

TANZANIA / JUDGMENT

SEMBO WILLIAM SHIJA

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SUB REGISTRY OF SHINYANGA
AT SHINYANGA LAND APPEAL NO. 24945 OF 2024 (Arising from the Judgment and Decree of the
District Land and Housing Tribunal of Shinyanga for Shinyanga in Land Application No. 7 of
2021) SEMBO WILLIAM SHIJA..... APPELLANT (Administrator of the estate of
late Shija Sembo Mpemba) VERSUS

1. PAULINE MAKASHA
2. HAMISI KANDA
3. ROBERT KACHWELERESPONDENTS
4. KATELEZU MKOMA
5. MAYALA MAHONA LUTAMLA (Administrator of the Estate Mahona Lutamla Mashila)
6. WALESIS KISUSI

JUDGMENT

20th November 2024 & 24th January, 2025 MASSAM, J: - The appellant herein is administrator of the late Shija Sembo Mpemba who died in 1992 and left the land of 200 acres which he owned it since 1964 after being given by his father. The said land is located at Mwang'hindu hamlet, Kimandaguli village, Lyabukande ward in Shinyanga District. In that capacity the appellant filed the land dispute 1 claiming ownership over the disputed land against the defendants who claimed that they bought the same from the late Shija Sembo. The application was heard and at the end tribunal ruled in favour of the respondents. Being distressed by the decision, the appellant appealed to this court based on the ground of appeal that; -

1. That, the trial tribunal did not follow the procedure and or the law when it visited the locus in quo/suit.
2. In the alternative to ground one herein, respondents having set up of the suit land to them which originally belonged to late Shija Sembo Mpemba, the trial Tribunal erred in law and fact in not holding such respondents failed short of proving that they actually purchased the land in question. In the hearing of this appeal the appellant was represented by Mr. Audax Constantine Advocate whilst the respondents enjoyed the legal service of Ms. Maria

Mwaselela and Chrisantus Chengula both learned counsels. Mr. Audax Advocate in submitting his appeal he informed the court that he will urge only the first ground of appeal and abandoned the rest grounds of appeal. 2 Arguing on the first ground of appeal, the appellant complained that the procedure for visit locus in quo was not followed. It was submission of Mr. Audax that procedure of visiting locus in quo was not adhered by the trial tribunal. Apparently, Mr. Audax submitted that visiting locus in quo is not mandatory, however if the trial tribunal wishes to visit the same must adhere the following, the court will visit the locus in quo with the parties if any, the court must prepare visitation notes, the court would re assemble to the court to revisit that notes and read over to the court and parties with the view to discussion if there is correction or alteration according to those notes and parties will adduce evidence of what happened to the visitation and the same will be part of the records. He forties his argument by citing the case of PROF T.L MALIYAMKONO VS WILHELM SIRIVESTER ERIO Civil Appeal No. 93 of 2021 at page No 9-14. Additionally, Mr. Audax submitted that at page No. 120-134 the record shows the procedures was not fully complied. In page No 122- 132 after arrival to the locus the trial tribunal started to record the evidence and on page 134 the trial tribunal came up with the something called summing up. 3 Moreover, Mr. Audax prayed the whole proceedings from 15th April, 2024 where the tribunal ordered to visit the locus quo to 19th July, 2024 where the court adjourn for judgment be nullified and set aside the judgment and decree, and the matter be remitted to trial tribunal to be heard with another chairman and if necessary to visit locus in quo in accordance with the law. Finally, he prayed each party to bear its own costs as none of the party contributed to the said irregularities. On her side, Ms. Maria Mwaselela advocate agreed that procedure of visiting locus in quo was not well followed and the remedy available is to nullify the proceedings from the date the matter was adjourned for visiting of locus in quo to the date when the matter was fixed for

judgment.

Moreover, Ms. Mwaselela prayed the case be remitted to the trial tribunal and be entertained by another chairman who will hear the matter in accordance to the law. Finally, she prayed every party bear its own costs as the issue of irregularities was caused by the trial tribunal and not the parties. On the side of Mr. Chrisantus Chengula advocate in his submission he stated that, where the court finds out that the procedures was not 4 followed and the visiting in quo was conducted after the court record the evidence to the court. The remedy is to nullify the proceedings and the file be remitted to the trial tribunal to conduct fresh visiting in quo if it finds it necessary or to prepare judgment by using the evidence which was already recorded. He supported his argument with the case of SAID H. LIPITE AND 680 OTHERS Vs. MINISTRY OF DEFENCE AND ANOTHER, Civil Appeal No 494 of 2021 page No 14 para 1. Finally, Mr. Chengula prayed nullification of the proceedings and this court to order retrial and if tribunal thinks fit to visit locus in quo to visit accordance to the law or to prepare judgment as per the evidence which was already recorded. On his rejoinder Mr. Audax added that he supports the submission from respondents the trial tribunal can prepare the judgment by using evidence which was already recorded or visit locus in

quo in accordance to the law. Having scanned the submission from both parties, the issue for deliberation is whether the appeal has merit or not. Now, this being the first appellate court is duty bound to re- evaluate and weigh the evidence by both sides so as to arrive at a just and fair finding. See the case of Charles Thys vs. Hermanus P. Steyn, Civil Appeal No.45 of 2007. Also, it is the principle that in civil cases, the burden of proof lies on the person who alleges anything in his favor as founded in Section 110 of the Evidence Act. More over the burden of proof envisaged above is on the balance of probabilities. See 3 (2) b of the Tanzania Evidence Act and as stated in various decisions, including Anthony Masanga vs. Penina Mama Mgesi and Another, Civil Appeal No. 118 of 2014 and Hamza Byarumshengo v. Fulgencia Manyika and 4 Others, Civil Appeal No. 33 of 2017 (both unreported). Therefore, in determining this appeal, I shall be guided by the above principles. Starting with first ground that the trial tribunal did not follow the procedure and or the law when it visited the locus in quo/suit land. Mr. Audax said that the procedure of visiting locus in quo are, that the court will visit the locus in quo with the parties if any, the court must prepare visitation notes, the court would re assemble to the court to revisit that notes and read over to the court and parties with the view to discussion if there is correction or alteration according to those notes and parties 6 will adduce evidence of what happened to the visitation and the same will be part of the records. He added that according to page No. 120-134 the record shows that the procedures was not fully complied with and at page 122-132 shows that after arrival of the parties to the locus the trial tribunal started to record the evidence and after that on page 134 the trial tribunal came up with the something called summing up. Finally, he prayed the whole proceedings from 15th April, 2024 where the tribunal ordered to visit the locus quo to 19th July, 2024 where the court adjourn for judgment to be nullified and set aside the judgment and decree, and the matter be remitted to trial tribunal to be heard with another chairman and if necessary to visit locus in quo to be conducted in accordance to the law. On other side, Ms. Mwaselela agreed that procedure of visiting locus in quo was not well followed and he stated that the remedy available is to nullify the proceedings from the date the matter was adjourned for visiting of locus in quo to the date when the matter was fixed for judgment and the case be remitted to the trial tribunal and be entertained by another chairman who will hear the matter in accordance to the law. 7 Likewise, Mr. Chengula advocate concede that the procedure was not adhered and the remedy available is to nullify the proceedings and the file be remitted to the trial tribunal to conduct fresh visiting in quo if it finds it necessary or to prepare judgment by using the evidence which was already recorded. I have scanned submission from both parties and going through the tribunal records. I wish to put clear the procedure when visiting locus quo which are, the court will visit the locus in quo with the parties if any, the court must prepare visitation notes, the court would re assemble to the court to revisit that notes and read over to the court and parties with the view to discussion if there is correction or alteration according to those notes and parties will adduce evidence of what happened to the visitation and the same will be part of the records. It is equally important to note that the above procedures were laid down in the case of Nizar M.Ladak vs. Gulamali Fazal Jan Mohamed [1980] TLR 29 the court held that "When a visit to a focus 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 witnesses as may have to testify in that particular matter and for instance, if

the size of a road or 8 width of a road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. 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 notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by courts in future." See also the case of Depson Balyagati vs Veronica J.Kibwana, Civil Appeal No. 21 of 2021. Back to the case at hand, the record show that the trial tribunal after arrival to the locus quo it started to record the evidence. See page 122-132 of the typed proceedings. Moreover, at page 134 the trial tribunal came up with the something called summing up. In the premises. I agree with learned counsels that the trial tribunal did not adhere the procedure of visiting the locus quo. Having said so, I allow appeal, I nullify the whole proceedings from 15th April, 2024 where the tribunal ordered to visit the locus quo to 19th July, 2024 where the court adjourn for judgment. I set aside the judgment and decree. I order the matter be remitted to trial tribunal to be heard with another chairman and set of assessors and if the tribunal 9 finds necessary to visit locus in quo to visit the same accordance to the law and if it finds not necessary to prepare judgment by using the evidence which was already recorded. In regard with the circumstances of this case. Each party to bear its own costs. It is so ordered. Dated at Shinyanga this 24th day of January , 2025. R.B. Massam. Judge 10

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