

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MAKANE, J.A., KISANGA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 51 OF 1997

BETWEEN

MICHAEL LESANI KWEKA. APPELLANT

AND

JOHN ELIAFE. RESPONDENT

(Appeal from a Ruling and Order of the
High Court of Tanzania at Dar es Salaam)

(Bubeshi, J.)

dated the 20th day of November, 1995

in

Civil Appeal No. 76 of 1993

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The appellant was the loser before the District Court of Ilala at Kisutu in a dispute over the ownership of Plot No. 92, Block 'D' Part I, at Tabata in Dar es Salaam. The respondent/plaintiff was declared the rightful owner of the plot and was granted all his prayers which included a prayer for a permanent injunction restraining the appellant or his workmen from developing the plot and a demolition and eviction order.

From this decision the appellant appealed to the High Court in Civil Appeal No. 76 of 1993. The appeal was dismissed on 5.8.94 for want of prosecution. The appellant then filed an application for re-admission of the appeal. The application was in turn dismissed on 18.5.95, similarly for want of prosecution. Undaunted, the appellant next filed an application for re-admission of the application for re-admission of the appeal. The application was dismissed for lack of

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merits on 20.11.95. This appeal is from that dismissal, leave to appeal having been granted by the High Court (Bubeshi, J.) on the same occasion.

Learned counsel for the appellant, Mr. Shayo, filed and argued three grounds of appeal. The first ground asserts that Bubeshi, J. dismissed the last application injudiciously. Mr. Shayo submitted in this connection that there was sufficient cause to allow the application because Mr. Mbuya, learned counsel who was to argue the same, had first to attend the Kisumu court and was held up there contrary to his expectation. Mr. Shayo conceded, though, that Mr. Mbuya was imprudent in risking to go to Kisumu first, but submitted that Bubeshi, J. should have been liberal since Mr. Mbuya turned up later on the same day only to find the application already dismissed. He sought to strengthen his argument with a passage from the 8th edition of SARKAR'S CIVIL PROCEDURE, p. 736, where it is stated:

The question is not whether by human possibility, being wise after the event he could not have got in time to the court, but whether he honestly intended to be in court and did his best though in his own stupid way to get there in time.

In reply to the argument, the respondent, appearing in person, submitted that Mr. Mbuya was not diligent but had been a habitual absentee from the commencement of the suit.

We have given consideration to the contending arguments and we can say at once that there is merit in the respondent's side. To begin with, Bubeshi, J. fully considered almost similar arguments by Mr. Mbuya and rejected them. She observed that twice he had absented himself from

the hearing of the application, that he had no regard for the High Court's precedence over district courts, and that even the appellant's son who was in court when the application was called out did not report that Mr. Mbuya was on his way, but merely said that he was listening in on behalf of his father. We think, with respect, that given this scenario, it is incorrect to say that the learned judge reached her decision injudiciously. By enumerating these factors, it is evident that she gave careful consideration to the matter before reaching her decision. We cannot see how liberal she could have been when she did not know that Mr. Mbuya would have turned up. That aside, there is considerable truth in the respondent's charge. We had the opportunity to examine the entire record and cannot help observing that Mr. Mbuya's unexplained absences from the time he got onto the suit make saddening reading. On the same page of Sarkar's work cited by Mr. Shayo, it is also stated: "Less leniency should be shown to pleaders than to parties seeing that it is a pleader's business to attend court regularly and to provide suitably for meeting his daily engagements." Mr. Mbuya failed to provide suitably for meeting his daily engagements. We reject the first ground.

The second ground turns on the merits of the dismissed appeal. It is stated that the trial court did not take the appellant's evidence from a land officer on the revocation of the respondent's right of occupancy. The purpose of this evidence was presumably to show that the appellant had acquired a valid title over the disputed plot. The second ground of appeal therefore contends that the learned judge erred in holding that the issue of revocation was sufficiently considered by the trial court. Replying to this, the respondent drew the Court's attention to the appellant's various annexures in the record of appeal pertaining to the revocation. It should first be pointed out that Bubeshi, J. considered

the fact that the land officer did not testify and observed that the appellant failed to produce the witness despite several adjournments. That is true, in fact on at least one occasion the trial magistrate vacated his order to proceed to judgment in order to enable the land officer to testify but the appellant failed to produce him. As the respondent also argued, the appellant could have taken out a court summons to compel the officer's appearance if he was keeping away but the appellant did not. We think the appellant had himself to blame in these circumstances. What is more pertinent to ask is whether the absence of the land officer's evidence on the revocation occasioned a failure of justice, in other words, whether that evidence, if received, would have tilted the scales in the appellant's favour. It does not appear so. The documents in the record of appeal, pp. 68 and 79 respectively, show that the respondent's title over the disputed plot was revoked on 10.2.92 and that the appellant was offered a right of occupancy over the same plot on 28.2.90. In other words, the offer was made to the appellant while there was a subsisting title over the plot. The omission of this evidence did not by any stretch of imagination prejudice the appellant; on the contrary, it was evidence in the respondent's favour. The second ground is accordingly rejected.

In the third and final ground it is suggested that the trial was a nullity and the Court is invited to invoke its revisional powers. Mr. Shayo stated that the suit was tried in the Resident Magistrate's Court contrary to section 22 (2) of the Land Ordinance (Cap. 113). The subsection requires all claims, other than claims against the government, arising under the provisions of the Ordinance in respect of any rights acquired under a right of occupancy in respect of land situate within the jurisdiction of a district court, to be prosecuted before such court.

Mr. Shayo referred to the unreported decision of the High Court to that effect in Dar es Salaam City Council & Others v. C.M. Mundebe & Another, Civil Appeal No. 39 of 1992. The respondent replied that this matter should have been raised before the trial court. We think, though, matters of jurisdiction, as distinct from objection to the place of suing, may be raised at any stage as they go to the root of the trial. The contention in this case is that the Resident Magistrate's Court had no jurisdiction to try the suit. Fortunately, we do not have to answer that question, or to pronounce on the status of section 22 (2), if these are new issues at all, since the facts appear different. We had the opportunity to scrutinise the original trial record in the course of hearing the appeal and it transpired that the suit was tried in the District Court although it was originally instituted in the Resident Magistrate's Court. We brought this fact to Mr. Shayo's attention. In the end, therefore, the third ground similarly fails.

For these reasons, we find no merit in the entire appeal which we dismiss with costs.


DATED at DAR ES SALAAM this 29th day of May, 2001.

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(F.L.K. WAMBALI)
DEPUTY REGISTRAR