IN THE HIGH COURT OF TANZANIA

AT TABORA

(Tabora Registry)

CIVIL APPEAL NO. 11 OF 1976

(Original DC. Tabora Civ. Case No. 1 of 1976)

Before: E. J. Nyamasagara, R/Magistrate.

---

NURMOHAMED ALI REMTULLA ..... APPELLANT

versus

FATU ESMAIL @ AMINA ESMAIL ..... RESPONDENT

---

# J U D G M E N T

MAPIGANO, J:

This case concerns a house on a plot of land situated within the boundaries of the township of Tabora and described as No. 138 N Kaze Hill, Ng'ambo Area. The appellant unsuccessfully brought an action in the District Court alleging and praying per para. 3 of his plaint:

> "That the plaintiff as landlord and/or owner of the house No. 138 Kaze Hill, Tabora claims from the defendant as tenant the sum of Shs. 540/= being arrears of rent due and owing by the defendant to the plaintiff for the said premises at agreed and/or reasonable rent of Shs. 60/= per month for the period of nine months from 1/4/75 to 31/12/75."

He also prayed for vacant possession, mesne profits at the rate of Shs. 2/= per day from 1/1/76 until vacant possession, costs and any other relief or reliefs that the court may deem fit to grant.

The respondent, an unmarried woman, resisted the action by pleading that she was both the holder of the right of occupancy of the land site and the owner of the house. Alternatively, she pleaded that she had cohabited with the appellant since 1964 and that for all practical purposes their relationship amounted to a marriage union and, therefore, if only implicitly, that the plaintiff was under a duty to maintain her by providing her with a reasonable shelter.

It was common ground that the respondent is the occupier of the plot on which the house stands. A certificate under the Land Ordinance thereof was granted to her on 8/4/70. She has been paying the yearly rentals. Further, one certainty about the parties is that they were for a long time, prior

...../2

to the institution of this suit, very friendly. However, as the learned Magistrate observed, there was no sufficient evidence to establish the respondent's assertion that they were cohabiting. The evidence showed that before the respondent was granted the right of occupancy from year to year the appellant had given her the management and full control of his bar business and had also met the rent in respect of the premises she occupied at that time.

It was also common ground that it was the appellant who submitted the plans for the house to The Town Council and that on approval of those plans by the Town Council a building permit was issued in his name, and that thereafter, on completion of the construction, he paid the yearly Urban House tax until that tax was abolished in 1975. I may interpose here to remark that I do not quite understand why and how the Town Council should have approved the plans and allowed the appellant to erect the house on a plot over which he had no certificate of title and which had already been allocated to some one else. I cannot say whether this was due to a lack of co-ordination between the land office and the Town Council. I am however given to understand that such a situation is not uncommon and unknown to the authorites and that houses are sometimes erected upon the land allocated to others in consideration for rent or by the permission of the occupier - the holder of the right of occupancy. That could be true, but at the same time it seems that such practice is inherently dangerous and the present dispute is a poignant testimony.

Furthermore, it was common ground that after the completion of the construction the appellant utilised the building for the operation of a bar business and that the respondent continued to be the manageress. And she lived in the same building without paying any rent. This dispute started after the appellant was refused licence to operate the bar.

There was however a hot dispute as to whether the respondent made any contribution towards the construction of the house. The respondent contended that she contributed Shs. 5,000/=. But the evidence of the appellant was to the contrary: he denied that she contributed even a cent. I may pause here to observe that it was not disclosed as to how much the building cost. The learned Magistrate found for the respondent on this issue. With respect, though the evidence of the respondent was not corroborated, but having regard to the cordial, if not intimate, relationship which existed between the parties, I am unable to fault that decision. I will not, therefore, disturb that factual finding.

...../3

As indicated at the beginning, the learned Magistrate dismissed the suit. In the main part, the basis of his decision was legal. The learned magistrate was in effect of the view that in law a house and the land on which it is built are one and indivisible and that they are incapable of being the subject of separate estates. He found authority in a passage which appears at P. 39 in the text book Land Tenure and Policy in Tanzania by Professor R.W. James, which says that:-

> "At common law "land" includes very much more than just the physical soil or substance. It includes buildings and any other thing attached permanently to the soil whether above or below the surface".

This passage, of course, expresses the well known maxim - cujus est solum ejus est usque ad coelum et ad inferos.

The learned Magistrate further held that in law the grantee of a right of occupancy "Owns not only the soil on the plot but all the permanent fixtures on it". He went on to say that in as much as the house in this case was built after the respondent had acquired the title to the use and occupation of the land, it belonged to the respondent, and that it was immaterial that the appellant might have made contribution towards its construction. He added that if the appellant had built or assisted in the building of the house with the permission of the respondent, then at best he was a mere Licencee and that the only redress he could seek was compensation under the principle of quantum meruit. But the learned Magistrate pointed out that in this case the court was precluded from granting any such relief in so far as the appellant had not specifically asked for it. He cited Arusha Tailoring Vs. Mrs. Pucci (1967) HCD No. 424, which restated the rule that parties are bound by their pleadings.

It is submitted on behalf of the appellant that the learned Magistrate erred in holding that the house and the land on which it is built are one and the same and that a certificate of a right of occupancy is always conclusive proof that the grantee of the right therein is the owner of the houses or buildings which happen to stand on the land in respect of which such certificate is granted. It is argued that at common law a distinction between a title to a plot of land and a title to a building thereon can possibly be separated.

...../4

With respect, I would agree with the above submission. As Professor James himself observes in his above text book at P. 40, the common law definition of land is simply a presumption and a transfer of a building separately from the soil would seem, in the light of the provision of the Interpretation Act, UK, 1889, tenable or innocuous at common law, and that an owner could, if he wished, devide his land horizontally, vertically or in any other way and dispose of the same so as to make them separate properties in the hands of the grantees. Indeed, it appears that this sort of division has long been recognized in England. For example in the old case of Denn d. Bulkley V. Wilford (1826), 8 Dow & Ry. K.B. 549, Abbott C,J. had this to say:-

> "No body will doubt that if the word "land" merely is used, without any qualification, it would be sufficient to pass meadow and pasture land, and land covered with water; but when we find that in this instrument 12 messnages are mentioned, and when we find also, not merely that 20 acres of land are mentioned, but also 20 acres of meadow, 20 acres of pasture, 5 acres of wood ....., it is impossible not to see that the term "land" was not intended to comprise meadow and pasture, a multo fortiori we must say that it was not intended to pass houses."

However, as Professor James further observes at the next page, there are in Tanzania statutory restrictions and it seems that by Section 66 of the Land Registration Ordinance, Cap. 334, land, including the building, held by a registered title cannot be transferred in horizontal portions.

Even then, I do not think that it is, strictly, contrary to law if an owner of an undeveloped plot privately arranges with or invites another person to develop the land, or if the holder of a right of occupancy accepts a contribution from another person towards such development. Either of such consensual arrangement would, I think, be in the nature of or amount to a sub-tenancy or licence. If and when such arrangement is determined, any permanent or unexhausted improvement made by or attributable to the licencee would or should be regarded as part of the land even by the parties themselves and inure to the benefit of the holder of the right of occupancy: quidquid plantutur solo, solo cedit. But the licencee would be entitled to a compensation either under the terms of their contract or on the principle of quantum meruit. It would be surprising and it would work a real injustice if the licencee cannot obtain such remedy.

...../5

As we have seen, the parties in this case built the house jointly under a special and private arrangement, though the extent of the appellant's contribution cannot be ascertained from the evidence. I think that the respondent as the grantee of the right of occupancy can, upon the termination of the special relationship, validly and properly assert the ownership of the house, and this should necessarily defeat the appellant's claim for rent and possession of the house. But at the same time, she must pay fair compensation for the house, for I think the appellant falls in the category of a licencee who deserves a compensation. This would be in line with other decisions of this court. In Nyakioze v. Sofia (1971) HCD No. 413, the husband Nyakioze constructed a building on a plot held by his wife Sofia under a right of occupancy. On divorce, the husband instituted proceedings in the court claiming ownership and possession of the house. It was held by this court, on appeal, that the house inured to the wife. But the High Court further directed that the wife should compensate the husband for the improvements.

And in Saada v. Saada (1971) HCD No. 421, the plaintiff constructed a house on land belonging to his concubine and the parties intended the house for joint use or benefit. On termination of their relationship a dispute arose as to the ownership of the house. This court held, on appeal, that in these circumstances the house inured to the owner of the land, but that there was an obligation on the part of the owner of the land to compensate the builder for materials and labour expended in erecting the house.

That then brings me to consider whether the court could grant compensation when the plaint did not specifically ask for such relief. Rule 1 (g) of Order 7 C.P.C. says that the plaint shall contain the relief which the plaintiff claims, and rule 7 of that Order says that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. As pointed out, the learned magistrate held the view that he had no power to grant compensation to the appellant. I will reluctantly differ. I think it is obvious that the ownership of the house was a principal issue. In fact it was framed by the trial court as issue No. 1 and the matter formed the main subject of discussion in the court. I therefore think that compensation could be granted to the appellant at least under the claim for "any other relief or reliefs that the court may deem fit" in so far as it would not have been inconsistent with the relief specifically claimed.

...../6

In conclusion, I would dismiss the appeal as relates to the arrears of rent and possession. I would grant compensation to the appellant. It is ordered accordingly. I remit the case to the trial court for it to determine the amount of compensation and award the same. I do not propose to make any order as to costs, as I feel that neither party has succeeded on his or her main arguments put forward on this appeal.

Delivered in Court.
Mr. Patel for the Appellant.
Respondent in person.

D. P. MAPIGANO,
JUDGE.

Tabora,
2nd July, 1977