IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CIVIL APPEAL NO. 131 OF 2018

LINUS CHENGULA ..... APPELLANT

VERSUS

FRANK NYIKA (Administrator of the estate of the late Asheri Nyika) ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kihwelo, J.)

dated the 17th day of March, 2015
in
Land Case No. 06 of 2010
.....

JUDGMENT OF THE COURT

13th & 19th May, 2020

MWANDAMBO, J.A.:

Linus Chengula, the appellant, lost to Frank Nyika, the respondent in a suit tried before the High Court at Iringa in Land Case No. 6 of 2010 for trespass to land known as Plot No. 347, Block E, Mwembetogwa Street in Makambako Township. As the appellant was aggrieved, he preferred the instant appeal urging the Court to set aside the judgment of the High Court

primarily because the respondent's success was against the weight of evidence.

The tale behind the suit before the trial court which has resulted into the instant appeal goes as follows as culled from the record of appeal. The appellant and one Asheri Nyika (now deceased), the father of the respondent were next door neighbours at a place/street called Mwembetogwa in Makambako Township. The appellant settled at that place way back in 1965. The late Asheri Nyika moved to the place in 1980 and found the appellant there staying in a muddy house. Unlike the appellant, Asheri Nyika applied for and was allocated the piece of land described as Plot No. 347 Block E, Mwembetogwa area by the land office, Njombe District. That allocation was made by way of a letter of offer Ref. No. 1967/4/JN dated 20th January, 1981 (Exh. P1). We shall hence forth be referring to it as Plot 347 or the suit land. According to the record, particularly the evidence of PW2, Plot 347 was among 51 plots surveyed along with BP Makambako many years back. It would appear that after the survey, Plot 347 extended to the land occupied by the appellant. However, for arrangements which are not supported by the evidence on record, the

appellant continued to occupy the land in his muddy house and the duo continued to co-exist peacefully. Despite the terms and conditions in Exhibit P1 requiring him to develop the land on the prescribed period, Asheri Nyika did not develop the entire land covered by plot 347. If anything is to go by, he acquiesced to the continued occupation of the appellant on part of disputed land. As luck would have it, sometime in 1998, the appellant started construction of a house next to the existing muddy house and had it finished in 2010. That did not amuse the plaintiff; the administrator of the estate of the late Asheri Nyika because the construction was done contrary to the existing arrangement whereby the appellant was allowed to remain in the suit land without doing any permanent construction whatsoever. As the appellant stuck to his guns claiming right on the suit land, the respondent instituted a suit in the High Court for trespass.

The appellant resisted the suit denying having encroached into the land owned by the late Asheri Nyika. He denied the respondent's averments that the suit land was surveyed and claimed title to the land on which he erected his house; No. MWT/137 as a licencee derived from a Residential Licence (Leseni ya Makazi) issued to him by Makambako Township

Authority. Being a licencee, the appellant claimed that he had been paying property tax to the relevant authority at all material time commencing the year 2010. He thus asked the High Court to dismiss the suit.

The trial of the suit before the High Court proceeded on five (5) issues namely; **one**, whether the plaintiff (respondent) was the owner of Plot 347; **two**, whether the defendant (appellant) trespassed into the plaintiff's suit land on Plot 347; **three**, whether the disputed plot was surveyed; **four**, whether Plot 347 is part of unsurveyed Plot No. MWT/137 Makambako area and; **five** the reliefs the parties were entitled to.

We wish to say a word or two on the issues at this stage. In our view, although the respondent claimed to have been the owner of the suit plot as aforesaid, it is the late Asheri Nyika to whom the offer (Exhibit P1) was made. The respondent was only an administrator of the deceased's estate which the said land formed part. Secondly, apart from Plot 347, there was no such plot as MWT/137 reflected in the fourth issue. Reference to MWT/137 should have been reference to the number of the house rather than the plot.

During the trial, the parties paraded two witnesses each to support its respective case. At the end of the trial, the High Court entered judgment for the respondent upon being satisfied that he had proved the case on the standard required in civil cases. It (the trial court) found no difficulty in answering the first issue for the respondent based on Exhibit P1 and the testimonies of the respondent (PW1) as well as Gerald Doglos Komba (PW2) supported by the defence witnesses. Having so found, the trial court observed that the appellant was a squatter on a surveyed land placing reliance on **Mwalimu Omari & Another v. Omari A. Bilali** [1990] TLR 9.

Notwithstanding the above, the trial court found no evidence to prove trespass and in consequence it answered the second issue for the appellant. As to whether the suit land was surveyed, the trial court answered it affirmatively on the basis of the evidence of PW2 and Exhibit P1. Having so held, it determined the fourth issue affirmatively and made a finding that Plot 347 extended to the land on which the appellant erected his house; No. MWT/137. Finally, the trial court ordered the appellant to give vacant possession by demolishing the house; No. MWT/137 on the land forming part of Plot 347. In this appeal, the appellant faults the High Court for:-

1. *Holding that the respondent was the rightful owner of the disputed land without considering the appellant's evidence.*
2. *Deciding that the land in dispute was surveyed based on insufficient evidence.*
3. *Holding that the suit house No. MWT/137 is built within Plot No. 347 Block E, Makambako which does not exist in law.*
4. *Ordering the appellant to demolish his house No. MWT/137 in the absence of evidence proving trespass on the disputed land and without compensation to the appellant.*

The appellant who is represented by Mr. Rutebuka Samson Anthony, learned advocate, filed written submissions in support of the appeal in terms of rule 106 (1) of the Tanzania Court of Appeal Rules (the Rules). The respondent did alike in reply through Ms. Samah Salah, learned advocate from IMMMA Advocates. During the hearing, Mr. Anthony appeared and prayed to adopt the written submissions so did Mr. Jonathan Wangubo, the learned advocate who appeared representing the respondent. Both counsel seized the opportunity to highlight on some aspects in their respective submissions particularly on ground one and four. We will consider the substance of the submissions in the course of our discussion on each ground of appeal. We note from the submissions that

ground two cuts across the entire appeal and so we propose to begin with it.

Mr. Anthony criticized the trial judge in relation to ground two for holding as he did that the disputed land was surveyed by relying on weak evidence of PW2 disregarding strong evidence from DW1 and DW2. According to the learned advocate, the mere possession of a letter of offer (Exhibit P1), was not conclusive proof that the land in question was surveyed. In elaboration, the learned advocate argued that PW2's evidence was too insufficient to come to a conclusion that the disputed land was surveyed because PW2 did not produce any survey map or at the very least, mention its registration number. On the contrary, the trial court should have believed DW1 and DW2 whose evidence showed that the disputed land was unsurveyed as corroborated by Exhibit D1.

In response, the learned advocate for the respondent argued that the trial court cannot be faulted for finding and holding that the evidence of PW2 as well as Exhibit P1 was sufficient to prove that the land in dispute was surveyed. Advancing her argument, the learned advocate contended that DW1 and DW2 could not have shaken PW2's testimony having

admitted in cross-examination that the competent authority to establish the existence of survey was, but the District Council which it did through PW2 regardless of his failure to produce a survey map in evidence. Still on this ground, the learned advocate contended that a survey map is a public document and thus its existence cannot be proved by unawareness of it by a witness and; in the absence of any evidence to the contrary, the trial court was right in its finding now challenged by the appellant. Furthermore, the learned advocate sought reliance from a High Court decision in **R v. Kerstin Cameron** [2003] T. L. R. 126 for the proposition that; although the Court is not bound by opinion of an expert, it must assign reasons for rejecting it; and that such an opinion can only be contradicted by another report or opinion. On the basis of the foregoing, the learned advocate argued that PW2's evidence could not be contradicted by DW1 and DW2 on the issue whether the disputed land was on a surveyed area. We must state at this stage that reference to **R v. Kerstin Cameron** (supra) is uncalled for in so far as the record does not show that PW2 gave evidence as an expert in terms of section 47 of the Evidence Act, Cap. 6 R.E 2002 (now R.E 2019].

In his brief rejoinder, the learned advocate for the appellant reiterated his submissions in chief particularly on the insufficiency of the evidence of PW2 on the basis of which the trial court found the disputed land was surveyed and lawfully allocated to the late Asheri Nyika now represented by the respondent.

As seen earlier, issue number three before the trial court was whether the disputed plot was surveyed. The learned trial Judge believed the evidence of PW2 who was a Land Surveyor from Makambako District Council representing the Executive Director of the Council. This witness is recorded to have testified that Plot 347 was amongst 51 plots from a survey conducted way back in 1980 and subsequently, the late Asheri Nyika was allocated that plot through Exhibit P1. However, the trial court said nothing about the evidence by DW1 and DW2 who are on record testifying that the area covering Plot 347 was not surveyed and hence the grant of a residential licence to the respondent. In not so many words, Mr. Anthony faulted the trial judge for not evaluating the evidence from both sides.

With respect, we are inclined to agree with the learned advocate being satisfied that the learned trial judge did not put to scrutiny the

evidence on both sides before coming to the conclusion that the disputed land was surveyed. If any authority will be required for agreeing with the learned advocate for the appellant, our decision in **Mkulima Mbagala v. R.**, Criminal Appeal No. 267 of 2006 (unreported) will be sufficient. The following is what the Court stated in that case:

> *"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at. See, for instance,* ***D.R. PANDYA v R.*** *(supra),* ***SHANTILAL M. RUWALA v. R.*** *[1957] E.A. 570, and* ***IDDI SHABAN @ AMSI v. R.*** *(supra). It now behoves us to discharge this duty."*

The Court's direction at the end of the above excerpt is consistent with rule 36 (1) of the Rules which vests the Court with power to re-appraise the evidence of the High Court or tribunal in its original jurisdiction and draw inferences of fact. The Court has exercised that power in many cases including our recent decision in **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Land, Housing and Urban Development & Attorney General,** Civil Appeal No. 52 of 2017 (unreported) in which we made reference to **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 shall do alike in this appeal.

From our own evaluation of the evidence, it is true that DW1 and DW2 (at pp 76-79) told the trial court that the land on which the respondent claimed to have been surveyed was unsurveyed. This is more so, because the appellant was granted the residential licence vide Exhibit D1 which could only be granted to people in unsurveyed areas according to DW1 and hence house No. MWT/137 next to the late Asheri Nyika's plot. The evidence by PW2 was to the effect that Plot 347 was amongst 51 plots

surveyed by Njombe District Council some 20 years back and that according to his recollection, the muddy house and house No. MWT/137 constructed by the appellant was at the middle of the late Nyika's plot and plot No. 346. Although he did not tender any documentary evidence, PW2 gave evidence making reference to a survey map. Mr. Anthony has attacked PW2 for his failure to tender the survey map or even mention its registration number to give credence to his evidence.

The issue arising from the foregoing is whether the respondent discharged his burden of proof to attract an affirmative finding of issue number three. There is no dispute that PW2 was a Land Surveyor with Makambako District Council, the authority responsible for land allocation. He was thus a competent person to tell the trial court whether the land on which he testified was surveyed or not. According to his evidence, he visited the area prior to giving evidence and found house No. MWT/137 constructed in the middle of Plot 347 owned by the late Asheri Nyika according to Exhibit P1. DW1 and DW2 feigned ignorance of any survey on the basis of Exhibit D1 and payment of property tax on house No. MWT/137. We agree that PW2 who is recorded to have represented the

Executive Director of Makambako District Council gave evidence in which he made reference to a survey map which he did not produce as an exhibit. However, as submitted by the learned advocate for the respondent, PW2's evidence on the survey was not discredited by DW1's and DW2's unawareness of it or by the mere possession of Exhibit D1 issued to the appellant. Worth for what it was, we are unable to agree with the appellant that the residential licence was conclusive proof that the land was unsurveyed having regard to PW2's uncontroverted evidence at page 73 that the Council does not recognize any licence in a surveyed area.

Accordingly, we hold that on the balance of probabilities, the respondent discharged his burden of proof in support of the third issue. Consequently, we find no merit in ground two and dismiss it. We now revert to ground one.

Essentially, Mr. Anthony submits in ground one that since the appellant had a customary title to the disputed land dating back from 1965, such right could not have been extinguished by the mere survey (if any) and allocation of it to the respondent. Placing reliance on section 3 (1) (b) (f), (g) of the Land Act, [Cap. 113 R.E. 2019] and section 11 of the Land

Acquisition Act, [Cap. 118 R.E. 2002], the learned advocate contended that allocation of the disputed land to the respondent was ineffectual in the absence of proof of compensation having been paid to the appellant. In his oral submissions, the learned advocate faulted the trial Court for declaring the appellant a squatter on an unsurveyed land relying on **Mwalimu Omari & Another** (supra) which had already been overturned by the Court of Appeal.

In her reply, the learned advocate for the respondent invited us to dismiss this ground. She submitted that contrary to the appellant, he neither pleaded ownership of the disputed land under customary title nor did he lead evidence to prove the same. Instead, the learned advocate argued, the appellant claimed that his plot and that of the respondent were distinct plots and that he occupied his through the residential licence (Exhibit D1). Regarding compensation, the learned counsel argued, and in our view correctly so, that it was neither part of the appellant's pleadings nor was it one of the issues framed and determined by the High Court. She reinforced her submission with our decisions in **Hotel Travertine Limited & 2 Others v. National Bank of Commerce Ltd** [2006] T.L.R. 133 and

James Funke Gwagilo v. The Attorney General [2004] T.L.R. 161 for two propositions; **one**, a parties are bound by their own pleadings and **two**, a party to an appeal is not permitted to raise a new issue on appeal not pleaded and considered by the trial court. In his oral address, Mr. Wangubo argued that the High Court rightly found and held that the land in dispute was surveyed on the basis of the evidence of PW2 who testified that Plot 347 was amongst 51 plots surveyed by the relevant authority. The learned advocate contended that there was no other evidence to contradict PW2 who is on record testifying that notwithstanding Exhibit D1 issued in relation to house No. MWT/137, such licence cannot be issued to occupier of land in surveyed areas and that explains why he was unable to trace a copy of Exhibit D1 in his office.

An examination of the pleadings shows that the respondent's claim was anchored on Plot 347 allocated to his deceased father in 1981 vide Exhibit P1 (para 2 and 3 of the amended plaint at page 24 of the record of appeal) and part of the appellant's old muddy house No. MWT/137 he occupied before the survey. In para 3 of the written statement of defence the appellant admitted that he was a squatter on the plot numbered

MWT/137 distinct from Plot 347 Block E. According to the appellant, the only dispute related to boundaries between the two plots. In other words, the dispute was limited to the extent to which Plot 347 extended rather than the whole plot. It is for this reason we think the manner in which the High Court framed the first issue was not appropriate. All the same, the trial court found credible evidence from not only the respondent's witnesses, but also from the defence witnesses proving that the land on Plot 347 belonged to Asheri Nyika; the respondent's father. Having so held, the trial court took the view that the appellant was but a squatter relying on its decision in **Mwalimu Omari & Another** (supra). The learned advocate for the respondent submitted as such despite Mr. Anthony's fierce criticism against the trial court's findings.

Considering that there was no dispute on whether the respondent's father was the owner of the land on Plot 347, we think, with respect, the appellant's criticism against the trial court is wholly unjustified. We shall demonstrate. First, by the appellant's own admission, his old house No. MWT/137 as a squatter on the land next to the late Nyika's plot. Indeed, his line of defence was long occupation therein and later through the

residential licence (Exh. D1). Secondly, the argument which the appellant relies in faulting the trial court in ground one is out of place because, as submitted by the respondent's learned advocate, the appellant is not permitted to raise matters not pleaded and determined by the trial court in this appeal consistent with our decisions in **James Funke Gwagilo** (supra) and **Hotel Travertine Limited** (supra). Taking the argument further, challenging the trial court for holding as it did that the respondent's father was the lawful owner of Plot 347 on the ground that the allocation of it was void for want of compensation is inconsistent with rule 93 (1) of the Rules. That rule enjoins an appellant to specify in his memorandum of appeal the points alleged to have been wrongly decided by the High Court. In so far as there was no issue regarding non-payment of compensation thereby vitiating the allocation of the disputed land to the respondent, the trial court cannot be faulted for something which was not before it and neither did it make any decision on it. We are fortified in this view by our previous decisions in **Elia Moses Msaki v. Yesaya Ngateu Matee** [1990] T.L.R. 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) cited in **Leopold Mutembei's** case (supra). At any rate, it has not been suggested that the respondent who was a mere allocatee of the disputed land was responsible for payment of compensation and so that argument crumbles. In the circumstances, we find no merit in this ground and dismiss it which takes us to ground three which faults the trial court for holding that house No. MWT/137 was built on Plot 347.

Mr. Anthony's argument on ground three was that in the absence of proof of compensation having been paid to the appellant, the allocation of the disputed land to the respondent was void. The learned advocate for the respondent reiterated her submissions made when addressing ground 1 and 2. In particular, the learned advocate stressed that in so far as non-payment of compensation was not pleaded and determined before the trial court, it cannot be raised on appeal. In addition, the learned advocate found no basis in this ground because the appellant did not dispute that Plot 347 belonged to Asheri Nyika and that house No. MWT/137 was built within Plot 347 in view of the documentary evidence through Exhibit P1 corroborated by PW1 and PW2.

We think we should not be detained in this ground in so far as it is based on the same argument on lack of compensation which we have already rejected shortly. Without further ado, this ground is desolate of merit and we likewise dismiss it.

The appellant's submission on ground four is that trespass was not proved to have existed neither was there any evidence to prove payment of compensation to the appellant. Accordingly, the learned advocate argues, it was wrong for the trial court to order the appellant to demolish his house – No. MWT/137. In his oral submissions, the learned advocate appeared to be shifting his standpoint by arguing that the order for demolition was irregular because the trial court had already held that the appellant was not a trespasser.

The learned advocate for the respondent submitted in reply that the order for demolition was justified since the trial court had already found that the appellant had built his house No. MWT/137 at the middle of Plot 347. Mr. Wangubo submitted orally that the trial court found that the respondent was to blame for allowing the appellant to remain into his land for as long as 30 years and so he could not have been a trespasser.

However, the learned advocate argued that the order for demolition followed a finding that the appellant had constructed house No. MWT/137 at the middle of Plot 347. On the basis of the foregoing submissions, Mr. Wangubo invited us to dismiss this ground and the entire appeal with costs for lack of merit.

Having examined the submissions by the learned advocates both written and oral, in the light of the evidence on record and the findings of the trial court when discussing the second issue, it seems to us that the appellant has missed the boat. We say so being alive to the fact that the trial court was satisfied from evidence that the appellant's continued occupation on the land was with the respondent's consent and so the question for him being a trespasser did not arise. Nevertheless, the trial court found sufficient evidence from both PW1 and PW2 that the appellant had constructed a new house at the middle of Plot 347 on the basis of which it ordered demolition to give vacant possession consistent with the respondent's prayer (b) in the amended plaint. We endorse the submissions by the learned advocate for the respondent and find no merit in this ground as well with the attendant consequences.

In the light of the foregoing, we hold that the appeal is wholly barren of merit and dismiss it with costs.

Order accordingly.

DATED at **IRINGA** this 15th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 19th day of May, 2020 in the presence of Mr. Samson Rutebuka, Advocate for Appellant, Linus Chengula the Appellant and Frank Nyika for Respondent is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL