IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 149 OF 2020

PATRICIA MPANGALA .....1ST APPELLANT

DR. JOHN MPANGALA .....2ND APPELLANT

VERSUS

VICENT K. D. LYIMO (As the guardian of

EMMANUEL LYIMO).....RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam]

(B. Mutungi, J.)

dated the 21st day of December, 2015

in

Land Appeal No. 58 of 2015

.....

JUDGMENT OF THE COURT

17th & 29th March, 2023

KITUSI, J.A.:

One of the issues for our determination in this appeal is whether it was legally correct for Vicent D. Lyimo to institute the application at the District Land and Housing Tribunal (DLHT) for Kinondoni as a guardian of Emmanuel Iman Lyimo. The said Vicent D. Lyimo who is the respondent instituted Land Application No.3 of 2008 against Patricia Mpangala and Dr. John J.K. Mpangala the first and second appellants

respectively. He won at the DLHT and in High Court Land Appeal No.58 of 2015 which the appellants had preferred.

This is a second appeal challenging the decision entered by the High Court in favour of the respondent. The dispute involves ownership of a piece of land registered as Plot No. 562 Block 'C' Mbezi Area in Kinondoni Municipality, within Dar es Salaam Region.

The respondent alleged and testified that the said plot was allocated to Emmanuel Iman Lyimo, a minor on whose behalf he was suing. He acknowledged the fact that the said piece of land was allocated to the respondent after the President had revoked the title of the previous owner one Abisai Issawangu. The essence of the complaint was an alleged trespass to the plot by the appellants demonstrated by erecting structures on that land. We shall resolve the issue of ownership of that piece of land later as it forms the substance of the second, third and fourth grounds of appeal.

We propose to deal with the first ground of appeal here and now. That ground states:-

> *"1. That the learned appellate Judge having found that the respondent's application was incompetent before the District Land and Housing Tribunal misdirected herself in failing to allow the appeal by striking out all the*

pleadings and proceedings before the said Tribunal."

This complaint had featured as the first ground in the memorandum of appeal that was presented for determination in Land Appeal No. 58 of 2015. The learned first appellate Judge appreciated that Order XXXI Rule 1 of the Civil Procedure Code (CPC) requires a person suing on behalf of a minor to indicate his status as being a next friend. She however dismissed the complaint on two grounds. First, Rule 2 (1) of Order XXXI of the CPC imposes a duty on the defendant to raise an objection and apply that the plaint filed in contravention of Rule 1 of Order XXXI of the CPC be taken off the file. Secondly, since this issue was raised at the DLHT and withdrawn subsequently, it could not be dealt with at an appellate stage. The first ground of appeal challenges that decision.

Messrs. Robert Rutaihwa and Cleophas Manyangu, learned advocates prosecuted the appeal for the appellants and respondent respectively. They had presented written submissions ahead of the date of hearing. We shall consider the written and oral arguments in our determination of every issue.

Mr. Manyangu has played down the first ground of appeal repeating the fact that the issue was raised at the trial DLHT but

withdrawn. He submitted further that the objection is not relevant in view of the fact that right from the land allocating authority, Vicent D. Lyimo was cited as guardian of Emmanuel Iman Lyimo. However, Mr. Rutaihwa insisted that the withdrawal of the objection did not give legitimacy to the wrongly instituted complaint and that it was the duty of any party to take note of that fact and raise it. He cited the case of **Tanzania Sewing Mashines Company Ltd. Vs. Njake Enterprises Limited,** Civil Appeal No.1 of 2008 (unreported).

With respect, we think this is a weak arrow in the appellant's bow although the appellant has fervently pursued it. To us, the withdrawal of the objection during the trial signifies that the appellant had elected not to apply for the taking off of the complaint from the file. Besides, the complaint in the first ground of appeal is, in our view, more an issue of nomenclature than substance. Should it cause such a storm as would sink the ship of substantive justice? We ask. We cannot allow that and we dismiss this ground of appeal because it addresses the form as opposed to the substance of the matter.

We shall now address complaints on the ownership of the disputed plot beginning with the second ground of appeal.

That ground of appeal states:-

"2 THAT, having regard to the fact that there was no evidence adduced to establish how the appellants right of occupancy was revoked by the President, the learned appellate Judge grossly misdirected herself in finding for the respondent."

There are two rival versions as regards the issue of revocation. On the one hand, there is evidence of DW1 disputing revocation of the title in respect of Plot No. 562 Block "C" although he admits being aware of the revocation in respect of Plot No.564 Block "C". It is also argued that the purported revocation did not follow due process. Further in relation to the second ground of appeal, the learned counsel for the appellant has submitted before us that PW2 would not competently testify on the ownership of the disputed plot because she joined the land office in 2004, long after the events leading to the dispute had taken place. In addition, it is submitted that the relevant documents tendered by PW2 were uncertified photocopies therefore offensive of sections 85 and 86 of the Evidence Act. The High Court is faulted for not critically evaluating the evidence of PW2 and this Court is invited to perform that duty.

On the one hand, PW2 deposed that the appellants' title to the disputed land was nullified upon the land office realizing that the same

had wrongly been issued while the subsisting title to Abisai had not been revoked. Thus, the land office did two things. It revoked the title to Abisai (Exhibit P6). Then it withdrew the offer to the appellant (Exhibit P7).

In his submissions, the learned counsel for the respondent pointed out what he considered to be a weak foundation supporting the appellant's title to the disputed piece of land. He submitted that DW1's story that he purchased the suit land from Dr. Evarist Mrema as per Exhibit D1 which is silent on the size of the land, cannot be reconciled with his other story that the land was allocated to his daughter as per Exhibit D3.

In dealing with these arguments, we start by straightening out a few aspects. First, the fact that PW2 was not occupying the land allocating office at the times when the piece of land was allocated to either of the parties, does not render her incompetent to testify on those facts, because she was testifying on entries in public records in terms of section 37 of the Evidence Act. This argument by Mr. Rutaihwa is rejected. The second point is that an offer or title to land given to a person when there is a valid subsisting offer or title to another person is invalid. See, **Frank Safari Mchuma v Shaibu Ally Shemndolwa** [1998] TLR 278, **Ombeni Kimaro v. Joseph Mishili t/a Catholic**

Charismatic Renewal, Civil Appeal No. 33 of 2017 and **Merchiades John Mwenda v. Gizelle Mbaga (Administrator of the Estate of John Joseph Mbaga – deceased) & 2 Others,** Civil Appeal N0. 57 of 2018 (both unreported).

We shall now consider the second ground of appeal. DW1 testified and it has been argued that Exhibit P7 which purports to cancel the offer or title to the appellants did not refer to Plot No. 562 Block 'C' which is the subject of the case. On the strength of this, Mr. Rutaihwa has maintained that there is no evidence that the first appellant's title to the Plot in dispute was cancelled. In relation to the second ground of appeal Mr. Manyangu raised several arguments, but mainly attacking the appellants' alleged title to the land on two fronts.

One, he underlined the contradiction in the names of the allocatees of Plot No. 562 Block 'C' posing the question whether it is Leticia Mpangala as testified to by DW1 or Patricia Mpangala as indicated in the certificate of title dated 4th September, 1989 (Exh. D3). With respect we consider this argument as coming too late in the day. The respondent sued Patricia Mpangala (first appellant) and Dr. John J. K. Mpangala (second appellant) and paragraph 5 of their Reply to the Application avers: -

> *"...The first respondent insists to state that the said land was allocated to her by the relevant land authorities in 1989."*

There was never an issue on the alleged variance of names and we hold the parties bound by their pleadings as it were. See the case of **Fatma Idha Salum v Khalifa Khamis Said** [2004] T.L.R. 143:-

> *"It is for this reason that we are saying that both the District Court and the Regional Court had no mandate to decide upon an issue which was not raised before the said Courts through pleadings. See:* ***James Funke Gwagilo v. Attorney General*** *(1)."*

The second argument is that the evidence in support of the first appellant's title is not consistent. The learned counsel drew our attention to DW1's testimony that he purchased the land as suggested by a handwritten agreement (exhibit D1) and then wondered how the same land would subsequently be a subject of allocation to his daughter, the first appellant.

To begin with, before us there is no issue of validity of the revocation because Abisai Issawangu whose title was revoked did not challenge it. At the trial, it was the respondent's case that the purported title to the first appellant was invalid for being superimposed over that of Abisai Issawangu. In our view irrespective of the letter (exhibit P7)

not referring to Plot No. 562 Block 'C' we ask if that omission would confer title to the first appellant when the existing title still subsisted? In order to provide an answer to that question we need to appreciate the fact that after the land authority's offer to a person is accepted by that person and a certificate of title is given, the land authority has no ownership over the same piece of land to offer to another person. This is in line with holding No. (ii) by the High Court in **Frank Safari Mchuma v. Shaibu Ally Shemndolwa** (supra) which we adopt and reproduce under:-

> *"(ii) An offer made subsequent to the acceptance of a previous offer is invalid and cannot give rise to a title; as the offer to the plaintiff was accepted long before the subsequent offer to the defendant, this subsequent offer was incapable of acceptance giving rise to a valid title."*

To add to the above, in the case of **Ombeni Kimaro** (supra), which cited the case of **Melchiades John Mwenda** (supra) the following pertinent point was made:-

> *"In cases of double allocation of land, even when it is occasioned by an authority or a person with legal mandate to allocate or transfer the land, the law is that the authority or transferor would have no title to pass to a subsequent grantee or*

> *transferee, by the application* ***of the priority principle****. The priority principle is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have title over it, a party who acquired it earlier in point of time will be deemed to have a better or superior interest over the other".* (Emphasis supplied).

Likewise, in the present case, having concluded that PW2 was competent to testify on the office records, we are also satisfied with her evidence that her office took steps to inform the appellants about the invalidity of the offer and title to them on the ground of the priority principle. The appellants cannot make a mountain out of this molehill by rubbing on the omission to cite Plot No. 562 Block 'C' because in our view, no right is created by a wrong in the circumstances of this case.

Before we let the second ground of appeal go, we want to share with Mr. Manyangu, his curiosity in the manner the appellants allegedly got the land. For one, if it is by the sale agreement (exhibit D1), neither Dr. Evarist Mremah who indicated that he was selling the piece of land on instructions from his in-law one F. Kiremi, nor the said F. Kiremi, testified. For another, there is the fact that no local leader witnessed the sale or testified to that effect during the trial. In view of DW1's own concession that previously he had a dispute with one Mary Machange

over the same piece of land, it cannot be safely said that the appellants' claim stands on firm grounds.

Lastly, we think DW1's testimony at page 78 of the record shoots down his own case. He stated:-

> *"The "wajumbe wa Serikali ya Kijiji" witnessed the sale transaction but would not sign it. The land was previously allocated to Abisai. The Plots were 562 and 564. Abisai had an offer. Ernest sold to us the sult land because he was the caretaker.* ***I purchased the land on 5/5/1988. The offer to Abisai was issued on 01/01/1988. I purchased it from Mr. Mrema after five (5) months."*** (Emphasis added).

As the sale agreement (exhibit D1) was clandestinely concluded when Abisai had an offer to the same piece of land five months earlier, it did not confer right to the purchaser, the second appellant. And for the reasons we have shown, the title to the appellants was invalid for being granted when there was an earlier subsisting one. In the circumstances the notice to the appellants (exhibit P7) sufficed to invalidate their title. There is no merit in the second ground of appeal, and we dismiss it.

The third ground of appeal raises the following complaint: -

> *"**THAT**, having regard to the evidence on record and the circumstances of the case the learned appellate Judge grossly misdirected herself in fact and in law failing to resolve the issue of two different certificates issued over the same plot in the name of the respondent and resolving the same in favour of the appellants."*

The submissions of the appellants' learned counsel in respect of the third ground of appeal is that two certificates of title of different dates were issued to the respondent. Counsel's argument is that if title to the appellants was invalid for being granted on an already existing title, why wouldn't the same principle apply to invalidate the second title that was issued to the respondent? For the respondent it has been submitted that land disputes at the location where the suit plot was situated were prevalent so the relevant authority instructed that a verification exercise be conducted. The second certificate of title, it is argued, was issued to the respondent after the verification.

With respect, the problem of overlapping titles testified to by PW2 does not apply when the offeree is the same person and the two titles do not present competing interests. The cases of **Ombeni Kimaro** and **Frank Safari Mchuma v. Shaibu Ally Shemdolwa** (supra), are based on existence of two or more competing claims over a piece of

land. Besides, the appellants' title had connection with that of Abisai Issawangu, who did not complain, not the respondent's title. So that any finding on the third ground of appeal even if, for argument sake, is against the respondent, it will not have any corresponding advantage over the appellants. We dismiss this ground for lacking merit.

We turn to the fourth and last ground of appeal which states:-

> *"**THAT**, having regard to the fact that there was contradicting evidence of documents coming from the office of the Commissioner for Lands, the learned appellate Judge sitting as a first appellate Court, grossly misdirected herself in failing to analyse the evidence adduced in particular exhibits from both parties and come to her own conclusion."*

We are of the view that the fourth ground of appeal is a repetition of the complaints in grounds two and three. It seeks to challenge the DLHT and High Court for resolving the dispute in favour of the respondent when each of the parties relied on documents issued by the same authority. Even in their submissions, learned counsel for the parties did no better than repeat their previous arguments related to grounds two and three. Central to the appellants' argument is that their title to the suit plot was not revoked.

However, we have, we hope, sufficiently demonstrated how the appellants' title was purportedly given when that of Abisai Issawangu had not been revoked. This is according to PW2 and even going by DW1 himself that he purchased the suit land five months after the same had been offered to Abisai Issawangu. Thus, the fourth ground of appeal lacks merit for the reasons articulated in the course of dealing with the first and second grounds of appeal.

Ultimately this appeal lacks merit and it is dismissed with costs.

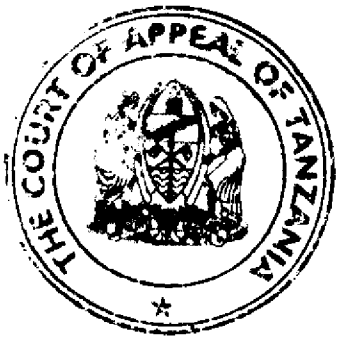
DATED at **DAR ES SALAAM** this 28th day of March, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of Mr. Nashon Nyambarya, learned counsel for the Appellants and Mr. Cleophas Manyangu, learned counsel for the Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL