IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 311 OF 2020

JACQUELINE JONATHAN MKONYI ..... 1ST APPELLANT

ABDALLAH MAKATTA t/a SENSITIVE ACTION MART ..... 2ND APPELLANT

VERSUS

GAUSAL PROPERTIES LIMITED .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

dated the 23rd day of August, 2019
in
Land Case No. 85 of 2016

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JUDGMENT OF THE COURT

29th May & 12th June, 2023

KITUSI, J.A.:

This appeal originates from Land Case No. 85 of 2016 in which the High Court (Mlyambina, J.) declared the plaintiff, the present respondent, the rightful owner of the disputed piece of land measuring about five and a half acres, located at Kunduchi Mtongani area in the City of Dar es Salaam. Incidentally, although the disputed piece of land is physically the same, the respondent sought to establish title to it through documentary exhibits of survey and certificate of title, just as

did the first appellant in claiming title to the very piece of land. Each had a survey plan and certificates of title bearing numbers distinct from the other's, as the relevant paragraphs in their pleadings demonstrate. The respondent alleged that she purchased the suit land on 15th March, 2011 and she pleaded as follows and we deliberately reverse the order of numbering:-

> *"8. That when the plaintiff was purchasing the suit premises; the same was unsurveyed piece of land measuring five and half acres whereas upon purchasing the same; the plaintiff duly surveyed the same vie survey plan No. E'355/1171 of 09/02/2012 where the whole suit premises was categorized as Plot No. 1, 2 and 3 "F", Kunduchi Mtongani, Dar es Salaam. Copy of the Survey Plan No. E'355/1171 of 09/02/2012 is attached marked "F".*
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> *5. That the plaintiff is the lawful owner of the premises described as Plot No. 1, Block "F" Kunduchi Mtongani, Dar es Salaam comprised under the Certificate of Title No. 120618, Plot No. 2, Block "F", Kunduchi Mtongani, Dar es Salaam comprised under Certificate of Title No. 120617; and Plot No. 3, Block "F", Kunduchi Mtongani, Dar es Salaam comprised under the Certificate of*

*Title No. 120616 herein referred to as the suit premises. Copies of the Certificate of Titles No. 120618, No. 120617 and No. 120616 are attached marked "**A**", "**B**" and "**C**" respectively."*

On the other hand the appellant's claim rested on the following pleadings:-

"3. That the contents of paragraph 5 of the plaint are totally disputed, the Defendants aver that the First Defendant is the lawful owner of the suit premises located at Dar es Salaam Bahari beach Area Block "A", described as Plot No. 2371/1; 238 and 239 which are held under certificate of occupancy Number 58133 and 54134 and further denies the fact that the suit premises described as plot no. 1, with certificate of title No. 120618, Plot No. 2 with certificate of title No. 120617 and plot No. 3 with certificate of title No. 120616 as described by the Plaintiff.

Copies of certificate of Title which prove the ownership over the plots are hereby attached and marked as J-Mkonyi-2 Leave of the court is craved to form part of this defence.

5. That, the contents of paragraph 9 of the plaint are strictly denied, the Defendants avers that the First Defendant is the lawful owner of the suit

premises and the purported Plaintiff's titles over the suit premises are cancelled and do not exist."

On those pleadings the High Court drew one main issue namely:

"1. Who is the rightful owner of the suit premises described as Plots No. 1, 2 and 3 Block F. Kunduchi, Mtongani Dar es Salaam, also known as Plots No. 237/238/1 and 239 Block "A" Bahari Beach, Dar es Salaam."

After receiving evidence from both parties, the trial court resolved the above issue in favour of the respondent and, as already intimated, declared her the rightful owner of the suit plots. There lies the first appellant's grievance, hence this appeal. The background of this case consists of two versions each representing the rival claims over the suit land which we shall interchangeably be also referring to as the disputed land or land in dispute.

The first appellant alleged and testified that her father Jonathan Philemon Mkonyi and her uncle Adrian Shayo purchased the suit land from one Mathias Mchaka in 1983 by paying for the same in two instalments. Subsequently Jonathan Philemon Mkonyi and Adrian Shayo transferred the disputed land to the first appellant by way of a gift. Thereafter the first appellant had the land surveyed and registered in

her name. We shall refer to the details of the survey and registration later.

Additionally, the first appellant alluded to two disputes over the land, one involving somebody Amaniel Mrutu who was in the habit of uprooting the beacons installed by her. It appears that this Amaniel Mrutu was doing so on the ground that he had a registered title to the same land too. When the first appellant complained to the Ministry of Lands, Mrutu's title was revoked.

The second dispute involved a person known as Edgar Mkwaya, against whom the first appellant instituted Land Case No. 132 of 2012. That case ended in the first appellant's favour because Mr. Mukwaya admitted, during preliminary stages, that he had no interest in the disputed land. Judgment on admission was therefore entered in favour of the first appellant. It was the appellant's intention to execute the said judgment on admission which brought the respondent into the arena. It happened that the respondent was in occupation of the land and her security guards would not let the first appellant in. She had to refer the matter to the Chairman of Kondo hamlet one Khamis Nonga Haule (PW3) seeking his intervention. PW3's testimony is that he knew the suit land to belong to the respondent so he called her director known as

Salutary John Meja (PW1) and he went to PW3's office only to learn of the first appellant being a decree holder in Land Case No. 132 of 2012 which declared her rightful owner of the suit land.

Since the respondent was not a party to the proceedings that led to the judgment on admission, she instituted objection proceedings but did not succeed. She then filed the suit that has given rise to this appeal.

The respondent's claim is that the original customary owner of the disputed land was one Mathias Msaka who sold it to Maturo Paulo Sebarua (PW2) on 28/4/1975 for shs 18,000/=. On 15/3/2011 PW2 sold that land to the respondent for Shillings 450,000,000/=. Three sale agreements were collectively exhibited as P2 to substantiate the respondent's claim. These are; the sale agreement dated 28/4/1975 between Mathias Msaka and Matulo Paulo Sebarua, the sale agreement between Matulo Paulo Sebarua and the respondent witnessed by the ten cell leader and the hamlet Chairman and another sale agreement between the same parties before an advocate Notary Public and Commissioner for Oaths known as Margareth Ringo. According to PW1, supported by Christina Yohana Warioba (PW4), at the time of the sale of the land by PW2 to the respondent, PW2 was still occupying the land,

and after the sale in 2011, the respondent took possession of the land and became PW4's neighbour. The respondent surveyed the same land too and got it registered in her name. We shall also refer to the details of the second survey a little while later.

Back to the details of the survey by the first appellant. She stated that she initiated the process by a letter to the Ministry of Land attached with a copy of the sale agreement in favour of her father and uncle as buyers. Eventually the disputed land was surveyed and registered in her name as Plots No. 237/1, 238/1 and 239 Bahari Beach.

Adelfrida Camilius Lekule (DW4) an officer in the office of Assistant Commissioner for Lands in Dar es Salaam testified in support of the first appellant being the registered owner of plots No. 237/1, 238/1 and 239 Bahari Beach as the survey No. E. 252/71 that led to the registration of those plots was the approved one. Those other surveys initiated by Aminiel Mrutu and that by the respondent were nullified by the Director of Survey and Mapping on the ground that they were surveys over an existing survey. DW4 stated in addition that the decree in Land Case No. 132 of 2012 in favour of the first appellant was another basis for the decision of the Director of Survey and Mapping nullifying the other surveys.

According to DW4, the survey of the Plots in favour of the first appellant was prompted by her letter dated 29/12/1999 and another letter dated 31/12/1999 by the Ward Executive Officer of the area introducing her as the owner of the land. DW4 said there was no copy of the sale agreement but the survey proceeded on the strength of the introduction letter by the W.E.O.

On the other hand, the respondent testified that she wrote a letter dated 1/12/2011 through the W.E.O which had the approval of the Municipal Director requesting for survey of the disputed land. The respondent's request was granted and the disputed land was surveyed vide survey Plan No. E. 355/1171 registering it as Plots No. 1, 2 and 3 Block "F" Kunduchi Mtongani. The letter of request dated 1/12/2011 and the survey Plan No. E 355/1171 were collectively tendered and admitted as Exhibit P3.

In resolving the dispute of ownership, the learned trial judge applied the principle of tracing of ownership from the original owner.

In **Ombeni Kimaro v. Joseph Mishili c/a Catholic Charismatic Renewal,** Civil Appeal No. 33 of 2017 (unreported), we

applied the priority principle and relevant to our instant case is the following excerpt.

> *"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."*

We shall subject the competing claims of the parties in this case to this test. We think the principle of tracing applied by the learned trial judge and the priority principle referred to in the above case are one and the same.

To begin with, the respondent presented oral evidence of PW1, PW2 and PW4. As the director of the respondent company, PW1 signed an agreement in which PW2 was selling the disputed land to her. At the time of the sale, PW2 surrendered to PW1 a previous sale agreement between him and the original owner Mathias Msaka. PW4's testimony supports PW2's that at the time of the sale of the land by PW2 to the respondent, PW2 was occupying the disputed land which was near PW4's residence.

There is also documentary evidence tendered by the respondent. One, the sale agreement between Mathias Msaka and PW2. Two, the sale agreement between PW2 and the respondent witnessed by the WEO and the ten-cell leader. Three, the sale agreement between PW2 and the respondent signed before advocate Ringo. These documents were collectively admitted as exhibit P2. There are also documents detailing the process of surveying the area, tendered as exhibit P3.

As for the appellant's case she also adduced oral evidence to support it. She testified as DW2 that her father and her uncle gave her the disputed piece of land out of love and affection. One Said Ally Nakwala (DW1) testified that in 1983 he was the Secretary of the village at Kunduchi Mtongani and also CCM branch secretary. In those capacities, he witnessed sale of the disputed land by Mathias Mchaka to Jonathan Mkonyi and Mr. Shayo, presumably the first appellant's father and uncle respectively.

In terms of documentary exhibits, the first appellant had none to prove how her father and uncle acquired the suit land before giving it to her. This is because DW1's prayer to tender the sale agreement did not succeed. The first appellant's chief basis for asserting interest over the

disputed land was the survey and certificate of title issued in her favour by the Director of Mapping and Survey and the Land Office.

The learned trial judge accepted the respondent's version and rejected the first appellant's. The ground for accepting the respondent's version was that she proved ownership by establishing how the land changed hands from Mathias Msaka to PW2 who in turn sold it to her. In rejecting the first appellant's case the learned Judge cited the case of **Rashid Baranyisa v. Hussein Ally** [2001] TLR 470, holding that mere survey and registration of land does not turn the original customary owner into a squatter. The learned judge attached no evidential value to the survey of the land and registration thereof in favour of the first appellant because, he observed in part:-

> *"The right of occupancy of the defendant stems from the air. There is no any foundation stone (document) giving right to the defendant that prompted the Ministry of Land to survey the suit land for the benefit of the defendant."*

According to DW4 the survey and registration of the disputed land in favour of the first appellant proceeded on mere trust of introductory letters by the leaders of the local government.

The learned Judge proceeded to declare the respondent the rightful owner of the disputed land and nullified the survey plan as well as certificates of title that had been issued to the first appellant.

That finding has attracted three grounds of appeal reproduced below:-

1. *That the Honourable Judge erred in law and fact by declaring the Respondent as the lawful owner of the disputed land while there is existence of another Judgment of the same Court declaring the 1st Appellant as the lawful owner of Plot No. 237/1, 238/1 and 239 Block "A" Bahari Beach Area Dar es Salaam, Land Case No. 132 of 2012.*

2. *That the Honourable Judge erred in law and fact by nullifying the title deed for Plot No. 237/1, 238/1 and 239 Block "A" Bahari Beach Area Dar es Salaam issued earlier and maintaining the Title deed for Plots No. 1, 2 and 3 Block "F" Kunduchi Mtongani issued and registered later over the same piece of land.*

3. *That the Honourable Judge erred in law and in fact by declaring the Respondent as the lawful owner of Plots No. 1, 2 and 3 Blocks "F" Kunduchi Mtongani while the said Title deeds were revoked by the Commissioner for Lands on the reasons that they were fraudulently.*

The appeal was prosecuted by Mr. Imam Daffa, learned advocate for the appellant and Messrs. Leonard Manyama and Sylvanus Mayenga learned advocates for the respondent. The stakes are, without doubt, enormously high on both sides.

It has been submitted for the first appellant in respect of the first ground of appeal that since the High Court had in Land Case No. 132 of 2012 declared the appellant the rightful owner of the disputed land, the same court could not later in Land Case No. 85 of 2016 declare the respondent the lawful owner of the same piece of land. Addressing us further the learned counsel submitted that the respondent ought to have applied for revision of the decision in Land Case No. 132 of 2012 if she wanted to assert her interest in that land. The letter of the Director of Survey and Mapping invalidating the survey that was conducted in favour of the respondent and endorsing as lawful the survey made in favour of the appellant, has been relied upon to make a case for the appeal to be allowed on the basis of ground one.

It has been argued in opposition to the above arguments that the High Court found it odd that the appellant preferred Land Case No 132 of 2012 against a person who was not in occupation of the land and left out the respondent who was in actual occupation of that land. It is

further argued that the respondent followed the procedure under Order XXI Rule 57 (1) of the Civil Procedure Code (CPC) by filing objection proceedings and when she did not succeed, she instituted Land Case No. 85 of 2016 to establish her interest, as per Order XXI Rule 62 of the CPC. The respondent's counsel cited three decisions to support his argument. These are; **Bank of Tanzania v. Devram P. Valambhia**, Civil Reference No. 4 of 2002, **Kezia Violet Mato v. National Bank of Commerce 3 Others,** Civil Application No. 127 of 2005 (both unreported) and **Katibu Mkuu Amani Fresh Sports Club v. Dodo Umbwa Mamboya and Another** [2004] TLR 326.

In addition, counsel has argued that Land case No. 132 of 2012 against Edgar Mukwaya could not be executed against the respondent who was not a party to it. He cited the case of **Mariam Ndunguru v. Kamoga Bukoli and Others** [2002] TLR 417.

We shall address the question regarding who was in actual occupation of the suit land at the time of the settlement order in Land Case No. 132 of 2012. There is evidence of PW3 who was the chairman of the street within which the suit land is located. There is also the evidence of PW4 a neighbour to the suit land. They testified that it is the respondent who was in actual occupation of the land in dispute such

that when the first appellant accompanied by the Court Broker, presented to PW3 an order of eviction from the suit land, PW3 was surprised and he called the respondent's director because he knew that the land belonged to the respondent.

We accept the evidence of PW3 and PW4 as true and, like the learned trial Judge, we wonder why the first appellant did not implead the respondent in Land Case No. 132 of 2012. There is also one curious aspect to this matter which suggests that the first appellant was aware of the respondent's presence in the suit land. This is that, the said Land Case No. 132 of 2012 was determined by a settlement signed on 17/2/2016. Why did it occur to the first appellant later that she should employ a court broker to evict a person who had allegedly settled the dispute amicably hardly a month earlier and even had to recruit services of the local leaders (PW3)? In our consideration, the above conduct offers a clue to the fact that the first appellant was aware that a person other than the judgment debtor in Land Case No. 132 of 2012 was in actual occupation of the suit land.

Whatever answer is given to the above question, we also ask whether the decree in favour of the first appellant in Land Case No. 132 of 2012 conferred her title to the land as against the whole world. Way

back in 1972, in **Issack Nguvumali v. Petro Bikulake (substituted by Mtalikwa Bikulake)** (1972) H.C.D 139 the High Court held that in land cases judgment in favour of a party is not always judgment against the whole world so it does not bind those who were not parties, and *res judicata* cannot apply. That decision is persuasive.

Certainly, the defendants in Land Case No. 85 of 2016 could not and did not plead *res judicata* because for that doctrine under section 9 of the CPC to apply even where the subject matter in the previous case is the same as in the subsequent, the parties must be the same or litigating under the same titles, which was not the case here. So, Mr. Mayenga learned advocate has a valid point, in our view, in suggesting that the defendants should have raised that argument if they considered the respondent bound by the decision in Land Case No.132 of 2012. As the Court held in the case of **Mariam Ndunguru** (supra) cited by the respondent's counsel there is a difference between "a *judgment in personam, described more accurately as a judgment interpartes"* and a judgment *"in rem".* The High Court then posed a question and provided answers as follows:-

> *"It was only in the judgment of the court in which the appellant was declared '"the true*

owner of the suit land". Did this declaration extend to third parties such as the respondents herein of the reliefs? I do not think so in view of the reliefs sought in the plaint the decision of the trial court must be construed to have been that the appellant was the true owner of the land as against the defendants in the suit only".

More recently in **Masumbuko Kowolesya Mtabazi v. Dotto Salum Chande Mbega**, Civil Appeal No 44 of 2013 (unreported), we cited the above decision of the High Court with approval so it is the correct position of the law rendering the first appellant's arguments in the first ground of appeal unmaintainable. The **Masumbuko case** (supra) also rhymes with **Issack Nguvumali** (supra), also judgment of the High Court, in its reference to the principles of *res judicata*, already discussed above. For those reasons, we dismiss the first ground of appeal for want of merit.

We turn to the second and third grounds of appeal. The second ground of appeal relates to the status of the survey and registration of the suit land as Plots 1, 2 and 3 done over the existing survey and registration of the same piece of land as 237/1, 238/1 and 239. In support of this ground of appeal, counsel for the first appellant

demonstrated that the certificates of title for that land were issued to her in 2003 well before the respondent purportedly obtained hers in 2012. He also referred to letters from the Director of Survey and Mapping nullifying the latter survey for being wrongly superimposed over the existing one.

On the other hand, the respondent supports the trial court's decision for being based on background tracing of ownership. Mr. Manyama for the respondent submitted that none of the parties alleged to have been allocated the suit land by the government, therefore it was incumbent upon each to prove how she got it before the survey and registration. He referred us to part of the testimony of PW1 where he had stated :-

> *"The main proof of ownership is legality of ownership, how one gets the area from whom, how, the procedure used to survey, apply for ownership up to the title."*

There is no contention by the first appellant that the above excerpt though by a lay person, does not state the correct procedure. Upon our consideration of the evidence and submissions made by counsel for the parties, we have no hesitation in saying that the

respondent made a better case than the first appellant. We wish to observe that this is not a case of the end justifying the means, so we agree with the submissions made by Mr. Manyama and the finding of the trial court that registration of land would not ipso facto prove title in the absence of evidence establishing how one got the title. In this case there is evidence of PW1, PW2 and PW4 showing how ownership of that land changed hands from one person to the other till it was sold to the respondent. There is also documentary evidence as earlier demonstrated.

There is, we are afraid, no similar chronology narrated by the first appellant as to how her father got the land before passing it over to her. The local leader who wrote a letter to the Ministry of Land introducing the first appellant as the owner of the suit land, had nothing to substantiate his opinion. DW4 conceded that the survey and registration in the first appellant's favour proceeded on that letter alone written by an official who had nothing to support his belief that the first appellant was the owner of the land. She also conceded, during cross examination, that she did not have in the office file, the settlement order in Land Case No. 132 of 2012. No wonder the learned trial judge observed that the first appellant's right to that land springs from the air,

and we agree with him. That finding is consistent with our decisions in **Ombeni Kimaro** (supra), **Rashid Baranyisa** (supra), **Meichiades John Mwenda v. Gizelle Mbaga & Others,** Civil Appeal No. 57 of 2018 and **Patricia Mpangala and Another v. Vicent K. D. Lyimo (as the guardian of Emmanuel Lyimo),** Civil Appeal No. 149 of 2020 (both unreported). The second ground of appeal is, therefore devoid of merit, we dismiss it.

The third ground of appeal challenges the finding of the trial court in favour of the respondent while the certificates of title in her favour were revoked by the Commissioner for Lands for having been fraudulently procured. When dealing with the first two grounds of appeal, we have sufficiently demonstrated that the judgment of the trial court declaring the respondent the rightful owner of the suit land, was based on the principle of tracing. The respondent led evidence, both oral and documentary, proving the sequence of events before she purchased the unsurveyed suit land and proceeded to survey it. Mr. Manyama submitted, citing section 10 (2) of the Land Survey Act Cap 324, that registration is not conclusive proof of ownership. With respect we agree with the learned counsel considering that the disputed piece of land was initially being held under customary title and going by our decision in

Rashid Buranyisa (supra) the survey did not reduce the customary owner into a squatter. It is our conclusion that the third ground of appeal lacks merit, and we dismiss it.

Consequently the whole appeal lacks merits and it is dismissed with costs.

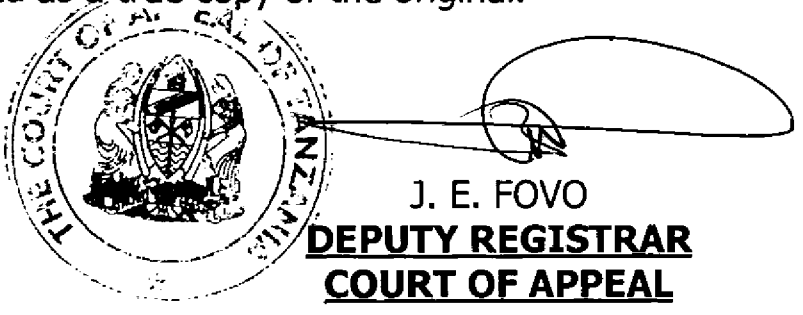
DATED at **DAR ES SALAAM** this 8th day of June, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of June, 2023 in the presence of Mr. Frank Mwalongo, learned counsel for the Appellants and Mr. Leonard Manyama, learned counsel for the Respondent is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL