AT DAR ES SALAAM

ORIGINAL JURISDICTION

CIVIL APPEAL I OF 1989

ISAAC SEPETU.....APPELLANT

versus

FATUMA ALLY FIDIN.....RESPONDENT

JUDGMENT

RUBAMA, J:

The facts in this case are relatively simple and largely not in dispute. The contested subject is the ownership of plot No.51, BAHARI BEACH area. FATMA ALYFDIN's claim on the plot is based on customary tenure, she having purchased the land in dispute on 2nd October, 1983 at Tshs. 9,000/- from one Omary Mwinyimkuu in the presence of three witnesses. (see exhbit B- the sale Agreement). ISAAC SEPETU on the other hand bases his claim to the offer of Occupancy to him by the Dar es Salaam City Council in June, 1987 (see Exhibit D1) and his payment of fees for the land in dispute to the appropriate authorities (see Exhibit D2). It is not disputed by both parties and the trial court so held that plot 51 Bahari Beach is within the boundaries of the Dar es Salaam City Council (See G.N. 88 of 1st July, 1983 - exhibit D4). It is inferable from the above that FATMA ALYFDIN, the plaintiff, purchased the land in dispute as found established by the trial court after coming into effect of G.N. No.88 of 1983.

After detailing the evidence for the plaintiff, the defendant and the written submissions of learned counsels for the plaintiff and the defendant, the learned trial magistrate stated:

> "I think I have to concur with the plaintiff's submissions and therefore I adopt it. In addition I have gone through GN 168 of 1975 in relation to the submissions given by my learned brother for the defendant regarding control and disposition of land. He argued that since there was no evidence to the effect that village council authorised the disposition of the shamba in favour of the plaintiff then the purported sale was void and of no legal effect, In principal I agree with the law. But the sale had the blessing of the village and that is why PW1 (the plaintiff) was allowed to be a member of the village. Since the plot is in a registered village an issue not in dispute, the law as it stands is clear that the City Council could not reallocate the same as clarified by the defence."

Regrettably the above quote from the judgment of the learned trial magistrate contains all the analysis and evaluation of the evidence before the court. It is hardly necessary to point out that the learned trial magistrate had not evaluated the evidence before her to reach or arrive to her conclusion.

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This error has led to her finding as established or undisputed facts that needed resolving eg. there was dispute, contrary to the finding of the trial court that the land in dispute was in registered village. This apart, the provisions of Order XIV Rule 1 (5) of the Civil Procedure Code, 1966 were not complied with. No issues were framed and recorded by the trial court. For the fact that the facts are simple and mostly not in dispute, this court's duty to reevaluate the evidence afresh would have been that harder.

There is no dispute that Mtangani Ujamaa Village is a registered Ujamaa Village. There is however, dispute that Plot No 51 Bahari Beach is within the Mtongani Village. The letter of protest by the Mtongani Village to the Dar es Salaam City Director (exhibit E) on the survey of same land without involving the village authorities is no evidence that the land being surveyed belongs to the Mtongani Village. From this letter (exhibit E) I read that some of the land being surveyed without involving the Mtongani Village authorities belonged to the Mtongani Villagers and nothing more. There is another dispute of who between the plaintiff and one Etutu mentioned in exhibit 5 and by Theobald Msafiri (DW4) the Dar es Salaam City Council Land Officer Grade III, owned the land in dispute. The plaintiff maintains that the land now forming plot no 51 Bahari Beach was purchased by her. In this she is supported by Swedi Swaleh (PW2), the Mtongani Ujamaa Village chairman who had been a resident of the Mtongani Kunduchi since 1963 and the Village Chairman since 1967 to the time of the hearing of the case in 1988. Theobald Msafiri (DW4) testified that the land in dispute had belonged to one Etutu. DW4 was closely involved in the pysical inspection of the area in which the land in dispute (plot 51, Bahari Beach) is situated and the allocation of 142 plots that had been surveyed and allocated to several people amongst whom was the defendant. As pointed out above, the learned trial magistrate never riverted to this conflict; she had found no conflict existed. On evaluation of the evidence, I accept that the land in dispute was the same as that purchased by the plaintiff as evidenced by exhibit B. The Mtongani Village chairman (PW2) had an intimate knowledge of the area due to his long stay in the neighbourhood. I also accept Mr. Marando's submission, learned advocate for the plaintiff that the evidence on ownership of the plot by Theobald Msafiri (DW4) was hearsay evidence as it had been based on the statement by the said Etutu who had not been called to testify. I further find merit in the submission by Mr. Marando that the said Etutu was an interested party over the land in dispute and his statement should have been taken with caution. I am fortified in this view by the evidence of Maryam Sumo (DW2), the wife of the defendant (DWI) while under cross examination that she had found on part of the land in dispute an old hut of the plaintiff's watchman and further that she had cut 54 plants on the land in dispute and had them counted in the presence of the plaintiff's watchman with the intention of making appropriate compensation to the owner of the cleared plants.

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She (DW2) was not dealing with the said Etutu. Further it was not to Etutu that the City Council had sent on 9th October, 1987 a Stop Order on complaint by Maryam Sume (DW2) that the plaintiff was constructing a "banda." But did the plaintiff establish in court, that she held the land in dispute under customary tenure? The answer to this is an emphatic No. As held in the case of National Agricultural and Food Corporation v. Mulbadaw Village Council and others, Civil Appeal No.3 of 1989 (Court of Appeal) (unreported) at p.5, that it "is for a plaintiff to establish that he was a native before a court can hold that he was holding land on customary tenancy." The plaintiff led no evidence to show that she was a native. This fact can not be assumed by virtue of her residence at Shinyanga as per evidence of her daughter (PW1) or her membership at the Mtongani Ujamaa Village as per exhibit C). "Deemed" right of occupancy is by virtue of s.2 of the Land Ordinance as amended by the Land Law (Miscellaneous Amendment) Act, 1970 (Act No.26 of 1970) can only be held by a "native" as defined in the Act. In view of this fact no proprietary rights "deemed" or otherwise were passed to the plaintiff/respondent on the sale of the land in dispute. The land in dispute was thus not owned by the plaintiff/respondent at the time it was allocated to the appellant/defendant by the City Council. The appellant/defendant was no trespasser to that land in dispute but properly granted by the appropriated authority i.e. the Dar es Salaam City Council. Accordingly the appeal is allowed with costs. The judgment/the trial court is hereby quashed and orders made thereunder set aside.

Yahya Rubama

YAHYA RUBAMA
JUDGE
15/4/91.

Coram: RUBAMA, J.
Parties absent
Judgment delivered

THE HIGH COURT OF TANZANIA

Yahya Rubama

YAHYA RUBAMA
JUDGE
15/4/91.

ORDER: The Registrar to inform the parties as soon as possible.

Yahya Rubama

YAHYA RUBAMA
JUDGE
15/4/91.

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23/4/91

Coram: S.S.Kaijage (DR)
Mr. Mwakasungura for Appellant
Mwakasungura/Marando, for Respondent

Order: In pursuance of an order made on 15/4/91 parties in this matter have been accordingly informed of the contents of the judgment.

S. S. KAIJAGE
DR/HIGH COURT
DAR E S SALAAM
23/4/91.