IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 292 OF 2017

AIDAN GEORGE NYONGO ....APPELLANT

VERSUS

MAGESSE MACHENJA .....1ST RESPONDENT
COMMISSIONER FOR LANDS .....2ND RESPONDENT
REGISTRAR OF TITLES .....3RD RESPONDENT
ATTORNEY GENERAL ....4TH RESPONDENT

[Appeal from the Judgement and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam]

(Mgetta, J.)

Dated the 18th day of July, 2016
in
Land Case No. 141 of 2007

JUDGMENT OF THE COURT

18th February & 9th March, 2022

KENTE, J.A.:

In the High Court of Tanzania (Land Division) sitting at Dar es Salaam, the respondent herein namely Magesse Machenja sued the appellant one Aidan George Nyongo along with the Commissioner for Lands, the Registrar of Titles and the Attorney General, (henceforth the second, third and fourth respondents respectively) claiming the following:

i) A declaratory order that he was the lawful owner of a piece of land known and described as Plot No. 184 Mbezi Beach Area Kinondoni Municipality, Dar es Salaam (CT. No. 44379).

ii) A declaratory order that all the unexhausted developments on the said piece of land were made by him.

iii) General damages to the tune of Tzs. 400,000,000.00

iv) A perpetual injunctive order restraining the defendants and their agents from trespassing and interfering with the suit property.

v) Cost and,

vi) Any other reliefs the court may deem appropriate to award.

The factual background giving rise to this dispute is briefly as follows.

Initially and indisputably, the disputed plot was allocated to one Subira Kasimbilo whose postal address was No. 55082 Dar es Salaam. According to the evidence on the record, Subira Kasimbilo was issued with a letter of offer of a right of occupancy (Exh. P1) in respect of the

disputed plot on 10th January, 1978 by the office of the Kinondoni District Commissioner. The events that followed thereafter are not articulate but there are two contentious claims forming the subject of the present dispute. On one hand, it was alleged by the appellant that on 2nd June, 1995 the same plot was allocated to him by the Land Division in the Ministry of Lands (vide Exh. D3). Yet on another hand, the first respondent, strenuously maintained that he acquired the disputed plot from Subira Kasimbilo in 1995 after she sold him an unfinished building which she had erected thereon.

After hearing the evidence led by the parties, the learned trial Judge found and subsequently held that, although both the appellant (who was the third defendant) and the first respondent (who was the plaintiff) possessed title deeds (exhibits P3 and D4 respectively) over the same plot the first respondent was its lawful owner having bought it from Subira Kasimbilo the first lawful owner. The finding by the learned trial Judge was essentially based on the letter (exh. P7) dated 5th May, 2005 which the second respondent wrote to inform the first respondent through his advocates that, notwithstanding the appellant's possession

of a certificate of tittle No. 49502 (exh. D4) over the disputed plot, the same belonged to the first respondent who was also armed with a registered certificate of tittle No. 44379 (Exh. P3) which was issued to him after he purchased the said plot from Subira Kasimbilo. The reasoning of the second respondent, which the trial Judge accepted hook line and sinker was that, there was no evidence showing that the title of Subira Kasimbilo was revoked by the relevant authority so as to pave the way for the subsequent allocation of the same plot to one Ezack Zakaria from whom the appellant claimed to derive his title. Invoking the principle of first in first served which essentially means that, it is the earlier grant which is effective, the learned trial Judge was of the settled view that, as opposed to Ezack Zakaria, Subira Kasimbilo had a better tittle to transfer to the first respondent a position which was confirmed by the second respondent as well through his letter (Exh. P7).

On the basis of this evidence, the learned trial Judge went on sustaining the claim by the first respondent and declared him the lawful owner of the disputed plot. He also issued a perpetual injunctive order restraining the appellant, the second, third and fourth respondents from

trespassing on, interfering with, or harassing the first respondent from peaceful possession and development of the said plot. Furthermore, the appellant was ordered to pay the first respondent TZS 100,000,000.00 being general damages.

The appellant was deeply aggrieved by that judgment of the High Court, hence this appeal. Deploying the professional legal services of Mr. Lusajo Willy, learned advocate, he lodged a memorandum of appeal containing seven grounds which can be summarised as follows. **One,** that the learned trial Judge erred both in law and in fact when he declared the first respondent the lawful owner of the disputed plot while there was evidence to show that his right of occupancy was obtained unlawfully. **Two**, that the learned trial Judge erred in law and in fact for making a finding that the first respondent had acquired the said plot from Subira Kisimbilo who had no valid transferable title because of her failure to pay the requisite fees when she was offered the disputed plot by the second respondent. **Three**, that the learned trial Judge strayed into error both in fact and in law, in holding that the appellant had failed to prove his ownership while he led sufficient evidence in support of his

claim. **Four,** that the learned trial Judge erred both in law and in fact in not taking into account the historical background of this dispute particularly the fact that the appellant was allocated the suit plot after the first offerees namely Kasimbilo and Ezack Zakaria had defaulted to pay the requisite fees and to meet development conditions. The appellant added that, if the trial Judge had traced the origin of his title, he could have declared him the lawful owner of the suit property. In essence the appellant's complaint is that his evidence was an exposition of the genesis of his title which he believed to be valid but the learned trial judge, either deliberately or inadvertently failed or declined to address that evidence. **Fifth,** that the trial Judge erred both in law and in fact by not ordering for the disputed plot to be sub-divided into two equal halves and allocating one half to him and another half to the first respondent as proposed by the second respondent. **Sixth,** that the trial Judge erred both in law and infact by making a finding that, the first respondent made unexhausted improvements on the disputed plot while there was no such improvements in the year 2000 as all developments were made after an order for maintenance of the *status quo* was made.

Finally, the appellant faulted the learned trial Judge for condemning him to pay the first respondent general damages amounting to TZS 100,000,000.00 instead of ordering him together with the second and third respondent to share the responsibility and the blame for the situation.

The appellant was at the hearing of this appeal represented by Mr. Lusajo Willy, learned advocate. On the other hand, while Ms. Magreth Ngasani, also learned advocate appeared to resist the appeal on behalf of the first respondent, Ms. Consesa Kahendaguza learned State Attorney represented the second, third and fourth respondents.

We wish to state, at this earliest opportunity that the intermixture of the appellant's complaints in this appeal and what we are called upon to decide, makes it convenient and necessary to combine and dispose of the first, second, third, fourth and fifth grounds of appeal simultaneously. To recapitulate, the basis of the appellant's complaint in the said grounds is that, he is the holder of the right of occupancy over the disputed plot the same having been allocated to him by the second respondent after the persons to whom the plot was initially allocated

neglected or failed to pay the necessary fees and taxes and to comply with the attached development conditions. But what is encouraging and particularly significant is the appellant's graceful acceptance of the first respondent's title over the same plot hence his call to the court to revert to the path of *"win some lose some"* to find what in his view, is a fair and just solution to this dispute. We shall come to this alternative prayer by the appellant at a latter stage of this judgment.

In support of the appeal, Mr. Willy submitted that, Subira Kasimbilo to whom the plot in dispute was initially offered way back on 10th January, 1978 and from whom the first respondent derives title, did not comply with the terms of the said offer as she failed to pay the requisite land fees and taxes. That, on that account, the offer was revoked automatically. The learned counsel went on submitting that, after revocation, on 15th March, 1978, the plot was allocated to one Ezack Zakaria who paid the requisite fee and, was issued with a title deed. However, according to the appellant's counsel, Ezack Zakaria failed to develop the plot within the prescribed period and, in consequence, his title was similarly revoked by the President in 1995. Mr. Willy added that,

in the same year, the appellant was allocated the same plot for which he went on and paid the required fee and taxes. The learned advocate submitted further that, contemporaneously, in 1995, the first respondent processed and obtained a certificate of title over the same plot after he purported to purchase it from Subira Kasimbilo. The learned counsel submitted however that, the first respondent had no better title to derive from the said Subira Kasimbilo whose title was automatically revoked by reason of her failure to pay the necessary fees and taxes. This, the learned counsel for the appellant concluded, meant that the transfer of ownership from Subira Kasimbilo and the subsequent grant of the right of occupancy by the second respondent to the first respondent, cannot have priority over the appellant's title which, in the learned counsel's view, was a better and superior title.

On the other hand, Ms. Ngasani learned counsel who, as indicated earlier, advocated for the first respondent, submitted to the effect that the first respondent's title took precedence over the appellant's because, it derived from the person to whom the plot was issued first in time and,

that as opposed to what is alleged by the appellant, that offer was not and has never been revoked.

Firmly in the trial court's side, Ms. Ngasani submitted that, on the same footing, the second respondent recognised the first respondent as the lawful owner of the disputed plot. With regard to the background of the appellant's and first respondent's titles, the learned counsel submitted that, that was canvassed by the trial Judge who, as we have seen, just picked the cue and drew his conclusion from what was said by the second respondent in his letter (exh. P7).

For her part, Ms. Kahendaguza appeared to be wavering between supporting and opposing the appeal. In the first place, showing her indecision, the learned State Attorney submitted that the appellant and first respondent should have shared the disputed plot as initially proposed by the second respondent. However, apparently considering that it was better for her to sit on the fence, Ms. Kahendaguza submitted, in the same breath that, the appellant's title was inferior to that of the respondent and therefore, his complaints were unwarranted.

Having given this matter an anxious and heedful consideration, we have reached the conclusion that, all things considered, the decision of the trial Judge cannot be disturbed. As it will be noted, in his judgment, the learned trial Judge, having observed that it was not in dispute that the first letter of offer (exh. P1) was issued to Subira Kasimbilo who is said to have subsequently sold the disputed plot to the first respondent, he went on expressing his misgivings on the authenticity of two letters of offer (exh. D3 and D4) which were issued to the appellant while the offer to Subira Kasimbilo was still in existence. The learned trial Judge further held that, although both the appellant and the first respondent were in possession of title deeds (exh. P3 and D4 respectively) in respect of the same plot, the second respondent as per exhibit P7, does not recognise the appellant's two letters of offer and by extension, his title which, as we shall hereinafter demonstrate, was tainted with procedural irregularities right from its source.

As to the second respondent's seemingly reckless act of issuing other letters of offer to the appellant while the offer of Subira Kasimbilo was still in existence, the trial Judge was satisfied by the white washing

explanation given by one John Minzikumtwe (DW2), an officer from the office of the second respondent, who told the trial court that, it could have been the result of poor records keeping which was a common phenomenon in the second respondent's office in 1995. We should say, with respect that, for some of the officers in the second respondent's office who could only be credited with papal infallibility by the skin of one's teeth, the version given by DW2 could mean something deeper but, for the purposes of this appeal, rather than longing for a useless nostalgia, we must contend ourselves with his explanation.

For our part, going by the evidence which was presented before the trial court, it behoves us to come to the conclusion that, the decision by the trial Judge was in the circumstances, unavoidable and we are inclined to agree with him. To start with, we wish to make an elementary but very pertinent observation which caters for the premise that, in the absence of sufficient proof that Subira Kasimbilo's letter of offer of the right of occupancy was revoked after she allegedly failed to pay the necessary fees and taxes, the correct position is that, her title retained priority over any other subsequent offers because it was issued first in

time. (See **Col. Kashimiri v. Naginder Singh Matharu** [1988] TLR 163. Obviously, that would spell doom to anyone claiming ownership of the disputed plot whose title was not derived from her.

Notably, throughout the hearing of this appeal, Mr. Willy made an inconclusive contention that Subira Kasimbilo's right of occupancy was automatically revoked and that the disputed plot was subsequently allocated to Ezack Zakaria who, as it turned out, after paying the required fees and taxes, he failed to effect any developments thereon as required by law hence the revocation of his title as well and its allocation to the appellant. However, we hasten to observe that the evidence is silent as to the identity of the revoking authority and the actual date of the alleged revocation. But then, what is meant by automatic revocation of one's letter of offer of a right of occupancy? Is it provided for anywhere in our laws? Those are the most biting questions that we have to determine directly or indirectly, in the course of this judgment.

In support of his line of argument that under the law, Subira Kasimbilo's offer could automatically be revoked because of her failure to pay the attendant fees and taxes, after we probed into his tenor of

argument, Mr. Willy referred us to the cases of **Hotel Travertine Limited & Others v. NBC Limited,** Civil appeal No. 82 of 2002 [2005], **Tanzania Revenue Authority v. Tango Transport Company Ltd,** Civil Appeal No. 84 of 2009, **MM World wide Trading Company Ltd & Another v. NBC Limited,** Civil Appeal No. 258 of 2017 and **Aidan George Nyongo v. Magese Machenje & Three Others,** Civil Appeal No. 214 of 2017 (all unreported). We suppose that what the learned counsel sought to submit is that, if an offeree of a right of occupancy fails or neglects to pay fees and taxes attached to that offer the said offer, terminates automatically.

Submitting in rebuttal, Ms. Ngasani was diametrically opposed to the views expressed by Mr. Willy. She said that, Subira Kasimbilo's letter of offer was not revoked and therefore, all the time, she (Subira Kasimbilo) maintained a better title over the disputed piece of land which she could pass to any other person as she did to the first respondent. Therefore, the learned counsel for the first respondent insisted that, her client's title to the disputed plot was superior to that of the appellant the same having been derived from the lawful owner.

Unhesitatingly, we are in general accord with Ms. Ngasani's proposition. We take the strong view that, the right of occupancy granted to Subira Kasumbilo could not be revoked without serving her with a revocation notice as it allegedly happened in the instant case. (See the case of **Mwajuma Mbegu v. Kitwana Amani** [2004] TLR 410). In the above cited case, having reproduced some of the conditions contained in the letter of offer of a right of occupancy, this Court went on to state categorically that, the President could only revoke the offer of Right of Occupancy by giving to the appellant notice in writing in terms of condition 8.

It follows therefore that, since Subira Kasimbilo the first offeree, had been issued with a letter of offer of a right of occupancy by a properly constituted allocating Authority and, there being no notice of revocation, cancellation or withdrawal of the said grant duly served upon her, the purported allocation of the same plot to the appellant was null and void. Put in other words, we are of the firm view that, once a Right of Occupancy was granted to Subira Kasimbilo by a duly constituted Authority, it remained valid until and unless otherwise revoked by the

President under section 10 of the now repealed Land Ordinance. That never occurred and therefore in 1995, Subira Kasimbilo still had a better and superior title to pass over to the first respondent.

We shall now revert to determine the sixth and seventh grounds of appeal in which, respectively, the appellant is faulting the learned trial Judge in his findings that the first respondent made unexhausted improvements on the disputed plot while the said improvements were carried out in violation of an order for maintenance of the *status quo* and for condemning the appellant to pay by himself, general damages amounting to TZS 100,000,000.00 to the first respondent after having found that the second and third respondents had recklessly issued two certificates of title to two different persons over one and the same plot.

It is noteworthy that, Mr. Willy did not have much to expound on the above paraphrased grounds of appeal. He simply adopted and urged the Court to sustain them, they being intelligible as to require no interpolations. The learned counsel only insisted that the unexhausted improvements were effected on the disputed Plot at the time when the parties were required to maintain the *status quo*. As for the TZS.

100,000,000.00 which the appellant was ordered to pay the first respondent as general damages, counsel for the appellant submitted in a nutshell, that, having found that the second and third respondents were responsible for issuing both the appellant and the first respondent with the rights of occupancy over the same plot, it was rather erroneous for the trial Judge to order him to pay by himself such a staggering amount of money without taking into account the second and third respondents' share of blameworthiness.

For the first respondent, Ms. Ngasani resisted by arguing, correctly so in our view, first that, what was alleged by the appellant in the sixth ground of appeal was not supported by the evidence on the record. Secondly, she submitted, on the seventh ground of appeal that, given the evidence which demonstrates the appellant's uncalculated intransigent position throughout this dispute, the trial Judge was perfectly entitled to condemn him to pay the impugned damages as he did. As a result, the learned counsel insisted, the appellant's complaint on that score, were without any factual or legal basis.

In his judgment, the learned trial Judge was satisfied and he accordingly found that, it was the first respondent who made unexhausted developments on the disputed plot. We agree with the finding by the learned trial Judge without hesitation. As correctly submitted by Ms. Ngasani, the contention by the appellant that the said developments were effected in violation of an order requiring the parties to maintain the *status quo,* was not supported by the evidence on the record. For instance, the appellant could not tender any document showing that indeed, at some point, the parties were directed by any Authority not to do anything on disputed the plot until the determination of the dispute between them or that someone had entered a caveat on the disputed plot to prevent its development. In the circumstances, we cannot accept Mr. Willy's claim that unexhausted improvements were effected in contravention of any lawful order. We find no merit in this complaint and we accordingly dismiss it.

We will now briefly address the question of the general damages. We agree with Mr. Willy that indeed, the second and third respondents were partly to blame for issuing the appellant and the first respondent

each with a title deed over the same plot. To that extent, one could hold them liable along with the appellant for general damages. However, the situation in this case is different. While it is on record that the first respondent was subjected to continuous threats and harassments from both the second and third respondents, it was the finding by the learned trial Judge that, all these acts were deliberately done in favour of the appellant who, on several occasions, through his father one George Charles Nyongo (DW1) who, as the record shows, was acting under the appellant's power of attorney, trespassed onto the suit plot. Like the trial Judge, we are convinced that the appellant must have been privy to the threatening and harassing the first respondent. Having obtained title over the disputed plot in the circumstances which were highly questionable, the logical conclusion is that, the appellant knew that, without seeking assistance and protection from the second and third respondent, he would, at one point in time, be in a dire strait. The adage being that, as you make your bed so you must lie in it, the appellant cannot be heard today, to hide behind the veneer of collective responsibility and complain that the second and third respondents should

have been held liable as well to pay general damages to the first respondents. That was his own cross to carry.

It is upon the above reasons that, all in all, we find this appeal to have no merit and hereby dismiss it with costs.

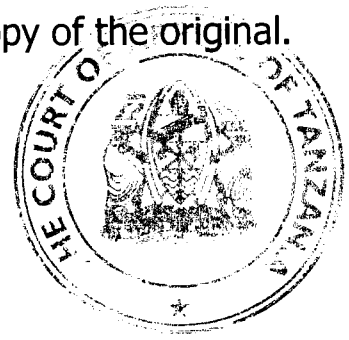
DATED at **DAR ES SALAAM** this 3rd day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 9th day of March, 2022 in the presence of Lusajo Willy, learned advocate for the appellant and Magreth Ngasani learned advocate for the 1st respondent and Urso Luoga, learned State Attorney for the 2nd, 3rd and 4th respondents is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL