IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., NDIKA, J.A., And KITUSI, J.A.)

CIVIL APPEAL NO. 212 OF 2016

JANE KIMARO ..... APPELLANT

VERSUS

VICKY ADILI (As an Administratrix of the

Estate of the Late ADILI DANIEL MANDE) ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)
(Mjemmas, J.)

dated the 30th day of October, 2015
in
Land Case No. 137 of 2010

.....

JUDGMENT OF THE COURT

13th July & 6th October, 2020

NDIKA, J.A.:

Central to this appeal is the ownership of land described as Plot No. 37, Block E, Tegeta in the City of Dar es Salaam. Ms. Vicky Adili ("the respondent"), acting as the administratrix of the estate of her deceased husband, Mr. Adili Daniel Mande, sued Ms. Jane Kimaro ("the appellant") in the High Court of Tanzania, Land Division at Dar es Salaam ("the trial court") claiming ownership of that land. She sought a permanent injunction and damages for trespass on the disputed property.

By its judgment dated 30th October, 2015, the High Court (Mjemmas, J.) held that the disputed property was a part of the deceased's estate on the reason it was established that the deceased had bought the property from its previous owner, a certain Mr. Thadeus Mwakilema (PW2), who owned it under a certificate of occupancy. On that basis, the court issued an order of permanent injunction against the appellant and ordered her to pay TZS. 20,000,000.00 as general damages for trespass. However, the court dismissed the respondent's claim for TZS. 5,500,000.00 as compensation for certain building materials allegedly taken away from the disputed property and converted by the appellant for her own use.

To appreciate the issues of contention in this matter, we find it apt to begin with the essential facts of the case.

The property in dispute was originally a part of a farm owned by the appellant under customary law. The farm was subsequently surveyed and eventually split into fifteen plots by the Ministry of Lands ("the Ministry"). The said plots were then re-designated for residential use. Aside from the property in dispute, which we have mentioned as Plot No. 37, the other parcels of land included Plots No. 32, 33, 35 and 40.

In support of her claim of title to the disputed property, the respondent led evidence at the trial that her deceased husband, through his attorney Mr. Amon David Mande (PW3), entered into a sale agreement (Exhibit P.2) dated 2nd January, 2002 with the said Mr. Mwakilema whereby in consideration of the sum of TZS. 2,000,000.00 the said Mr. Mwakilema was to transfer to the deceased his right of occupancy over the disputed property. Pursuant to the terms of that agreement, the agreed purchase price was duly paid and Mr. Mwakilema handed over to the purchaser the original documents of title to the property, namely the letter of offer and the certificate of occupancy number 49882 (Exhibit P.3). Admittedly, the deceased did not immediately take any further steps to regularize his ownership of the property by effecting the envisaged transfer of the title. Subsequently, in the course of an effort to develop the said property, the respondent learnt of the appellant's rival claim of title. By then, the appellant had taken possession of the property and determinedly refused to vacate it when she was confronted by the respondent.

The property's registered owner, PW2 Thadeus Mwakilema, confirmed the alleged sale to the deceased. He tendered the certificate of occupancy (Exhibit P.3) under which he held the property following its allocation to him in 1999 after the initial title to it granted to Mr. Joachim A. Lisha was revoked by the President of the United Republic in 1997. He also proffered at the trial

two letters from the Ministry (the first one dated 12th May, 2005 and the other dated 3rd April, 2006 – Exhibits P.4 and P.5 respectively) confirming him as the lawful occupier of the disputed property. The letters further refute the appellant's claim of title, stating that following the acquisition and survey of her farm she was allocated two plots (Plots No. 39 and 40) and was offered additional monetary compensation which she was directed to collect within thirty days of the date of the second letter.

Conversely, the appellant was resolute that she ought to have been allocated four plots of the surveyed farm, instead of only two plots and that the disputed property remained her lawful property essentially on the ground that she had not been compensated for it, contending that her title to it still subsisted. She also told the trial court that she occupied and developed the property all along hoping that the land would be finally allocated to her but that never happened even after the initial grant of the land to Mr. Joachim A. Lisha was revoked.

The appellant called Ms. Elizabeth Charles (DW2), a Land Officer from the Ministry. She, at first, addressed the court on the process of acquisition of land by the Government for the purpose of surveying and development, stating that the Government would normally conduct an assessment of compensation.

Following such assessment, compensation must be paid to clear any pre-existing titles before the land concerned is surveyed and plots of land created therefrom. Finally, the plots are allocated to successful applicants.

On the status of ownership of the disputed property, DW2 acknowledged that the said property remained registered in the name of Mr. Thadeus Mwakilema. That the said Mr. Mwakilema's title was granted in 1999 after the previous title in the name of Mr. Joachim Lisha was revoked in 1997. That the said land was a portion created from the appellant's farm and that the appellant was in turn allocated two plots (Plots No. 34 and 40) and that in addition, she was offered monetary compensation, which she had not yet collected.

Upon reviewing the evidence on the record, the learned trial Judge was impressed by the respondent's case. Relying on the evidence adduced by the respondent and her two witnesses as well as the sale agreement, the certificate of title and the letter from the Ministry dated 3rd April, 2006 (Exhibits P.2, P.3 and P.5 respectively), the court found it preponderant that the respondent was the lawful owner of the property in dispute on account of having bought the said land from its registered owner (PW2). The court rejected the appellant's claim that she had not been given compensation to clear her pre-existing

customary title as it found it established that she was offered monetary compensation by the Ministry vide the letter of 12th March, 2005 (Exhibit P.4) even though that payment remained uncollected. In consequence, the court entered judgment and decree in the respondent's favour in the terms we mentioned earlier.

The appellant now seeks the reversal of the High Court's judgment and decree on three grounds:

1. *That the trial Judge erred in law by holding that the land was legally revoked and given to one Thadeus Mwakilema without paying due regard to the legal requirement for compensation and that there was no compensation made to the appellant who legally owned the land in question.*
2. *That the trial Judge erred in law relying on the sale agreement and holding that the respondent is the lawful owner without taking into consideration that there is no legal transfer of the registered land in question from Thadeus Mwakilema to the late Adili Daniel Mande as required by the land laws.*
3. *That the trial Judge erred in law by declaring the respondent as the lawful owner while she had no cause of action against the appellant taking into account there was neither transfer effected to the respondent nor was compensation paid to the appellant.*

Mr. Octavianus Mushukuma, learned counsel, appeared at the hearing to prosecute the appeal for and on behalf of the appellant. In his oral argument amplifying the written submissions lodged in support of the appeal, Mr. Mushukuma canvassed the first and second grounds of appeal only but abandoned the third ground. On the other hand, the appeal was strongly resisted by Mr. Heavenlight Mlinga, learned counsel for the respondent.

We begin with the first ground of appeal, faulting the learned trial Judge for holding that the initial title to the property in dispute was legally revoked and given to Mr. Mwakilema without paying due regard to the fact that her pre-existing customary title had not been extinguished.

The essence of Mr. Mushukuma's contention in support of the appellant's claim of title was that since the property in dispute was carved out of land the appellant held under customary title, the subsequent allocations of the disputed property by the Ministry, initially to Mr. Lisha and eventually to Mr. Mwakilema in 1999, were ineffectual as the appellant's customary title still subsisted. In elaboration, he argued that the customary title could not be extinguished unless the appellant had surrendered her rights over the land upon being paid compensation. The evidence on record, he added, established that the appellant was never paid any compensation even though the Ministry

allegedly issued a letter (Exhibit P.5), which she allegedly did not receive, inviting her to collect compensation. This submission was anchored upon the decision of the Court in **Suzana Kakubukubu and Two Others v. Walwa Joseph Kasubi and Another**, Civil Appeal No. 14 of 1991 (unreported). Further reliance was placed on **Attorney General v. Lohay Akonaay and Joseph Lohay** [1995] TLR 80 for the proposition that customary or deemed rights in land are real property protectible under the law and so, they cannot be expropriated without compensation according to the law.

Replying on amplification of the written submissions lodged in opposition to the appeal, Mr. Mlinga initially acknowledged that the property in dispute was part of the appellant's holding under customary title but stressed that it was lawfully acquired and surveyed by the Ministry. He argued that the appellant was sufficiently compensated for her land as she was allocated two surveyed plots of lands carved out of the original holding and was offered monetary compensation, as averred by DW2. That if the appellant had not yet collected her compensation, she only had recourse against the Commissioner for Lands. It was his further contention that the initial grant of title to the property in dispute to Mr. Lisha and the subsequent allocation of that land to Mr. Mwakilema after Mr. Lisha's title had been revoked were unblemished and so was the disposition of the right of occupancy between Mr. Mwakilema and

the deceased. Finally, he submitted that the two decisions relied upon by the appellant were inapplicable to the instant matter.

As stated earlier, the property in dispute was one of the fifteen plots carved out of the land the appellant held under a customary title following a survey done by the Ministry. It was initially allocated to Mr. Lisha following the survey and that it was subsequently allocated to Mr. Mwakilema in 1999 after Mr. Lisha's title was duly revoked for failure to abide by the conditions for development of an allocated land. What is hotly contested is whether the appellant's customary title subsisted on the ground that it was not extinguished for want of payment of compensation thereby rendering the two succeeding grants of title to Mr. Lisha and then to Mr. Mwakilema ineffectual.

To begin with, we note that the learned counsel are concurrent with the position of the law that a right of occupancy under customary law cannot be extinguished upon an area being declared a planning area or upon such area being surveyed unless compensation is paid. To resolve the issue at hand, we think it is necessary to look at our decision in **Suzana Kakubukubu** (*supra*), relied upon by the appellant, so as to put its holding into a proper perspective.

In the aforesaid case, the appellants had initially made several requests for the survey of their jointly owned farmland to enable them to convert their

holding under customary law into a right of occupancy under the then Land Ordinance, Cap. 113. The survey was eventually carried out but without the knowledge of the appellants who had then left the land in the care of one person called Ndege and other five licensees. Following the survey, the farmland was split into two plots that came to be known as Farms 2 and 3. Farm 3, which was the subject of the dispute, was subsequently allocated by the second respondent, as a land allocating authority, to the first respondent, who, then started developing it after he had made compensation and obtained a certificate of occupancy over the plot.

The primary issue in **Suzana Kakubukubu** (*supra*) was whether the appellants had surrendered their rights over their holding as there was proof that the caretaker (the said Ndege) and other licensees were paid compensation. In its decision, this Court held that the caretaker might have been one in charge of the farm while the appellants were away but he had no authority to dispose of the land or surrender the appellants' rights over the land. The Court found it significant that all through the appellants asserted ownership over the farm in dispute and that both respondents had notice of the appellants' title well before compensation was paid to the licensees who must have posed as holders of rights over the land in dispute.

In our considered view, there is a clear distinction between **Suzana Kakubukubu** (*supra*) and the instant appeal. While in the former case the survey of the land and payment of compensation were made without the knowledge of the joint owners of the land, in the present case the appellant's holding under customary law was surveyed and split into the fifteen plots with her full knowledge and consent. Furthermore, whereas in the former case the said Ndege and the five compensatees posed as holders of rights over the disputed land and then collected the payment of compensation in circumstances such that the respondents should have known that the said Ndege and the compensatees were acting in fraud, in the instant appeal it is on record that the Ministry offered monetary compensation to the appellant in addition to the two surveyed plots of land that she had already been allocated. Looking at this evidence in its totality including the arrangement for payment of compensation, we are of the firm view that the appellant in the instant case surrendered her rights over her holding under customary law to pave way for it to be surveyed and allocated according to the law. She no longer can legally maintain a claim of title to the disputed property. In the premises, we do not find any fault in the initial allotment of the land in dispute to Mr. Lisha nor do we see any impropriety in the subsequent allocation of the same land to Mr.

Mwakilema after Mr. Lisha's title was duly revoked. Accordingly, we dismiss the first ground of appeal for want of merit.

We now turn to the second ground of appeal, the contention being that the trial Judge wrongly adjudged the respondent the lawful owner of the property in dispute relying solely on the sale agreement.

The thrust of Mr. Mushukuma's submission on the second ground was that the respondent should not have been declared the lawful owner of the property in dispute on the strength of the sale agreement (Exhibit P.2) as the alleged sale of the property was not followed up with the transfer of the title from Mr. Mwakilema to the late Mande. He posited, therefore, that the said Mr. Mwakilema remained the titleholder as neither the deceased nor the respondent as the administratrix of the deceased's estate took appropriate steps for transferring and registering the title in consonance with the sale agreement.

On his part, Mr. Mlinga conceded that the title was yet to be transferred to the respondent due to the protracted wrangling between the parties to this matter over the property in dispute. However, it was his contention that the respondent (or rather, the deceased's estate) had a protectible interest in the disputed property.

The issue under consideration, in our view, poses no difficulty. Section 2 of the Land Registration Act, Cap. 334 Revised Edition of 2002, defines the term "owner" to mean:

> *"in relation to any estate or interest, the person for the time being in* ***whose name that estate or interest is registered;"*** [Emphasis added]

Mr. Mlinga must have had in mind the import of above definition as he conceded that Mr. Mwakilema remained, in the eyes of the law, the owner of the property in dispute as no transfer of title had been effected in favour of the deceased or the respondent as the administratrix of the deceased's estate. The agreed disposition of the right of occupancy between Mr. Mwakilema and the deceased could only have taken effect if the procedure for the transfer of title stipulated by the provisions of Sub-Part III of Part VI of the Land Act, Cap. 113 Revised Edition of 2002 and the Land (Disposition of Rights of Occupancy) Regulations, 2001, G.N. No. 74 of 2001 had been complied with. More particularly, according to Regulation 3 of the aforesaid Regulations, the transfer required the approval of the Commissioner for Lands, which was yet to be sought and obtained. In this sense, we agree with Mr. Mushukuma that in the absence of the transfer of title having been effected, the trial court erred in adjudging the respondent as the lawful owner of the property. In the

premises, the respondent, not being the registered owner of the property in dispute, was not legally entitled to injunctive relief or damages for trespass on the disputed property. Accordingly, we set aside the trial court's declaration of title in favour of the respondent as well as the order for permanent injunction and payment of general damages.

The above notwithstanding, we agree with Mr. Mlinga that although the deceased was not the duly registered owner of the property, the sale agreement between him and Mr. Mwakilema created a protectible interest. The agreement entitled the deceased purchaser to be registered the occupier of the property in dispute by taking appropriate steps for the transfer of the right of occupancy from Mr. Mwakilema, which the respondent has not done. Yet, we feel compelled to remark that the respondent's failure to formalize her title does not in itself give the appellant title to that property.

Certainly, there appears to be some truth in Mr. Mlinga's contention that the protracted dispute over the land in dispute might have had a bearing on the respondent's failure to regularize her ownership of the property. We only hope that she will find it advisable to take steps to perfect the claim by the deceased's estate of title to the property in dispute on the strength of the sale agreement.

We think it is momentous that we should remark, before we take leave of the matter, that we heard this appeal on 14th July, 2020 sitting as a standard panel of three justices of appeal including our brother, the late Mmilla, J.A., who was the presiding Chairman. Following the hearing, we deliberated on the appeal in a conference, again presided over by him, where we agreed on the reasoning steps and the outcome of the appeal. Sadly, Mmilla, J.A. passed away on 24th September, 2020 before this judgment was finalized and signed. The Court once faced an unhappy occasion like this in **Ahamad Chali v. Republic** [2006] TLR 13 at a time when the rules of the Court were silent on the way forward. This situation is now luckily governed by Rule 39 (11) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, G.N. No. 344 of 2019 thus:

> *"(11)* ***Where one of the members of the Court dies****, ceases to hold office or is unable to perform the functions of his office by reason of infirmity of the mind or body, the remaining members, if-*
>
> *(a)* ***after considering the facts of the appeal or matter before them have concurring opinion, shall deliver the judgment****; and*

(b) they do not concur, the matter shall be referred to the Chief Justice for constituting another panel to conduct a fresh hearing." [Emphasis added]

It is pursuant to the provisions of Rule 39 (11) (a) above that we render this judgment as it expresses our concurring opinion as surviving members of the panel.

The upshot of the matter is that the appeal is partly allowed to the extent shown above. In view of the circumstances of this matter, we order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 2nd day of October, 2020.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered on this 6th day of October, 2020, in the presence of Mr. Octavian Mshukuma Counsel for the Appellant and Mr. Augustino Ndomba Counsel for the Respondent, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL