IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A, KEREFU, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 178 OF 2020

STEPHEN NYAKIRE.....APPELLANT

VERSUS

ILALA MUNICIPAL COUNCIL.....1ST RESPONDENT

THE COMMISSIONER OF PRISONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

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

(Mutungi, J.)

dated the 30th day of June, 2015

in

Land Case No. 9 of 2005

.....

JUDGMENT OF THE COURT

25th April & 18th September, 2023

RUMANYIKA, JA.:

Before the High Court of Tanzania at Dar es Salaam, Land Division (Mutungi, J.), Steven Nyakire ("the appellant") sued Ilala Municipal Council, The Commissioner of Prisons and The Attorney General ("the 1st, 2nd and 3rd respondents") respectively. He sought, among other orders, a court's declaration that he is the rightful owner of the piece of land situated at Kinyerezi Ward in Ilala District ("the suit land"), and that, the act of the 1st respondent to allocate the suit land to the 2nd respondent was unlawful. He

also sought for an order to nullify that allocation. Alternatively, he prayed to be allocated another land or be compensated for TZS. 84, 000,000.00 being the value of the suit land and reallocation expenses.

The respondents, on their part, vehemently denied the appellant's claims praying for dismissal of the suit with costs. After consideration of the evidence of the parties, the trial court entered judgment in favour of the respondents thus dismissed the suit with costs.

Briefly, the background to this appeal as drawn from the evidence of Steven Nyakire (PW1), the sole witness from that end who is now the appellant herein, is that, he purchased the suit land from one Armstrong J. Mushi in 1998. He occupied it and erected a magnificent bungalow there, where he and his family dwelt joyfully and undisturbed until in 2004 when the 2nd respondent was allocated 150 acres extending to the suit land. According to the record of appeal, vide G.N. No. 15 of 1992 the suit land and some neighbors' plots were declared to be a planning area for public use and taken by the President. On that account, the appellant and his fellows were served with notices to give vacant possession, upon being compensated. However, the appellant was not satisfied with the compensation of TZS. 7,402,000.00 offered by the 1st respondent. He thus continued with the construction of his house. By that time it was at a lintel stage. It is also evident on record that, in September 2004 the appellant received a letter with Ref. No.121/UMM/V/Vol. II/103 dated 15th September, 2004 (exhibit D2) from the 2nd respondent

notifying him that the suit land had been reallocated to the former, thereby declaring the appellant an illegal occupier thereof. He refused the proposed compensation for being inadequate claiming that, according to the valuation report (exhibit P4) the suit land was worth TZS. 30,431,000.00 and not TZS. 7,402,000.00 offered. He is also on record having testified that, the allocation of the suit land by the 1st respondent to the 2nd respondent was flawed with irregularities, illegality and impropriety. In view of the above, he instituted the suit for the orders as highlighted above.

On the respondents' side, there were Sabas Vehame Majolo (DW1), Kiangi Kibwana Abdallah (DW2), Honest Kulalya (DW3) and Justine Kisangya (DW4) armed with three exhibits. The respondents denied the appellant's claims stating that, he never owned the suit land because it was vested in the President of the United Republic of Tanzania (the President) in 1992. They also asserted that, if really the appellant purchased it in 1998, then the alleged vendor had no title over the suit land to pass to the appellant. Further, and upon noting that, the notice to give vacant possession was served on the appellant but ignored it and continued with the construction of the house. The 1st respondent issued him with a stop order on 13th September, 2004 by affixing it on the wall of that house which he also ignored. It was the claims of the 1st, 2nd and 3rd respondents that from that moment the appellant occupied the suit land illegally.

It is further evident that, the whole area including the suit land which is adjacent to the Segerea Prison was acquired by the President in 1992 and later, the 1st respondent allocated it to the 2nd respondent.

Upon fully hearing of the parties, the trial court was satisfied and found that, the suit land was acquired by the President in 1992 thus its allocation by the 1st respondent to the 2nd respondent was legal. In the end therefore, the trial court dismissed the appellant's case with costs for want of merit.

The appellant is aggrieved by that decision and has appealed to the Court through a memorandum of appeal comprising nine grounds. Those grounds are reproduced as follows:

1. *That, the trial court erred in law and fact in holding that the appellant tendered valuation report for the sale and not for compensation;*
2. *The trial court erred in law and fact in failure to take into account compensation laws and procedures that could have enabled the court to award compensation to the appellant as prayed for in the plaint;*
3. *That, the trial court erred in law and fact in holding that the suit premises was public land;*
4. *That, the trial court erred in law and fact in holding that a stop order was duly and properly served to the appellant;*
5. *That, the trial court erred in law and fact in not holding that the decision by the first respondent to allocate the suit premises to the second respondent did not fall under the conditions of entailing acquisition of land by the Government for the public purposes;*

6. *That, the trial Court erred in law and fact in not holding that the allocation of the suit premises to the second respondent by the first respondent was illegal since it was superimposed over a valid customary or deemed right of occupancy held by the appellant;*
7. *That, the trial court erred in law and fact in not nullifying or invalidating the allocation of the suit premises by the first respondent to the second respondent;*
8. *The trial court erred in law and in fact in not entering judgment and decree in favor of the appellant as prayed for in the plaint; and*
9. *The decision of the trial court is otherwise wrong and faulty at law.*

When the appeal came on for hearing, the appellant was represented by Ms. Dora Mallaba assisted by Ms. Abbriaty Kivea, both learned Counsel whereas, the respondents had the services of Mr. Edwin Joshua Webiro who was assisted by Ms. Kause Kilonzo Izina and Mr. Hussein Kambi, all learned State Attorneys.

Ms. Mallaba adopted the written submission filed on 10th August, 2020. He argued the 1st and 2nd grounds of appeal conjointly contending that, indeed the Valuation Report (exhibit P4) was meant for sale purposes. However, she asserted that, the learned trial Judge should have held that the appellant was entitled to compensation equivalent of the purchase price of the house shown. She stated further that, pursuant to regulations 3 and 4 of the Land (Assessment of Value of Land for Compensation) Regulations, G.N. No. 78 of 2001 read together with section 3 (g) of the Land Act and section 12(2)

of the Land Acquisition Act, Chapters 113 and 118 both R.E. 2002 respectively, the said purchase price reflected the current market value of that house which was TZS. 30,431,100.00. Additionally, she argued that, TZS. 84,000.000.00 claimed by the appellant as compensation was actual and fair, since it included unexhausted improvements on the suit land, disturbance, transport, and accommodation allowances for the whole period he had been kicked out, allegedly being denied of the use of the house and the arising loss of profit.

On the 3rd ground of appeal, Ms. Mallaba asserted that, the trial court did not consider the unchallenged evidence of the appellant about his purchase of the suit land as shown in exhibit P1. She contended that the appellant's customary right thereon should not have been extinguished without compensating him appropriately and adequately.

Regarding the 4th ground of appeal on the status of the alleged stop order, Ms. Mallaba argued that, the evidence of DW2 and DW3 that the 1st respondent served a notice and stop order on the appellant when the house was at a lintel stage of construction was not reliable. Since the 1st respondent did not discharge his burden of proof on the alleged existence and service of a stop order. She argued that, the issue of the appellant ignoring the stop order should not have been raised. Additionally, she argued that, no copy of the alleged stop order was tendered in court as exhibit. She also contended that, the merely assumed service of the stop order on the appellant is tantamount

to the trial court having shifted the onus of proof to the appellant which is not accepted. To reinforce her argument, she cited our previous decisions in **Abdul Karim Haji v. Rymond Nchimbi Alois And Another**, Civil Appeal No. 99 of 2004 (unreported) and **Anthony M. Masanga v. Penina (Mama Mgesi) and And Another**, (Civil Appeal No. 118 of 2014) [2015] TZCA 556 (18 March 2015: TanzLII). Further, Ms. Mallaba argued that, in the absence of proof of service and date of the alleged stop order on the appellant, time and place where the 1st respondent took the photograph (exhibit D4) to show that, indeed that photograph was of the suit house, the impugned decision cannot stand.

Regarding the 5th and 6th grounds of appeal, which she argued together, Ms. Mallaba contended that, if at all the suit land was declared to be a planning area, the President acquired it, and later the 1st respondent allocated it to the 2nd respondent, those acts were *ultra vires* for contravening the provisions of section 29 of the Land Act. She thus urged us to find the 1st respondents acts to be null and void and hold that, the 2nd respondent should have not applied for, and ultimately allocated the suit land, notwithstanding the 1st respondent's intention and promise to compensate the appellant on the suit land.

On the 7th ground of appeal which is about the learned trial Judge not invalidating the allocation of the suit land by the 1st respondent to the 2nd respondent, Ms. Mallaba stressed that, in the absence of any evidence to

show that, the 1st respondent had the powers delegated to it by the President to do so, the trial court should have invalidated the purported acquisition and the subsequent allocation of the suit land for being unlawful.

With regard to the 8th ground of appeal which concerns the trial Judges' failure to enter the judgment and decree in favour of the appellant, Ms. Mallaba argued that, such findings and order were against the weight of the evidence. She added that, in fact the appellant had proved his case on the balance of probabilities showing that he was the lawful owner of the suit land. She further contended that, the appellant is entitled to, and deserves compensation as an outgoing occupier of the suit land. She relied on our decision in **The Attorney General v. Lohay Aakonay And Another** [1995] T.L.R. 80 to reinforce her argument.

Replying, Mr. Webiro adopted the written submission lodged in Court on 19th September, 2020. On the 1st ground of appeal, he contended that whenever need arose and, upon the President acquiring land as here, compensation was limited to the value of the unexhausted improvements effected on that land. Relying on section 12 (12) of the Land Acquisition Act, he added that, such valuation needed approval by the Chief Government Valuer which evidence is missing in the present case. Further, he argued that, the valuation report (exhibit P4) was for sale of the house and not for compensation purposes. He relatively had a similar submission to the preceding 2nd ground of appeal. He commended on the stance taken by the

learned trial Judge for abiding to the appropriate compensation laws and procedure arriving at the right decision. He thus, urged us to dismiss the appellant's complaints on this ground.

On the 3rd ground of appeal about the legality of the President's declaration of the suit land to be for public use and acquiring it, Mr. Webiro urged us to uphold the impugned decision. He implored us to find that, the President made it in conformity with the Town and Country Planning (Planning Arears) Order, 1992 and section 4(1) (a) of the Land Act for the exclusive Government Schemes. He further argued that, the appellant did not object to that exercise much as he could have not purchased the suit land in 1998 which is almost six years after the President's declaration in 1992. The appellant's claims for compensation on it were not justified, he added.

On the 4th ground of appeal, Mr. Webiro urged us to uphold the learned trial Judge's finding that, the appellant was dully served with the respective stop order which he ignored and proceeded with the construction of the house to its completion. He further contended that, impliedly, the appellant acknowledged being served with the stop order as it was affixed on the wall of the house on the suit land. Because, he argued, most of the time the appellant was away from the site. He added that, the evidence of DW1 that John, the appellant's construction supervisor and some masons thereof witnessed it was not challenged since they did not appear in court. To support his argument, Mr. Webiro cited the decision of the Court in **City Coffee Ltd**

v. The Registered Trustees of Ilolo Coffee Group [2019]1 T.L.R. 182 to support his argument. Thus, he urged us to draw an adverse inference against the appellant, for failure to bring in court the said material witnesses.

The 5th and 6th grounds of appeal were argued together, on the propriety of the President's declaration and acquiring the suit land allegedly superimposed over the appellant's customary right. Mr. Webiro argued that, it was not the respondent's contention that the suit land was acquired by the 1st respondent in the first place, but by the President who had the mandate, upon the suit land being surveyed, and pursuant to section 11 (5) and (7) of the Land Act through the Commissioner for land the 1st respondent allocated it to the 2nd respondent.

On the 7th ground of appeal, Mr. Webiro's submission was similar to those he made on the preceding 6th ground. He asserted that, the evidence on record and the circumstance of the case showed that, the President's declaration and acquisition of the suit land and subsequently, the 1st respondent allocating it to the 2nd respondent was proper as held by the learned trial Judge.

Further, responding to the 8th and 9th grounds of appeal, Mr. Webiro contended that, the acquisition of the suit land was proper and so is the respective compensatory valuation report. He argued that, the fact that, at the time the appellant was issued with the said notice and stop order, the

value of the house stood at TZS. 7,402,000.00. He did not sufficiently challenge that evidence. Mr. Webiro thus, asserted that, the appellant did not deserve compensation. Nevertheless, he contended that, TZS. 84, 000,000.00 claimed by the appellant as compensation was on the high side and against weight of the evidence presented by the parties.

Having scrutinized the record of appeal and considering the written and oral submissions of the parties' learned counsel for and against the appeal, we propose to start our deliberation with the 3rd ground of appeal where the trial Judge is faulted for finding that, by Government Notice No. 15 of 1992 (the Notice), the suit land was declared to be for public use and acquired by the President.

However, from the outset, we wish to point out that, upon perusing the laws, we have found that, the Notice referred above was the one issued under sections 89 and 90 of The Tanzania Post and Telecommunications Corporation Act. With respect, it is irrelevant to this case because it does not concern the issues of declaration under reference nor land acquisition. It is our finding therefore, that the Notice referred above was inadvertently cited by the 1st respondent, and similarly referred to by the trial judge in her judgment.

As such, as a matter of fact the law applicable to the instant case is The Town and Country Planning (Planning Areas) Order 1992, G.N. No. 231 of 1993. Thus, in terms of section 59(1) (g) of the Evidence Act [Cap 6 R.E.

2019], we take a judicial notice of its existence. Actually, the respective G.N was made under section 13(1) of the Town and Country Planning Ordinance Cap. 378, which was later revised and became the Town and Country Planning Act, Cap.355 (the Act). The section provides as follows:

> *"s.13(1)- If, after consultation with the local government authority concerned, the Minister is of the opinion that a general planning scheme should be made in respect of any area,* ***he may by order published in the Gazette declare that area to be a planning.***
>
> *(2) An order under this section shall come into operation on the material date".*

(Emphasis added).

For the purpose of this case, the relevant part of G.N. No. 231 of 1993 which was published on 13th August, 1993 states as follows:

> *"1. The order may be cited as the Town and Country Planning (Planning Areas) Order, 1992.*
>
> *2. The Areas described in the schedule hereto are declared to be Planning areas for the purposes of the Town and Country Planning Ordinance.*
>
> *3. That detailed schemes for the scheduled areas shall be prepared and deposited with the Director of Urban Development.*
>
> *4. That all land specified in this Order shall vest in the President on the coming into effect of this Order, the*

President shall thereafter allocate the land so vested in him for the purposes specified in the detailed schemes.

SCHEDULE

1. *N/A*

"2. Ilala District:

Msongola, Mbande, Mvuti, Pugu Station and Pugu Kajiungeni, Chanika Buyuni, ***Kinyerezi,*** *Mburuka,* ***Segerea,*** *Ukonga, Mjumba Sita, Gongo la Mboto, Kipunguni, Stakishari, Karakata, Vingunguti, Kipawa, Mjohe and All land within two kilometres on both sides of the Dar es Salaam-Kisarawe Road from Gongo la Mboto to the boundary of Dar es Salaam Region with Coast Region".*

3 *N/A*

4. *N/A*

Dar es Salaam
28th December, 1992

M.B. KOMANYA
Minister for Lands, Housing and Urban Development"

(Emphasis added).

From the foregoing therefore, it is not disputed that the area in which the suit land is situated was declared a planning area in 1992 thus vested in the President as prescribed under Order 4 reproduced above. It cannot

therefore be overemphasized that, from the effective date, that is, 13th August, 1993 when the Minister published the Order under section 13 of the Act, in terms of section 35 of the Act, the appellant or any other person could not develop the suit land as of right without consent of the local authority, in this case the 1st respondent. That section provides as follows:

> *s.35- Notwithstanding any other law to the contrary,* ***no person shall develop any land within a planning area without planning consent*** *or otherwise than in accordance with planning consent and any conditions specified therein.*
>
> (Emphasis added).

In the case before us, the appellant alleged to have purchased the suit land from one Armstrong J. Mushi in 1998, which is about six years after it was declared a planning area. Unfortunately, the said Armstrong Mushi, the alleged vendor of the suit land, was not called at the trial as a witness to support the appellant's allegations and convince the trial court that, by the time of the said declaration and acquisition he owned the suit land and was not paid compensation thereon. In the circumstance, we are entitled to draw an adverse inference against the appellant for failing to bring the alleged vendor whom we find to be material witness. Holding so, we are fortified with the Court's previous decisions including **City Coffee Ltd** (supra), **Aziz Abdalla v. R** [1991] T.L.R. 71 and **Rex v. Uberle** (1938)5 EACA 58 from a

long list of authorities. For instance, in **Rex's** case (supra), the defunct East African Court of Appeal which is the Court's predecessor pronounced that:

> *"The Court is entitled to presume that evidence which could be but is not produced would, if produced be unfavorable to the person who withholds it".*

Moreover, even for the sake of assumption the appellant is believed to say that he purchased the suit land in 1998, still we would accede to Mr. Webiro's proposal that, by that time, the alleged vendor did not have a title on the suit land to pass to him, because, as stated earlier on, the suit land had been declared a planning area for almost six years and thus acquired by the President. On that basis therefore, we subscribe to the learned State Attorney's observation that from the very beginning, the appellant did not deserve compensation for any exhaustive developments made by him thereat.

Another reason for the appellant being not entitled to compensation is that, even if the vendor would have legally passed the title to him, which is not the case, he led no evidence to show that he developed the suit land with a requisite and mandatory consent of the planning authority as stipulated under section 35 of the Act. The Court has taken that stance in a number of its previous decisions. For instance, see the cases of **Director of Moshi Municipal Council v. John Ambrose Mwase**, (Civil Appeal No. 245 of 2017) [2019] TZCA 39 (10 April 2019: TanzLII) and **Director of Moshi**

Municipal Council v. Stanlenard Mnesi And Another, Civil Appeal No. 246 of 2017 [2019] TZCA 85 (11 April 2019: TanzLII) quoted in **Imani Mbugi v. Songea Municipal Council**, (Civil Appeal No. 168 of 2020) [2022] TZCA 241 (2 May 2022: TanzLII). Indeed, the planning consent would have entitled the appellant to invoke the provisions of section 50 of the Act to urge the authority, for that purpose, to determine the deserving amount of compensation. For clarity section 50 of the Act provides:

> *"50(1) Subject to the provisions of subsection (2) of this section, the value of any land within a planning area shall, for the purpose of determining the amount of compensation payable pursuant to the provisions of this Act, be deemed to be the value of such land on the material date together with the value of any development carried out thereafter with planning consent.*
>
> *(2) In giving planning consent under the provisions of this Act to the temporary development of any land within a planning area, the authority concerned may give such planning consent on the condition that the value of such temporary development shall not be taken into account for the purposes of assessing of any compensation payable to the owner of such land and in any such case the value of any such temporary development shall not be taken into account for the purposes of assessing compensation payable".*

The above said, we are settled in our minds that the issues of improper acquisition of the suit land by the President after the declaration that it fell into a planning area and the subsequent allocation by the 1st respondent to the 2nd respondent are, with respect, out of place. Ground 3 of the appeal is therefore dismissed for lacking in merit.

Now that, for the reasons given above, from the beginning the appellant had no valid title on the suit land to entitle him compensation, he deserved none. Therefore, the issue whether or not the valuation report tendered by the appellant was for sale of the suit land or compensation it is not relevant in the circumstances. We are saying so because the appellant was a trespasser, right from the word go. Finding so, we are fortified by the Court's previous decisions including those in the cases of **Tenende Budotela and Another v. The Attorney General**, (Civil Appeal No. 29 of 2012) [2012] TZCA 247: [19 May 2012: TanzLII] and **John Siringo and 20 Others v. The Tanzania National Roads Agency and Another**, (Civil Appeal No. 171 of 2021) [2022] TZCA 489: [3 August 2022: TanzLII] once a trespasser always a trespasser. Consequently, the 2nd ground of appeal fails.

The 4th ground of appeal is about proof of service of a stop order on the appellant regarding the then ongoing construction. We find that complaint to be redundant, considering our reasons and finding above that, the appellant did not own the suit land and thus, not even entitled to be served a stop order leave alone proper service. The respective ground also crumbles.

As regards the appellant's 5th ground which concerns the 1st respondent allocating the suit land to the 2nd respondent and, allegedly, illegally acquired, with respect, that complaint is unfounded because though appellant had no title as found earlier on, it is the 1st respondent who was authorized under the Act to allocate the planned area after the preparation of the scheme. The 5th ground is equally dismissed.

With regard to the 6th ground of appeal, about the 1st respondent allocating the suit land to the 2nd respondent allegedly illegally, as observed above, we will repeat ourselves that, the appellant did not have title, be it customary/deemed right-based as claimed, or granted right of occupancy. Since he did not prove it to the contrary, this ground of appeal also is dismissed.

From the foregoing therefore, the 7th ground of appeal will not take much of our time. Basically, from our deliberation above, the trial Judge cannot be faulted for having not nullified or invalidated the allocation of the suit land by the 1st respondent to the 2nd respondent, which the appellant did not own. For that matter, the appellant had no good cause of action to sue the respondents in the first place. In the result, ground seven is dismissed.

In the final analysis, considering our deliberations on the dominance of the 3rd ground on the disposition of the appeal as stated earlier on and those grounds that followed, we are of the settled view that, the 8th and 9th grounds

of appeal lack basis to support the appellant's complaints that the trial court's decision is legally wrong because it did not enter judgment in his favour. As we have stated above, there is no evidence to support the appellant's assertions. Ultimately, we dismiss the respective grounds.

For the foregoing reasons, we find no merits in this appeal and dismiss it entirely with costs.

DATED at **DAR ES SALAAM** this 11th day of September, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of September, 2023 in the presence of Ms. Dora Mallaba assisted by Ms. Abbriaty Kivea both learned counsel for the Appellants and in the absence of the Respondent, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL