

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A., LILA, J.A., And MKUYE, J.A.)

CIVIL APPEAL NO. 271 OF 2017

**1. JAFARI HUSSEIN SINAI }
2. FARAJI FADHILI }APPELLANTS**

VERSUS

**1. SILVER GENERAL DISTRIBUTORS LIMITED.....1ST RESPONDENT
2. KUMBURU SISAL ESTATES LIMITED.....2ND RESPONDENT
3. MUHEZA DISTRICT COUNCIL.....3RD RESPONDENT
4. THE COMMISSIONER FOR LANDS.....4TH RESPONDENT
5. MINISTRY OF LAND AND HUMAN SETTLEMENTS
DEVELOPMENT.....5TH RESPONDENT
6. THE ATTORNEY GENERAL.....6TH RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Khamis, J.)

dated 29th day of July, 2016

in

Land Case. No. 6 of 2013

JUDGMENT OF THE COURT

19th February & 1st March, 2019

MUSSA, J.A.

This appeal originates from a dispute over ownership of a farm known as Kumburu Sisal Estate which is situated in Muheza District. The farm is registered under a Certificate of Occupancy with Title No. 17281

and entered as Land Office No. 20627 farm No. 686. We shall henceforth refer the afore described landed property as "the suit land".

In the High Court of Tanzania (Land Division), at Tanga Registry, the first and second respondents instituted Land Case No. 6 of 2013 over ownership of the suit land. Originally, the respondents had enjoined twenty (20) defendants including the appellants herein but, subsequent to an out of court settlement, the first and second respondents withdraw their claims against all the defendants save for the appellants herein. More particularly, the plaintiff's claim was that subsequent to the execution of an asset sale agreement on the 1st December, 1988 the first respondent purchased the suit land from the Government and, according to the claim, the same was comprised of 2000 hectors of Sisal farmland with all exhausted improvements thereon.

Thereafter, the Government re-surveyed the suit land and, the first respondent was issued with the referred Certificate of Title on the 25th July 2003. A little later, on the 4th August 2003, the first respondent transferred the Certificate of Title to the second respondent and on the 23rd February, 2011 the second respondent obtained a loan facility amounting to Tshs.

520,000,000/= from the Tanzania Investment Bank for the purpose of financing the expansion of sisal production at the suit land.

Earlier, in the year 2008 the first and second respondents discovered that the appellants had encroached portions of the suit land and were setting up agricultural farms for both perennial and seasonal crops. Repeated demands from the respondents to have the appellants vacate the suit land were futile, hence the preferred suit through which the first and second respondents sought the following reliefs:-

- " i. Declaration that the 2nd Plaintiff is the lawful owner of the farm comprised under Farm No. 686, Kumburu Sisal Estate, Muheza District, and that the Defendants are trespassing the Plaintiff's estate.*
- ii. An order for the immediate vacation and eviction of the Defendants from the 2nd Plaintiffs' estate.*
- iii. General Damages amounting to Tanzanian Shillings Two Hundred Million (Tshs. 200,000,000) for trespass and misuse of the Plaintiff's land*
- iv. Costs of this suits.*

v. Any other relief(s) that this Honourable Court might deem just and fit to grant."

In response, the appellants refuted the claim through a joint written statement of defence in which they additionally enjoined a counter claim against all the respondents herein. In a nutshell, their claim was that it were actually the respondents who encroached on the suit land and that they have been in physical occupation of the suit land for several years prior to the alleged encroachment. Furthermore, it was claimed, to the extent that the appellants were not involved in the re-survey process, the Certificate of Title was improperly issued to the first respondent. Wherefore the appellants prayed for the following reliefs:-

- " a. The honourable court be pleased to declare that, the certificate of title no. 17281 issued to the first defendant was issued contrary to the law as such it is null and void*
- b. The honourable court be pleased to declare the Plaintiffs the lawful owners of their respective parcels of land.*
- c. The 1st and 2nd Defendants in the Counter-Claim be ordered to pay the Plaintiffs in the Counter-Claim general damages as per this honourable court's assessment.*

d. Costs of this suit.

e. Any other relief(s) this honourable Court deems just and fit to grant.”

At the commencement of the trial, the following issues were agreed by the parties and recorded by the trial court in terms of Order XIV Rules 5(1) and (2) of the Civil Procedure Code, Chapter 33 of the Revised Edition 2002(the Code):-

- 1) Who is the rightful owner of the suit land?*
- 2) Whether the Defendants in the main suit have encroached or trespassed on part of the Plaintiffs' land registered under C.T No. 17281, L.O. No. 20627 and Farm No. 686.*
- 3) Whether the re-survey of the above land was done without the involvement and consent of the Defendants in the main suit.*
- 4) Whether the title issued to the first Defendant in the Counter Claim by the Government followed proper procedure.*
- 5) Whether there is a cause of action against Muheza District Council, third Defendant in the Counter Claim.*
- 6) Whether any of the parties has suffered any damages as a result of trespass from the other.*
- 7) To what reliefs are the parties entitled to?”*

To buttress their case, the respondents featured a total of eight(8) witnesses plus a host of documentary exhibits. The appellants called 2 witnesses to support their claim denial as well as the counter claim. The 4th, 5th and 6th respondents jointly presented a single witness, whereas the third respondent had no witness.

On the first issue as to who is the rightful owner of the suit land, the respondents sought to establish an affirmative answer through the testimony of Hamis Ally Kindoroko (PW8). As it were, the witness testified on six factors, that is, **first** that he is a shareholder of both the first and second respondent; **second**, that the suit land was originally owned by the defunct Tanzania Sisal Authority; **third**, that in the wake of privatizations, the Presidential Parastatal Sector Reform Commission (PSRC) invited bids for the purchase of the suit land to which the first respondent emerged successful; **fourth**, a sale agreement was executed between the Government and the first respondent as evidence of the purchase (exhibit P3); **fifth**, that upon the purchase, in the year 2003 the Government resurveyed the suit land and issued the first respondent with a right of occupancy (exhibit P5); and **sixth** subsequently, the first respondent transferred the suit land to the second respondent and, on the 23rd February, 2011 the latter obtained a loan facility amounting to shs.

520,000,000/= from the Tanzania Investment Bank to expand production at the suit land.

Still on ownership, the testimony of PW8 was complimented by some neighbours and collaborators who confirmed the transaction which elevated the first respondent to owner of the suit land. These are Waziri Ali Kingazi(PW1), Juma Idd Semauya(PW2), Hassan Omari Shomari (PW3) and Mussa Khatib Swemwavu(PW4).

For their part, the appellants reiterated their claim founded in both the joint written statement of defence and the Counter-claim to the effect that the parcels of land including the suit land were purchased or passed over to them by their respective uncles.

In his deliberations the learned trial judge was satisfied that the suit land passed title from the Tanzania Sisal Authority to the first respondent and ultimately to the second respondent. Having considered the appellants' counter claim that the suit land was obtained and passed over to them by their uncles, the learned trial judge rejected the claim as an afterthought and, instead, found thus:-

"I am therefore satisfied that the second plaintiff is the lawful owner of the parcels of the land in

*dispute which are part of Farm No. 686, Kumburu
Sisal Estate, Muheza under Certificate of Title No.
17281”*

Such was a crucial finding which was, in our view, sufficient to resolve the basic issue in both the respondents’ case and the appellants’ Counter-claim which sought a declaration as to the lawfull owner of the suit land. We note, however, that the trial judge went further and resolved the remaining issues. More particularly, the second issue pertaining to trespass was resolved affirmatively, whereas the court found it was unnecessary to involve the appellants in the re-survey. The third and fourth, issues were resolved to the effect that the certificate of title was appropriately issued to the first respondent. Coming to the fifth issue on cause of action against the third respondent, the trial judge answered it in the negative. Finally the trial Court awarded general damaged to the tune of 30,000,000 to the first and second respondents.

Having resolved the issues, the trial court reiterated its declaration that the second respondent is the lawful owner of the suit land and ordered the appellants to immediately vacate from it. In Fine, the respondents claim succeeded with costs.

The appellants are aggrieved and are presently seeking to impugn the decision of the High Court upon a memorandum of appeal which is comprised of seven (7) points of grievances namely:-

"1. The Honourable Trial Court erred in law when it held that the appellants have trespassed into the 1st and 2nd respondents alleged suit plot and if so, to what extent?

2.The Honourable Trial Court erred in law when it held that, there was no need to involve the Appellants, the 3rd respondent and others in the alleged re -surveying of the suit plot.

3.The Honourable Trial Court erred in law when it held that, the lack of involvement of the Appellants in the re-survey as not a cause of action.

4.The Honourable Trial Court erred in law when it held that, the counter-claim failed due to non - joined of other parties (PSRC and Tanzania Sisal authority).

5.The Honourable Trial Court erred in law and in fact when it failed to take into consideration of the extent of the land sold to the 1st Respondent

6.The Honourable Trial Court erred in law and in fact when it held that the plaintiffs in the main suit suffered damage.

7. The Honourable Trial Court erred in law and in fact when it ordered the appellants to give vacant possession of the suit plot without taking into consideration the fact that, the appellant had already been evicted from their suit plots at the time/date of judgment”

When the appeal was called on for hearing before us, the appellants were represented by Mr. Armando Swenya, learned Advocate, whereas the first and second respondents had the services of Messrs Stephen Sangawe and Joseph Nuwamanya, learned Advocates. The third, fourth, fifth and sixth respondents were represented by Mr. Killey Mwitasi, learned Senior State Attorney. The learned counsel from either side were agreed to fully adopt their respective written submissions save for minor elaborations which we need not recite.

In his written submissions, the learned counsel for the appellants gave a consolidated argument with respect to the first, second, third and fifth grounds of appeal which, he said, and we would suppose, rightly so, they all boil down to the questions of ownership and legality of the Certificate of Title issued to the first respondent. In a nutshell, the appellants sought to impress that the Certificate of Title was issued **first**, in the absence of evidence of proof of ownership from the first respondent;

and **second**, upon an illegal re-survey of the suit land which excluded the appellants involvement.

From the adversary end, Messrs Sangawe, Nuwamanya and Mwitasi strenuously argued that in counterclaim, the appellants grossly failed to prove ownership of the suit land. More specifically, they submitted the appellants failed to show that they had a better title than the first respondent who exhibited a Certificate of Title. On the re-survey, the respondents submitted that it was not mandatory to involve the appellants in the exercise much as there was no evidence or proof that they were owner.

Addressing the issues of ownership and the re-survey, we should express at once that the learned trial judge properly directed himself. There was, so to speak, ample evidence to support the finding that the second respondent is the lawfull owner of the suit land. As we have already intimated, PW8 adduced to several factors preceding the grant of the Certificate of Title to the first respondent. As regards the re-survey, the judge also properly made a recital of the testimonies of Sebastian Mchomvu(DW3) and Paul Shembui (PW6), the two surveyors who testified in court. DW3, for instance, stated:-

"According to the survey practice, when one re-surveys his land as title excision, he does not need to involve any person other than himself. My duty was only to survey the land, the responsibility of re-allocating the re-surveyed land was not mine. Villagers around the Sisal estate were not involved because the land did not belong to them. Only the owner of the farms were important in the re-survey process"

Correspondingly, PW6 stated:-

"Survey means you do a fresh process of survey. Re-survey means you re-do the survey process. You do not need to involve neighbours in the re-survey process because you act within the first surveyed area. The reason of involving neighbours is to avoid over lapping or trespassing to other peoples lands."

To this end, we fully associate ourselves with the findings of the trial judge on both the ownership of the suit land and the re-survey exercise.

As regards the fourth ground of appeal, the appellants are obsessed with the view that the trial court rejected the counter-claim on account of the non-joinder of the other parties (PSRC and Tanzania Sisal Authority). With respect, on a closer scrutiny of the judgment of the trial court at page

864 this is not what transpired. As he was addressing the fifth framed issue, the trial judge referred to paragraph 36 of the counter-claim in which the appellants raised a complaint against the local and central government for excluding them from the process of re-surveying. Having referred to the complaint, the learned judge concluded:-

"the counter claim did not disclose how and why Muheza District Council had a duty of ensuring that they (counter claimants) were involved in the re-survey which in actual fact was done by PSRC and Tanzania Sisal Authority who are not even parties to this case. In my view this allegation was misconceived from the start and connote amount to a cause of action in law. The Defendants/ Counter claimants submissions on this point goes to prove its misplacement because they failed to cite any law or authority that places an unjustified duty on Muheza District Council. I therefore hold that there is no cause of action against the local author."

From the foregoing finding, it cannot be discerned by any stretch of imagination that the court disallowed the counter-claim on account of a misjoinder of parties. As it has already been intimated, the counter claim

was dislodged by the courts finding and declaration that the lawful owner of the suit land is the second respondent.

In the sixth ground of appeal, the appellants seek to fault the trial Judge for awarding damages to the first and second respondents. In this regard, like the trial court, we find relevance in what was stated by the Court in the case of **Tanzania Sanyi Corporation V. African Marble Company Ltd** [2004] TLR 155:-

"General damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrong doing must, therefore, have been cause, if not a sole or a particularly significant cause of damage"

In the matter under our consideration, the complained wrong doing was trespass and destruction of property to which the first and second respondent claimed that it negatively impacted the estates operations. They prayed for a sum of shs. 200,000,000/= but the trial court trimmed down the amount to shs. 30,000,000/=. We have found no cause to fault the trial court in its award.

Finally, on the seventh ground of appeal, we found ourselves at a loss understanding the merits of the complaint since, if at all, the

appellants had been evicted by an earlier order, that order was not comprised in the proceedings under our consideration and, for that matter, there is no semblance of merit in the complaint.

In sum, as we have endeavored to demonstrate, we fully associate ourselves with the findings of the trial court and, accordingly, we find this appeal to be bereft of merits. In fine, the appeal is hereby dismissed with costs.

DATED at **TANGA** this 1st day of March, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



E. Y. Mkwizu
E. Y. Mkwizu
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL (T)