

TANZANIA / JUDGMENT

Samwel Mathias vs Salvatory Sotery 1

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TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOKA LAND APPEAL NO. 13093 OF 2024 (Arising from Land application No. 51 of 2022 District
Land and Housing Tribunal for Karagwe) SAMWEL
MATHIAS..... APPELLANT VERSUS SALVATORY
SOTERY..... RESPONDENT

JUDGMENT

18th and 29th November, 2024 BANZI, J.: Before the District Land and Housing Tribunal for Karagwe (the trial tribunal), the respondent, Salvatory Sotery instituted a land suit against the appellant, Samwel Mathias claiming that, the appellant had trespassed into his land measuring ten acres located at Bukingi area, Nyamiaga hamlet, within Nyaishozi village in Karagwe District (the suit land) which he acquired by way of gift from his father, Sotery John in 1993. He further claimed that, his father acquired the suit land from his grandfather, John Mkwate who acquired it by way allocation from clan elders, "Abakungif in 1940. His claim was supported by his grandmother, Yuliana John (AW2), Sarapion John Mkwate (AW3), Joasi Matayo Buzaire (AW4) and Karoli Runyasi (AW5). Page 1 of 7 On the other hand, the appellant denied the allegation claiming that, the suit land belongs to him after he purchased the same from Steven Sendegea on 13/11/2020. According to him, the suit land is not in any how bordering with the respondent. He went on claiming that, initially that land was owned by Grevas Sematwa who sold Kazini Kiyora. He went further stating that, Kazini Kiyora sold it to Kahima Butare who sold it to Steven Sendegea. His evidence was supported by Steven Sendegea (DW2), Kazini Kiyora (DW3) and Amani Benedicto (DW4). He also produced sale agreements (Exhibit DI, D2 and D3) tracing his ownership. After closure of evidence of both parties, and considering the circumstances of the case, the trial tribunal found it prudent to visit the locus in quo. After several adjournments due to various reasons, on 08/03/2024, the counsel for the respondent informed the trial tribunal that, the respondent was sick and would not recover soon so as to participate in that visit. The counsel for the appellant conceded to that prayer. As a result, the trial tribunal vacated its order and fixed the date for assessors' opinion. In their opinions, the assessors opined in favour of the appellant. However, in his final verdict, the learned Chairman differed with them and found that, respondent had proved his claims. Eventually, the respondent was declared as the lawful owner of the suit land while the appellant was ordered to vacate Page 2 of 7 the suit land and to pay Tshs.100,000/= as compensation for trespass. Aggrieved with such decision, the appellant has

lodged his appeal to this Court containing three grounds. However, for the reasons to be apparent soon, I will not reproduce the grounds of appeal. When the appeal was called for hearing, the appellant was represented by Mr. Raymond Laurent, learned counsel whereas, the respondent enjoyed the services of Mr. Adalbert Kweyamba, learned counsel. In the course of their submissions, learned counsel for both sides were probed to address the Court whether circumstances of the case called for visiting the locus in quo and whether it was proper for the trial tribunal to vacate its order of visiting the locus in quo. Mr. Laurent submitted that, considering that each party mentioned different area, it was important and for the interest of justice for the trial tribunal to visit the locus in quo in order to clear the confusion about the exact area in dispute between the parties. In his view, since the Chairman had made an order of visiting the locus in quo, by vacating that order without valid reason the tribunal became functus officio. Though the respondent's long sickness was the main reason for trial tribunal to vacate its order, it raises suspicion whether the respondent was really sick considering that, he resurfaced and appeared in court on the following date when the matter was Page 3 of 7 scheduled for receiving the opinion of assessors. He therefore prayed for this Court to order the trial tribunal to visit the locus in quo according to the requirement of the law and recompose the judgment. He supported his stance with the case of *Salum Mayombya and Another v. Lucas Ndahuzi* (Civil Appeal No. 97 of 2021) [2024] TZCA 639. In response, Mr. Kweyamba argued that, the issue of visiting the locus in quo was raised by the trial tribunal itself and the prayer to vacate the order was made by the respondent which was conceded by the appellant. According to him, since visiting the locus is not mandatory, it was proper to vacate the order. Besides, there was valid reason for vacating the order. He prayed for the appeal to be dismissed by upholding the decision of the trial tribunal. I have carefully considered the rival arguments of learned counsel for both sides. It is an established principle of law that, visiting the locus in quo is in the discretion of the court or tribunal. The court or tribunal is not mandatorily required to visit the locus in quo. The tribunal has discretion to visit the locus in quo depending on the prevailing circumstances of a particular case. Nevertheless, visiting a locus in quo is much relevant where there are conflicting contentions on the location and boundaries of the suit land. For instance, where it happens that the parties are giving evidence that Page 4 of 7 is contradicting on where the suit land is clearly located, either by application of the party or the court on its own motion have to visit the suit land to clear the confusion. It is from visiting the locus in quo where the court or tribunal can resolve the dispute clearly, justly, properly and with certainty. In the case of *Avit Thadeus Massawe v Isidory Assenga* (Civil Appeal No. 6 of 2017) [2018] TZCA 357 it was held that: "A fair resolve of the dispute needs the physical location of the suit property to be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon request by either party, taken move to visit the locus in quo so as to dear the doubts arising from conflicting evidence in respect of on which plot the suit property is located." In another case of *Bomu Mohamedi v. Hamisi Amiri* (Civil Appeal No. 99 of 2018) [2020] TZCA 29 it was stated; "We would like to put it dear that a visit to the locus in quo is purely on the discretion of the court. It is done by the trial court when it is necessary to verify evidence adduced by the parties during trial. There is no law which forcefully and mandatoriiy requires the court or tribunal to conduct a visit at the locus in quo." Page 5 of 7 As it was stated by Mr. Laurent, in this case, there were conflicting

contentions on the location of the suit land and neighbours bordering the land each party is claiming to own. Such conflicting evidence persuaded the learned Chairman who found it prudent to visit the locus in quo in order to clear the confusion. At this juncture, I join hands with the position taken by the learned Chairman, because due to the prevailed circumstances, it was necessary for the trial tribunal to visit the locus in quo in order to ascertain the location and boundaries of the suit land so as to resolve the dispute justly, properly and with certainty. However, there was no genuine and compelling reasons for the trial tribunal to vacate its order of visiting the locus in quo considering that, there was no proof of sickness of the respondent. Besides, the respondent's behaviour of disappearing for long and resurfacing soon after the order was vacated, raises suspicion if at all, he was really sick. For the foregoing reasons, I am inclined to invoke the provisions of section 43 (1) (b) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] and nullify the proceedings starting from 08/03/2024 onwards. Consequently, I quash the judgment and set aside the decree of the trial tribunal. I hereby remit the case file back to the trial tribunal for it to visit the locus in quo before taking afresh the opinion of assessors and recomposing the Page 6 of 7 judgment. It is also ordered that; the trial tribunal shall follow all legal procedures concerning visiting the locus in quo. Considering the circumstance of the case, I make no order as to costs. It is so ordered. I. K. BANZI JUDGE 29/11/2024 Delivered this 29th day of November, 2024 in the presence of Mr. Raymond Laurent, learned counsel for the appellant also holding brief of Mr. Adalbert Kweyamba, learned counsel for the respondent, the appellant, the respondent, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, RMA. Right of appeal duly explained. Page 7 of 7

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