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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 112 OF 2002

ABDALLAH MOHAMED & ANOTHER APPELLANTS

VERSUS

MISPERES BUSOKA RESPONDENT

Date of last order - 14/10/2005
Date of Judgment - 3/2/2006

J U D G M E N T

MLAY, J.:

The two appellants ABDALLAH MOHAMED and AUGUSTINO A. GALIMA were jointly sued by the Respondent MISPERES MUSOKA in Magomeni Primary Court for trespass and construction of dwelling houses on the land purchased by the Respondent. After hearing evidence from both sides the Primary Court found that the appellants had not trespassed on the land because the respondent had himself authorised the appellants presence. Being aggrieved by the decision of the Primary Court, the respondent through the services of Mr Magessa advocate, appealed to the District Court of Kinondoni. The appellate District Magistrate set aside the judgment of the Primary Court holding that the present appellants were trespassers and ordered the present appellants to demolish their houses and vacate

the land in dispute. Being aggrieved by the judgment and decree of the District Court, the appellants have appealed to this court, on the following grounds:

- “1. That the District Court erred in law and fact by not considering exhibit “C” which shows the basis of appellants ownership over the suit premises.
2. That the trial Magistrate erred in law and fact by not considering the evidence adduced and the opinion of the Primary Court who visited the suit premises and held that the Appellants were trespassers.
3. That the magistrate erred in holding that the Appellants did acquire the suit premises without consideration.
4. That the trial Magistrate erred in law and facts by ordering the Appellants to demolish this houses and to vacate from the suit premises without any compensation for an exhausted

improvements they had effected on the suit premises.”

At the hearing of this appeal the appellants were unrepresented by an advocate and the 1st Appellant with the consent of the 2nd Appellant made representations on behalf of both appellants while Mr Magafu, learned advocate made submissions on behalf of the respondent.

On the 1st ground of appeal the Appellant's submitted that the respondent and the appellant entered into a written agreement in which the respondent transferred the land in dispute to the appellants. The appellants referred to Exhibits "C" which was also recorded before a Magistrate (Exhibit "D" produced during trial).

On the 2nd ground the appellants submitted that the trial court visited the land in dispute and found that the appellants were occupying the area which the respondent had given them according to the agreement Exhibits "C" and "D". On the 3rd ground the appellants submitted that they had purchased the land in dispute for Tsh.260,000/= and built houses but later the vendor was successfully sued by the owner of that land but the respondent who obtained that land from the owner, agreed to let the appellants to continue occupying the land because they had already built houses on the said land. On the last ground the appellants submitted that as they have

already built houses on the land in dispute, if they are ordered to vacate the land and demolish the houses, they have nowhere to go.

Mr Magafu, Counsel for the Respondent argued that the main issue in this appeal is contained in the first ground of appeal. He conceded that the respondent is not disputing that she entered into an agreement with the appellants and that the respondent did not demand any consideration from the appellants. He however argued that the appellants continued to occupy the land as licencees as they had not paid anything to the respondent for the land. He contended that the problem arose after the appellants started to encroach upon the respondent's land claiming the whole land to belong to them. Mr Magafu argued that it was for this reason that the respondent decided to terminate the licence by instituting the suit in the Primary Court. Mr Magafu argued that the respondent did terminate the Appellants licence to stay on the land by telling them to vacate verbally, and the licence having been revoked, the appellants became trespassers.

Mr Magafu made an alternative submission that even if the appellants are not trespassers, there is need to establish the boundaries of the land occupied by the respondents and the land occupied by the appellants. In that event Mr Magafu prayed that this court gives directions that the boundaries be ascertained so that the parties can live in peace.

In reply the appellants denied to have moved the boundaries of the area in which they had agreed the appellant should stay. They denied to have trespassed into the respondents area.

The issue for determination in this appeal is whether the appellate District Magistrate was wrong to hold that the appellants were trespassers to the respondents land and thereby, reversing the decision of the Primary Court. As Mr Magafu pointed out, this issue is the subject of the first ground of appeal. However, before attempting to address the issue, a summary of the fact in the dispute needs to be given.

During trial, it was a common ground that the respondent purchased one acre of land from one Salima Saidi. According to the sale agreement Exh. "A", the sale was effected on 1/3/94. It was also a common ground that the appellants had purchased jointly, a piece of land from one George Shangama. According to the sale agreement, the purchase took place on 10/9/92. The appellants started building dwelling houses on the said land. It was in evidence that the land purchased by the appellants was comprised in the land subsequently purchased by the respondent and it was conceded by the appellants that prior to the land being sold to the respondent, it did not belong to the vendor George Shangoma who sold it to the appellants, but belonged to Amina Saidi who sold it to the

respondent. It was also a common ground that after purchasing the land the respondent agreed in writing to allow the appellants to retain the land on which they had built their dwelling houses. The agreement is contained in Exhibits 'C' and 'D' which were signed by both parties in the presence of witnesses. On 17/2/99, nearly five years after signing the said agreement to allow the appellants to retain the land on which they had built their dwelling houses, the respondent instituted a suit against the appellant's in the Primary Court of Magomeni for trespass to his land. In the Primary Court it was held that the respondent had allowed the appellants to retain the land and therefore there was no trespass. The suit was accordingly dismissed. The respondent appealed to the District Court of Kinondoni which held that the agreement comprised in Exhibit "C" cannot negate ownership of the suitland to the respondents. The appellate District Magistrate held that the appellants were trespassers and set aside the decision of the Primary Court and ordered the present appellants to demolish their houses built on the land in dispute. It is on this background that the appellants have filed the present appeal to this court.

As I stated earlier or in this judgment, the main issue for determination is whether on the facts of this case, the District Court was right in deciding that the appellants were trespassers. The suit is based on trespass to land. What then constitutes the tort of

trespass to land? In Winfield and Jalowicz On Tort Thirteenth Edition at page 360, the law is stated as follows:

"Tress pass to land, like the tort of trespass to goods consists of interference with possession"

In the present case, it would seem that the respondent was claiming that the appellants had built houses on his land. According to the respondent's evidence during trial, the houses were built on his land after he had purchased the land but it was the appellants' case that the said houses were built on the land prior to the respondent's purchase of the land. Neither the trial Court nor the first appellate Court made a specific finding as to who entered the land in dispute first. It was however not in dispute that after the respondent had purchased the land, he allowed the appellants to retain the land on which they had built the said houses. Mr Magafu Counsel for the respondent has submitted that the appellants became licencees. In Winfield and Jalowicz cited above, a licence has been defined as follows, at page 366.

*"For the purpose of trespass, the best definition of a licence is that given by Sir Frederick Pollock. A licence is **"that consent which, without passing any***

interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful."

If the above definition is applied to the present case and if we accept Mr Magafu's submission that the respondents permission allowing the appellants to retain the land on which they had built their houses was no more than a licence, it follows that the appellants presence on the land and of their houses cannot constitute trespass to land because the respondent's consent prevents those acts from being wrongful.

This was the clear reasoning behind the decision of the Primary Court. Winfield and Jalowicz cited above puts the matter in very clear terms by stating at page 366 of the text that:

"A man is not a trespasser if he is on land with the permission, express or implied, of the possessor, and that is all that matters for the present purposes."

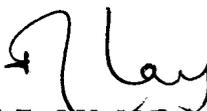
I entirely agree with this statement of the law. There was uncontroverted evidence that the respondent permitted expressly, the appellants to retain the land on which they had built their houses.

The presence of those houses on that land cannot therefore constitute the tort of trespass to land. The appellate District Magistrate misdirected himself in determining the appeal on the grounds of title or ownership of the land. The issue of trespass is not concerned with title or ownership of the land but with interference with possession of the land. The suit was not for ownership of land but of trespass to land. We therefore hold that the District Magistrate was wrong to find that the appellants were trespassers for reasons that the respondent's permission as evidenced by Exhibit "C" "did not pass the title to the suit land to the respondent" (appellants). The permission prevented their presence on the land from being wrongful and therefore constituting the tort of trespass.

Mr Magafu has invited this Court to direct that the boundaries of the land retained by the appellants and that which is retained by the respondent be determined. First, on the evidence before the trial Court and in the first appellate Court; the issue of ascertaining the boundaries did not arise and was not considered. Secondly the respondent's case, did not rest on the issue of boundaries but on the presence of the appellants houses on his land. He had in fact claimed all the land to be returned to him. For the two reasons this court as a second appellate court, cannot consider and decide upon a matter which was not in issue in the proceedings in the two courts below. The parties are however free to seek such redress in the appropriate

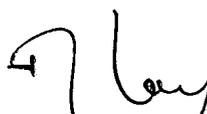
tribunal established by under section 3 of the Courts Land Disputes Courts Act, No. 2 of 2002.

In the final analysis, this appeal is allowed and the judgment and decree of the District Court are set aside and the judgment and decree of the Primary Court are reinstated. Costs to the appellants.


(J.I. MLAY)
JUDGE

The right of Appeal is explained and upon obtaining a certification of a point of law for consideration by the Court of Appeal.

Delivered in the presence of the Respondent and in the absence of the appellants this 3rd day of February, 2006.


(J.I. MLAY)
JUDGE
3/2/2006

2,030 Words.