IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CIVIL APPLICATION NO 60/17 OF 2020

ACER PETROLEUM (T) LIMITED ..... APPLICANT

VERSUS

BP (TANZANIA) LIMITED .....RESPONDENT

(Application for review of the decision of the Court of Appeal of Tanzania, at Dar es Salaam)

(Mussa, Wambali, And Levira JJ.A.)

dated the 16th day of January, 2020
in
Civil Appeal No. 8 of 2018

.....

RULING OF THE COURT

3rd November, 2021 & 28th June, 2022

MWARIJA, J.A.:

The applicant, Acer Petroleum (T) Limited instituted this application under s. 4 (4) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and Rule 66 (1) and (6) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The Court has been moved to review its judgment dated 16/1/2020 arising from Civil Appeal No. 8 of 2018. The appeal giving rise to the impugned decision emanated from the decision the High Court (Land Division) at Dar es Salaam in Land Case No. 151 of 2018 (the Land Case).

The Land Case which was instituted by the respondent, BP (Tanzania) Limited involved a dispute over ownership of a parcel of land, Plot No. 331 situated at Kurasini area in Temeke District within the City of Dar es Salaam (the suit land). The respondent claimed for *inter alia,* a declaration that it was the lawful owner of the suit land, that the same was allocated to it by the then Ministry of Lands, Housing and Urban Development (the Ministry) in 1994 vide a letter Ref. No. LD/17/3770/7/UMS dated 1/10/1994.

The applicant disputed the claim and in addition raised a counterclaim seeking also to be declared the lawful owner of the suit land on account of having purchased it from the company known by its acronym of TRADECO. The applicant claimed that the said company owned the suit land vide a certificate of title No. 186230/33 issued by the Ministry on 15/7/1994. According to the applicant, the title deed was preceded by a letter of offer Ref. No. LD/166903/7/KK dated 1/4/1994.

Having heard the evidence of the witnesses for the parties, the learned trial Judge (Ngwala, J.) found that there was a double allocation of the suit land. It was her finding that, allocation of the suit land to TRADECO which later transferred it to the applicant, was made before the survey intended for land use planning at of the area where the suit

land is situated, had been made. The learned trial Judge was thus of the view that the allocation of the suit land to TRADECO was made pre-maturely and therefore, invalid.

On the other hand, the learned Judge found that, even though the applicant's letter of offer preceded that of the respondent, because the former's later was invalid for having been issued before the approval of the survey, the grant to the applicant was void *ab initio.* She held therefore, that despite having been granted the letter of offer later in time, the respondent was the lawful owner of the suit land. The High Court thus entered judgment for the respondent and proceeded to dismiss the counterclaim. It declared the respondent the lawful owner of the suit land and consequently, awarded it TZS 10,000,000.00 as damages for trespass. The respondent was also awarded costs of the suit and interest on the decretal sum at the rate of 7% per annum from the date of the judgment to the date of full satisfaction of the decree.

The applicant was aggrieved by the decision of the High Court and thus appealed to this Court raising a total of twenty grounds of appeal. At the hearing of the appeal however, the applicant's counsel abandoned two grounds and consolidated the other thirteen which he argued them together. With regard to the rest of the grounds, the same

were argued separately including the tenth ground in which the applicant contended that the suit was filed out of time.

Having considered the arguments of the learned counsel for the parties and upon re-evaluation of the evidence, the Court found that the appeal could be determined on the basis of grounds 4, 10 and 18 in consolidation with grounds 19 and 20. The same are to the effect that:

> *"4. That the Honourable High Court erred in law and in fact to take that the stand of the land authorities was that the rightful owner of the suit premises was the Respondent and not TRADECO Ltd, issued a certificate of title to TRADECO Limited and registered transfer of ownership from the said TRADECO to the appellant;*
>
> *5-9 ....N/A*
>
> *10. That the Honourable High Court erred in fact and law by not dismissing the suit by the Plaintiff for being out of time upon turning the case to be what the land office did or did not do in the process that ended up granting the right of occupancy over the suit land to TRADECO Ltd in April, 1994;*
>
> *11-17 ....N/A*

18. That having declared that suit land as a playground and buffer zone, the Honourable High Court erred in law and in fact to hold that the defendant had trespassed to the respondent's land and condemning him to pay Tshs. 10,000,000/= as damages for trespass;

19. That the Honourable High Court erred in law and in fact in holding that the Appellant committed trespass on the suit land against the Respondent, without evidence that the Appellant unlawfully took possession of the suit plot from the Respondent;

20. That having the Respondent proved no damage suffered from the alleged trespass, the trial court erred in law and in fact to grant to the Respondent a total of Tshs. 10,000,000/= as damages for trespass."

With regard to the 10th ground, the Court did not find merit in the contention by the counsel for the applicant that the suit was filed out of time. It found that the dispute between the parties started after the suit land was transferred to the applicant on 14/5/2008. In the circumstances, since the suit was filed in the High Court on 26/6/2008 within a period of one month of the date on which the dispute arose, then whether the cause of action was based on tort recovery of

possession or a claim for compensation founded under items 1,6, and 22, respectively of Part I of the Law of Limitation Act [Cap. 89 R.E. 2002, now R.E. 2019] (the LLA), the suit was filed within time. The Court observed as follows in its judgment at page 220 of the record of appeal.

> *"Therefore, applying any standard classification of the period of limitation set in the LLA, the suit which was lodged before the High Court by the respondent could not be taken to have been time barred. We think it was in this regard that the learned counsel who represented the appellant at the High Court did not raise any objection on the limitation of time of the suit at that particular time and place."*

As for the 4th ground of appeal in which the counsel for the applicant faulted the learned trial Judge for having acted on the evidence of the two files which were not, listed in the list of the documents intended to be relied upon by the respondent, as required by O.VII r. 14(1) of the Civil Procedure Code [Cap. 33 R.E. 2002, now R.E. 2019] (the CPC), the Court agreed that the files Ref. No. LD/166903 which was admitted as exhibit 'A' and Ref. No. LD/173770, were improperly admitted and thus expunged them from the record. The files

which were tendered by PW1, an official from office of the Commissioner for Lands after the learned trial Judge had granted leave to the said witness to do so, were acted upon by High Court to find that the respondent was allocated the suit land. The files were however, admitted without affording the applicant the opportunity to express whether or not it had any objection to their admission. It was not further, afforded the right to cross-examine PW1 on the contents of those documents. The Court found also that the learned trial Judge did not comply with O.XII r. 2 of the CPC which requires a trial court to give reasons for admitting the documents which were not listed in terms of O. VII r. 14 (1) of the CPC.

Notwithstanding the expungement of the evidence of the two files, the Court found that, on the basis of the remaining evidence on the record, particularly the letter ref. No. LD/166603/14/ZM dated 22/10/96 written by the Ministry to the then chairman of the City Commission and the oral testimony of PW1, the High Court rightly found that the respondent was the lawful owner of the suit land. On the part of the evidence of the witnesses for the applicant, the Court observed that apart from the disputed certificate of occupancy (exhibit D1), their testimony was not supported by any letter of offer or a sale agreement

between the applicant and TRADECO. Thus, relying on exhibit 'A', the we held that the same;

> *"... made it clear that, the mentioned plots therein (the suit land) were rightly owned by the respondent as the same were erroneously granted to Export Trading Co. Ltd and TRADECO and that the Ministry of Lands was in the process of revoking the said grant (to TRADECO as claimed that it owned it vide exhibit D9)".*

On further re-evaluation of evidence, the we were satisfied that, since the Ministry's letter Ref. No. LD/17377/16/JS dated 28/8/96 recognizing TRADECO as the lawful owner of the suit land was cancelled and because in his evidence, the founder of TRADECO was aware of existence of exhibit 'A' because the same was copied to his company and furthermore, because exhibit. 'A' was not cancelled despite exhibit D9, the claim by the applicant that it owned the suit land was baseless. Thus, from the evidence of exhibit 'A' which resolved the problem of double allocation by the Ministry, we came to the conclusion that the respondent was the lawful owner of the suit land.

On whether or not the applicant should have been declared the *bona fide* purchase of the suit land, the Court found that the applicant

did not take sufficient precautions before it purchased it. We observed that from the evidence, first, the applicant was informed of exhibit D9 and secondly, whereas the sale agreement was entered on 6/12/2007, the application for official search was made on 15/1/2008 and issued on 22/2/2008. On these findings, we dismissed the 4th ground for want of merit.

With regard to grounds 18,19 and 20 in which the applicant contested the award by the High Court, of damages to the respondent to the tune of TZS 10,000,000.00, after having considered, among others, the fact that, it was undisputable that the respondents' fence, was demolished, we were of the view that the award was justified. In the circumstances therefore, we also dismissed these three grounds of appeal. As for the rest of the grounds, we found that the same were raised in the alternative and therefore, after having dismissed the foregoing grounds (the 4th, 10th, 18th 19th and 20th grounds), the remaining ones were rendered superfluous. We eventually dismissed the appeal.

As stated above, the application is predicated on Rule 66(1) (a) and (6) of the Rules which states as follows:

"66 (i) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds: -

(a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;

(b) – (e).... N/A

(2) An application for review shall, subject to necessary modifications, be instituted in the same mode as a revision.

(3) – (5) .... N/A

(6) Where the application for review is granted, the court may rehear the matter, reverse or modify its former decision on the grounds stipulated in sub-rule (1) or make such other order as it thinks fit."

In essence therefore, the applicant's complaint is that the impugned decision was based on an error which is apparent on face of the record resulting into miscarriage of justice.

According to the notice of motion, the applicant's contention is that the impugned judgment is tainted with the following errors which are manifest on the face of the record:

"(a) That the Honourable Court erred in law for not deciding ground number 1 of appeal which was challenging the High Court for having admitted, heard and decided the case instituted by the plaint which did not disclose the problem that the court decided upon and no cause of action.

(b) That the Honourable Court erred in law and in fact to rule in effect that the problem of the Respondent that the High Court heard and decided was wrongful transfer of ownership from TRADECO LIMITED to the appellant in 2008 while deciding the issue whether the suit was time barred and at the same time holding to the effect that the problem that was disturbing the Respondent which the High Court decided and which the Court of Appeal also decided against the appellant while tackling the issue of who was the lawful owner of the land was alleged wrongful grant of the suit land TRADECO LIMITED in 1994;

(c) That the Honourable Court erred in law and in fact not to decide one of the central issues in the appeal before it, namely which document is authoritative, superior and overriding over the other between a certificate of occupancy naming

a person to be the owner of an unrevoked title and a letter issued on behalf of the Commissioner for Lands expressing his view that the grant of the land to that person was not correct and his intention to process it revocation in deciding the question whether the person holding the certificate is, in the absence of occurrence of such threatened revocation, the owner or not;

(d) That the Honourable Court erred in law and fact by not considering and deciding the Applicant's contention that, even in the letter of the Commissioner for Lands and other actors rather than sticking to the certificate of occupancy as urged, the records show not just the letter dated of 22/10/1996 from the Commissioner in which the Court relied but conflicting letters and opinion from different actors, some written by the Commissioner himself, and the agreed opinion that the proper way to change ownership is by revocation (which has never taken place), and the caution of the Attorney General against effecting the intended revocation towards deciding the issue of ownership against the Applicant.

(e) That the Honourable Court erred in law not to consider its decisions in the cases of ***Omary Yusufu v. Rahma Ahmed Abdulkadir*** *[1987] TLR 169 and* ***Peter Adam Mboweto v. Abdallah Kulala and Another*** *[1981] 335 and even the High Court's decision in* ***Consolidated Holding Corporation v. Abdallah Mpokonya*** *(Commercial Case No. 104 0f 2004), all giving protection to persons like the applicant who purchase registered lands for which there is no caveat on the register, which were in four corners with the present case and which were all cited and their texts supplied."*

At the hearing of the application, the applicant was represented by Mr. Audax Kahendanguza Vedasto, learned counsel while the respondent had the services of Mr. Gaspar Nyika, also learned counsel. Both learned advocates had, prior to the hearing date, complied with Rule 106 (1) and (7) of the Rules by filing their written submissions in support of the application and the reply thereto respectively. Later on, during the hearing, Mr. Vedasto made further oral submission highlighting his written submission to which Mr. Nyika made his reply thereto.

Submitting in support of ground (a), Mr. Vedasto argued that the Court did not decide the 1st ground of appeal in which the applicant

challenged the finding by the High Court that the respondent had better title than that of the TRADECO. His argument on that ground was that; it was clearly indicated in the plaint that the applicant was the first one to acquire the suit land vide a title deed registered on 18/7/1994 thus defeating the respondent's claim that it acquired the suit land on 29/11/1994. He argued further that, since in the plaint, the respondent did not allege that the applicant had fraudulently obtained the title deed, the allegation of fraud which was made in the course of hearing the suit amounted to formulation of a new cause of action which required to be proved by evidence. Relying on the case of **Makori Wassaga v. Joshua** [1987] T.L.R. 88, the learned counsel argued that the course taken by the High Court was improper because it amounted to setting up a new case. He submitting further that, had the Court determined that ground on the basis of those arguments and in consideration of s. 33 (1) of the Land Registration Act [Cap 334 R.E. 2019], it would have found that the High Court erred in deciding that the applicant was wrongly allocated the suit land.

Relying to the arguments made in support of ground (a) of the notice of motion, Mr. Nyika started by pointing out what is considered to be an error apparent on the face of the record as stipulated under Rule

66 (1) (a) of the Rules. Relying on the case of **Chandrakant Joshibhai Patel v. R.** [2004] T.L.R. 218, he submitted that, it must be a patent mistake which would not require long arguments to discern. As to the contention that the 1st ground of appeal was not decided, Mr. Nyika disputed that assertion arguing that the said ground, which raised an issue on who among the respondent and TRADECO had a better title to the suit land, was decided together with the 4th ground of appeal.

The learned counsel went on to state that, the argument by the argument by the counsel for the applicant that in its defence, the respondent had raised a new cause of action, was neither raised in any of the 20 grounds of appeal nor in the written statement of defence. Citing the case of **Hotel Travertine Ltd & 2 Others v. National Bank of Commerce Ltd** [2006] TLR 133, the learned counsel submitted that, since the matter was raised for the first time during the hearing of the appeal, the same ought to have not been considered.

Having deliberated on the learned advocates' rival arguments on this ground of the notice of motion, we are, with respect, unable to agree with the counsel for the applicant that the first ground of appeal was not determined. From the pleadings, the trial court framed the following main issue for determination:

"Who is a rightful/lawful occupier of the suit land".

The issue was answered in favour of the respondent. The Court held, as follows at page 30 of the record of appeal:

"...The rightful or lawful occupier of the suit land is M.S. BP (T) Ltd., that is to say that the plaintiffs are the lawful owners of the suit land."

The decision was not, however, based on the finding that the allocation of the suit land to TRADECO was perpetuated by fraud. It was based on the evidence of the parties' witnesses and the tendered documents obtained from the Ministry evidencing the sequence of the allocations to TRADECO and the respondent. Having evaluated the evidence, the learned trial Judge held as follows:

"In my considered opinion TRADEO did not meet the conditions and requirements of the Scheme. [it] was allocated the suit plot prematurely, that is before the survey was approved. As a consequence, the land authorities were well determined to revoke his title. The validity of the grant of title to TRADECO must depend on the validity of the survey plan under which such grant was created. ***The plan which resulted to the grant of title to TRADECO was invalid***

and never existed. Hence the validity of the Plaintiff's titie ...cannot be defeated merely because it was given later in time than the title of TRADECO.

The Plaintiff's title is still valid. It has never been revoked. The grant of the letter of offer two was valid in the eyes of the law because the Plaintiff accepted the offer and paid the necessary fees. The Certificate of occupancy was prepared but the Commissioner for Lands withheld the signature. On the other hand, the issuance of title of TRADECO was contrary to the Laws of this country ***ab initio****."*

The issue of fraud which, as contended by the counsel for the applicant, was not pleaded, came about in the judgment by way of an *obiter dictum*. It was an expression given by the learned trial Judge in passing and was not therefore, essential to the decision. This is clear from the wording of paragraph 2 at page 26 of the record of appeal where it is shown that, besides the oral and documentary evidence establishing that the respondent had a better title than that of TRADECO, the trial court found in addition, that the certificate of occupancy granted to TRADECO was procured by fraud.

In that respect therefore, since the 1st ground which was dealt together with the 4th ground of appeal was uphold on the basis of the reasons given the trial court, the contention that the same was not decided because the Court did not consider the arguments challenging the trial court's finding based on fraud, is devoid of merit. We thus dismiss ground of the notice of motion.

On ground (c) of the notice of motion, Mr. Vedasto argued that the Court did not decide the issue which arose from the 2nd and 8th grounds (also decided in the 4th ground of appeal) as to which between the certificate of occupancy and the letters or minutes expressing opinion supercedes another. According to the learned counsel, in terms of s. 40 of Cap 334, exhibit. D1 sufficiently proved that TRADECO was the lawful owner of the suit land because the trial court was not supposed to rely on the evidence of letters but that of the register. He cited the case of **Omary Yusuf v. Rahma Ahmed Abdulkadi**r [1987] T.L.R. 169 to support his argument. It was Mr. Vedasto's submission that, we did not only fail to consider that factor, which was decisive, but we also failed to follow the precedent, the omissions which, according to him are reviewable in terms of Rule 66 (1) (a) of the Rules and the case

of **Edgar Kahwili v. Amer Mbarak,** Civil Application No. 21/13 of 2017 (unreported), respectively.

The reply by the counsel for the respondent on the submission made in support of that ground was to the effect that, in deciding the issue on the ownership of the suit land, the Court did so after it had re-evaluated the evidence in its totality. Following that analysis, the Court was satisfied that the title did not pass to TRADECO. He argued that, since the issue was decided, the applicant's complaint has obviously stemmed from its dissatisfaction. Citing the case of **Mirumbe Elias @ Mwita v. R.** Criminal Appeal No. 4 of 2015 (unreported), he argued that, being dissatisfied with a decision does not constitute entitle a party seek a remedy by way of review.

We respectfully agree with Mr. Nyika that, in deciding the issue of ownership of the suit land, the Court re-evaluated the whole evidence on that aspect and came to the conclusion that, as held by the trial court, the respondent was the lawful owner thereof. Apart from re-evaluating the evidence of the letters from the Ministry, the Court considered also the validity or otherwise of the certificate of occupancy issued to TRADECO. In the judgment at page 237 of the record, we observed decided as follows:

"... although there is no evidence that the certificate of occupancy that was granted to TRADECO Limited was revoked, but existence of exhibit 'A' which has clearly stated the position on the dispute which existed between her and the respondent in resolving the double allocation of the suit plot by the Ministry of Lands in 1996, had the effect of showing that the respondent is the rightful owner of the same."

From the foregoing, the contention by the counsel for the applicant that the Court should have decided which, between the certificate of occupancy and the letters, supercedes the other is, in our view, tantamount to challenging the merits of the decision, the move which is beyond the scope of an application for review-See for instance, the case of **Patrick Sanga v. R.** Criminal Application No. 8 of 2011 (unreported). In that case, the Court observed as follows:

"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no

jurisdiction to sit over our own judgments. In any properly functioning justice system like ours, litigation must have finality and a judgment of the final court in the land is final and its review should be an exception."

In the circumstances, we find that this ground of the notice of motion is also devoid of merit, and hereby dismiss it.

On ground (d) of the notice of motion, Mr. Vedasto argued that, in arriving at its decision on the ownership dispute brought about by the double allocation of the suit land, the trial court should not have relied on the opinion of the Commissioner for Lands but that of the Attorney General who is the adviser of the Government in all matters of law as provided for under s. 23(3) of the Attorney General (Discharge of Duties) Act, No. 4 of 2005.

The argument was countered by Mr. Nyika who submitted that, the contention to the effect that the Attorney General had given his opinion on the matter, is not borne out by the record. He argued further that, even if that would have been the case, such an opinion would not be binding on the Court. Mr. Nyika went on to submit that, in any case, the decision not to act on that opinion or otherwise is not amenable to review because it would require a long-drawn argument to find whether

or not such decision is erroneous. He cited the case of **Mirumbe Elias v. R.** (supra) to support his argument.

From the submissions of the learned counsel for the parties and upon our perusal of the record, we need not be detained much in disposing this ground of the notice of motion. It is not in dispute that, neither the Attorney General nor his representative gave evidence before the trial court. According to the trial court's judgment (see pages 22-23 of the record of appeal), what is on record is that the Attorney General advised the Ministry that revocation of the right of occupancy issued to TRADECO would entitle the said company to compensation.

In its decision however, after having considered the evidence in its totality, the court came to the conclusion that TRADECO did not have any valid title which could be revoked. We hasten to state that, we agree with the respondent's counsel that this ground is similarly devoid of merit.

With regard to ground (e) of the notice of motion, the counsel for the applicant argued that, in determining the issue whether or not the applicant was the lawful owner of the suit land by virtue of being a *bona fide* purchaser for value, the Court erred in failing to follow the principle of *stare decisis.* He stressed that, the position which had been restated

in the cases of **Omary Yusuf** (supra), **Peter Adam Mboweto v. Abdallah Kulala & Another** [1981] TLR 335 and **Kahwili v. Mbarak** (supra) should have been followed.

In reply, the respondent's counsel submitted that the principle is applicable only to a case in which the particular facts and circumstances are alike, not to every case in which the issue of *bona fide* purchaser arises. He argued further that, since in this case, the issue was dealt with and decided, the decision thereto cannot be challenged on the ground that an alternative view was possible. According to the learned counsel, that is not within the scope of the review jurisdiction. He relied on the case of **Blueline Enterprises Ltd v. East African Development Bank,** Civil Application No. 21 of 2012 (unreported).

Having given due consideration to the submissions made by parties' advocates on this ground, the same can also be briefly disposed of. In agreeing with the decision of the trial court that the principle of *bona fide* purchaser for value did not apply, we emphatically stated in our judgment at pages 238-238 of the record of appeal that, although the applicant was aware of the ownership dispute, between the respondent and TRADECO, it did not take sufficient precautions, including to conduct an official search with a view to ascertaining that

the TRADECO was the lawful owner of the suit land before purchasing it. In the circumstances, the complaint by the applicant that we did not consider the *stare decisis* principle is misconceived because the same was not applicable under the particular facts of this case should have been applied is untenable.

On the basis of the foregoing reasons, this application is dismissed for want of merit. Costs shall be in the cause.

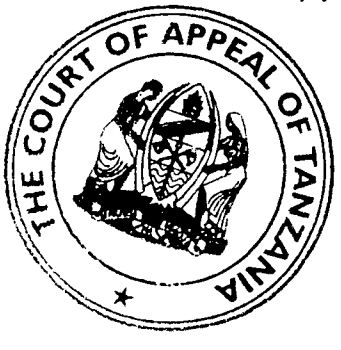
DATED at **DAR ES SALAAM** this 27th day of June, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 28th day of June, 2022 in the presence of Ms. Haisa Rumanyika also holding brief of Mr. Audax Vedasto, learned advocate for the Respondent and absent of the applicant, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL