IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MKUYE, J.A., MGEYEKWA, J. A. And NGWEMBE, J.A.)

CIVIL APPEAL NO. 382 OF 2021

REGISTERED TRUSTEES OF TELESINA SISTERS ..... 1ST APPELLANT
RUNATI BENITO KIMBE..... 2ND APPELLANT
MAGNUS BENITO KIMBE ..... 3RD APPELLANT
RENATO BENITO KIMBE..... 4TH APPELLANT
JUVILLAN KIMBE ..... 5TH APPELLANT
ISSA MATUGA..... 6TH APPELLANT
ELIO NGWILANGWA..... 7TH APPELLANT
ONESMO KIMBE.....8TH APPELLANT
JUMANNE MAHENGE.....9TH APPELLANT
OSWARD MAHENGE ..... 10TH APPELLANT
JOSEPH PILLA..... 11TH APPELLANT

VERSUS

NASSORO THABIT LIPANGILE (An administrator
of the estate of RUKIA LIPANGILE) ..... 1ST RESPONDENT
KHAMIS MUSSA ..... 2ND RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Iringa]

(Matogolo, J)

dated 3rd day of November, 2020

in

Land Appeal No. 12 of 2020

JUDGMENT OF THE COURT

4th & 10th December, 2024

NGWEMBE, J. A.:

This appeal is from the judgment and decree of the High Court of Tanzania at Iringa in Land Appeal No. 12 of 2020. The appeal was

dismissed and the appellate court upheld the decision of the District Land and Housing Tribunal for Iringa (the tribunal). The dispute involves land ownership of 726 acres located at Ipokera village within Iringa District in Iringa Region, whereas the appellants were claimed to have invaded about 62 acres. Given the complex background of the dispute, and having regard of what this Court is required to decide at the end, a detailed historical background is required.

The record of appeal indicates that the land in dispute was one farm when the first right of occupancy was granted back in 1950 and was transferred between several occupants in its history. The respondents are among those who allege to have been registered as rightful occupants holding it by tenancy in common. It is during their occupation that they applied for partition, thus the land was surveyed and registered as two separate farms; Farm No. 559, LO No. 149220 Ipokera Village, Title No. 7163 MBYLR and Farm No. 560, LO No. 149138 Magulilwa Village, Title No. 7162, MBYLR. By then the Mbeya Land Office served Iringa, Rukwa, Songwe and Mbeya itself.

It seems during the respondents' alleged occupancy there were disputes in respect to the ownership of the suit land. The respondents therefore, sued the appellants jointly and severally before the tribunal. In their application, they claimed that they bought the disputed land

in a court sanctioned auction in 1991, which was exercised in execution of loan default decree by a person claimed to be the owner, one Mohamed Salehe. That the first appellant was their neighbour, who had her own land, but later it was alleged she started to invade into the respondents' land.

Further in their cause of action, the respondents averred that some villagers and village leaders together with the appellants herein, invaded the land in question and demolished the improvement therein. It was the respondent's assertion that apart from the appellants, there were other people who had invaded the said land. The respondents took some measures to serve an eviction order from Iringa District Court in 1996 and advice by Land Officer in 2006, but with time, the invasion would resurface. It is further alleged that the appellants in this appeal, had invaded in the disputed land in the year 2011. The respondents opted to lodge several applications before the tribunal against the appellants in different suits which were later on consolidated. The reliefs they sought in the consolidated application included; declaratory order on lawful ownership; compensation of TZS. 450,000.00 for the value of the demolished house and permanent injunction against the appellants.

The first appellant in her Written Statement of Defence (WSD) disputed the claim and further averred that the land she occupies is different from the disputed land. During hearing, they asserted to have purchased their land in the year 1995 from one Austin George Tawel, the alleged original owner. One nun Sister Otavia Gomano, of Tosamaganga Mission, Iringa rural, testifying as DW2 proved to have been present at the purchase transaction. Also Ms. Merina Chonya (DW4) who was Mr. Tawel's wife, testified about the ownership of Mr. Tawel and the circumstances which led to sale of the land to the first appellant Teresina Sisters, the transaction which she was a witness. The rest of the appellants claimed to derive their respective ownership from grants by the District Authority of Iring District under the Ujamaa land scheme by then in the year 1978. They stated that part of the land so donated to villagers was originally owned by Austin George Tawel, who abandoned it.

After hearing of DW4, before the defence could proceed, the appellants' learned advocate Mr. Mkwata passed away. But in his discharge of duty, advocate Mkwata had already communicated with the Office of the Registrar of Titles for the purpose of testifying before the tribunal. Advocate Rwezaura, the successor maintained the need to call an officer from the Office of the Registrar of Titles and

communicated to the tribunal on the difficulties of calling the said witness. The said witness demanded to be facilitated. Thus, the trial chairman resolved that the defence should be closed and thereby issued an order for visiting *locus in quo*. Such visit was duly conducted on the next scheduled date. After visiting *locus in quo*, the tribunal found merit in the respondents claim and granted the reliefs as sought in its judgment.

The appellants at first, appealed to the High Court in Land Appeal No. 02 of 2015 which upon hearing, the High Court (Feleshi, J. as he then was), found that closure of the defence by the Chairman was irregular and prejudicial to the parties. It proceeded to nullify the proceedings recorded after 12/03/2014 and set aside the judgment thereof, subsequently ordered the tribunal to conduct re-trial from where DW4 ended, the officer from Registrar of Titles be called and the defence hearing to proceed to its logical closure.

When the matter was remitted back to the tribunal, one Frida Mwasulama (DW5), a Legal Officer from the Office of the Registrar of Titles at Mbeya, appeared and testified in respect of the land in dispute. Her evidence though in nutshell, was to the effect that the respondents were registered to be occupants of the disputed land. She also gave the historical background of the land to have been

granted a title to some European citizens before independence. That Mohamed Salehe was never registered as a rightful owner of the right of occupancy in respect of the disputed land in history. At a later stage, a prayer to recall DW5 was made and upon being resummoned, she testified that the land in dispute before the respondents being registered, was allocated to Austin George Tawel, whose title was later on revoked in 1966 and that from revocation to 1996 it is unknown if any person was granted right of occupancy.

Thereafter, the advocates for both parties had prayed for visiting *locus in quo* for the purpose of verifying the demarcation between the appellants and the respondents' area and verify is if at all the appellants had actually trespassed to the respondents' land because, among other matters, exhibit D2 tendered by the first appellant seemed to suggest a different area. An order was issued to the effect that visiting *locus in quo* would be on 20/12/2018 and that a surveyor from the Land Commissioner's Office at Mbeya should be summoned to identify the disputed boundaries and location of the farms referred in Exhibits P3 and D2.

However, the visiting on 20/12/2018 was adjourned for a number of reasons which appear in record of appeal (pages 312 – 314) up to 08/01/2019 when a regional land surveyor was summoned. It

happened that on that date the *locus* visit was again adjourned for the reason that the surveyor needed time to prepare. The visit was adjourned several times, thereafter and eventually on 01/11/2019, two issues cropped in, as addressed by the chairman were; **first,** directive from the government that costs for visiting *locus in quo* should not be borne by the parties but by the District Council where the land is located and **second,** the chairman having proceeded without assessors for a while after they were not found, he came across the decision of this Court regarding composition of the tribunal in case of absence of assessors. He thus, wanted to resolve as to whether he can proceed that way without assessors. After the parties addressed him, on 03/02/2020 he delivered a ruling to the effect that, hearing should proceed without changes. After delivery of that ruling, a date for judgment was scheduled to be on 20/02/2020, which was not delivered until 20/03/2020, when the judgement was actually delivered. As such, the intention to visit *locus in quo* vanished without trace.

Once again in its judgment, the tribunal found the respondents rightful owners, which decision aggrieved the appellants. Their appeal before the High Court was unsuccessful, hence this second appeal. In

this appeal, the appellants are challenging the concurrent findings of the lower courts on six grounds of appeal, paraphrased as follows:

1) *That the first appellate court misdirected itself in law in failing to find that the 2nd respondent had failed to prove his ownership and, that it could not have been proved by proxy.*
2) *That the first appellate court failed to find that the DLHT had determined the dispute in the absence of assessors.*
3) *That the first appellate court misdirected itself in not finding that the respondents title deed was acquired fraudulently.*
4) *That the first appellate court relied on extraneous matters not forming part of the evidence.*
5) *That the first appellate court failed to properly evaluate the evidence.*
6) *That the first appellate court erred in failing to find that the mandatory procedure for visitation of locus in quo was not observed.*

When the matter came before us for hearing, Ms. Amelia Adam Chalamila, learned advocate stood to argue the appeal for all the appellants while Messrs. Cleophace Manyangu, Rutebuka Samson

Anthony and Marko Kisakali, all learned counsel, teamed up to oppose the appeal.

Before going into the actual hearing, Mr. Anthony notified the Court that the first respondent had passed away on 16/09/2024 and following her demise, her son Mr. Nassoro Thabit Lipangile was appointed by Primary Court of Songea at Mfaranyaki, in Probate Cause No. 61 of 2024 to be an administrator of the deceased estate. Thus, he prayed to substitute the first respondent's name with Nassoro Thabit Lipangile under rule 105 (1)(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Since the prayer was not objected by the parties, we granted it and ordered substitution of the first respondent with the administrator of the deceased estate as prayed.

Considering the nature of the grounds raised by the appellants and the reflection of the background we have endeavored to explain, we prompted the parties to address the Court on *whether the order of the tribunal to visit locus in quo was complied with.*

Ms. Chalamila was brief and invited the Court to refer to their joint written submission in respect to the issue raised by the Court. What we can extract from their written submission is that, the visiting of *locus in quo* conducted by the tribunal was unprocedural. They

suggested that such a flout affected the proceedings of the tribunal and subsequently affected the decision of the first appellate court.

Replying by the respondents, Mr. Anthony stated that there was no such visit that was conducted. He argued that, when the matter was remitted by the High Court, the relevant directive was to hear the evidence of DW5 which was complied with. To him, there was no necessity of visiting *locus in quo* because the area is surveyed and demarcations are vividly visible.

Mr. Manyangu, also for the respondents stressed that, there was no need of visiting *locus in quo*. He categorically argued that PW1 testified before the tribunal that the land was surveyed with clear demarcations. DW5 from the Land Registrar's office and PW2 clarified about the disputed land. He, thus, implored the Court to dismiss the appeal with costs.

Ms. Chalamila in rejoinder, having revisited her record, conceded to what the learned counsel for the respondents submitted that the visit to *locus in quo* was not conducted as per the order of the tribunal. However, she observed that under the circumstances, it was necessary for the tribunal to visit *locus in quo*.

As earlier on pointed out, we will determine the issue raised by the Court before we consider other grounds of appeal. From the record and as correctly argued by the parties, the tribunal did not visit *locus in quo*. It is also worth noting that the first visiting of *locus in quo* was extinguished by the order of the High Court when it nullified the proceedings in which the *locus quo* was inclusive. Correctly so, the tribunal after recording the DW5's testimony, parties prayed to visit *locus in quo* and the tribunal issued an order to that effect, while scheduling the date to effect that order. As it is glaringly clear, the order which was made by the tribunal was neither vacated by the tribunal nor set aside or nullified by any competent court. It is apparent in the record of appeal that such an order was not complied with to date, yet the tribunal proceeded to compose its judgment without complying to its previous order of visiting *locus in quo*. Thus, the demarcations between the plots in Exhibits P3 and D2 were not verified and ascertained. The move remained catastrophic not only to the tribunal and parties, but also the High Court which not knowing that the visiting of *locus quo* was not complied with, it relied on the proceedings of the *locus in quo* which were nullified by itself before Feleshi, J. (as he then was).

Under the above features, the appellants' counsel insisted compliance of the tribunal's order to visit *locus in quo* as important and necessary to end the dispute conclusively. However, Mr. Kisakali held a contrary view that visiting *locus in quo* was not necessary as the demarcations of the suit land were visible. After being probed by the Court, Mr. Manyangu admitted that the visiting of *locus in quo* is important. We are determined to resolve the issues of whether the order of visiting *locus in quo* was complied with and whether that visiting was necessary to have a conclusive determination of the dispute, and the way forward before we can consider other grounds of appeal.

To begin with, we reiterate that visiting *locus in quo* in land disputes is never mandatory. It is even discouraged to be adopted where not necessary. But where the circumstances of the case so dictate, the court/tribunal must conduct such a visit according to the laid down procedures. It is never an insignificant task to be treated so lightly. Visiting *locus in quo* should not be equated to a recreational visit which can be easily cancelled without strict procedure. Also, visiting *locus in quo* is a serious business of the court/tribunal, intrinsic to the spirit of the core function and dispensation of justice. A genuine seriousness therefore is owed not only by the court, but also

parties opting for and the actual conduct of it. It must be earnestly exhibited that they have studied the dispute and that for a final and fair determination of the dispute or at least a certain matter in contest, visiting *locus in quo* is necessary. Where such visit is found to be really necessary, the court or tribunal must adhere to the procedures which have been expounded in several decisions of the Court, which we find no need to reproduce them herein.

As a matter of general rule, visiting *locus in quo* is necessary in land disputes where the parties are disputing on the location of the land in dispute or where there is a contention on the boundaries of their respective plots, or in case of trespass, where boundaries are clear, but there is contention as to whether one party's activities like farming, construction or other activities have protruded into the neighbour's land amount to trespass. The circumstances are diverse and depend on case-to-case basis, but the purpose will be to ascertain those facts and assertions which can neither be verified by oral testimony nor exhibited through documents presented before the court or tribunal. See: **Victor Raphael Luvena v. Magreth Ephraim Kawa & Others** (Civil Appeal No.25A of 2021) [2023] TZCA 17526 (23 August 2023).

As to whether visiting *locus in quo* was necessary in this case, we have judged that it was. The nature of the dispute as reflected in the record of appeal justifies visiting *locus in quo*. It appears that parties were not in common understanding as to the identity of the disputed land or at least the location, description and boundaries were in dispute between the parties. The first appellant's Written Statement of Defence, at page 33 of the record, stated at paragraph 5 that:

> *"The purchase, possession and use of the suit land by applicants is of non-concerned to 1st Respondent so long as this right does not infringe 1st respondent's right to occupy their own land."*

DW2 in her testimony, stated that among the farms they own includes; Kihanga farm, Luona farm and Kiduvandembwe farm while specifying that the Luona Farm located in Kilolo District, Mawambala Village is the one in dispute. On the other hand, the respondents described the land in dispute to be located at Magulilwa Village and Ipokera village. Exhibit P3 tendered by the respondents had different descriptions from those contained in exhibit D2 tendered for the appellants, which described the land to be at Ukumbi Village, Iringa District originally issued in 1985 to Austin George Tawel. Although the respondents asserted that the village names kept changing with time, still there was no automatic suggestion that the address given by

parties were referring to exactly the same area with clear boundaries. We find that visiting *locus in quo* in this matter was necessary.

We accede to both, the tribunal chairman and advocates for the parties when they agree to visit *locus in quo.* The chairman of the tribunal even extended his order requiring that an officer from the Office of the Commissioner of Land should be present in that exercise to ascertain the boundaries. Up to that stage, things were well in order, but thereafter followed an utter vagrancy.

It is known that the said visit did not materialize and eventually it vanished and an order for judgment was issued as if the hearing was closed. Even the closure of the defence hearing was not marked in the record. We have asked unanswered question as to why the tribunal just decided to leave that arrangement in the air and proceeded to deliver the judgment and we failed to find any logical reason on record for such abrupt decision. We understand an order like that would be vacated by the tribunal itself if there were good reasons to do so, like change of circumstances. Such an order would as well be set aside by the superior court. None of the two happened in respect of the order for visiting *locus in quo.*

We are alive to the traditional rule that orders made by courts or tribunals must be complied with. This rule is old and stable to all courts and tribunals. It was pronounced strongly in English decision of **Hadkinson v. Hadkinson** [1952] 2 All ER 567 that:

> *"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until - that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."*

The above decision is part of our law and it has been pronounced in many of our decisions including; **Olam Tanzania Limited v. Halawa Kwilabya**, Civil Appeal No. 17 of 1999 (unreported); **Karori Chogoro v. Waitihache Menengo,** Civil Appeal No. 164 of 2018 [2021] TZCA 281 (5July 2021) and **CRDB Bank PLC v. Heri Microfinance Limited & Another** (Civil Appeal No. 20 of 2020) [2024] TZCA 202 (19 March 2024). In the first case, we observed thus:

> *"Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored,*

the system of justice will grind to a half or it will be so chaotic that everyone will decide to do only that which is conversant to them."

It can be noted that most of the cases where the above rule was addressed, it has been the parties who failed to obey the order. But, in this matter, unfortunate, it is the maker of the order who was the first to defy it without disclosure of any reason. We treat this to be an extreme case of disobedience to the cardinal rule of justice referred above.

In such glaring error, the first appellate court ought to have seen it and rectified it even before the parties landing to the Court by way of an appeal. Unfortunately, the High Court overlooked such an important point of law which is intended to protect the system of justice in the Country. The danger is glaring if this Court will bless it, obvious will assure occurrence of injustice and chaos of the system of justice which we are obliged to protect.

Standing on above consideration, we are determined to hold that the tribunal committed a serious irregularity for such a trend it devised. It is elementary that orders once made must be complied with unless they are vacated with or set aside by a superior court. The Court is impeded from proceeding any further action in the

proceedings when an order which is part of the said proceedings is existing and unfinished. Unfortunately, the tribunal was defiant and negligent to continue with delivery of judgment in unfinished proceedings and unfulfilled previous orders. The tribunal knew the previous order it made and just decided to ignore it and proceeded to compose judgment and, in its judgment, did not state anything about that order. Such decision was an invitation to judicial chaos and unjust system which we are not ready to condone.

We have already given our joint breath on how serious the visiting of *locus in quo* was. In the circumstances, we find no need to determine the remaining grounds of appeal.

On the way forward, we invoke our revisional powers bestowed on us under section 4 (2) of the Appellate Jurisdiction Act Cap 141 and nullify the proceedings of the tribunal with effect from the last order of scheduling for visiting *locus in quo*, which was issued on 22/2/2019, quash the resultant judgment which was delivered on 24/4/2020 and set aside all orders emanating therefrom.

Moreover, we remit the respective file to the tribunal and order a different chairperson to visit the *locus in quo* in accordance with the procedures laid down by the law and compose a proper judgment

based on the available evidence. We further order that, such visiting and composition of judgment be conducted expeditiously but with full compliance of the law and involvement of parties in visiting *locus in quo.* Since the omission was not occasioned by the parties, we make no order as to costs.

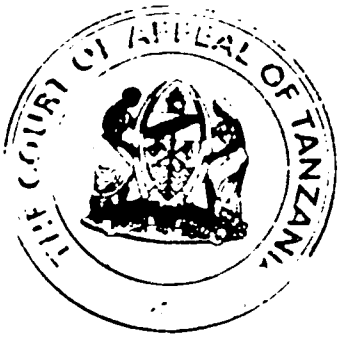
DATED at **IRINGA** this 10th day of December, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2024 in the presence of Mr. Marco Kisakali, learned counsel for the Respondents also holding brief for Mr. Amelia Chalamila, learned counsel for the Appellants, is hereby certified as a true copy of the original.



D. P. KINYWAFU
DEPUTY REGISTRAR
COURT OF APPEAL