IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: RAMADHANI, J.A., MUNUO, J.A., And NSEKELA, J.A.)

CIVIL APPEAL NO. 28 OF 2002

BETWEEN

FATMA IDHA SALUM .... APPELLANT

AND

KHALIFA KHAMIS SAID .... RESPONDENT

(Appeal from the judgment of the High Court of Zanzibar at Vuga)

(Dourado, Aq. J.)

dated the 18th day of May, 1998
in
Civil Appeal No. 2 of 1998

JUDGMENT OF THE COURT

NSEKELA, J.A.:

This appeal concerns a dispute over a plot of land now occupied by the respondent Khalifa Khamis Said. The appeal originates from the District Court at Vuga wherein the plaintiff (now respondent) in his plaint claimed that he was the owner of plot no. 464 in Mazizini Area by virtue of Offer No. 1422 from the Commission for Lands and Environment dated the 10.6.93. The appellant in her written statement of defence claimed also that she was the lawful owner of part of the disputed plot as she had bought it from one

Juma Saidi Shamte on the 4.6.89 as evidenced by a sale agreement to that effect. She also relied on the Statutory Declaration dated the 10.9.91. On the 14.8.95 the District Court framed and recorded two issues, namely –

1. Je, ni kweli wadaiwa (sic) alikiingilia kiwanja cha mdai?
2. Je, ni nani hasa mwenye milki ya kiwanja kinachobishaniwa?

The appellant in her written statement of defence included a counter-claim claiming ownership of the disputed plot and seeking vacant possession. It is therefore not surprising that the court did not frame and record an issue that the appellant be paid compensation. We shall revert to this matter later on. The District Court ordered that the appellant should vacate the suit premises on which she had encroached upon; that Kamisheni ya Ardhi na Mazingira should pay compensation for the land taken from the appellant and declared the Statutory Declaration as null and void. The appellant was aggrieved by this decision and appealed to the Regional Court. The Regional Court dismissed the appeal in its entirety. Undaunted by this set-

back, the appellant appealed to the High Court where in a terse judgment, the appeal was also dismissed, hence the appeal to this Court.

Before this Court, the appellant raised four grounds of appeal, namely –

1. That the Honourable learned Judge erred in law and in fact by not making a thorough review of the proceedings before him and in not considering the grounds of appeal before him.

2. That the Honourable learned Judge erred in law and fact in not considering the findings of the trial court on Government acquisition of land without compensating the shamba owners contrary to the Constitution.

3. That the Honourable learned Judge erred in law in not addressing himself properly to the issue of compensation of bona fide purchaser improvements as provided under the law.

4. That the Honourable learned Judge erred in law in not addressing himself to the issue of the learned Regional Appeal Magistrate turning himself into a forensic expert and a witness contrary to the law hence arriving to an erroneous conclusion to the injury of the appellant.

At the hearing of the appeal, Mr. Mbwezeleni and Mr. Mnkonje, learned advocates represented the appellant. The respondent appeared in person, unrepresented.

The first ground of appeal was a general complaint. It was the contention of Mr. Mbwezeleni that the learned Judge treated the appeal in a perfunctory manner contrary to the letter and spirit of Order XLVI rule 31 of the Civil Procedure Decree, Cap. 8. There is considerable merit in this complaint. The relevant part of the judgment reads as under:

> "Both the learned District Magistrate and the Regional Magistrate held that the plot was legally conveyed to the Respondent by the Land Commission. The Director of Land Commission who was delegated authority

> signed the document conveying the plot to the respondent. I am unable to see any grounds for upsetting these findings."

As can be gleaned from this key part of the judgment of the High Court, there is a general reference to the decisions of the District Court and the Regional Court with which the learned Judge concurred without explaining the reasons for so doing. The judgment of an appellate court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he/she exercised his/her own mind in deciding the dispute. The provisions of Order XLVI rule 31 of the Civil Procedure Decree are mandatory in nature. The judgment of an appellate court has to set out the points for determination; record the decision thereon and the reasons for the said decision. A wholesale adoption of the judgment of the court below cannot be considered as sufficient compliance with the law.

The second and third grounds of appeal are closely connected and will be considered together. Mr. Mbwezeleni forcefully submitted that the appellant had been evicted from the plot and should therefore be compensated for the unexhausted improvements on the

lands he previously occupied and subsequently granted to the respondent. The learned advocate cited Article 17 of the Constitution and Section 51 of the Transfer of Property Act, Cap. 150 in support of his submissions. The respondent on his part submitted that the appellant was a trespasser on the plot and was not entitled to payment of any compensation. The respondent added that under the Land Tenure Act, 1992, all land belongs to the Government and the Government could acquire land and pay compensation. Furthermore, there was no evidence of any improvements on the land.

It is surprising to us that the appellant should at this stage be raising the question of compensation being paid to her for the purported acquisition of her plot. It is our settled view that if any compensation at all is payable to the appellant is a matter which should have been properly pleaded before the trial court and not raised and decided upon in an ad hoc manner as it was done in the lower courts. In the pleadings, both the appellant in her counter-claim and the respondent in the plaint did not raise the question of acquisition and non-compensation by the Government of plot no. 424. Understandably, this was not one of the two issues framed and

recorded by the District Court. Inexplicably, both the District Court and the Regional Court discussed the matter and made a decision upon it. The High Court (Dourado, J.) declined to discuss the matter since the Government was not a party to the suit. With all due respect to both the District Court and the Regional Court, these issues were not pleaded and should not have been considered. It is now settled law that the only way to raise issues before the court for consideration and determination is through pleadings and as far as we are aware of, this is the only way. Order VII rule 8 of the Civil Procedure Decree provides –

> "Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

In the counter-claim, the appellant was the plaintiff and therefore as a general rule the appellant is not entitled to reliefs

which were not specified in the counter-claim. It is for this reason that we are saying that both the District Court and the Regional Court had no mandate to decide upon an issue which was not raised before the said Courts through pleadings. (see: (CAT) Civil Appeal No. 67 of 2001 between **James Funke Gwagilo and Attorney-General** (unreported). The learned authors of Moghas Law of Pleadings in India (15th edition) at page 6 have this to say –

> "The whole object of pleadings is to give fair notice to each party of what the opponent's case is, and to ascertain with precision, the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue ... The main object of pleadings is to find out and narrow down the controversy between the parties. Contentions which are not based on the pleadings cannot be permitted to be raised e ither at the trial stage or at the appellate stage". (emphasis supplied)

In the fourth ground of appeal, Mr. Mbwezeleni launched a scathing attack on that part of the judgment of the trial Magistrate which doubted the authenticity of the signature of the appellant on

the Statutory Declaration. In the words of the learned advocate, the trial Magistrate had turned himself "into a forensic expert and a witness contrary to the law ..." We would like to point out at the outset that the said Statutory Declaration was not evidence of the ownership of the property described therein. It was a mere assertion on oath that the appellant owned the disputed plot. It was not evidence that he had a better title than that of the respondent (see: (CAT) Civil Appeal No. 15 of 2000 between **Kaderdina Yussuf Osman Hassania and Sadiq Osman Hassania and Two Others** (unreported). Under the Land Tenure Act 1992 public land is vested in the President and the power of disposition of such public land is delegated to the Minister responsible for lands. As stated before, the basis of the appellant's claim to the plot is the sale agreement between Juma Said Shamte and the appellant Fatma Idha Salim dated the 4.6.89. The respondent on the other hand claims to have acquired the disputed plot vide an Offer dated the 8.6.93 issued by the Commission for Lands and Environment. Section 3 of the Land Tenure Act, 1992 provides as follows:-

> "3 (1) All natural land within the islands of Zanzibar occupied or unoccupied, is hereby

declared to be public land and shall be deemed to have been so declared from 8 March, 1964;

(2) Public land is declared to be vested in, and at the disposition of the President, to be held by him, for the use and common benefit, direct or indirect, of the people of Zanzibar.

(3) Subject to the provisions of subject (sic) 2 and to any directions of the President public land shall be administered in accordance with this Act by the Minister, who may make dispositions of public land and perform all powers and duties contained in this Act on behalf of the President.

(4) the Minister may subject to the provisions of this Act, both distribute public lands which are under the control of the Government by grants or (sic) occupancy as well as terminate those rights of occupancy when appropriate as defined by this Act."

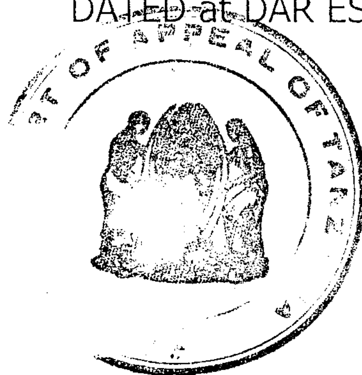
It is the contention of the respondent that he was granted Offer No. 1422 "Barua ya Haki ya Utumiaji wa Ardhi", by Kamisheni ya Ardhi na Mazingira in respect of plot No. 464 (Commission for Lands and Environment) under the Land Tenure Act, 1992. In terms of section 3 (1) of this Act, all natural land was declared to be public land as from the 8.3.64 and became vested in the President on behalf of the people of Zanzibar. This meant that the President had superior title over land in Zanzibar. Under the said Act, the Minister responsible for lands has powers of granting rights of occupancy to individuals. The respondent was such a grantee by being granted an Offer No. 1422 by the Commission for Lands and Environment. Therefore the rights and obligations of the respondent over plot 464 is governed by the Land Tenure Act, 1992. Contrary to the appellant's contentions, the Transfer of Property Act, Cap. 150 is inapplicable. Section 5 of Cap. 150 provides –

> "5. In the following sections, transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself and one or more other living persons and "to transfer property" is to perform such act."

The respondent was granted that piece of property by the Commission for Lands and Environment, a non-living person. In view of the position we have taken that the Transfer of Property Act does not apply to the dispute at hand, it is unnecessary for us to consider sections 51 and 54 of the said Act. Needless to say there was no sale of the disputed plot by the appellant to the respondent. Any remedy that the appellant may have for the purported acquisition of his land does not fall under the Transfer of Property Act, Cap. 150.

In the result, we dismiss the appeal in its entirety with costs.

DATED at DAR ES SALAAM this 10th day of February, 2004.

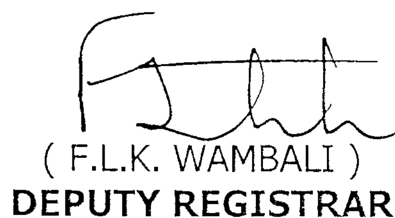


A.S.L. RAMADHANI
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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



(F.L.K. WAMBALI)
DEPUTY REGISTRAR