

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MBAROUK, J.A., MZIRAY, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 240 OF 2017

**PASCHAL MAGANGA APPELLANT
VERSUS
KITINGA MBARIKA RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania
at Mwanza)**

(Bukuku, J.)

**Dated the 25th day of October, 2016
in
Land Appeal No. 59 of 2011**

JUDGMENT OF THE COURT

27th March & 3rd April, 2019.

MWAMBEGELE, J.A.:

This is a second appeal. It stems from the decision of the District Land and Housing Tribunal for Mara at Musoma in Land Case No. 5 of 2010 whose judgment was rendered on 12.08.2011. In that case, the appellant Paschal Maganga instituted the suit against the respondent seeking several orders of the Tribunal; a declaration that the house standing on plot No. 49 Block 'J' High Density, Rutigingwa Street, Musoma Municipality (hereinafter referred to as the disputed house) belonged to him, eviction of the respondent, payment of mesne profits, costs of the suit and any other

relief the Tribunal deemed fit and just to grant. That suit was decided in favour of the appellant. The applicant; the appellant herein, was declared the legal owner of the disputed house as from 15.12.2008 when he bought the same from a certain Patrick Amani Mbarika. The respondent was ordered to vacate the disputed house within thirty days reckoned from 12.08.2011; the date of pronouncement of that judgment. No mesne profits were awarded.

The respondent was not happy with the decision of the District Land and Housing Tribunal (hereinafter referred to as the Tribunal). He thus preferred an appeal to the High Court. The High Court (Bukuku, J.) allowed the appeal and reversed the decision of the Tribunal. Believing the decision of the Tribunal which was in his favour was correct, the appellant lodged this appeal on six grounds of complaint seeking to assail the decision of the High Court.

When the appeal was placed for hearing before us on 27.03.2019, Mr. James Andrew Bwana, learned counsel, appeared for the appellant. Mr. Joseph Mugabe Stephens, also learned Counsel, appeared for the respondent. Both parties had earlier filed their respective written

submissions for or against the appeal, as the case may be, which they sought to adopt as part of their oral arguments before us.

Mr. Bwana started his onslaught by seeking to abandon the first and second grounds as well as opting to consolidate the remaining third, fourth and fifth grounds. He chose to argue the sixth ground separately. After dropping the first and second grounds, the remaining grounds may be put in two clusters; first, the complaint of the remaining third, fourth and fifth grounds is essentially that, having found that the Will which purported to bequeath the disputed house to Patrick Amani Mbarika was invalid, the High Court ought not to have declared the respondent the owner of the disputed house, but, rather, should have returned the same to the estate of the late Anastazia Wakala and secondly, that the judgment and decree of the High Court are problematic as the judgment is not clear on granting ownership of the land in dispute to the respondent as shown in the decree. We shall hereinafter refer to the first cluster as the first ground of appeal and the second cluster as the second ground.

Arguing the first ground of appeal, Mr. Bwana submitted that the High Court Judge erred in granting ownership of the house to the

respondent. The learned counsel gave two reasons. One, that after finding that the Will which allegedly bequeathed the disputed house to Patrick Amani Mbarika was invalid, it was not proper to grant ownership to anyone. In those circumstances, he argued, the house should have been ordered to revert to the estate of the deceased Anastazia Wakala. Two, the respondent prayed to be declared owner of the house on appeal. In his amended Written Statement of Defence at p. 17 of the record of appeal, Mr. Bwana charged, the respondent prayed for a declaration that the sale was unlawful and the house be returned to the estate of the deceased. Arguing that parties are bound by their pleadings he submitted that the applicant cannot on appeal come to pray for a declaration that he was a lawful owner of the same house.

In respect of the second ground of appeal which was the sixth ground before abandoning and consolidating some of the grounds, Mr. Bwana argued that the word "extent" used in the last part of the judgment of the High Court was not clear. He submitted that the word can have several interpretations; first, that the Will that bequeathed the disputed house to Patrick Amani Mbarika (the seller) was invalid. Secondly, that Patrick Amani Mbarika is the administrator of the estate of the deceased

Anastazia Wakala. Thirdly, whether the house in dispute is No. 49 or 50 and, fourthly, whether the Tribunal Chairman adduced reasons to depart from opinions of assessors as required by the law.

Mr. Bwana went on to submit that there is nowhere in the judgment of the High Court where the judge gave reasons why the house in dispute should belong to the respondent. That was a blatant disregard of Order XX rule 4 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter referred to as the CPC) which requires that the judgment should contain reasons, among others. To bolster up his argument, the learned counsel cited **Ali Abdallah Amour & another v. Al-Hussein Sefudin (Safi Stores)** [2004] TLR 313 in which adherence to the provisions of Order XLVI, rule 31 of the Civil Procedure Decree, Chapter 8 of the Laws of Zanzibar which is in *pari materia* with Order XX rule 4 of the CPC, was insisted. That rule provides that the judgment of the Appellate Court shall be in writing and shall state the points for determination, the decision thereon and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. The learned counsel also relied on our unreported decision in the case of **The Attorney General v. Ahmad R. Yakuti & 2 others**, Civil Appeal No. 49 of 2004 to

pray that the disputed house be ordered to revert to the estate of the late Anastazia Wakala so that the administrator of her estate determines who is the heir to it.

Responding, Mr. Stephens submitted in respect of the averment that the respondent prayed for ownership on appeal that in the application before the Tribunal, one of the prayers was a declaration that the suit house belonged to the appellant. He went on to argue that the averment is confirmed by the appellant in his deposition before the Tribunal that he was there to tell the Tribunal that he deserved to be declared the lawful owner of the disputed house. He therefore labelled as untrue the allegation that the respondent raised such a claim on appeal.

On lack of *locus standi* for Patrick Amani Mbarika to dispose of the disputed house, the learned counsel submitted that he disposed of the same as an heir, and not as an administrator of the late Anastazia Wakala. All the same, Mr. Stephens had no opposition to the prayer that the disputed house reverts to the estate of the late Anastazia Wakala.

On the second ground respecting the ambiguity of the word "extent" in the judgment, Mr. Stephens submitted that there was no ambiguity at all. He clarified that there had been filed three grounds of appeal before the High Court among which one was refused and two of them were allowed. That was the meaning of the word "extent" in the judgment of the High Court, he argued.

Mr. Bwana had nothing in rejoinder.

Having stated the above, we should now be in a position to confront the issues of contention in this appeal which we think very little is in dispute as the crucial part of it is not at issue. We say so because, the advocates for the parties are at one that the disputed house reverts to the estate of the late Anastazia Wakala so that the administrator of her estate deals with it in accordance with the law.

Be that as it may, regarding the first ground of appeal, as consolidated, we haste the remark that we, having subjected the record to proper scrutiny and analysis, are of the view that the learned counsel for the appellant is right in his argument that the High Court, having found

and held that the Will which purported to bequeath the disputed house to Patrick Amani Mbarika was invalid, it ought not to have held that the respondent was a lawful owner of the said house. This is so because Patrick Amani Mbarika, without a proper Will giving him ownership of the disputed house, had nothing to pass to the appellant. That is to say, no good title passed from him; the seller to the appellant; the buyer. Patrick Amani Mbarika had nothing to sell, or exchange as happened here, to the appellant. This stance finds support in the rule embodied in the Latin maxim which goes **nemo dat quod non habet**. According to this maxim, so **Black's Law Dictionary (8th Edition)** tells us, no one gives a better title to property than he himself possesses. In the same vein, the Will being invalid, one can argue that the deceased Anastazia Wakala died intestate and thus the respondent could not have been the legal owner of the disputed house. In the circumstances, the first ground is answered affirmatively; that is, having found that and held that the Will which purported to bequeath the disputed land to the said Patrick Amani Mbarika was invalid, the High Court erred in holding that the disputed house belonged to the respondent.

The subject of the complaint in the second ground of appeal (as shown above) is the allegedly somewhat ambiguously phrased last paragraph of the judgment of the High Court. This ground will not detain us. To appreciate what we are going to say infra in determination of this ground, we propose to reproduce the paragraph complained of. It reads:

*"From the above foregoing, I find that the appeal has merit. **It is allowed to the extent explained.** The respondent is condemned to costs. Ordered accordingly".*

[Emphasis supplied].

The bolded expression in the quote above is claimed by Mr. Bwana for the appellant to be pregnant with meaning; referring to meanings more than one. He gave four meanings as shown above. On the other hand, Mr. Stephens is of the view that the expression simply meant the appeal which was predicated upon three grounds had merits on two grounds but had none on one ground. We find ourselves pressed to state at this juncture that we find Mr. Stephens argument very convincing. As rightly submitted by Mr. Stephens, the Petition of Appeal to the High Court had three grounds. Our perusal of the record of appeal unveils that the first

one was to the effect that the Tribunal erred in failing to appreciate that the respondent; the appellant herein, failed to prove his title to the disputed house. The second was on the Tribunal's failure to assign reasons for differing with the opinion of assessors. The third and last was that the decision of the Tribunal was against the evidence on record. While the first and third grounds were answered in the affirmative, the second one was answered negatively. Thus, we agree with Mr. Stephens that by allowing the appeal "to the extent explained", the High Court Judge simply meant the appeal was meritorious in the first and third grounds of appeal but was not in the second ground. Generally, the appeal was allowed basing on the first and third grounds. As Mr. Bwana did not address us the problematic nature of the last para of the judgment in the manner complained of in the ground of appeal, it should just suffice to say that we do not see the paragraph as problematic. We also find Mr. Bwana's averment to the effect that the respondent raised the prayer to be declared legal owner of the disputed house on appeal as not backed by the pleadings. The complaint that the High Court Judge did not give reasons or the decision as having no merit. The High Court Judge sufficiently gave reasons for her decision to allow the appeal before her to the extent

demonstrated and declared the respondent the legal owner of the disputed house. With this conclusion, we find no basis in this complaint and reject the second ground of appeal.

The above said, we find merit in this appeal to the extent shown above. With that in mind, we order that the disputed house be reverted to the estate of the late Anastazia Wakala so that the administrator of her estate deals with it according to law. As this is essentially a dispute between members of one family, and, as both counsel for the parties did not press for costs, we order that each party shall bear its own costs here and in the courts below.

Order accordingly.

DATED at **MWANZA** this 2nd day of April, 2019.

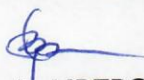
M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL