

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIV. APPEAL NO. 35 OF 1994

SAID ATHUMANI ATHUMANI APPELLANT

V E R S U S

NDUGU DAMAS RESPONDENT

JUDGMENT

KAJI, J.

The appellant SAID ATHUMANI is appealing against the decision of Kisutu Resident Magistrates Court which declared the respondent MELCHION DAMAS to be the legal owner of Plot No. 42 Block D. Kigogo.

It is in the record that around 1970 the respondent Damas together with about 38 others had their plots at Mburahati kwa Jongo reclaimed by the government for the use by TANESCO. They were allocated other plots at Mabibo/Kigogo. The respondent was allocated Plot No. 42 Block D. He was on 23rd September, 1970 issued with a Letter of Offer of Right of Occupancy No. L.O. 569032. But due to what he termed as "lack of money" he could not develop it. So on 1st July, 1977 it was allocated to the appellant Said who was issued with Certificate of Title No. 23735.

In 1988 when the respondent started developing it the appellant protested alleging the said plot to be his. Efforts for reconciliation failed. The appellant took the matter before Kisutu RM's Court and claimed inter alia, for a Declaratory Order that he was the registered owner of the said plot and that the respondent's Right of Occupancy be cancelled or rescinded. He also prayed for the eviction of the respondent from the said plot and for removal of any structure that the respondent might have erected on the said plot.

The respondent denied the claim and raised counter claim for a Declaratory Order that he was the lawful owner and/or occupier of the said plot and that the appellant's title, if any, be revoked forthwith.

The trial court was of the opinion that when the appellant was purportedly

granted or allocated that plot the respondent's title to that plot had not yet been extinguished, and that the said purported allocation to the appellant was null and void. The appellant's claim was dismissed and the respondent's counter claim was granted as prayed.

The appellant was aggrieved. He lodged this appeal through the legal services of Mr. Mkondya learned counsel. The respondent was represented by Mr. Magesa both before the trial court and before this court. Mr. Mkondya complained that the learned trial Principal Resident Magistrate erred in declaring the respondent the lawful owner of the plot in dispute in view of the evidence of the Kinondoni District Land Development Officer PW.2 VALENTINE who supported the appellant's claim. The learned counsel also challenged the jurisdiction of the trial court in view of S.99 of the Land Registration Ordinance Cap. 334. He therefore submitted that the judgment of the trial court was unlawful and should be set aside and the appellate be declared the lawful owner.

In reply the respondent's learned counsel Mr. Magesa replied that the respondent was rightly declared the lawful owner of the suit plot because the purported revocation of his Right of Occupancy was not made according to the proper procedure.

Replying on the challenge of jurisdiction the learned counsel replied that a Resident Magistrate Court has got jurisdiction to declare as to who is the lawful owner in case of a dispute over a registered piece of land. The learned counsel called upon this court to dismiss the appeal with costs. In short that is the gist of the matter.

There is no dispute that the plot in dispute was allocated to the respondent on 23/9/1970 by virtue of a Letter of Offer of Right of Occupancy No. 569032. There is also no dispute that the respondent paid all the relevant taxes for that plot until in 1988 when a dispute arose over ownership of the said plot.

There is also no dispute that the appellant was allocated the same plot on 1st July, 1977 by virtue of Certificate of Title No. 23735 of 1st July, 1977. Therefore the only crucial issue is as to who is the lawful owner of the said plot between the appellant and the respondent.

According to the evidence of Kinondoni District Land Development Officer PW.2 Valentine he said the respondent failed to develop the plot in dispute as a result of which he was notified by means of a letter that if he would not have developed the plot in dispute as a result of which he was notified by means of a letter that if he would not have developed it within a given time his title would be revoked. He said the respondent did not develop it within that given time and that he did not show cause as to why his title should not be revoked.

So it was revoked on 30/6/77. But this witness did not show any copy of the said notice nor could he prove whether the respondent was really notified. In fact he could not even tell the court as to who revoked the respondent's title nor could he show the court any copy of the alleged revocation.

In the absence of all this it is difficult to believe that the respondent's title was revoked and that it was properly revoked. The case of PATMAN GARMENTS INDUSTRIES LTD V TANZANIA MANUFACTURERS LTD (1981) TLR 303 and the case of PREMI V. CALICO TEXTILE INDUSTRIES LTD - High Court Civil Appeal No. 5 of 1978 DSM are good examples on how a right of occupancy can properly be revoked and the proper grounds for revocation. PW.2 failed to give convincing evidence that the respondent's title was revoked and that it was properly revoked. The trial court's finding on this cannot be faulted and the appellant's complaint on this has no merit and is dismissed.

As for as the question of jurisdiction is concerned it was the appellant himself through his then advocate from 'tkumphrey & Company (Advocate) who instituted the suit praying for a declaratory order. The respondent denied the claim and raised a counter claim in similar footing praying for a declaratory order in his favour. Why did the appellant institute that suit before a Resident Magistrates Court if he knew or believed that it had no jurisdiction? Is he raising this issue because he lost the case? Why didn't he raise it before the trial court if he believed it was an issue worthy consideration by the court? The appellant is just cruying wild. He did not cite any authority which prohibits a Resident Magistrate's Court from issuing a declaratory order or judgment. S.99 of the Land Registration Ordinance Cap 334 Cited by his learned counsel is irrelevant. That is applicable where a party is applying for a prerogative order against the Minister for Lands or the Registrar of Titles. In that case a Resident Magistrates Court has no jurisdiction. In the present case none had applied for a prerogative order. Both parties were claiming to be lawful owner of the suit plot. The court was called in to decide as to who was the lawful owner. The court made a finding that the respondent was the lawful owner and declared him to be so. There is nothing indicating that the value of the subject matter exceeded the pecuniary jurisdiction of the court. That was a simple case of a party claiming his piece of land/plot against a trespasser who is pretending to be a lawful occupier.

The appellant's complaint against jurisdiction of the court is therefore dismissed.

The appellant's learned counsel was also not happy with the learned Principal Resident Magistrate's remark that he was not impressed by the demeanour of the Kinondoni District Land Development Officer PW.2. A trial Magistrate is the best judge of the witness, demeanour because he is the one who sees the witness while giving his evidence. In the present case PW.2 insisted that the respondent was served with a notice requiring him to develop the plot within a certain period and that he did not do so and so his right was revoked and he was notified accordingly. This witness was not present as a Kinondoni District Land Development Officer at that time nor could he produce any copy of the said correspondences. How could a court believe such a witness? The learned trial Magistrate was entitled to weigh his evidence and there is nothing indicating that he weighed it wrongly.

It is upon the above reasons that I have been of the view that this appeal is devoid of merits. It is accordingly dismissed with costs.

S. N. KAJI

JUDGE

14/2/1997

It: Judgment has been delivered in the presence of the respondent's learned counsel Mr. Magea this 14th day of February, 1997.

S. N. KAJI

JUDGE

14/2/1997

CERTIFY THAT TRUE COPY OF THE ORIGINAL.

F.S. MSHOTE
DISTRICT REGISTRAR
 17TH NOVEMBER, 1997