IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A And MDEMU, J.A.)

CIVIL APPEAL NO 536 OF 2020

ZEBRA INTERNATIONAL ENTERPRISES LIMITED .....APPELLANT

VERSUS

ANTHONY MRISHO NGAI .....1ST RESPONDENT

COMMISSIONER FOR LAND ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

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

(Mutungi, J.)

Dated the 16th day of September, 2019
in
Land Case No. 33 of 2013

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JUDGMENT OF THE COURT

20th & 28th February, 2024.

MAIGE, J.A:

In the High Court of Tanzania at Dar es Salaam (the trial court), the appellant sued the respondents for the following reliefs: **first**, a declaration that she is the lawful owner of the property on Plot No. 430 Block "C", Tegeta Area, Kinondoni Municipality in Dar es Salaam (the suit property); **second**, a declaration that the allocation of the suit property to the first respondent by the second respondent is illegal and unlawful;

third, a declaration that the first respondent is unlawfully occupying part of the suit property; **fourth**, perpetual injunction to restrain the first respondent from entering and developing the suit property; and **fifth** vacant possession of and demolition of the first respondent's structure on the suit property.

The appellant claimed to have acquired the suit property by way of allocation from the second respondent vide a letter of offer issued on 25th September, 1986 under TP Drawing No. SSP/01/09/1986 and constructed a two building rooms thereon. It was claimed further that, in 2005, the first respondent, purporting to be the owner, trespassed unto the suit property and constructed a house thereon. As against the second respondent, the allegation was that; he allocated the suit property to the first respondent while aware of a pending suit between the latter and the appellant.

In his defence, the first respondent denied having trespassed unto the suit property. He claimed that, the building complained of is on plot numbers 505 and 506 under a certificate of title number 145099 registered in his name. He claimed to have purchased the same from Mohamed Ally Mkalekwa in 1982 and had since then been in occupation of the same under customary land tenure until 2016 when it was officially

allocated to him by the second respondent. He said, the inclusion of the suit property in the second respondent's project which led to allocation of the same to the appellant was improperly done when he was in Zanzibar. That, when he came back from Zanzibar, he complained to the relevant authorities and, as a result, it was reallocated to him. On their part, the second and third respondents denied the assertion and maintained that the allocation of the suit property to the first respondent was legally made.

It may perhaps be relevant to note that initially, the suit was against the first respondent alone. However, on 22nd February, 2018 when the matter came for trial and after the appellant had been served with a list of documents to be relied upon which included the first respondent's title deed, she successfully prayed for amendment so as to implead the second and third respondents as well. On 11th June, 2018, therefore, the amended plaint impleading the second and third respondents was filed.

Five issues were framed by the trial court for determination. **One,** whether the plaintiff is the lawful owner of the suit property. **Two,** whether the suit property was surveyed by 1985. **Three**, whether the suit property is in a different area from plot numbers 505 and 506 Block C, Tegeta. **Four**, whether the allocation of the disputed plot by the second

defendant to the 1st defendant while this matter was pending in court was lawful. **Five**, to what reliefs are the parties entitled.

In support of her case, the appellant produced four witnesses. The first one was her director, David Joseph Mahende (PW1) who tendered a company resolution (exhibit P1), a drawn order of the District Land and Housing Tribunal for Kinondoni dated 2/11/2011 (exhibit P2), a letter of offer dated 25th September, 1986 in the name of the appellant and the TP Drawing No. SSP/05/09/1986 (exhibit P3 collectively), an exchequer receipt dated 28/11/1986 (exhibit P4) and a letter dated 4/11/1986 from the second respondent (exhibit P5). The second witness was Patrick John Chitende (PW2), a retired land officer who claimed to have allocated the suit property to the appellant and signed into exhibit P3. Next was Sheikh Yahya Hamed Rashid (PW3) an employee of African Muslim Agency, an organisation allegedly holding a piece of land near the suit property. The last one was Major Thomas Dagaro Diami (PW4) who claimed to own a landed property close to the suit property.

The first respondent testified as DW1 and tendered a sale agreement dated 20/7/1982 (exhibit D1), a letter from ward executive officer for Kunduchi to the second respondent dated 18/5/1994 (exhibit D2), a letter from the village office to the land officer Kinondoni

municipality dated 11/12/2001 (exhibit D3), a letter from the second respondent to Kinondoni Municipality dated 30/9/2002(exhibit D4), a letter from Kinondoni municipal director to the department of survey of the Kinondoni municipality dated 6/04/2004 (exhibit D5), a report in relation to the suit property dated 8/9/2004 (exhibit D6), a letter from the ward executive officer for Kunduchi to the Kinondoni municipal director dated 4/10/2004 (exhibit D7), a letter from the Kinondoni municipal director to the municipal town planning officer dated 20/1/2005 accompanied with a copy of a site plan(exhibit D8), an invoice from the second respondent to the first respondent dated 9/10/2015 (exhibit D9), receipts of payment on plot numbers 505 and 506 issued by the second respondent to the first respondent dated 6/11/2015 (exhibit D10) and a letter from the appellant's advocate to the second respondent dated 5/8/2014 (exhibit D11).

The second witness for the first respondent was Antony Anicent Kessy (DW2), a resident of Tegeta whereas the last one was Sebastania Modestus Mhowera (DW3), a public relation officer for Kinondoni municipality. He was, in 2004, the ward executive officer for Kunduchi.

On their part, the second and third respondents relied on the evidence of Kajesa Minga (DW4), a land officer from the second

respondent and Colinel Juvent Ndimila (DW5), a surveyor from the department of survey and mapping. The former tendered a sketch map on plot 430 Block C (exhibit D12), a survey plan E'355/118, Reg Plan 29583 dated 12/5/1996 (exhibit P13) and a letter dated 4/11/2009 from the second respondent to Africa Muslims Agency entitled "Mgogoro wa Viwanja Na. 388,430,486,489,491,492,493 and 495" and which was copied to the first respondent and PW1.

The trial court inspected the *locus in quo* in the presence of PW1, DW1 and DW5. The purpose behind, it would appear, was to ascertain if the suit property and plots numbers 505 and 506 were at the same position.

From the evidence, the trial court was satisfied that, the case was not proved against the respondents. It accordingly dismissed it with costs. Aggrieved, the appellant preferred the instant appeal. She is faulting the trial court on the following grounds:

1. *The trial judge erred in law and fact in invalidating the original survey which created the disputed plot, i.e., Plot No.430 Block "C" Tegeta, Kinondon, Dar es Salaam, which was allocated to the appellant, and consequently further erred in law when she held that the appellant did not own the plot.*

2. *The trial judge erred in law when she held that the disputed plot that was owned by the appellant did not exist and that it was located at a different area other than the area it was pleaded in the plaint. She further erred in law and fact when she held that instead, plot No.505 and 506 Block C Tegeta which belonged to the 1st defendant (1st respondent herein) are the ones that existed at the relevant area.*
3. *The trial court erred in law and in fact in holding that the allocation of the plot to the 1st respondent after second survey, and issuance of the title to the said 1st respondent while the suit was pending in court was proper and lawful.*
4. *The trial court erred in law and in fact in holding that the invasion into the plot by the 1st respondent and the conversion of the structure constructed by the appellant therein into a modern house, while the suit was pending was proper and lawful.*

Before us, Mr. Jonathan Mbuga, learned counsel, prosecuted the appeal on behalf of the appellant whereas Mr. Daimu Halfani also learned counsel, stood for the 1st respondent and Mr. Edwin Joshua Webiro, learned State Attorney appeared for the second and third respondents.

In their respective oral arguments, the learned counsel for the appellant and first respondent adopted their written submissions in support of or in opposition to the appeal, as the case could be with some highlights. Mr. Webiro did not file any written submissions. He, however, made oral submission in opposition of the appeal.

In support of the first ground of appeal, Mr. Mbuga started by criticising the trial court in denying the appellant's ownership of the suit property basing on the evidence of DW4 and DW5 that the original TP Drawing under which the suit property was allocated to the appellant was cancelled and replaced with the 1996's survey plan which created plot numbers 505 and 506 on the suit property and changed the position of plot No. 430 into an open space. The approach taken by the trial court, submits the counsel, was not in order as the respective evidence was not founded on the second respondent's pleadings as the law requires. Reference was made to the case of **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019 (unreported) and **Daniel Otieno Migore v. South Nyanza Sugar Co. Ltd** [2018] e-KLR.

In the alternative, it was submitted, the requirement of section 70 and 71 of the Town and Country Planning Act, Cap. 355 of the laws was not complied in the process as the notice of cancellation was not gazzeted and the appellant was as a result, not compensated despite that it changed the position of her plot into an open space. We were referred to the case of **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Ltd.,** Civil Revision No. 1 of 2009 (unreported).

In further alternative, it was submitted that, since the allocation of the suit property to the appellant was prior to the allocation of the same to the first respondent, under the principle of priority stated in the case of **Jacqueline Jonathan Mkonyi and Others v. Gausal Properties Ltd,** Civil Appeal No. 311 of 2020 (unreported), the first allocation should have taken precedence over a subsequent one.

On the second ground, Mr. Mbuga submitted that since the letter of offer issued to the appellant in 1986 was in law a conclusive evidence of the appellant's title on the suit property, and, there being no evidence of fraud, it was wrong for the trial court to hold that it did not exist. His contention was based on the principle in **Magori Ally Nyambage v. Anthony Kalanga** [2011] T.L.R. 229.

He submitted further that although the first respondent pleaded existence of a certificate of title, the same was not tendered into evidence. The first respondent tendered only the sale agreement in exhibit D1 which cannot be evidence of his title on the suit property because it does not mention the size and boundaries of the suit property. As a result, he submitted, it has nothing to link it with the suit property. To substantiate his argument, Mr. Mbuga referred us to the decision of the High Court in

Janeth Ngowi v. Bernard Patrick Mlenga, Land Appeal No. 253 of 2021 (unreported).

As to whether the suit property and plot numbers 505 and 506 are different pieces of land, the counsel submitted that the evidence from both sides suggests that it was the same property. It was only the plot numbers which changed, he added. He faulted the trial judge in wrongly applying the evidence of DW5 that plot numbers 505 and 506 emanated from a land which was left unsurveyed while she had already held that the suit property was surveyed in 1986. Even the evidence at the *locus in quo* established that it was the same property, he further submitted.

In respect of the third ground of appeal, it was submitted that for being procured in 2016 while the suit leading to this appeal was pending, the allocation of the suit property to the first respondent was not made in good faith as it sought to frustrate if not to obstruct the course of justice. Two cases of the High Court, namely; **Amina Amri v. Ahmed Mabrouk,** PC Civil Appeal No. 85/90 and **National Chicks Corporation Ltd and Others v. National Bank of Commerce,** Miscellaneous Commercial Cause No. 36 of 2015 (both unreported) were cited.

As regards the last ground of appeal, it was submitted that once the trial court had established from the evidence at the *locus in quo* that

the first respondent invaded into the appellant's plot and constructed a modern house over the latter's structure during the pendency of the suit, it should have not given a blessing to such kind of actions. Finally, Mr. Mbuga urged us to allow the appeal with costs.

In response to the first ground, Mr. Daimu started by admitting that, indeed, the area covering Plot No. 430 Block "C" was, in 1986, allocated to the appellant vide the 1986"s TP Drawing. The said allocation, he submitted while making reference from the evidence of DW4 and DW5, was a mere proposed allocation because in law a valid allocation is based on a survey plan duly approved by the Director of Mapping and Survey. He clarified that, the 1986 survey had, until 1995 not yet been approved. An approved survey plan on the respective area, he submitted, was made in 1996. He submitted in the alternative that, even if the 1986's survey was complete, it could no longer be valid because it was replaced by the 1996 survey. Whether the issue of cancellation of the original survey was pleaded, Mr. Daimu submitted, is an afterthought because aside from not being raised and adjudicated upon at the trial court, it is not in the grounds of appeal.

On the second ground, Mr. Daimu submitted that the issue in this case is not the status of the letter of offer issued to the appellant in

respect of Plot No. 430 Block C but the existence of the plot itself. He submitted that as a result of the 1986's survey, the suit property though was under customary ownership of the first respondent, was allocated to the appellant without the former being compensated. With the approved survey of 1996, he submitted, the suit property reverted back to the first respondent as plots 505 and 506 and the position of Plot No. 430 changed into an open space. In his contention, therefore, the trial court was right in holding that the suit property is not on Plot No. 430.

On the third ground, it was Mr. Daimu's submission that as the change of the location of Plot No. 430 Block "C" was in 1996 while this suit was instituted in 2013, the complaint by the appellant in the respective ground is baseless.

On the fourth ground, it was submitted that the first respondent cannot be blamed to have invaded the land while the same was allocated to him by the relevant authority. After all, he submitted, construction of a building on a land is not by itself a proof of ownership. He prayed, therefore that, the appeal be dismissed with costs.

On his part, Mr. Webiro in essence joined hands with Mr. Daimu's submissions and urged us to dismiss the appeal with costs.

In his rejoinder the appellant reiterated what he submitted in his submission in chief.

We shall start our deliberation with the first ground of appeal. The first complaint therein is that, the trial court determined the issue of the appellant's ownership of the suit property based on the cancellation of the 1986 survey plan by the 1996 survey plan a fact which was not pleaded. The major concern of the appellant through his counsel is that such fact was not pleaded in the written statement of defence of the first respondent. That parties are bound by their pleadings and are not allowed, during trial, to adduce evidence which departs from pleadings is a settled principle of law upon which parties herein are not in dispute. It has been stated in a number of decisions. See for instance, **James Funke Ngwagilo v. Attorney General** [2004] T.L.R 161, **Lawrence Surumbu Tara v. The Hon. Attorney General and 2 others** , Civil Appeal No. 56 of 2012 and **Charles Richard Kombe t/a Bulding v. Evarani Mtungi and 3 others** , Civil Appeal No. 38 of 2012 (both unreported).

The contention by Mr. Daimu which is shared by Mr. Webiro is that since the complaint was neither raised nor adjudicated upon at the trial court, it cannot be raised for the first time during appeal.

As we said above, the case at the trial court was commenced by the appellant. He was accusing the first respondent for trespassing unto her land. As against him, he was praying essentially for a declaration that he was the lawful owner of the suit property. The grounds for the appellant's claim against the first respondent were pleaded in paragraphs 9, 10 and 11 of the amended plaint which for clarity are reproduced hereunder:

> "9. *That, sometime in 2005 the Defendant without any legal justification and purporting to be the owner of the land constituting among others the demised premises, invaded part of the demised premises and erected buildings thereon.*
> *10. That, the Defendant further filed a land dispute at the Ward Tribunal and finally at the District Land and Housing Tribunal of Kinondoni (vide) Application No. 186/2008 against Col. David Mahende. The application was struck out with costs on 2/11/2011.*
> *11. That despite striking out of the Defendant's application, the Defendant has continued to occupy the Plaintiff's part of the demised premises illegally and is now erecting other structures thereon without any legal justification."*

From the above averments, it is quite clear to us that, the appellant's ground of claim against the first respondent was solely based on trespass. The amended Plaint which appears at pages 73 to 78 does not say

anything about the validity or otherwise of the 1996's survey plan under which the suit property was officially allocated to the first appellant. We note from paragraph 12 of the amended plaint that, the appellant did complain against the second respondent for allocating the suit property to the first respondent while the matter was pending at the trial court for determination. In particular, the appellant made reference to the year 2016 when the first respondent was formally allocated with plot numbers 505 and 506. The complaint as it can be seen has nothing to do with the approved survey plan of 1996 under which the first respondent's two plots were created and Plot No. 430 turned into an open space.

It has to be noted that, in 2013 when the appellant was commencing the suit at the trial court, the second and third respondents were not parties to the proceedings and there is no claim that they had been notified of the case before. Therefore, it would remain with no proof that, the second respondent issued the respective certificate of title to the first respondent while aware that it was a subject of the pending case. Therefore, even if it was to be assumed that, the evidence of DW4 and DW5 was inadmissible for departing from pleadings, the appellant's suit at the trial court would remain unproved.

Mr. Mbuga would suggest in his submission that the appellant was unaware of the 1996's survey plan. We cannot agree with him because the appellant filed the amended Plaint after she had been served with a list of additional documents accompanied with the first respondent's certificate of title. Besides, reading from paragraphs 1, 6,7,10,12,13 and 14 of the first respondent's amended written statement of defence, the existence of the 1996's survey plan was pleaded and the relevant documents attached. Therefore, if the appellant wished to rely on the alleged irregularities in the 1996's survey plan as her ground of claim, she would have further amended her plaint to incorporate the same.

The evidence of DW4 and DW5 is challenged on the ground that it was not founded on the written statement of defence of the second and third respondents. However, looking at the amended plaint and the reliefs sought, the first respondent, it would appear to us, was impleaded as a necessary party to assist the trial court in determining the dispute. There was no specific relief sought against the second respondent. In our view, in as long as the evidence of these two witnesses had a foundation on the amended written statement of defence of the first respondent, it cannot be said that such evidence departed from pleadings as to take the appellant by surprise. The complaint is, therefore, without merit.

It was also submitted that since exhibit P3 was allocated prior to the allocation to the first respondent, under the rule of priority in **Jacqueline Jonathan Mkonyi** (supra), the appellant's title should have taken precedence over the first respondent's title. The rule of priority, with due respect to Mr. Mbuga, cannot apply in the instant matter. As we understand it, the rule applies where both the two allocations are intact. It does not apply, as in the instant matter where, as we have held, the 1986 allocation was varied by the allocating authority in 1996. With the changes in 1996, therefore, there was no allocation to compete with that of the first respondent. In any event, the first respondent's title on the suit property is traceable from the acquisition in 1982 through purchase from the original owner which conferred to him a customary right of occupancy. The first respondent's acquisition being prior to that of the appellant, the principle of priority should have applied against the appellant. Therefore, in **Jacqueline Jonathan Mkonyi** (supra) relied upon by Mr. Mbuga, it was observed;

> *"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 Baranyisa*** *(supra) the survey did not reduce the customary owner into a squatter".*

That the notice of cancellation was not gazetted and the appellant not compensated, is a fact which was neither raised nor adjudicated upon during trial. As a result, it was not framed into an issue for determination. Therefore, we agree with Mr. Daimu that, the same cannot be the basis for determination of this appeal. It is not in the grounds of appeal either. In any event, the evidence on the record suggests that the appellant was notified about the process before the suit property being reallocated to the first respondent.

There was also a contention that the first respondent's 1982 purchase agreement in exhibit D1 could not prove title for want of description of the suit property. We see no merit on this contention for the simple reason that before official allocation of the suit property to the first respondent, the relevant village authority verified, as per exhibits D3 and D6 that, the suit property had been under customary ownership by the first respondent.

In view of the foregoing discussions, therefore, the first ground of appeal lacks merit and it is hereby dismissed.

This now takes us to the second ground of appeal where the trial court is faulted in holding that the property which was initially allocated to the appellant is no longer in existence as it has been replaced by plot

numbers 505 and 506. It was submitted for the appellant that since a letter of offer is as good as a certificate of title, the appellant's title should have been better than the first respondent unless there was evidence of fraud. With respect, the contention is misplaced. It could have been relevant if in accordance with the available survey plan, the suit property had still been on Plot No. 430 Block "C" which is not the case. Therefore, if the appellant had any title, it was not, as the trial court held, on the suit property but on an area which is an open space. For the same reason, the trial court cannot be faulted in holding that plot number 430 Block "C" and Plot Nos. 505 and 506 were in different locations because its holding was based on a survey plan duly recognized by the relevant authority. On top of that, as already alluded above, the first respondent's interest on the suit property traces its genesis from the customary right of occupancy acquired in 1982 which was prior to the appellant's alleged acquisition.

Having said that, we hold that the second ground of appeal is without merit and it is accordingly dismissed.

We turn to consider the third ground of appeal. The trial court is criticized, in this ground for not holding that, the allocation of the plots to the first respondent after the 1996 survey and issuance of the title to him while the suit was pending at the trial court was improper and unlawful.

This issue cannot detain us since it is apparent from the record that the second respondent was joined in these proceedings in 2018 while the survey and consequential allocation of the suit property to the first respondent had already taken place. There being no evidence that the second respondent was aware of the case before, the allegation cannot stand. The third ground of appeal is therefore devoid of any merit and we dismiss it.

We proceed with the last ground where the trial court is faulted for erroneously blessing the first respondent's convertion of the appellant's structure on the suit property into a modern house. Mr. Daimu has submitted that since the issue at the trial court was on the ownership of the suit property, the existence of a structure on the suit property allegedly erected by the appellant was not the basis of the decision. He is quite right, in our view. This is because, the appellant's claim at the trial court was that she was the lawful owner of the suit property. That she erected a structure on the suit property, was a fact which was introduced so as to establish her ownership on the suit property. It would follow, therefore that, once established that she was not the owner, the issue became irrelevant. Thus, the contention is neither here nor there. The last ground of appeal is therefore dismissed.

In the final result and for the foregoing reasons, we find the appeal without merit and, it is accordingly dismissed with costs.

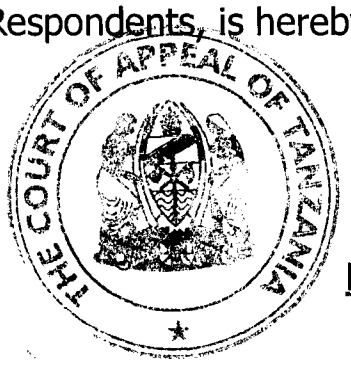
DATED at **DAR ES SALAAM** this 27th day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2024 in the presence of Mr. Emmanuel Mbuga, learned counsel for the Appellant and Mr. Daimu Halfani, learned counsel for the 1st Respondent who also took brief for Mr. Edwin Joshua Webiro, learned State Attorney for the 2nd and 3rd Respondents, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL