

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MJASIRI, J.A., MMILLA, J.A., And MZIRAY, J.A.)

CIVIL APPEAL NO. 58 OF 2013

ESHIE MOSSY MBARUKU APPELLANT

VERSUS

1. BI KUNGWA RAJABU 2. REHEMA RAJABU (as Administratrix of the Estate of the late RAJABU MBARUKU)	} 1ST RESPONDENT 2ND RESPONDENT
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**(Appeal from the Judgment and Decree of the High Court
of Tanzania Land Division at Dar es Salaam)**

(Rumanyika, J.)

dated the 13th day of February, 2013

in

Misc. Land Appeal No 78 of 2011

JUDGMENT OF THE COURT

10th February & 17th March, 2017

MZIRAY, J.A.:

This appeal is against the judgment and decree of the High Court (Land Division) dated 13/2/2013 which upheld the decision of the District Land and Housing Tribunal of Kinondoni in Application No. 348 of 2005 delivered on 16/6/2011.

Briefly stated, this appeal has this history. The first and second respondents are sisters and the surviving daughters of one Rajabu Mbaruku. The appellant is the sister in-law of the two, having been married to their brother, one Mbaruku Maulid. The second respondent is the administratrix of the estate of the late Rajab Mbaruku. The dispute between the parties is centered on house No. 9/29 A, Block "A" – Mwananyamala in Kinondoni District. On one hand the appellant alleges that she was a tenant since 1979 and later on 24/12/1999 she purchased the disputed house from the respondents' father, the late Rajab Mbaruku. On the other hand, the first respondent is claiming ownership alleging that her husband purchased it from National Housing Corporation (NHC) in 1965 through tenant purchase scheme. This version is supported by the second respondent.

Problems cropped up when the appellant initiated the process of transferring the house in dispute in her name. She failed to effect the transfer upon being informed by the Ministry of Land, Human Settlements and Urban Development that the plot was registered in the name of the first respondent. Having discovered that she has been conned by the respondents' father, the appellant filed two cases. She simultaneously filed Criminal Case No. 656/2003 of obtaining money by false pretences against

Rajab Mbaruku in the Primary Court of Kinondoni and Misc Civil Case No. 5 of 2003 against the first respondent in the District Court of Kinondoni seeking a declaration that she is the rightful owner of the disputed house together with all the improvements thereon. The District Court declined to declare her the rightful owner instead it ordered the respondents' father to refund her the purchase price of Shs. 3,000,000/=. In the criminal case the accused, (Rajab Mbaruku), was convicted and placed on probation for one year and in addition was ordered to refund the appellant the purchase price of Shs. 3,000,000/=. Being dissatisfied, she successfully filed Criminal Appeal No 16/2005 in the District Court of Kinondoni which upheld the decision of the Primary Court and ordered the appellant to remain in the disputed house until the purchase price and costs of the renovation she incurred are fully paid.

The legal wrangle did not end there. In 2005, the first respondent filed Application No. 348 of 2005 in the trial tribunal against the appellant and second respondent seeking vacant possession and compensation for unlawful occupation to a tune of Shs. 1,000,000/= per annum with effect from the year 2000 to the date of final determination of the application. The appellant raised a counter-claim against the respondents seeking for the refund of Shs. 3,000,000/= which she paid as purchase price, Shs.

17,000,000/= as renovation costs and general damages to the tune of Shs 10,000,000/=. In its decision, the trial tribunal ordered the appellant to deliver vacant possession within a period of 30 days from the date of the decision and all other claims including the counter-claim were dismissed.

Discontented by the decision, the appellant filed Land Appeal No. 78 of 2011 in the High Court, Land Division consisting of eight grounds of appeal on which in essence she complained of the dismissal of her counter-claim and on her second point she criticized the trial tribunal's decision for having failed to consider the decision of the District Court of Kinondoni in Criminal Appeal No. 16 of 2005. The District Court of Kinondoni had ordered for the refund of the sale price and renovation costs on the disputed house. At the end of the day, the first appellate court dismissed the appeal with costs and ordered the appellant to give vacant possession forthwith and additionally to compensate the first respondent Shs. 1,000,000/= per annum with effect from the year 2000 till the date the first respondent takes possession of the disputed house.

Aggrieved, the appellant filed this second appeal advancing nine grounds of appeal which are basically predicated upon the following complaints, namely;

- (1) *The High Court erred in awarding the first respondent compensation of Tshs. 1,000,000/= per year from 2000 to the date of payment, a relief which was not among the grounds of appeal and there was no cross- appeal filed by the first respondent.*
- (2) *The High Court erred in not entertaining the counter-claim by the appellant.*
- (3) *The High Court erred in not considering the Order of Kinondoni District Court in Criminal Appeal No. 16 of 2005 which ordered the appellant to remain in the suit premises until when she is paid back the purchase price.*
- (4) *The High Court erred in holding that the issue of adverse possession was not part of the appeal before the Court.*

At the hearing of the appeal, on 10/2/2017, Mr. Audax Vedasto learned Counsel represented the appellant and Mr. Reginald Martin, learned Counsel represented the respondents.

Mr. Vedasto in arguing the appeal, adopted his written submission and argued further before us on the first ground that in determining the matter the trial tribunal, as reflected at page 155-158 of the Record of Appeal, dismissed the applicant's claim of Tshs. 1,000,000/= and that there was no appeal to that effect. The learned counsel went on to state that the High Court erroneously awarded the first respondent undeserved sum of Tshs. 1,000,000/= as compensation. It is the learned Counsel's submission that the amount awarded was neither pleaded nor stated as one among the reliefs sought in the grounds of appeal. On that basis therefore, the learned Counsel argued that it was a fatal error for the High Court to vary the decision of the trial tribunal without there being an appeal to that effect and it found also as an error to award the first respondent Tshs 1,000,000/= without considering the fact that the same was not one among the relief sought in appeal. Additionally it found that there was no cross-appeal by the first respondent to contest the dismissal of this prayer by the Trial Tribunal. To support his argument the learned counsel referred us to the cases of **Melita v. Sailevo Loibanguti** [1998]

TLR 120, **Georgia Celestine Mtikila vs Registered Trustees of Dar Nursery School and International school** [1998] TLR 512, **AICC V. Dr. Edward Clemens** [1989] TLR 154, **Zacharia Milolo vs. Onesmo Mboma** [1983] TLR 240 and that of **Cooper Motors Corporation (T) LTD v. AICC** [1991] TLR 165.

In relation to the second ground of appeal, the learned counsel submitted that it was wrong for the High Court to conclude that the issues raised in the counter-claim were not *per se* land disputes. On this point he argued that the appellant in the counter-claim was actually claiming a refund of the purchase price of the suit land, renovation costs and injunction against possession by the respondent. He argued that the trial judge did not even attempt to define a land dispute nor did he show why he thought these claims are not within the purview of land dispute. It is the submission of the learned counsel that so long as land is a subject matter or object of a dispute, then that is a land dispute. The learned counsel referred us to section 167(1) of the Land Act –Cap .113 R.E. 2002 which according to him confers jurisdiction to all land Courts to hear and determining all manner of disputes, actions and proceedings concerning land. It is his contention that issues of refund of the purchase price and renovation costs falls squarely under this provision.

The third ground is whether a decision in criminal proceedings can have binding effect in a case of civil nature. As it will be seen in the record of Appeal at page 131-132, while parties in this appeal were trying to pursue their rights by way of civil litigation the appellant registered Criminal Appeal No. 16/2005 in the District Court of Kinondoni which decided that since the appellant incurred costs in renovating the suit land then she deserved to enjoy possession until she is paid back costs for renovation. It is the contention on the learned Counsel for the appellant that in so long as this decision was not appealed against, then it had a binding effect to any other judicial proceedings. The learned counsel therefore concluded that it was an error for the trial tribunal as well as the High Court to disregard the decision in Criminal Appeal No. 16/2005 which had a binding effect to the two courts. He fortified his argument by referring us to the cases of **Amani Chogo Chacha V Roba Nyamtara** (1967) HCD 433 and the decision in the case of **Stephen Wasira V. Joseph Warioba** (1999) TLR 334.,

On the last ground raised on adverse possession, the learned Counsel argued that the High Court missed the point by stating that the issue of

adverse possession could not be argued because it was not part of the grounds of appeal.

In his effort to convince this Court that the doctrine of adverse possession could be invoked, the learned Counsel brought an interesting point and submitted that the second respondent had been since 1979 exercising all the powers of the owner of leasing and receiving rent over a period of 12 years, then she got ownership by way of adverse possession, and thus had all powers over the land, including powers to sell it. It is the argument of the learned Counsel that since the second respondent's possession started in 1979 and was going on in 1999 when she signed the sale agreement, then the High Court was to accept the second respondent as a person with power to transact on all matters over the suit property binding the first respondent, in which case the sale would also bind the first respondent and in exercise of those powers, she did so as an adverse possessor. In that regard, he concluded that the doctrine of recent possession could be safely invoked.

Conclusively, Mr. Vedasto invited us to fault the High Court's decision and proceed to quash and set it aside; grant all the reliefs prayed by the appellant in the High Court with costs.

On his part, Mr. Reginald Martin learned Counsel for the respondent, submitting in reply to the first ground of appeal briefly argued that there was no error committed by the lower courts in awarding the respondent Tshs.1,000,000/=. He pointed out that both the District Land and Housing Tribunal and The High Court had power to grant any relief deemed fit where interest of justice demanded. He therefore dismissed the first ground of appeal to be of no substance.

In response to the second ground of appeal, the learned Counsel submitted in essence that the trial tribunal was right to reject the counter-claim as the relief sought in the counter-claim related basically to refund and compensation and had no direct link with land matters.

Reacting to the third ground of appeal on the issue of failure to consider the Order of Kinondoni District Court in Criminal Appeal No. 16 of 2005, the learned Counsel was of firm view that since the first respondent was not a party to that criminal proceeding, therefore, the order made in that case did not bind her.

In response to the last ground of appeal on the issue of adverse possession, the learned Counsel pointed out that the appellant was a

tenant in the house in dispute until in 1999 when she purported to purchase it. In his view, the time of 12 years on which a person claim ownership under adverse possession started to run from the date he purchased the house in dispute and not otherwise. On that basis, the learned counsel strongly argued that in the situation at hand, the claim of ownership under adverse possession cannot arise. He challenged the arguments brought forward by Mr. Vedasto to have no substance hence misleading.

We are grateful to the learned Counsel for their respective brief submissions. However, we will have to start with the first ground of appeal as argued by both learned Counsel.

In determining the matter, the District Land and Housing Tribunal for Kinondoni at Kinondoni stated and we quote:-

"Finally this application is allowed only to the extent that the first respondent to vacate in the suit premises within 30 days from today.

A Claim of Tshs. 1,000,000/= as raised by the applicant is dismissed, equally the counter claim by the first respondent"

[Emphasis Supplied].

In view of that decision it is quite obvious that the claim of Tshs. 1,000,000/= by the first respondent was dismissed. On appeal to the High Court, none of the parties complained against the dismissed claim; but the High Court when entertaining the appeal, among other things, awarded the first respondent Tshs 1,000,000/= as compensation. It is clear from the Record of Appeal that this was not one of the reliefs sought in the grounds of appeal. With greatest respect, the High Court slipped in an error to grant this relief. Cases must be decided on the issue on the record. (See **Grace Umbe Mwakitwange vs. Suma Clara Mwakitwange Kaare** and 7 others, Civil Appeal No 88 A of 2007 CAT Dar es Salaam, **Kombo Hamis Hassan v. Paras Keyoulous Angelo**, Civil Appeal No. 14 of 2008 [both unreported] and **Melita v. Sailevo Loibanguti** [1998] TLR 120). However, in the **Melita** case it was decided that the High Court being the first appellate court was supposed to deal with the appeal as presented and not otherwise. The Court further stated;

".....we think it would be most unfair to the respondent to decide this case on this issue, when it was not raised in the first appeal".

That being the position and on the basis of the preceding authorities cited herein above, we totally agree with Mr. Vedasto that it was a fatal error for the High Court to award the first respondent Tshs. 1,000,000/= as compensation, a relief not founded on the ground of appeal and there was no cross-appeal filed by the first respondent to that effect. The first ground of appeal therefore succeeds.

The issue of counter-claim on the second ground of appeal should not waste much of our time. The counter-claim by the appellant is based on costs of renovations and refund of purchase price. These costs could be land matters and fall under the purview of section 167(1) of the Land Act if there was evidence led specifically and sufficiently to prove that the appellant incurred expenses at the tune of Shs. 17 million to renovate the suit premises. There was no evidence to that effect advanced before the trial tribunal. It was expected for the appellant to at least come forward with cost breakdown to show how the figure of Shs. 17 million was reached. On the claim of the refund of the purchase price the first respondent did not have such obligation because she was not a party to the agreement executed for the sale of the disputed house. Above all, she never received even a single cent of the amount allegedly paid as sale price. It is at this point that we agree with the High Court that the claim on

the refund of purchase price and costs of renovations by the appellant were purely based on monetary recoveries, other than land dispute. In view of that therefore, we find that the trial tribunal committed no error in not entertaining the counter-claim. This ground of appeal also fails.

Regarding the issue that both the trial tribunal and the High Court did not consider the Order by the District Court of Kinondoni in Criminal Case No. 16 of 2005, with greatest respect, it is a principle of law that wherever there is conflict of interest over landed property, matters should not be taken for criminal proceedings but the same should be resolved in civil courts to determine the issue of ownership (See for instance the decisions in **Ismail Bushaija V.R** [1991] TLR 100 and that of **Said Juma V.R.** [1968] HCD 158. Since the matter at hand was a land dispute, then the High Court was right to ignore the Order of the District Court in Criminal Appeal No. 16 of 2005. Also, the High Court being a superior court is not bound by any decision of the inferior court even if the said decision is not appealed against.

On the last ground raised, the learned counsel for the appellant argued that the High Court missed the point by stating that the issue of adverse possession could not be argued because it was not part of the grounds of appeal. It is true that this issue was not part of the grounds of

appeal before the High Court but we think that because it is a point of law and is also embodied in the grounds of appeal before us, we find that as a final Court of the land and for the interest of justice we have an obligation to decided on the issue.

The argument brought forward by Mr. Vedasto is that since the second respondent has exercised all the powers of the owner from 1979 - 1989, which is a period of over 12 years, then in exercise of those powers, she did so as an adverse possessor. With respect, the argument does not sound well in our mind and we have to say that this line of thinking is not convincing to us. In the first place, the appellant was, as aforestated, a licensee. This being the case, she cannot rely on the doctrine of adverse possession. Even where we were to agree with Mr. Vedasto that the ground of adverse possession had any weight, which is not the case, still it could not have bailed out the appellant because from 1999 which we have said is the year when she could be regarded as having started the claims over that property, only six years had elapsed up to the point when the matter was filed in the trial tribunal. Therefore, on this angle too, this ground is baseless.

On that basis therefore the appeal is partly allowed to the extent explained.

As the appeal is partly successful, we make no order as to costs.

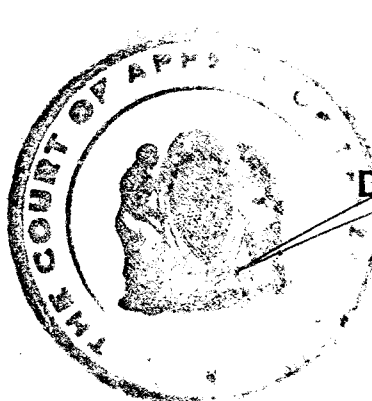
DATED at DAR ES SALAAM this 9th day of March, 2017.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL