

TANZANIA / JUDGMENT

CIVIL APPEAL NO 97 OF 2021

SALUM MAYOMBWA AND ANOTHER VS LUCAS NDAHUZI

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: WAMBALI. J.A., MASOUD. J.A. And ISSA, J.A.) CIVIL APPEAL NO. 97 OF 2021 SALUM MAYOMBYA.... 1st APPELLANT MAGANIKO MAGOSHA 2nd APPELLANT VERSUS LUCAS NDAHUZI RESPONDENT (Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza) (SiyaniLJU Dated the 30th day of April, 2019 in Land Appeal No. 38 of 2018 JUDGMENT OF THE COURT 15th & 19th July, 2024

WAMBALI, J.A.: The appellants Salum Mayombya and Maganiko Magosha were sued by respondent, Lucas Ndahuzi at the District Land and Housing Tribunal for Chato (the DLHT) in Land Application No. 10 of 2017. It was contended as per the record of appeal that, the respondent herein was allocated the suit land, a farm measuring 5 acres located at Nyakakarago village, Nyamirembe Ward in Chato District since way back 1975 by his late father, Ndahuzi Masunzu. That he enjoyed the land until 2007 when it was invaded by Mashauri Lugata claiming to be the owner which resulted in Land Case No. 29 of 2007 at Nyamirembe Ward Tribunal. The matter was held in the respondent favour and he was handed over the suit land. In 2011 there was another case over the same piece of land with the same Mashauri Lugata, which was however decided in favour of the respondent. In February, 2017 the appellants herein emerged and claimed ownership of the said piece of land. The respondent filed Land Application No. 10 of 2017 in the DLHT for Chato for the declaration of ownership of the disputed land and that the trespass by the appellants in the said piece of land was unlawful. The respondent also prayed for vacant possession of the suit land, payment of TZS. 2,000,000.00 as general damages, costs of the suit and TZS. 22,500,000.00 as compensation for his crops that were destroyed. The appellant summoned Sprian Madubula Sungwa and Felician Ndahuzi who testified as PW2 and PW3 respectively. The appellants strongly contended that the land that was the subject of litigation in 2007 and 2011 between the respondent and one Mashauri Lugata is different from the land currently in dispute. The appellant stated further that they leased their piece of land to the respondent but later discovered that the respondent intended to dispossess them. The appellants summoned Zabibu Hassan (DW3), Salvatory Washa (DW4) and Zugilo Pimbili (DW5). Upon hearing, the DLHT dismissed the application and declared that indeed there are two pieces of land, separate from one another in view of the evidence obtained after the visit to the locus in

quo. The respondent was aggrieved and thus he appealed to the High Court. The High Court allowed the appeal and declared the respondent as the lawful owner. The High Court relied on the totality of the evidence of the parties on record and held that the respondent evidence was heavier than that of the appellants. Therefore, it was held that the DLHT wrongly declared the appellants as lawful owners of the disputed land. The decision aggrieved the appellants who filed the instant appeal. The aggrievement with the decision of the High Court by the appellants is expressed through the memorandum of appeal comprising five grounds of appeal. However, before the hearing, the appellants abandoned the third, fourth and fifth grounds and argued the first and second grounds. The appellants also lodged written submissions in support of the appeal. The appeal is strongly contested by the respondent who also lodged written submission. The respective grounds are as follows: "1. That the appellate Judge grossly erred In law by entering a judgment In favour o f the respondent by relying on the Irrelevant judgment o f Nyamirembe Ward Tribunal, Exhibit PEI which were between different parties and over different portion o f land to be conclusive evidence as against the appellants.

2. That the appellate Judge grossly erred in law to proceed in determining the appeal on merit while he observed that there was procedural irregularity in the trial tribunal for omitting to record what was discerned on locus in quo by the trial chairperson. " At the hearing of the appeal, the appellants had the services of Mr. Chiwalo Nchai Samwel, learned advocate, whereas the respondent was represented by Mr. James Njelwa, also learned advocate. In determining the appeal, we propose to start by considering the arguments for and against the second ground. It was strongly submitted by Mr. Samwel in the written submission that the first appellate judge erred to proceed with determining the appeal on merit while he had noted a procedural irregularity on the omission to record the proceedings in relation to the visit to the locus in quo which occasioned miscarriage of justice to the parties. In his submission, the first appellate judge was enjoined by the law to quash the judgment of DLHT and order a fresh trial from the stage of the visit to the locus in quo. To emphasize his argument on the procedure and relevance of visiting the iocus in quo, he referred the Court to the decision in Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed

[1980] T.L.R. 29. He concluded that the failure to record the proceeding on what transpired at the locus in quo is fatal and urged us to allow the second ground of appeal. In response, Mr. Njelwa supported the position taken by the first appellate judge because in his view, there was nothing which was recorded with regard to the proceedings of the visit to the locus in quo by Chairman of the DLHT. He emphasized that, the first appellate judge therefore properly evaluated the evidence available on the record to reach the conclusion that the respondent was the lawful owner of the disputed piece of land. He submitted that even if the evidence pertaining to the visit of the locus in quo had been recorded, it could not add anything valuable in resolving the dispute between the parties. Besides, he stated that the first appellate judge could not rely on the alleged evidence with regard to the visit to the locus in quo which was purely stated by Chairman of DLHT in the judgment without linking it with the evidence on the record. To support his argument on the procedure of conducting the proceedings during the visit to the locus in quo, he also made reference to

the decision in *Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed* (supra). In the end, Mr. Njelwa prayed for the dismissal of the second ground of appeal. Upon perusal of the record of appeal, it is evident that the DLHT Chairman on 6th February, 2018 recorded that the Tribunal and the parties would visit the locus in quo on 16th February, 2018. However, on the scheduled date of the visit, the Chairman simply recorded the coram indicating those who attended namely, the assessors, the parties and the Tribunal clerk but the record of proceedings in relation to what transpired on that date is not indicated. Nevertheless, in the judgment, the Chairman observed that after the visit to the locus in quo in fact there were two pieces of land in the disputed area. On the other hand, though the first appellate High Court judge noted the anomaly, he proceeded to determine the appeal in accordance with the evidence on the record in absence of the evidence on what transpired at the locus in quo. According to the record of appeal, it is apparent that save for indicating the coram stated above, the record of proceedings during the visit to the locus in quo is not shown. Therefore, it is not known as to what transpired during the said visit. The omission certainly occasioned a miscarriage of justice as the first appellate court could not make a proper re-evaluation of the entire evidence tendered by the parties at the DLHT in the absence of the proceedings on what transpired at the visit to the locus in quo if it was really conducted. It is noted further that the complaint of the appellants in the second ground with regard to the visit to the locus in quo was also the subject of complaint of the respondent in ground four of the petition of appeal which was lodged at the High Court in Land Appeal No. 38 of 2018 as reflected in the record of appeal. More importantly, in determining the said ground, the first appellate judge allowed it as he was satisfied that according to the record of proceedings, though there was an order for visiting the locus in quo, there were no proceedings on what happened on the particular date on the record. Particularly, he stated as follows when he conjointly dealt with the fourth and fifth grounds of the petition of appeal: "As it can be seen in the above quoted extract of the tribunal's judgment, the learned trial chairman based his decision on the evidence obtained after visiting the disputed land. Going through the record however no evidence of what transpired at the locus was recorded. In his submissions during the hearing of this appeal, counsel Chiwaio argued that the disputed area was visited. With due respect to the learned counsel, much as I agree with him, the records are silent as to what transpired there. It is trite law that when an adjudicating authority decides to visit a locus in quo, it should be done so in the presence of the parties and witnesses and more so the findings of such visit must be recorded in the proceedings. In this matter, if at all the locus was visited, the Tribunal did not record what was testified by the witnesses and which Anally was relied on by the chairman in his decision. It is not known for example having visited the disputed area what made the Tribunal to concede that the disputed area was different from the one that the applicant was handled back having successfully sued one Mashauri Lungata. Having said so, I find merits in these two grounds of appeal. By not recording what transpired at the locus in quo and yet used its finding in determining the matter, the Tribunal assumed a role of a witness rather than an adjudicator. I find support in this conclusion 8 from the Court of Appeal of Tanzania decision in *Nizar M.H. Ladak v.*

Gulamali Fazal Jan Mohamed, Civil Appeal No. 9 of 1980." In this regard, since the first appellate judge had acknowledged the absence of the proceedings with regard to the visit to the locus in quo and allowed the fourth ground of appeal whose substance is similar to the second ground in this appeal, he could not have gone ahead to evaluate the evidence on the record and declare that the evidence on the record indicated that the respondent successfully proved the case as in civil matters, a party whose evidence is heavier than that of the others, must win. This was against his reasoning and finding as per the reproduced excerpt above. Considering the record of appeal, we entertain no doubt that the omission of the Chairman to enforce the order he had issued on the visit to the locus in quo and the unexplained absence of the proceedings occasioned miscarriage of justice to the parties. Thus, the proceedings of the DLHT from the respective date, that is 16th February, 2018 onward were vitiated. We therefore, respectfully hold that the first appellate judge had no justification to evaluate the evidence on record of the DLHT without resolving the failure by the Chairman to comply with the order he issued on 6th February, 2018 regarding the visit to the locus in quo. At this juncture, we wish to restate the relevant procedure of visiting the locus in quo. The law is settled that a visit of the locus in quo is not mandatory, and it is done only in exceptional circumstances. However, where the trial court, or in this case, the Tribunal deems it necessary to visit the locus in quo, then it is bound to carry it out properly. In this regard, in the case of Nizar M.H. Ladak v. Gulamali Fazal Jan Mohamed (supra), the Court held: "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 such each witness as may have to testify in that particular matter... When the court re-assembles 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." 10 Further, in Kimonidimitri Mantheakis v. Ally Azim Dewji & Others (Civil Appeal No. 4 of 2018) [2021] TZCA 663 (3 November 2021, TANZLII), the Court stated that: "...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. 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." [Emphasis added] In the instant appeal, it is clear that since there is no evidence that the DLHT and the parties visited the locus in quo as ordered, it is not possible to ascertain if the procedure stated above was complied with. Nevertheless, what is important is that since there is no record of proceedings in the record of appeal, the DLHT could not legally purport to refer the evidence of the parties with regard to the visit to the locus in quo in its judgment in determining the rights of the

parties. Therefore, the first appellate court was enjoined to nullify and quash the judgment of the DLHT and direct the way forward instead of proceeding to evaluate the available evidence and arrive at a conclusion on the lawful owner of the disputed land. On the way forward, since it is clear as per the record of appeal that the DLHT ordered the visit to the locus in quo at the request of the parties, but the record of proceedings are not available, the remedy is to nullify the proceedings from that date inclusive of the Tribunal's judgment and those of the High Court, set aside the decree and thereby order a fresh trial as it was done in T.L. Maliyamkono v. Wilhelm Sirivester Erio (Civil Appeal No. 93 of 2021) [2022] TZCA 39 (18 February 2022, TANZLII). Consequently, we allow the second ground of appeal. On the other hand, since the respective ground suffices to dispose of the appeal, we do not find it necessary to deal with the first ground of appeal. In the event, we allow the appeal. In the result, we nullify the judgment of DLHT of Chato in Land Application No. 10 of 2017 and set aside the decree. The nullification also applies to the proceedings of the High Court in Land Appeal No. 38 of 2019 as they emanated from nullity proceedings. In the final 12 analysis, we accordingly order that the matter be placed before the DLHT for conducting the visit to the locus in quo as earlier on ordered in accordance with the law and later determine the dispute between the parties as soon as practicable. Given the circumstances of the appeal, we make no order as to costs. DATED at MWANZA this 19th day of July, 2024. F. L. K. WAMBALI JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL A. A. ISSA JUSTICE OF APPEAL The Judgment delivered this 19th day of July, 2024 in the presence of Mr. Chiwalo N. Samwel, learned counsel for the appellants also holding brief for Mr. James Njelwa, learned counsel for the respondent; is hereby certified as a true copy of the original. a (MB, a ajsL D. R. LYIMO DEPUTY REGISTRAR ' v <£/■ COURT OF APPEAL

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