

TANZANIA / JUDGMENT

idd fumbo vs athanas nyanda 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) AT SUMBAWANGA LAND APPEAL NO. 31 OF 2020 (C/0 Land Application No. 45 of 2019 of District Land and Housing Tribunal for Katavi) IDD AMRI FUMBO APPELLANT
VERSUS ATHANAS NYANDA RESPONDENT

JUDGEMENT

Date: 25/08 & 27/09/2021 Nkwabi, J.: In the District Land and Housing Tribunal for Katavi, the respondent emerged the winner in Land application number 45/2019, The appellant would not let go without a further fight as such, he lodged this appeal in this court. The respondent had sued the appellants claiming for:

1. Vacant possession.
2. Payment of damages to the tune of eight million shillings.
3. Costs of this application.
4. Any other relief this honourable tribunal may deem fit to grant. The appellant lost the suit since the suit was decided in favour of the respondent. It is from the above decision of the trial tribunal the appellant brought forward to this court the following grounds of appeal:
 - a. That, the tribunal erred in law by deciding a case without following procedures of accommodating the opinion of assessors properly as per the law.
 - b. That, the tribunal erred in law when by skipping the procedure governing admission of documentary evidence.
 - c. That, the tribunal erred in law and fact by holding that neither the appellant nor the respondent is the legal owner of the disputed property.
 - d. That, the trial tribunal erred in law by its failure to record and appreciate in its judgment what transpired when the tribunal visited locus in quo.

- e. That, the trial tribunal erred in law and fact by disregarding the appellant testimony and his witnesses who testified that the suit land belonged to the father of the appellant Based on those grounds of appeal that the appellant prayed the appeal be allowed, the suit land be declared the property of the appellant, costs of the appeal be borne by the respondent and any other reliefs this court may deem fit and just to grant. In the reply to the petition of appeal, the respondent insisted that the trial court proceedings and judgment are flawless. He prayed the appeal be dismissed with costs. It is apparent on the submissions of the counsel for the appellant that the appellant abandoned the 3rd and 5th grounds of appeal as he did not submit on the same. I too, will deal With the 1st and 4th grounds of appeal only. I start with the first one which is that, the tribunal erred in law by deciding a case without following procedures of accommodating the opinion of assessors properly as per the law. On this the respondent countered that the chairman is not bound by the opinion of the assessors. He gave reasons why he differed with their opinion in compliance with the law. 3 V In his submission, Mr. Laurence John, learned counsel for the appellant argued that the chairman of the tribunal did not follow the dictates of the law as the judgment was delivered the same date on 30/10/2020 with the opinion of the; assessors. He argued that is a fatal irregularity and it occasioned injustice to the appellant as he could not get the chance to know the opinion of assessors before judgment date. He cited Edina Adam Kibona v. Absolom Swebe (Shell) Civil Appeal no. 286 of 2017 (CAT) and Sikuzani Saidi Magambo & Kirioni Richard v. Mohamed Roble Civil Appeal No. 197/2018 (CAT). The respondent in his reply submission, said there are no irregularities and the chairman departed from the opinion of assessors and gave reasons for such departure. In rejoinder, the counsel for appellant explained that the complaint of the appellant was that the opinions of assessors were given on the same date with the judgment delivery date something which is irregular. 4 With great respect to the counsel of the appellant, I am not impressed with the ground of appeal as well as the submissions in respect of the same. I agree that the opinions were read over to the parties on the very day. The court record shows that the opinions of the court assessors were prepared on 20/08/2020 and the same were read over on 30/10/2020. I think the complaint is lame, since the opinions were in writing, the same were read over in court. Tribunal assessors are there to aid the tribunal in reaching at a just decision, they are not there for assisting any party. I do not see any anomaly in this complaint as the counsel for the appellant thinks. The opinions of assessors were duly considered and the trial tribunal chairperson decided otherwise and there is nothing wrong in that. The authorities submitted by Mr. Laurence are distinguishable to the matter at hand hence cannot be based upon in deciding this case. I dismiss the 1st ground of appeal. The next ground of appeal for my consideration is the 4th one which is to the effect that the trial tribunal erred in law by its failure to record and appreciate in its judgment what transpired when the tribunal visited locus in quo. 5 In reply to the petition of appeal, the respondent retorted that the findings of the tribunal on the visit to the locus in quo were that the disputed land is not measuring 39 acres but only ten acres. In submission, Mr. Laurence asserted citing Gulamali Fazal Janmohamed

[1980] TLR 26: 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 witnesses as may have to testify in that particular matter When the court reassembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated 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, or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future. The record of the trial tribunal speaks for itself, the trial tribunal never reassembled in the tribunal after locus in quo visit to evaluate the evidence obtained in the locus in quo visit neither appreciate the evidence obtained in locus in quo which was in favour of the appellant due to the fact that all the witnesses testified in the locus in quo testified to understand the suit land belonged to the appellants father, the counsel for the appellant lamented and referred this court to Sikuzani Saidi Magambo & Another (supra) as well. Responding to the submission of the learned counsel on the 4th ground of appeal, the respondent argued that the findings were that the disputed land is not measuring 39 acres of land as claimed by the appellant but only about ten acres. It also stated that the applicant's father and that of the respondent are neighbours. He further argued that the judgment explains how the appellant's witnesses contradicted themselves hence their evidence failed to assist the appellant to prove that the land is owned by the late Arriri Fumbo (the appellant's father) therefore the allegation that the tribunal never reassembled after locus in quo visitation were merely intending to mislead this honourable court. In rejoinder, Mr. Lau rance stressed the issue complained by the appellant is not about the evidence of the witnesses at locus in quo, but it is on why the evidence of witnesses who testified when the tribunal visited locus in quo went unrecorded by the trial tribunal to the extent of even not being appreciated in the trial tribunal's judgment. In addition, the trial tribunal never reassembled to discuss what happened when the trial tribunal went in locus in quo contrary to the requirement of the law per the above cited precedents. With respect to the respondent, I agree that the procedural irregularity complained about is clear on the face of the record. What transpired at the locus in quo is not clear as simply the court listed the names of the persons who attended but what they said or observed was not recorded. It was the opinion of the chairman that was recorded that: "At the locus in quo we observed that the land in dispute is less than 10 acres not 39 acres ..." That is contrary to the directive on how the visit to the locus in quo should be recorded. This ground has merits and it is accepted by this court. Like in the above decisions of the Court of Appeal, that the irregularity vitiated the trial and occasioned a miscarriage of justice to parties, it is difficult to gauge if the court were not affected with what it heard and observed at the locus in quo in the circumstances of this case. The result is to quash the proceedings and judgment of the trial tribunal and set aside its decree. Based on the above discussion I allow the appeal. I quash the proceedings and judgment of the trial tribunal. I set aside the trial tribunal's decree. I order this suit be expeditiously tried de novo by another chairman with a new set

of assessors. It is so ordered. DATED and SIGNED at MPANDA this 27th day of September, 2021. J. F. Nkwabi Judge 9

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