial Chairman erred in law and in fact for failure to conduct proper procedure during visiting of locus in quo hence reached to unfair decision.
4. That, the Honourable Trial Chairman erred in law and in fact for failure to record the opinions of assessors in the proceedings but produced them in the judgment. The hearing of this appeal, proceeded through written submissions. The appellant was represented by Mr. Emmanuel Antony, learned counsel, whereas, the respondents were unrepresented. 3 Mr. Emmanuel Antony for the appellant started with the 3rd ground of appeal by submitting that the trial chairman erred in law and in fact for failure to conduct proper procedure during the visiting of locus in quo hence reached to unfair decision. To cement his argument, he referred the case *Kimnidimitri Mantheakis vs. Ally Azim Dewji and 7 others*, Civil Appeal No.4 of 2018, CAT at Dar-es salaam (unreported) at page 8 where, guidelines for conducting locus in quo were outlined. Elaborating further, Mr. Emmanuel stated that, the record of the trial tribunal at page 18 and 19 of the typed proceedings clearly show that: One, there was no witness of the Appellant at the locus quo. Two, what was adduced at the locus quo was adduced by the parties who did not take oath. Third, on 19/04/2023 the advocate for the appellant had reserved the right of cross examination until the visit of the locus quo is conducted. However, the records show that, the appellant was not afforded the opportunity to cross examine the respondents. On the 2nd ground, Mr. Emmanuel averred that the trial tribunal failed to afford the appellant's advocate an opportunity to cross examine the respondents while the advocate of the appellant had informed the trial tribunal as revealed at page 18 and 19 of the trial tribunal proceedings. To 4 buttress his argument the learned counsel cited the case of *Charles s/o Kidaha and 2 Others vs, The Republic*, Criminal Appeal No. 398 of 2018 CAT at Mbeya (unreported), in which the Court nullified the proceedings and judgment of the trial court for failure to allow cross examination by either party. The learned counsel argued the 1st and 4th grounds of appeal collectively. He submitted that, when assessors were giving opinions, the appellant was not present and the opinions of assessors were not recorded in the trial tribunal proceedings. Mr. Emmanuel cited the case of *Edina Adam Kibona vs. Absolom Swebe (Sheli)*, Civil Appeal No. 286 of 2017, CAT at Mbeya (Tanzlii) and the case of *Sikuzani Said Magambo & Kirion Richard vs. Mohamed*, Civil Appeal No. 197 of 2018, CAT at Dodoma (Tanzlii). Guided by the above authorities, Mr. Emmanuel averred that page 20 of the trial tribunal proceedings revealed that there was a date for opinions but the same did not show that the trial chairman required the assessors to read their respective opinions. Mr. Emmanuel continued to submit that another anomaly was the act of the Tribunal to allow the opinions of assessors to be read in the absence of the 5 appellant. That, the date for recording opinions was fixed but the record does not suggest if there was an order requiring the appellant to attend on the date of opinions nor was there any order that directed the assessors to read their opinions. He explained that at page 4 of the trial tribunal judgment, the trial Chairman did encompass the opinions of assessors

which did not feature in the trial proceedings. The learned counsel for the appellant urged this court to allow this appeal and nullify the proceedings and judgment of trial tribunal. Responding to the third ground of appeal, the respondents jointly submitted that, the procedures at the locus in quo were conducted effectively and in accordance to the law. They went on to state that, the essence of visiting locus in quo is for the parties to show the physical picture of what actually was adduced during the trial. Also, it is conducted in order to enable the Chairman to get the real physical picture based on evidence which was adduced during the trial. The respondents elaborated that during the trial, the parties gave their evidence under oath. What was done at the locus in quo was for the parties to give real picture of what was stated at the trial. Thus, it is not genuine for 6 the appellant to assert that evidence at the locus in quo was not taken under oath. They proposed that, if there was new evidence from other witnesses who did not take oath during the trial, then those witnesses were supposed to take oath at the locus in quo. They insisted that what was done at the locus in quo was done procedurally. Concerning the assertion that there was no appellant's witness at the locus, it was replied that, both parties were afforded the right bring their witnesses at the locus in quo. The fact that the appellant's witnesses were not present was not the fault of the court but the fault of the appellant who failed to call her witnesses while knowing that they were supposed to be present at the locus in quo. Submitting against the issue that the appellant was not accorded the opportunity to cross examine the respondents, it was the respondents' averment that both parties at the locus in quo were afforded the right to be heard (which included right to cross examine). They fortified their submission by referring to page 20 of the typed proceedings dated 15/5/2023 where both parties when asked, they agreed that, that was what transpired at the locus in quo. 7 On the second ground of appeal which is also in respect of failure to afford the appellant right to cross examine; they reiterated their submission on the 3rd ground of appeal. They added that, since the appellant was represented by an advocate, it was the role of the said advocate to raise such concern of right to cross examine. They stated further that, the fact that the records of the trial tribunal are silent on whether the appellant was represented by an advocate or not is beyond their ability since it is the role of the tribunal to keep the records. Lastly, on the 1st and 4th grounds of appeal, the respondents responded that the record is very clear since the opinions of assessors were arranged to be read on 23/05/2023 and the appellant was present when the order was issued. Thus, she cannot state that she was not aware of it. Replying to the argument that the assessors' opinions are not featured in the proceedings, the respondents were of the view that such fact does not negate the fact that assessors opined as seen in the judgment. The respondents prayed this court to dismiss this appeal with costs. In conclusion, the respondents raised a point of law that the appeal was filed out of time. 8 In his rejoinder, Advocate Mary Kway holding brief for Mr. Emmanuel Antony for the appellant reprised their submission in chief. Regarding the issue of time limitation; Ms Mary submitted that she was aware of the requirement of the law that appeals from the District Land and Housing Tribunal should be filed within 45 days from the date of delivery of judgment. She said that, it is also the position of the law that in computing the period of limitation, there is a certain period which should be excluded automatically. She

cited section 19(2) of the Law of Limitation Act, Cap 89, R.E 2019 and the case of Valerie Mogovern vs Salim Farkrudin Balal, Civil Appeal No. 386 of 2019, CAT at Tanga in support of her averment. She stated that, in this case, judgment was delivered on 26/05/2023, but records show that copy of judgment was supplied to the appellant on 27/06/2023, copy of proceedings was supplied on 02/08/2023 after several follow ups by the appellant. She insisted that, counting from 02/08/2023 or 27/06/2023 to 10/08/2023 when this appeal was filed, the appeal was filed within 45 days as required by the law. I have carefully considered the grounds of appeal, the rival submissions of both parties and the records of the trial tribunal. The issue for determination is whether this appeal has merit. 9 Starting with the 3rd ground of appeal, the learned counsel for the appellant faulted the trial Tribunal for failure to comply to prescribed procedures during the visiting of the locus in quo, hence, reached to unfair decision. On the other hand, the respondents submitted that the procedures were complied with at the locus in quo. From the foregoing submissions I am alive that, visiting the locus in quo is not mandatory, it is done only in exceptional circumstances and when done, the prescribed procedures must be duly followed. This was stated in the case of Nizar M.H. vs. Gulamali Fazal Janmohamed [1980] TLR 29, which 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, 10 or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future" See also the recent decisions of the Court of Appeal in Avit Thadeus Massawe vs. Isidory Assenga, Civil Appeal No. 6 of 2017 (unreported) and Bongole Geoffrey & and four others vs Agness Nakiwale, Civil Appeal No. 76 of 2015 CAT (Unreported) which were referred in the case of Kimonidimitri Mantheakis vs ally Azim Dewji & Others (supra), which was also cited by Mr. Emmanuel for the appellant. At page 8 (supra) the Court of Appeal illustrated that: "In the light of the cited decisions, for the visit of 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 made known to the parties and advocates, if any." 11 From the referred cases above, in short, the mandatory requirement of visiting locus in quo are that; all parties, their witnesses and their advocates (if any) must be present and the evidence must be taken properly on oath and recorded. The appellant's learned counsel claimed that, first, there was no any witness for the appellant who visited the locus in quo; second, the parties adduced their evidence without taking oath and the appellant's counsel was not afforded the right to cross examine the respondents. According to the records of the

trial Tribunal, the proceedings at the locus quo, is reflected on page 19 of the typed proceedings. For ease reference I hereby reproduce it as follows: “KWENYE ENEO LA MGOGORO Mwombaji: Wajibu maombi wamevamia eneo langu kwa kuvuka. Mjibu maombi 1: Sijavuka mpaka ni mfereji huu unaonekana. Mjibu maombi 2: Mpaka ni mfereji. Mjibu maombi 3: Mpaka ni kama walivyoonesha wenzangu.”¹² From the above extract, the records speak loudly that evidence of both parties at the locus quo was taken without oath. This is contrary to prescribed procedures of visiting locus in quo. Therefore, I agree with Mr. Emmanuel that the procedures of visiting the locus quo were not adhered to. Another noted anomaly at the locus in quo as expounded by Mr. Emmanuel is that the appellant’s counsel was not afforded the right to cross examine the respondents. This was disputed by respondents who stated that both parties were accorded right to be heard including right to cross examine. They made reference to page 20 of the trial Tribunal’s records to support their contention. With due respect to the respondents, the trial Tribunal’s records reveal otherwise. As quoted above, the records show that after the Trial Chairman had recorded the answers from the parties, he issued an order of adjourning the matter to 15/05/2023 for reading to the parties what transpired at the locus in quo. At page 16 and 18 of the typed proceedings, the learned advocate for the appellant reserved the right to cross examine until during the visiting of the locus in quo. However, the proceedings do not show if he was availed with 13 such right of cross examining the respondents. Even if the learned advocate did not remind the Trial Tribunal on such issue, it is a requirement of the law that parties must be accorded with right to cross examine at the locus in quo. As it was stated by the Court of Appeal in the case of *Kimondimitri Mantheakis vs ally Azim Dewji & Others* (supra) that the court should allow cross-examination by either party, or his counsel. The respondents’ argument that the parties agreed on what transpired at the locus in quo is baseless since agreeing with what transpired at the locus quo does not mean that they agreed with the procedures thereto. It is the trial tribunal which had the duty to observe the prescribed procedures and not the parties who were to be guided by the tribunal. Therefore, I join hands with the appellant’s counsel that the procedures of visiting locus in quo, were not adhered to. Concerning the 1st and 4th grounds of appeal which are to the effect that opinions of assessors were not recorded in the proceedings and that the same were read in absentia of the appellant. With due respect to the appellant’s counsel, when the matter was set for reading opinions, the appellant was present. Thus, he was duly informed. Regarding recording the opinions in the proceedings of the trial tribunal, the law requires opinions of assessors to be given in writing. In our case, hand 14 written opinions of assessors were attached to the proceedings. Also, the learned counsel for the appellant complained that the proceedings of the trial tribunal do not show that the trial Chairman required the assessors to read their opinions. However, the proceedings dated 23/05/2023 read that: “Baraza: Shauri linakuja siku ya leo kwa ajili ya kusomewa maoni ya wajumbe wa Baraza hili. Wajibu maombi: Tupo tayari kupokea maoni. Baraza: Maoni ya wajumba Sarah Mchau na Sarah Lukindo yamesomwa kwa wajibu maombi na bila kuwepo mwombaji bila taarifa mbele ya wajumbe wa Baraza hili. Amri: Hukumu 26/05/2023.” Therefore, it is evident that opinions of assessors were read out in the tribunal. Consequently, I find the 1st and 4th grounds of

appeal lack merits. Concerning the new raised issue that this appeal was filed out of time, I agree with the learned counsel for the appellant that pursuant to section 19 (2) of the Law of Limitation Act (supra), time spent for obtaining 15 copy of judgment and proceedings must be excluded. Thus, this appeal was filed within 45 days as required by the law. Taking into consideration my findings on the 2nd and 3rd grounds of appeal, I find merit in the appeal. I therefore quash the judgment and order and nullify proceedings of the trial tribunal and order trial de novo of the matter before another Chairman sitting with a different set of assessors. Appeal allowed with no order as to costs. It is so ordered. Dated and delivered at Moshi this 4th day of March 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 04/03/2024 16

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