IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT SUMBWAWANGA

LAND APPEAL NO. 2 OF 2012

(From the Decision of the District Land and Housing Tribunal of Sumbawanga in Land Case No. 9 of 2012)

CHARLES KALUKULA
JOSEPH KALUKULA } **..... APPELLANTS**

VERSUS

HUMPHREY ROBERT ..... RESPONDENT

2nd May & 17th June, 2014

JUDGMENT

MWAMBEGELE, J.:

At the centre of controversy between the appellants Charles Kalukula and Joseph Kalukula and the respondent Humphrey Robert is a parcel of land christened as Plot Nos. 119 and 121 Block "TT" (MD) Kizwite area within the Municipality of Sumbawanga, Rukwa Region (henceforth "the disputed land"). This land was surveyed in 2003 and the disputed land was allocated to the respondent on 01.04.2007 for a term of 66 years. Before the survey, the disputed land was occupied by the appellants. It is not contested that the appellants asked for compensation but were not compensated and any follow up with the Municipal Council to the effect did

not bear any fruits in seven years. Thus in 2011 the appellants decided to built a house on the disputed plots.

Having seen the appellants have built a house on plots which were allocated to him, the respondent instituted a suit for trespass in the District Land and Housing Tribunal claiming for, *inter alia*, a declaration that he is a lawful owner of the disputed land. The respondent won the case; the District Land and Housing Tribunal declared the appellants trespassers and that the respondent was a lawful owner of the disputed land. Aggrieved, the appellants have preferred an appeal to this court on three main grounds of grievance. These are:

1. That the Tribunal Chairperson erred in law and fact in failing to consider and order the issue of compensation to the appellants due to the fact that he ruled that the appellants need to be compensated and hence reaching to a wrong decision.

2. That the Tribunal Chairperson erred in law and fact in failing to consider the question of long stay of the Appellants to the disputed land herein and thus leading him to a wrong decision.

3. That the Tribunal chairperson erred in law and fact in failing to consider the evidence of the appellant herein that to date they have not been compensated for the purported acquisition of their land and hence there is nothing like acquisition thus leading him to a wrong decision.

This appeal has been argued by written submission following an order of this court dated 11.03.2014. The parties have filed their written submissions in time. The appellants' submission has been presented by Emmanuel Joachim Msengezi of Peak Attorneys while the respondent's has been presented by the respondent himself.

Mr. Msengezi, learned counsel for the appellants has complained of the appellants not being involved in the whole process of survey particularly valuation if there was one. He submits that the whole process ought to have been done in compliance with the Land (Assessment of the Value of Land for Compensation) Regulations, 2001 – GN No. 78 of 2001 and the Land (Compensation Claims) Regulations, 2001 – GN No. 79 of 2001 which enact the procedure to be followed when assessing land for purposes of compensation. The learned counsel for the appellants adds that the Guidelines for Valuation and Compensation, 2009 issued by the Ministry of Lands, Housing and Human Settlements which should have guided the Municipal Director to extinguish the existing rights in the land in question during valuation were also not adhered to. Failure to comply with the foregoing procedure, the learned counsel for the appellants submits, the Municipal Council did not acquire good title to the land which it could pass to the respondent. ***Haruna Mpangaos & 932 Others Vs Tanzania Portland Cement Co. Limited***, Civil Case No. 129 of 2008, an unreported decision of the Court of Appeal and ***Obed Mtei Vs Rukia Omari*** [1989] TLR 111, the Court of Appeal Decision are cited in support of this proposition.

The learned counsel for the appellants submits further that noninvolvement of the owners of the disputed land in the whole process of survey was contrary to the provisions of sections 7 and 8 of the Land Survey Act, Cap. 324 of the Revised Edtition, 2002. He contends further that trespass cannot exist in the present case as the land is in the possession of the appellant and cites ***Jela Kalinga Vs Omari Karumwana*** [1991] to support this contention.

On the other hand, the respondent submits that he was allocated the disputed land after complying with the laid down legal procedures and the appellants did complain at the manner in which the Municipal Council took the same from them. The respondent submits further that Egidius John Banyenza PW3 did not testify that the disputed land was acquired by the Municipal Council from the appellants; therefore "the plethora of authorities to justify his point" is of little relevance. The respondent submits that he has a better title and that the ***Jela Kalinga*** case is distinguishable from the present case in that in that case the Court of Appeal was seized with a situation where a party who was not allocated a parcel of land was suing who encroached upon it in trespass which is not the case in the instant case.

The respondent submits further that possession of the disputed land came into his hands when he was granted the right of occupancy; possession need not necessarily be physical. The appellants were therefore trespassers in the light of the decision of ***Frank Safari Mchuma Vs***

Shaibu Ally Shemndolwa [1998] TLR 278 wherein this court referred to what is known as common law presumption of possession as follows:

> "... at common law there is a presumption that possession is always attendant to title and, as the plaintiff had title to the land, it is presumed that he was in possession".

On what amounts to possession, the respondent has also referred the court to the definition of the term to Black's Law Dictionary.

In the instant case there seem not to be disputed that the appellants were not compensated upon the disputed land being declared a planning area. According to PW3, the land seems to have been surveyed on orders of the Regional Commissioner and upon contribution from those who were allocated the plots. Nonpayment of compensation to the appellants seems to be the centre of complaint from the outset and comes out very clearly in the memorandum of appeal and submissions.

The legal question that this judgment must answer is whether or not nonpayment of compensation to the holder of a deemed right of occupancy extinguishes that right upon the land being declared a planning area. Or put differently, whether the right of the holder of the deemed right of occupancy extinguishes upon the land being declared a planning area even when compensation is not paid. There is a string of authorities that hold that that the deemed right of occupancy is extinguished upon the

land being declared a planning area and upon payment of the requisite compensation – see: ***Mwalimu Omari and Another. Vs Omari A. Bilali***; [1990] TLR 9, ***Attorney-General Vs Sisi Enterprises Limited*** [2007] 2 EA 33 and ***Haruna Mpangaos*** (supra) to mention but a few.

If compensation extinguishes the deemed right of occupancy upon the land being declared a planning area; nonpayment of the same, in the same line of argument, does not extinguish the deemed right of occupancy upon the land being declared a planning area.

It follows therefore that in order to extinguish appellants' deemed right of occupancy upon the land being declared a planning area and consequently allocate the disputed land to the respondent, the appellants ought to have been compensated first to make the transaction valid. This being the case, the appellants seem to argue, the land allocating authority did not acquire good title to pass to the respondent. And the appellants seem to argue further, that, in the premises, the allocating authority had no land to allocate to the respondent and the allocation was therefore unlawful with no legal force. This argument is very convincing but after an injection of common sense to it, I have regrettably found it to be unacceptable. It was held in ***Mwalimu Omari*** (supra) that title under customary law and a granted right of occupancy in an area declared a planning area cannot co-exist. Title to urban land depends on grant and in the instant case it is the respondent who was granted that right of occupancy. The appellants; holders of deemed right of occupancy, therefore, cannot own the disputed land in co-existence with the respondent; holder of granted right of

occupancy. As the appellants' complaint hinge on compensation, it is in all fairness that they should be compensated to make the allocation by the land allocating authority to the respondent valid.

However, as can be gleaned from evidence, the appellants built the house on the disputed land after realising that follow up for compensation did not bear any positive results. Should they be compensated for this unexhausted improvement as well? I have subjected this question to serious scrutiny and I find it obvious that the appellant did not build the house on the disputed land without any iota of justification. As was held in ***Alli Mangosongo Vs Crispina Magenje*** [1977] LRT n. 8 that a person is entitled to compensation to unexhausted improvement effected on the land, if at the time of carrying out such improvement, he had apparent justification for doing so. His Lordship Kisanga, J. (as he then was) had this to say at page 41:

> "... a person should be entitled to compensation for improvements effected on the land only if at the time of carrying out such improvements he had apparent justification for doing so, for example where he bought and developed the land in good faith but it later transpires that the seller in fact had no title to such land which he could have passed to him".

In the case at hand, the appellants built the house after seeing that no compensation was forthcoming. But they did so knowing full well, or they ought to have known, that despite their not being compensated, the disputed land was allocated to another person after the survey. This negates the "apparent justification" envisaged by the ***Mangosongo*** case (supra). Thus, in developing the land under such circumstances, the appellants were treading on very dangerous grounds to their detriment. They have found themselves into the present mess as a result of their not being careful; taking for granted that they had justification to be compensated before ownership of the disputed land could validly pass to another person. This, in my view, was not a proper course to take in compelling the allocating authority to compensate them. Redress could be sought in a court of law instead of opting for the path they took.

In the premises, I find that the compensation that is fair and just in the circumstances of this case is one that was due to the appellants as at the date when the land was declared a planning area and consequently surveyed. For the avoidance of doubt, under the present land legislation, land, even without unexhausted improvement, has market value and is eligible for compensation. In sum, in the light of the foregoing discussion, the appellants are not eligible for compensation of the unexhausted improvement they effected after the survey. I therefore order that the appellants should be paid viable and adequate compensation for the land

and unexhausted improvements, if any, at the market value, as valued by the government valuer, as at the date when the disputed land was declared a planning area. Unless this is done, title to the disputed land cannot validly pass to the respondent.

This appeal succeeds to that extent. In the peculiar circumstances of this case, I make no order as to costs.

DATED at SUMBAWANGA this 17th day of June, 2014.

J. C. M. MWAMBEGELE

JUDGE