IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA,J.A., LUANDA,J.A. And MJASIRI,J.A.)

CIVIL APPEAL NO. 129 OF 2008

HARUNA MPANGAOS AND 932 OTHERS..... APPELLANTS

VERSUS
TANZANIA PORTLAND CEMENT CO. LTD.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Manento, J.K)

Dated 26th day of October, 2006
in
Civil Case No. 173 of 2003

JUDGMENT OF THE COURT

11th February, 2009 & 8th Sept. 2010

LUANDA, J. A:

Way back in the 1960's, the respondent, a cement manufacturing factory, acquired a piece of land at Wazo Hill within Dar es Salaam where limestone, the raw material for the manufacturing of cement, is available.

In the 1980's the respondent realized that the area it occupied would not satisfy the demand of the factory, in particular the limestone. So, arrangements were made to secure more land by

buying out those occupying the needed land which is adjacent to the one the respondent was occupying.

It is the respondent's case from a total of twelve witnesses that the village officials of Boko and Tegeta were contacted with the view to securing more land by organizing meetings with villagers. At the end of the day, the respondent managed to buy out a number of villagers by way of compensation after conducting valuation exercise. The land was surveyed and a new title deed incorporating the old and new boundaries was issued (Exht P1). So, the current title deed now comprises plots No. 1, 4 and 7 after effecting payment to the villagers (Ext P3- March, 1993).

It is on record that the valuation exercise was not conducted once. It was done thrice. This is because some villagers surfaced in September, 1993 and 1996 and claimed that they were not paid compensation. The complaints were looked into and those who had genuine claims were compensated (Exht P5). The evidence on record further shows that plants including trees and permanent structures were valuated and payment was duly effected. Indeed,

according to (Exht P3, P4 and P5) a good number of villagers- more than 200 were paid.

However, after the compensation exercise was over some villagers who were paid compensation refused to vacate. The respondent went to the court of law for redress. The court ordered vacant possession in favour of the respondent.

Sometime in 2000/2001 acting on some rumours that the respondent was releasing the area, people started invading the area and built small huts. The act of invading the area alarmed the Boko village chairman, see his letter (Exht P7 of 4/1/2001) who advised the respondent to take immediate action if the rumours were unfounded. Hence the filing of the suit in the High Court.

In the High Court of Tanzania at Dar es Salaam the respondent sued Haruna Mpangaos and 932 others for trespass and prayed for the following reliefs, namely:-

(i) A declaration that the respondent is the lawful owner of the disputed suit land.

(ii) A declaration that the appellants were trespassers

(iii) A permanent injunction order restraining the appellants or their agents from interfering with the respondent's lawful occupation.

(iv) Expenses which the respondent had incurred in clearing structures allegedly erected on the land, estimated at Tsh. 800,000,000/=

(v) General damages.

(vi) Costs.

(vii) Any relief the court deemed fit to grant.

The appellants disputed the claim and maintained that they were occupying the land lawfully. However, out of the 933 appellants only thirteen had testified. And out of that figure nine conceded to have received the money. They, however, refused to vacate because they claimed the amount was small. As to the other four they denied to have received compensation.

After hearing the suit, the High Court (Manento, JK) virtually granted all the reliefs prayed, save expenses which the respondent claimed to have incurred in clearing some structures. The trial High Court assessed and awarded the respondent Tsh. 100,000,000/= as general damages.

Aggrieved by the decision of the High Court, the appellants have preferred this appeal. Mr. Mabere Marando and Mr. Benito Mandele advocated for the appellants and have filed eleven grounds. Essentially the grounds raised can conveniently be categorized into two groups. One, there are those covering purely legal issues. The appellants are contending that the following laws were either not followed or flawed, namely, the Land Registration Act Cap. 332, the Land Acquisition Act, Cap. 118 and the Land Survey Act, Cap. 324. Two, there are those touching on the evidence. That the trial learned Judge decided the case against the weight of evidence in particular the appellants were not trespassers, that the village leaders could not negotiate and consent to the acquisition of the individual land in question which is not the Village property, and that there is no basis or justification in awarding the respondent general damage to the tune of Tsh 100,000,000/=.

In this appeal Mr. Rostam Mbwambo, learned Counsel represented the respondent. Mr. Mbwambo resisted the appeal and maintained that the appellants were trespassers. He also filed a notice of cross – appeal which in essence is similar to that raised by

the appellants that Village leaders could not, on behalf of the Villagers, have consented on the disposition of the disputed individual land. He prayed that portion be quashed and set aside as it is not borne out by evidence on record. All in all, he prayed that the appeal be dismissed with costs.

It was the finding of the trial High Court that land comprising Plots Nos. 1, 4 and 7 Wazo Hill Area, Dar es Salam belonged to the respondent after it bought out by way of paying unexhausted improvements to the occupiers thereon. The appellants are challenging that finding. Mr. Marando attacked the manner in which the respondent came to own the land by not following the laid down procedure of acquiring such land. His attack centers on three pieces of legislation namely, the Land Acquisition Act, Cap. 118, Land Registration Act, Cap 332 and Land Survey Act, Cap 324 and the evidence as a whole. We start with those touching on laws. We first start with Land Acquisition Act, Cap. 118.

It is the submission of Mr. Marando that there are two ways for one to acquire land. One is by way of purchase. The other is

through acquisition by the President of the United Republic in the interest of the public.

The latter, according to Mr. Marando, is governed by the Land Acquisition Act, Cap. 118. The taking of appellants' land appears to have invoked the said law, he submitted. Since, it was not the President who acquired the land, such acquisition was not proper, he contended.

In reply to this ground Mr. Mbwambo submitted that what in essence took place was a disposition. The occupiers were paid their respective entitlements representing the value of development made thereon. The question of acquisition as per the above cited law is out of place.

This aspect should not detain us as there is nothing in the record to suggest that the land was acquired by the President under the provisions of the Land Acquisition Act, Cap. 118. On the contrary the evidence on record on the respondent's case which the trial learned Judge had accepted as true shows that the respondent managed to get the land by buying out, so to speak, the occupiers thereon. We shall discuss at a later stage in this Judgment whether

or not the taking of such land by the respondent was proper. Suffice to say that under the aforestated circumstances we are unable to see how the Land Acquisition Act, Cap. 118 came into play. The Land Acquisition Act, is not applicable at all.

Next is the Land Registration Act, Cap. 334. It is the submission of Mr. Marando that since the respondent acquired the land for the first time, then the same ought to be registered under section 12 of Part II of the Land Registration Act, Cap. 334. And the procedure is for the Registrar of Titles to publish in the official gazette and in any other new papers he deems fit to do so and give notice to the adjoining neighbours who might be affected. Since that was not done, the respondent did not acquire the land lawfully, he submitted.

On the question of registration, Mr. Mbwambo said section 12 of the Land Registration Act, Cap. 334 should not be read in isolation. It should be read together with section 8 of the same Act which spells out what title is to be registered. He submitted that according to section 8 of the Act the title to be registered must be a registrable estate in the form of a freehold or leasehold or a deemed freehold or

leasehold. The land the subject matter of this appeal is a right of occupancy. It is not covered under the said law. It is his submission that the Land Registration Act, Cap. 334 does not apply.

The trial learned Judge agreed with the submission of Mr. Mbwambo and held that the Land Registration Act, Cap, 334 is not applicable.

We have gone through the submissions of both sides as well as the law. We entirely agree with Mr. Mbwambo. Section 12 of the Land Registration Act, Cap. 334 merely provides the manner in which the first registration of title is made. It does not however spell out or state what should be registered. That which is to be registered is provided for under section 8. And what is to be registered is a freehold or leasehold or deemed freehold and leasehold but does not include a right of occupancy. Section 12 provides:-

> 12(1) Every application for first registration shall be advertised by the Registrar at the expenses of the applicant in the Gazette and in such one or more newspapers, if any, as the Registrar may decide.

And section 8 reads:-

8(1) For the purposes of this Part the expression "registrable estate" means a freehold estate or a lease, or any estate which is by the provisions of the Act deemed to be freehold or leasehold, but does not include –

(a) a lease for an unexpired term of five years or less unless such lease contains an option whereby the tenant can require the landlord to grant him further term or terms which, together with the original unexpired term, exceed five years; or

(b) a lease from year to year or for periods of less than a year whether or not the lease includes an initial fixed term, unless such initial fixed term exceeds four years; or

(c) a right of occupancy whether a certificate of occupancy has been issued in respect thereof or not

(2) An estate of absolute ownership acquired before the 26th day of January, 1923, shall be deemed to be a freehold estate.

(3) An Erbbaurecht or hereditary right of construction granted under German law during the German administration of Tanganyika shall be deemed to have created a lease of land thereby affected.

(4) Any land previously held in absolute ownership which has been validly endorsed or dedicated as wakf under Muslim law shall be deemed to be freehold notwithstanding such endowment or dedication.

In the instant case the respondent was granted a right of occupancy as per **(Exht P1).**

And a right of occupancy is not one of the registrable estate provided under Section 8 of the Land Registration Act, Cap 334. It follows therefore that the cited law is inapplicable in this case.

We now turn to the Land Survey Act, Cap. 324. It is Mr. Marando's submission that Section 8, and its proviso (i) of the Land Survey Act,Cap.324 read together with Rules 7 and 8 of Cap 324 (subsidiary legislation) makes it mandatory that whenever a survey is to be effected or carried out, the owners of the land earmarked for the survey must be given reasonable notice. To buttress his point he referred us to **Obed Mtei v Rukia Omari** (1989) TLR 111 where

this Court held, *inter alia,* that before making any survey it is the duty of the land officer to make sure that all third party interests are cleared and if it is a farm the land officer to see to it that the owners agree on the boundaries.

As that was not done, Mr. Marando urged us to declare that there is no lawful boundaries of the land claimed by the respondent.

Reacting to this ground, Mr. Mbwambo said the survey was done after the respondent had bought out the appellants. Thus, there was no occupier or owner other than the respondent; hence there was no need of issuing the aforesaid notice.

In resolving this issue the trial learned Judge in his judgment said:-

> *"At the stage of survey, the plaintiff [Respondent] was already the owner of the said land thus he was the person to be notified of the survey to be conducted".*

Earlier on he had thus observed:-

"After the compensation then the plot was surveyed in the 1990's and a title deed No. 42336 was issued and a certified photocopy annexure A was produced as exhibit without objection. It was marked exht P4".

From above the learned trial Judge is saying that there was no need of giving notice as there were no owners other than the respondent. And that is what Mr. Mbwambo was contending.

Under section 8 and its provision (i) of the Land Survey Act, Cap 324, it is required anyone who has been assigned to conduct a survey or to do any matter in connection with survey, before entering any such land to issue a reasonable notice where the circumstances permit or allows, otherwise he can enter and carry out the assignment without issuing the same provided in our view sufficient grounds or reasons exist. The section reads:-

8. The Director or any land surveyor or any person authorized by the Director either generally or specifically, may enter upon any land with such unlicencesed assistants as may be necessary; for the purpose of

(a) making any survey;

(b) affixing or setting up thereon or therein any survey mark;

(c) inspecting any survey or survey mark;

(d) altering, repairing, moving or removing any survey mark;

(e) doing anything necessary for carrying out any of the above said purposes.

Provided that:-

(i) before so entering upon any land the Director or land surveyor or the authorized person shall, whenever practicable, give reasonable notice to the owner or occupier of the land of intention to enter thereon.

(ii) N/A.

The question now is whether at the time of the survey the entire disputed land belonged to the respondent and hence there was no need of issuing a notice. And the idea behind giving notice in this case as held in **Obed** case cited *supra* was for the owners of the land to agree on the boundaries.

First we wish to point out at the outset that Exht P4 referred in the above quoted passage from the judgment of the trial High Court

has nothing to do with a title deed. Exht P4 is a letter of 21/9/93 from the Ministry of Lands, Housing and Urban Development addressed to the General Manager of the respondent.

The title deed is Exht P1. However, Exht P4 which is relevant and a good piece of evidence has two important features. One, it contains grievances of those owners or occupiers whose land was taken but they were not paid. Two, it contains their number and the amount of money they were entitled to be paid as compensation. By then the title deed ExhtP1 had already been issued. The title deed was issued on 27th May, 1993. Not only that even Exht P3 which contains a list of 377 payees to pave way for the respondent to take over the land, leave alone those paid in 1996 after they had lodged their complaints shows that payments were effected from June, 1993 onwards and not before the issuance of the title deed. According to the available evidence on record a title deed is preceded by a survey. It is crystal clear that the survey was done while the owners or occupiers were yet to be compensated. We are of the settled view that at that juncture the respondent had yet to acquire the disputed land. We are unable to go along with Mr. Mwambo and the trial learned Judge on this point.

Having resolved that question the next and obvious issue is whether or not before compensation and survey the appellants were given reasonable notice or there were reasons which prevented them from being given the same.

The available evidence in the record shows that those appellants who were paid compensation were very much aware about the survey which was to be carried out. It is no wonder no one protested in any way including filing a suit in a court of law to challenge the manner in which the exercise of suveying was conducted. However, their main complaint was that the amount paid was either inadequate or some were not paid at all but later were paid. Under the above circumstances, we are satisfied that notice was given before the survey was carried out.

Last but not least is the evidence as a whole. This will enable us consider whether the finding of the trial High Court is supported by the evidence on record.

It is the case for the respondent that after paying compensation to those who were occupying the land now christened

as Plots Nos. 1,4 and 7 as evidenced in Exht P1 they lawfully acquired the land. The respondent thus asked the trial High Court for vacant possession, *inter alia,* as the appellants were trespassers. The appellants on the other hand disputed the claim and maintained that they were not trespassers; they were occupying the suit land lawfully. However, out of 933 appellants only 13 testified for the defendants' case. And these 13 each maintained to own a piece of land separately from another. In otherwords there is no evidence advanced in respect of 920 appellants, as each one of them testified in relation to his or her own piece of land and no more.

Since the land is not jointly owned by all the appellants, and since it is them in their individual capacities who claimed to have a better title than the respondent and as that is one of the issues raised in the suit, in terms of O.XVIII Rule 3 of the Civil Procedure Code Cap.33 it was the duty of each appellant and not someone else to testify and prove on balance of probabilities that the disputed land belonged to each individual. That was not done. Only 13 gave evidence. In actual fact even those 13 appellants did not testify for and on behalf of 920 which is not proper either, if they had happened to do that.

In **Nafco v Mulbadaw Village and Others** [1985] TLR 88 this Court, held, inter alia, we quote.

> *" There is no evidence as to when each villager had occupied or was in possession of the land,.... In any event each villager had to prove his own case. Each claim is different from the other, in terms of date of possession, of acreage, of the method of acquisition, and so on. They were individual claims. A person may act and represent another person, but we know of no law or legal enactment which can permit another person to testify in place of another".*

As there is no evidence coming from 920 appellants to assert their rights over the land, it is very difficult to sustain their claim.

We are now turning to the 13 appellants who testified. The thirteen appellants could conviently be divided into two groups. The first group comprises those who admitted to have been paid compensation but were not ready to part with their pieces of land

because either the amount paid was inadequate or/and forced to receive the same. These are Mwahoja Shabani Kambi (DW1), Rajabu Ally (DW3), Parazi Mwinyihamisi (DW4), Mwamvua Mnyamani (DW5), Hussein Haogwa Mkwavi (DW7), Rashid Alli Mangwanga (DW10) Zainabu Mfaume (DW 11) Ramadhani Mnyamani (DW12) and Richard Mahiri (DW13).

The second group consists of Muhidin Haogwa (DW2), Fardinand Joseph Mushi (DW6), Mbaruku Alli (DW8) and Shaban Tufi (DW9). These denied to have been paid compensation. Like those in the first group they were also not prepared to part with their real property.

We prefer to start with those in the first group. We have gone through the evidence. The allegation that they were forced to accept the compensation and were not adequately paid were raised for the first time during the trial after ten years. One would have expected the same to have been raised immediately or soon after payments were effected. To raise the complaints after a period of ten years to say the least is, in our view, an afterthought. We are unable to agree with them. It is our settled opinion that these appellants freely

disposed of their individual pieces of land and were adequately compensated. They are trying to be clever after the event.

As regards to the second group we also find their claims to have no merit. Muhidin Haogwa (DW2) gave contradictory evidence as how many acres he owned. In his evidence in chief he said 35 acres. When he was cross examined he said 16 acres. He also said he got the land from his late father one Haogwa Mkwavi in the 1990's but who as he had said, died in 1984! But his late father was compensated (See Exht P3 item 46). His evidence is not worth of belief.

Ferdinand Mushi (DW6) informed the trial court that he owned an acre which he was given by Richard Mahiri (DW13). He claimed to have planted banana, coconuts, vegetables and kept animals. But if the respondent paid for cassava stems 150 in number to one Sangenya Mikuto standing on his land as evidenced in Exht P5, it suprises us for DW6 not to have been compensated for banana and coconuts, if at all he planted them. Chances are that either he did not plant anything and by then in law land per se had no market

value so he could not be compensated for a bare land or Richard Mhiri (DW13) took it in disguise that he owned the entire land.

Mbaraka Ali (DW8) and Shabani Tufi (DW9) on the other hand did not say the acreage of their shamba nor the manner in which they came to own them. We are in doubt whether really they own the shambas in question. All these appellants falling into this group failed to prove their claims on a balance of probability.

There is yet the question of general damages. The trial learned Judge awarded the respondent Tsh. 100m/= as general damages without the same being prayed for and without any evidence that the respondent suffered that much. Obviously that was not proper. The same cannot stand.

Finally, is the cross-appeal. In his judgment, the learned trial Judge held, we quote:-

> *"... the plaintiff negotiated with the occupiers of the suit land through their village leaders".*

It is elementary that a village leader or any person for that matter has no mandate to negotiate on behalf of the owners of the land in

question unless that village leader or person has an express authority from the owner of that land to act on his behalf.

In the instant case the individual occupiers accepted compensation. That in our view indicated consent on their part that they were ready to surrender the land to the respondent. No village official acted on their behalf. The learned Judge misdirected himself on this aspect. We accordingly quash that finding.

In sum we dismiss the appeal in its entirety with costs.

Order accordingly.

DATED at DAR ES SALAAM this 4th day of August, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR