IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MWARIJA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 57 OF 2017

LEOPOLD MUTEMBEI ..... APPELLANT

VERSUS

PRINCIPAL ASSISTANT REGISTRAR OF TITLES, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT ..... FIRST RESPONDENT

THE ATTORNEY GENERAL ..... SECOND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated the 28th day of August, 2014
in
Land Case No. 27 of 2009

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JUDGMENT OF THE COURT

5th & 12th October, 2018

NDIKA, J.A.:

This appeal arises from the decision of the High Court at Mwanza dismissing with costs the appellant's claim against the respondents for general damages in the sum of TZS. 384,000,000.00. The said sum of money was for alleged loss suffered following his eviction from a room he occupied on a tenancy in a commercial building situate at Plot No. 159 Block 'T', Lumumba Street, Mwanza City (property in dispute). The

appellant essentially claimed that he was on 24th February, 2009 driven out of the demised room at the instance of one Mr. Lameck Airo upon an order issued by the District Land and Housing Tribunal of Mwanza (the DLHT) after the said tribunal had acted on false information issued by the first respondent that the said Mr. Airo was the registered owner of the disputed property. It was the appellant's case that the said Mr. Airo's title to the disputed property was based on a bogus certificate of title and, therefore, he was wrongly registered by the first respondent as the owner of the property in dispute. Feeling that justice was not rendered in the aforesaid decision of the High Court, the appellant now appeals to this Court on fifteen grounds.

The brief background to this appeal is as follows: on 7th April, 2003, the appellant entered into a one-year renewable lease (Exhibit P.1) with one Faustina Emmanuel over a single room in the disputed property at the annual rent of TZS. 1,800,000.00. The said Ms. Emmanuel allegedly executed the lease on behalf of her sons Prosper Emmanuel and Diogen Emmanuel, who were then the registered joint owners of the property in dispute. While still in occupation of the demised room, on 1st November, 2005 the appellant was served with notice (Exhibit P.5) by the aforesaid

Mr. Airo to yield up to him vacant possession of the demised room, the latter claiming to be the new owner of the property in dispute. The appellant refused the demand as he established, based on an official search report he received from the first respondent dated 21st November, 2007 (Exhibit P.6), that the ownership of the suit property had then reverted to His Excellency the President of the United Republic of Tanzania. In response, Mr. Airo sued the appellant for vacant possession of the demised room in the District Land and Housing Tribunal of Mwanza (the District Tribunal) but that action ended vainly as the said Mr. Airo was found to have no registered title to the property in dispute. The District Tribunal's ruling dated 24th October, 2008 was admitted in evidence as Exhibit P.7.

On 29th December, 2008 the appellant was served with another quit notice (Exhibit P.8) from Kabonde and Magoiga law firm acting on behalf of Mr. Airo. On the same day he conducted an official search at the first respondent's offices on the status of ownership of the property in dispute and learnt from a report (Exhibit P.9) that Mr. Airo had then been registered as its occupier. Subsequently, on 5th January, 2009 Mr. Airo instituted an application against the appellant (Miscellaneous Application

No. 157D of 2008) in the District Tribunal for an order of eviction. The application was granted and eviction order was issued as evidenced by Exhibit P.10. Pursuant to the aforesaid order, on 24th February, 2009 the appellant was evicted from the demised room by a broker duly appointed by the District Tribunal.

It was the appellant's case that his eviction was contributed by the first respondent who dubiously registered the said Mr. Airo as the owner of the property on the strength of a spurious certificate of title. In this regard, the appellant is recorded at page 201 to have claimed at the trial that:

> *"I contend that the cause for my being evicted from my business had to a big extent got contribution from the first defendant [first respondent herein]. This is from the fact that she did register Lameck Airo in the property that was owned by the President of the URT. It is my belief that without such an act, I could not have been evicted from the first instance."*

The appellant claimed further that following his inquiries from the Mwanza City Land Office conducted on 10th June, 2008, 2nd July, 2008 and 11th November, 2008 he learnt that the said office did not recognize Mr. Airo as the lawful owner of the property. It appeared that the entry of Mr.

Airo's name in the Land Register was made without the consent of the Commissioner for Lands having been sought and obtained. He further claimed that the unlawful act of the first respondent led to his eviction resulting to loss of his place of business since 24th February, 2009. He estimated the occasioned loss at TZS. 384,000,000.00. In support of his claim, PW2 Fatuma Mohamed, an avowed frequent customer at the appellant's shop, adduced that she visited the shop sometime in 2009 but she found it closed down.

The case for the respondents rested on the evidence adduced by Ms. Margaret Julius Mziray, a Principal Registrar of Titles. In a chronological account of the ownership of the property that she presented, she said that the said property was originally allocated to Said Amri on 1st January, 1990 as evidenced by the certificate of occupancy issued on 5th December, 1990 (Exhibit D.1). It was subsequently registered in the name of Said Amri on 9th November, 1995. She tendered an extract from the Land Register (Exhibit D.2) showing the flow of change of ownership of the property as follows: on 2nd August, 1996 Mr. Rogers Clement Kidogo replaced Said Amri as the occupier; then, on 3rd February, 1997 Mr. Fabian Anthony took over occupancy; on 24th September, 1997 Mr. Prosper Emmanuel and Mr.

Diogen Emmanuel became joint owners; on 21st December, 2007 Ms. Consolata Joseph took over ownership; and finally, on same day (21st December, 2007) Mr. Lameck Airo replaced Ms. Consolata Joseph Mtui as the occupier pursuant to a Deed of Transfer of Right of Occupancy (Exhibit D.1) that was lodged.

Ms. Mziray acknowledged in her testimony to have issued to the appellant official search reports on the status of ownership of the property in dispute on several occasions. The reports given, she adduced, were true and accurate as they reflected the state of occupancy as at the material time.

The High Court framed four issues for trial: **one**, who is the rightful owner of the property in dispute; **two**, whether the information given by the first defendant/first respondent had any impact on the eviction of the plaintiff/appellant from the demised room; **three**, whether the plaintiff/appellant suffered any damage from the eviction; and **finally**, to what reliefs was each of the parties entitled.

On the first issue, the trial court held, based upon the extract from the register (Exhibit D.2), that Mr. Airo was the lawfully registered owner of the property in dispute at the time of the eviction and thereafter. The

court rejected the appellant's claim, based upon Exhibit P.6, that ownership of the property remained in His Excellency the President of the United Republic of Tanzania.

The trial court, then, went on to answer the second issue in the negative; that the information given to the appellant by the first respondent, whether true or false, had no bearing in the appellant's eviction from the demised room. The learned trial judge (Mwangesi, J., as he then was) reasoned that since the appellant's occupation of the room was premised upon his lease with Ms. Emmanuel, he could only sue for breach of the covenants in the lease and that he had no recourse against the respondents who were not privy to the aforesaid lease.

Based on the aforesaid determination of the first and second issues against the appellant, the trial court answered the third issue – whether the appellant suffered any damage – in the negative. In consequence, the suit, as hinted earlier, was dismissed with costs.

In this Court, the appellant challenges the High Court's judgment and decree on fifteen grounds, some of which concerned matters that did not come up before the trial court. It is settled that this Court will only look at the matters that came up in the lower court(s) and were decided: see, for

example, **Elia Moses Msaki v. Yesaya Ngateu Matee** [1990] TLR 90 and **Ludger Bernard Nyoni and Harrison Lyombe** (for and on behalf of 369 Tenants) **v. The National Housing Corporation**, Civil Application No. 211 of 2009 (unreported). Accordingly, we think that the grounds of complaint can be condensed into three main points: **one**, that the learned trial judge improperly dismissed the appellant's claim for want of cause of action despite an earlier ruling of the predecessor judge (Sumari, J.) holding to the contrary; **two,** whether the first respondent fully complied with the laws in registering the property in dispute in the name of Mr. Lameck Airo; and **three**, whether the trial court erred in failing to sustain the appellant's claim of entitlement to compensation under section 100 (1), (2) and (3) of the Land Registration Act, Cap. 334 RE 2002 (the LRA) for the loss suffered on account of errors made in the registration of Mr. Lameck Airo's title.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented whereas Mr. Robert Kidando, learned State Attorney, represented the respondents.

The appellant began his oral submission by adopting his written submissions and a list of authorities that he had filed earlier. On the first

point as listed above, he criticized the learned trial judge for holding in his judgment that he had no cause of action against the respondents despite the predecessor judge (Sumari, J.) having held to the contrary when she dismissed the respondent's preliminary objection at the pre-trial stage on 10th October, 2011. He added that the proceedings were consequently mired by confusion emanating from unexplained and irregular transfer of the case between the two learned judges. Relying on the decision of the Court in **VIP Engineering Marketing Ltd. v. Mechmar Corporation (Malaysia) Berhad of Malaysia**, Civil Application No. 163 of 2004 (unreported), he urged that the proceedings of the trial court be nullified for the irregular change of the presiding judge and that the matter be remitted to the trial court for a retrial.

On the second ground as reformulated above, the appellant contended that Mr. Airo's registration as the owner of the property in dispute was starkly faulty; it was premised upon a bogus certificate of title and that it had not received the requisite consent of the Commissioner for Lands. On the third ground, it was his contention that he was entitled under section 100 (1), (2) and (3) of the LRA to an indemnity for the loss he suffered due to his eviction from demised room that was precipitated by

the wrongful registration of Mr. Airo's title to the property in dispute pursuant to forged documentation of title.

Conversely, Mr. Kidando for the respondents, having adopted the written submissions that he had lodged in opposition to the appeal, submitted that the appeal was without substance. Specifically, on the first ground, he supported the learned trial judge's reasoning on the second drawn issue that included a holding that the appellant's action lacked any cause of action. That determination, he added, was made upon a full and sound evaluation of the evidence on record. He fervently argued that there was no conflict between the decision made by Mwangesi, J. (as he then was) and Sumari, J.'s ruling on the preliminary objection.

As regards the second point, Mr. Kidando contended that there was no proof that the registration of title in favour of Mr. Airo was fraudulent or wrongful. He said the chronology of the change of ownership over the property in dispute was clearly proved by the extract from the Land Register (Exhibit D.2) and that it is shown that Mr. Airo was finally registered as the owner upon the said property being transferred to him from Ms. Mtui. The learned State Attorney refuted that the said transfer was vitiated by errors.

On the third ground, Mr. Kidando denied that the appellant's eviction from the demised room was attributable to the registration of Mr. Airo as the owner of that property. Referring to pages 203 and 204 of the record of appeal, the learned State Attorney said that the appellant admitted at the trial that he was evicted upon a lawful order of the District Tribunal and that he respected it. He thus submitted that given the circumstances, the appellant had no recourse to an indemnity under section 100 (1), (2) and (3) of the LRA. Even if that were so as alleged, such a claim, Mr. Kidando argued, ought to have been pursued under the purview of section 100 (6) of the LRA by lodging a requisite application to the Registrar of Titles. The appellant did not lodge any application for indemnity, he added.

Rejoining, the appellant maintained that the learned trial judge's decision conflicted with his predecessor's ruling on the preliminary objection. He also reiterated his claim of entitlement to recompense under section 100 (1), (2) and (3) of the LRA.

In dealing with the above issues as the first appellate Court, we are enjoined by the provisions of Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-appraise the evidence on the record and draw our own inferences and findings of fact subject, without doubt, to the usual

deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See, for instance, **D.R. Pandya v. R.** [1957] EA 336; and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported).

We begin with the complaint that the learned trial judge improperly dismissed the appellant's claim for want of cause of action despite an earlier ruling of the predecessor judge (Sumari, J.) holding to the contrary.

It is common cause that at the pre-trial stage the then presiding judge (Sumari, J.) dealt with a preliminary objection raised by the respondent on two points one of which contended that the plaint was bad in law for not disclosing any cause of action. Having heard the parties on 7th September, 2011, Sumari, J. dismissed the preliminary objection in whole. On the question of cause of action, she held, as shown at p.83 of the record, that:

> *"I am of the opinion from the facts and evidence of annexures adduced that the plaintiff has a cause of action against the defendants. As it cannot be disputed that the 1st defendant certified through his documents that one Lameck Airo is a lawful*

occupier of the disputed premises. It will not be fair and just to dispose of this suit at this stage. ***This is to say that the plaintiff has a cause of action*** *to be determined."* [Emphasis added]

As hinted earlier, the parties herein lock horns on whether the learned trial judge took a conflicting view. The record is clear that he did so as can be seen in his judgment at pp. 19 – 21. A part of the reasoning made by Mwangesi, J. (as he then was) reads thus:

> *"It is unfortunate that, while I was being assigned this case file to handle, the pleadings were complete and even the stage of mediation had been completed whereby it failed.* ***I term it unfortunate because the way I view this suit, it ought not to have reached the stage of being heard. This is from the fact that, from the facts gleaned from the plaint, my feeling is that, the plaintiff had no cause of action against the first defendant and so is against the second defendant.***" [Emphasis added]

The above extracted passage leaves no doubt that the learned trial judge's opinion was based on his own assessment of the plaint, not on the basis of his appreciation of the evidence on record. We thus find

justification in the appellant's criticism that the said conclusion by the learned trial judge conflicted with his predecessor's ruling that the appellant had a cause of action. There is no doubt that the learned trial judge slipped into error by making a pronouncement on a matter that had been conclusively determined by his predecessor. We think he was *functus officio* on the question at hand – see, **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported).

However, we do not agree with the appellant that the impugned opinion of the learned trial judge brought about confusion in the proceedings nor was the transfer of the case from the predecessor judge to the learned trial judge irregular or unexplained. The case was duly reassigned by the Judge in Charge to the learned trial judge for the final pre-trial conference (final PTC) after mediation had failed before Bukuku, J. on 17th October, 2013. The learned trial judge, then, took over the case on 1st April, 2014, conducted the final PTC on 24th April, 2014 and presided over the entire trial. Accordingly, while we find merit in the first ground of complaint, which we allow, that the learned trial judge erred in his finding that the appellant had no cause of action, we dismiss the contention that

there was unexplained and irregular change of judges in the case. We thus decline the appellant's invitation that we nullify the trial proceedings and dispatch the case for a trial *de novo*.

On the question whether the first respondent fully complied with the laws in registering the property in dispute in the name of Mr. Lameck Airo, we think the learned trial judge cannot be faulted in his finding against the appellant. The appellant's evidence on errors or forgery in the impugned registration falls abysmally short of cogent of proof. As can be seen at page 202 of the record, he adduced that:

> *"On 02/7/2008 and 10/6/2008 and 11/11/2008 I did visit the Land Officer of the City [Council] where I was told that in their knowledge, they understood Costa Emmanuel as the lawful owner of the house."*

The above evidence is plainly worthless. It is not just hearsay but also unconfirmed information that cannot be acted upon by a court of law. It would have been prudent if the appellant had produced the so-called City Council Land Officer as a witness to testify on that claim. At any rate, looking at the extract from the register (Exhibit D.2) the name of Costa Emmanuel appears nowhere in the chronology of ownership over the property in dispute.

What's more, at the same page of the record, the appellant went on to testify that:

> *"As the Land Officers on behalf of the Commissioner were not recognizing Lameck Airo as the lawful owner it means that the first defendant did register Lameck Airo without the consent of the Commissioner and thereby making the registration improper."*

Again, the above claim against the impugned registration is made upon conjecture and unacceptable hearsay evidence. We reject it.

Conversely, the respondents' witness (DW1 Ms. Mziray) adduced on the chronology of ownership of the disputed land and confirmed that the registration of Mr. Airo's title was faultless. In comparison with the appellant's evidence, we think Ms. Mziray's account is more cogent.

The above apart, we find it apt to emphasise the essence of any land titles system by referring to the observation made by Dr. R.W. Tenga and Dr. S.J. Mramba in their book bearing the title **Conveyancing and Disposition of Land in Tanzania: Law and Procedure**, LawAfrica, Dar es Salaam, 2017, at page 330:

> *"... the registration under a land titles system is more than the mere entry in a public register;* ***it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transactions that confer, affect or terminate that ownership or interest****. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property,* ***for the register itself is conclusive proof of the title****."*
> [Emphasis added]

We wholly subscribe to the above view. On this basis, we find Exhibit D.2 is not just proof of the state of ownership over the property in dispute by the persons named therein, but also evidence confirming the underlying transactions that conferred or terminated the respective titles to the persons named therein. By dint of logic, therefore, the appellant's contention that Mr. Airo's registration was secured without the consent of the Commissioner for Lands or that it was secured on the strength of a bogus certificate is hollow. We reject it. We thus find no merit in the second point of grievance.

Finally, we deal with the question whether the trial court erred in failing to sustain the appellant's claim of entitlement to compensation

under section 100 (1), (2) and (3) of the LRA the alleged loss suffered on account of errors made in the registration of Mr. Lameck Airo's title.

We think that the question at hand need not detain us. We have already held that the testimony that the appellant gave to establish the alleged irregularity and fraud in the registration of Mr. Airo's title in the Land Register at the time the District Tribunal ordered his eviction from the demised room was mere conjecture and hearsay. It is also our firm view that the information he received from the first respondent on the status of ownership of the property in dispute vide two search reports (Exhibits P.6 and P.9) contained none of the alleged errors or omissions or fraud. Moreover, as indicated earlier Ms. Mziray's evidence allayed fears of existence of errors in the Land Register, which is, by law, an unimpeachable proof of the titles recorded therein. On this standpoint, the appellant's contention that he suffered loss due the eviction precipitated by certain errors in the register is farfetched and unfathomable.

The foregoing apart, we agree with Mr. Kidando's submission that even if the appellant's claim for recompense for loss due to errors in the Land Register were assumed, for the sake of argument, to have merit, he ought to have taken recourse under section 100 (6) of the LRA. For ease of

reference, we reproduce the subsections (1) to (6) of the aforesaid provisions thus:

> *"(1) Any person suffering loss by reason of any rectification of the land register under this Act shall, subject to the provisions of this Act, be entitled to be indemnified by the Government.*
>
> *(2) Where an error or omission has occurred in the land register, but the land register is not rectified, any person suffering loss by reason of such error or omission shall, subject to the provisions of this Act, be entitled to be indemnified by the Government.*
>
> *(3) Where any person suffers loss by reason of an error in a copy of or extract from the land register or of or from a document or plan filed in the land registry, certified under the provisions of this Act, he shall be entitled to be indemnified by the Government.*
>
> *(4) No indemnity shall be payable under this Act to any person who has himself caused or substantially contributed to the loss by his fraud or negligence, or derives title (otherwise than under registered disposition for value) from a person who so caused or substantially contributed to the loss.*

(5) Where an indemnity is paid in respect of the loss of an estate or interest in any registered land the amount so paid shall not exceed–

(a) where the land register is not rectified, the value of the estate or interest at the time when the error or omission which caused the loss was made; or

(b) where the land register is rectified, the value of the estate or interest immediately before the time of rectification.

(6) ***The Registrar may, on the application of any interested party, and subject to an appeal to the High Court, determine whether a right to indemnity has arisen under this section, and if so, award indemnity.****"*[Emphasis added]

The above provisions are uncomplicated and easy to understand. Any person that suffers loss in terms of any of subsections (1), (2) and (3) can seek indemnity from the Government by applying under subsection (6) to the Registrar of Titles who is enjoined to determine whether an entitlement to indemnity is made out, and if yes, award appropriate indemnity, under section 100 subject to the right of appeal to the High Court. It is common ground that the appellant herein did not invoke this statutory provision but rushed to the High Court right away to institute the suit against the

respondents. On this basis, we hold that his claim was wrongly and prematurely presented to the High Court. In consequence, we find that there is no merit in the third point of grievance.

That said and done, we hold that the appeal lacks merits and is hereby dismissed with costs.

DATED at **MWANZA** this 11th day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL