

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIVIL APPEAL NO. 42 OF 2000

MICHAEL S. LUPIANA APPELLANT
VERSUS
ALEX O. LEMA RESPONDENT

" J U D G E M E N T "

THEMA, J

This is an appeal by Michael Simon Lupiana the appellant against the judgment of Hon Kolombora learned Principal Resident Magistrate dated 28th January 2000. In that judgment the learned Principal Resident Magistrate declared Alex Onesmo Joshua Lema the rightful owner of the disputed plot No 233 Situáli at Mbezi Beach, Kinondoni within the City of Dar es Salaam.

Furthermore the learned trial magistrate found as proved that the appellant the appellant was trespassed to the suit land, thus declaring the developments carried out by the appellant to be unlawful and had to be demolished or removed.

Aggrieved by the judgment of the trial court, the appellant has lodged a memorandum of appeal on the following grounds:

- (1) error in law and fact by the trial magistrate in holding that the respondent is the rightful owner of the suit plot.
- (2) error in law and fact by the trial magistrate in holding that the appellant trespassed on the suit land requiring the demolition of the building constructed.
- (3) error in law by the trial magistrate in holding that the building be demolished without any compensation.
- (4) error in law and fact on the part of the learned trial magistrate in admitting as evidence uncertified for the respondent.

With leave of the court, the appellant was allowed to file two additional grounds of appeal to wit:

- (5) error in law and fact by the learned trial magistrate in relying on the testimonies of witnesses who were not subjected to cross examination by the defendant/appellant.
- (6) error in law on the part of the trial magistrate in trying the suit when at the material time the court had no jurisdiction in that the monetary value of the subject matter had not been pleaded and an order to amend the plaint was not complied with by the plaintiff/respondent.

The appellant argues the court to allow the appeal, declare the trial a nullity and set aside the judgment and decree with costs.

Like in the trial court the parties are represented by the same learned counsel, Mr El Maamry for the respondent and Mr Maira for the appellant. The appeal has been well argued by both counsel by way of written submissions.

Let me deal with grounds five and six of appeal in that order. On ground five of appeal the learned counsel for the appellant has contended that the two witnesses i.e PW 2 and PW4 called to testify on behalf of the plaintiff were not cross examined by the defendant while the testimony of PW 3 has not been recorded. Mr Maira for the appellant has submitted the right to cross examine is an important undertaking to a fair trial as it embodies the rules of natural justice, i.e a fair hearing. Mr Maira has argued that failure to give the appellant an opportunity to cross examine resulted in an unfair trial.

In reply Mr El Maamry basing on the record submitted that no injustice was done to the appellant/defendant as opportunity presented itself at the trial for cross-examining the plaintiff's witnesses.

I respectfully agree with Mr El Maamry that indeed the record bears that testimony as both appellant and his advocate were present when the witnesses testified. With respect to PW 4 TATU the record speaks loud and clear that defendant now appellant abandoned cross examination of the witness. This was on 16/12/98. The appellant cannot be heard now complaining that he was denied a fair trial. Accordingly this ground of appeal fails.

Ground six in the memorandum of appeal touches on the pecuniary jurisdiction of the trial court. It is correct that the appellant raised the issue in the course of trial and a ruling was delivered directing among other things that plaintiff file an amended plaint indicating or showing the monetary value of the subject matter. The respondent then plaintiff on 9th September 1991 filed the amended plaint; copy of which was served to Maira and Co Advocate on behalf of the defendant/appellant. The record does not show that the defendant/appellant filed his amended defence despite his several prayers to do so. On the basis of this background information I find no merit in this ground appeal and I dismiss it.

I will proceed to deal with ground one in the memorandum of appeal which in my view is the main bone of contention. The appellant is complaining that the learned trial magistrate fell in error of law and fact in holding that the respondent then plaintiff was the rightful owner of plot No 233 Mbezi Biach and consequently declaring the respondent/plaintiff the lawful owner of the suit plot. From the evidence on record I am of the firm view that the learned trial magistrate cannot be faulted for making that finding. For it is not in dispute that the respondent was allocated the suit plot before the appellant and a certificate of Title No. 23711 was issued to confirm respondent's title over the suit premises. The letter of offer and certificate of title No 26868 subsequently issued to the appellant were invalid documents creating no rights known to law. It is elementary point of law that following the allocation of the plot in dispute as well as the issuing of the certificate of title to the respondent, the property in that land passed to the respondent, and there was nothing of value that remained which could be offered and passed to the appellant. I take it that the appellant was illadvised to presume that he had a good title own the suit premises when he was offered the letter of offer as well as the certificate of title. It should be emphasized beyond and shadow of doubt that appellant has no good title over that land, but were documents worth nothing in law. It would follow therefore as day follows night that the appellant is a trespasser that land and the learned trial magistrate correctly declared appellant as such. Being a trespasser ab initio the development activities carried out by the appellant on the suit land are equally illegal entitling him to no compensation as correctly ruled by the trial magistrate. Appellant cannot benefit out of his own insolence. This then disposes of grounds one, two and three of the memorandum of appeal.

Before I conclude let me address briefly on the submission of Mr Maira learned counsel on the issue of revocation of the appellant's title while the matter is pending in court. I do agree with the learned counsel for the appellant that in terms of the holding in Partman Garment Industries Ltd versus Tanzania Manufactures Ltd ~~981~~ TLR 303, the purported revocation by His Excellency over Certificate of Title No. 26868 would have been null and void. This would also apply if at all to the certificate of title No. 23711. However as held elsewhere in this judgment as the certificate of title No 26868 was null and void ab initio the president's action to revoke a nothing were a wasted efforts as there was nothing to revoke.

In summary and for the reasons given I hold that this appeal has no merit and I dismiss it with costs. The judgment of the trial court is upheld and confirmed.

It is so ordered.

S. IHEMA
S. IHEMA

JUDGE

2/12/2000