IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT MTWARA

LAND CASE APPEAL NO. 16 OF 2015

(from the Decision of the District land and Housing Tribunal of Mtwara District at Mtwara in Land Case No. 19 of 2006)

JAFARI LAZIMA BINAMU
(Administrator of the estate of the late Lazima Binamu) ..... APPELLANT

VERSUS

HASSAN CHIONDA ..... 1ST RESPONDENT
THE EXECUTIVE DIRECTOR,
MASASI DISTRICT COUNCIL ..... 2ND RESPONDENT
MAAJAR RWECHUNGURA KAMEJA &
CO. ADVOCATES ..... 3RD RESPONDENT

JUDGMENT

Twaib, J.

The appellant, Jafari Lazima Binamu, the Administrator of the estate of the late Lazima Binamu, is aggrieved by the decision of Mtwara District Land and Housing Tribunal at Mtwara which made two declarations: First, that the respondent was the lawful owner of the suit property; two, that the certificate of occupancy registered as Title No. 7125 MTW in the deceased's name was an illegal document on the ground that it was fraudulently obtained and illegally issued.

At the hearing of the appeal, the appellant appeared before me personally. The first respondent was represented by Mr. Mtaka, learned Advocate, the second respondent was represented by Mr. Musobe, Advocate, and the third respondents

were represented by Mr. Obedia, Advocate. The appellant filed six grounds of appeal. As agreed by all parties, the same were argued by the way of written submissions.

In the first ground of appeal, the appellant alleged that the learned trial chairperson erred in law and fact in concluding that in law upon the expiry of term of right of occupancy of the late Lazima Binamu, ownership of the suit property reverted to his Excellency the President of the United Republic of Tanzania, without citing any law providing that position or having on his hand any evidence proving that the said ownership had reverted to the President while the deceased owned a building thereon.

The appellant conceded that the term of the late Lazima Binamu's right of occupancy under Certificate of Title No. 11444 was 33 years. Reckoning from 1st March 1956 when the term began, the 33-year period ended in 1989. The learned trial Chairman stated (page 13 of the judgment) that by the time the late Lazima Binamu died, ownership of the suit property had reverted to the President. The appellant said this suggests that there is a law which expressly provides for such reversion. He is however of the view that there is neither such provision, a judicial decision, nor even a condition in the certificate of the right of occupancy supporting that proposition. He said it was not in the mind of the legislature at the time of enacting relevant land law to put a requirement for the holder who made unexhausted improvements thereon to apply for renewal of the right of occupancy upon expiry of his term in order for his title to continue in effect. Neither of the repealed Land Ordinance Cap 113 nor the current Land Act Cap 113 R.E 2002 has such kind of requirement, he argued, rather, the later Act introduced through

section 32(3) the right of the holder of the Right of Occupancy to be offered a renewal of that right upon its expiry.

The appellant further contended that, even at the time the appellant's late father acquired the said land, there was no such requirement. Neither was there any provision empowering the Commissioner for Lands to offer the renewal of expired right of occupancy. He concluded that it was not correct to say that once the term of the right of occupancy expired, the land reverted to the President while the suit plot had some improvements thereon. He was therefore entitled to a renewal of that right of occupancy without having to apply for it.

The first respondent submitted in support of the findings of the trial Tribunal on this ground. He said it a is "settled" and "well-known" principle of land law in Tanzania (referring to section 4 (1) of the Land Act, Cap 113, R.E 2002) that the President is the ultimate authority over land ownership. A similar position was taken by the second respondent, who contended that the trial chairman did not error in law nor in fact in his conclusion, as both the Land Act (likewise relying on section 4 (1) of the Act) and the Village Land Act, Cap 114 (R.E 2002) state that all lands are public lands vested in the President as a trustee for and behalf of all citizens of the United Republic.

On his part, the 3rd respondent submitted that the trial chairman was right in relying on the unchallenged evidence of TW2, the Land Officer from the Ministry of Lands, Mtwara Zone, and contended that the Tribunal's decision was based on the facts and evidence before it.

In rejoinder, the appellant maintained that all the respondents failed to point out which provision of the law states that once the term of right of occupancy expired, the ownership of the land reverted to the President.

Section 4 (1) of the Land Act Cap 113 provides that, "*All land in Tanzania shall continue to be public land and remain vested in the President as trustee for and on behalf of all the citizens of Tanzania.*" The pervasiveness of this provision is obvious, and endures even when the President grants a right of occupancy to another person (whether natural or corporate). That is why all rights of occupancies are for a term definite.

The late Lazima Binamu's right of occupancy was no exception. It was for 33 years. That period ran from 1st March 1956, and it must be deemed to have ended exactly 33 years later, i.e., on 28th February 1989. At that point in time, the President's superior title would have stepped in and resume its effect, unless a renewal and effected. In this case, nothing of that sort happened. Six years later, the late Lazima Binamu died. It is not in dispute that until his death, he had done nothing was by way of renewal of his right of occupancy. Neither he nor his heirs can claim to have been entitled to an automatic renewal.

The appellant's evidence shows that he was granted a new title (No. 7125 MTW), which was registered on 1st August 2014. That piece of land bears a different definition from the plot in dispute. It is located at Mkuti, Masasi, while the plot in dispute (Plot No. 11444, later on known as Plot No. 275) is at Commercial Area, Mkuti. However, the site plans for the two plots appear to show that they are for one and the same plot, though the name of the location differ. I have no doubt that both the two certificates of title refer to the disputed plot. But the appellant's

title was issued when the land had already been granted to Mtwara RTC, and the transfer of to the 1st respondent had already been effected years before, the subsequent grant to the appellant would have had no legal effect and could not grant the appellant with any interest over the disputed land.

Although it is true, as the appellant states, that section 32 (3) of the Land Act does not require a holder of a right of occupancy to renew his tenure upon expiry, the said section provides conditions for such holder to comply with the terms and conditions of the right of occupancy in a satisfactory manner and where it is practical to do so, before he/she can be offered a renewal of the right of occupancy on any terms and conditions which the Commissioner for Lands may determine before that right of occupancy is offered to any other person or organization.

The conditions include complying with the land use conditions and payment of the annual nominal land rent due to the Government, as per section 34 of the Land Act. Under section 32 (3) of the Land Act, a right of occupancy is is renewable upon expiration of the granted term, on terms and conditions to be determined, so long as all conditions relating to the earlier right of occupancy were adhered to.

The record shows that the appellant, and Lazima Binamu before him, failed to comply with the conditions of occupancy, as they paid no land rent for the disputed plot from 1989 when the title came to an end, nor did he do so from 1975 when the land was transferred to him from Shariff Rajper. Failure to so comply would trigger the automatic incoming of the superior landlord (the President) under section 4 (1) of the Land Act, as a trustee for and on behalf of all the citizens of Tanzania.

With this finding, the first ground of appeal has no merit and it is dismissed.

In the second ground of appeal, the appellant states that the trial chairman was wrong to find that the second respondent was right to allocate the very same plot to Mtwara Regional Trading Company Ltd. ("Mtwara RTC") while there was no proof that the said interest of the deceased had already been cleared.

The appellant submitted that the last holder of CT No. 11444 before the term expired was the late Lazima Binamu, and that he made developments on that land. The appellant laments that while the trial chairman found that the deceased had interest on that plot which needed to be cleared (but was in fact not cleared) before allocating the same to another person, the chairman proceeded to hold that the allocation of the land by the second respondent to Mtwara RTC was lawful. The appellant said that the learned Chairman disregarded the evidence of TW2 who stated that upon expiry of the right of occupancy the same cannot be offered to another person unless the first owner is compensated for his improvements on the land.

I think it is convenient to dispose of this ground together with the fourth ground of appeal, as they are inter-connected. In the latter, the appellant contends that the allocation of the suit property to Mtwara RTC was tainted with fraud and the learned trial chairperson misdirected himself when he relied on Exh. D2 (a certified true copy of the original of Certificate of Title No. 275 MTW) to find that there was such allocation. The appellant submitted that there is a contradiction as to why the original Certificate was not produced, and instead a certified copy thereof was exhibited—that the original document was mortgaged by Mtwara RTC to the National Bank of Commerce ("NBC").

The appellant faults the Tribunal's reliance on this document for a variety of reasons, but essentially because there was no satisfactory explanation as to when was the mortgage created, and that it was not certain as to why there was a certified copy, as the 1st respondent said the original was lost while the third party said that the original was in possession of NBC. He concluded that Exh. D2 was not enough to prove that the second respondent allocated the plot to Mtwara RTC, who in turn (through the third respondent) sold it to the first respondent. Due to this apparent contradiction, argued the appellant, the relevant allocation documents such as the application for a grant and letter of offer should have been produced. Since these documents were not produced, the office of the Commissioner for Lands did not know how the plot allocated to the Mtwara RTC, he argued.

The first respondent submitted that the Law of Evidence Act (citing sections 63, 65, 67, 86 and 87) is clear on documentary evidence. He said TW2 explained that prior to 2010, all the records of title documents for Mtwara were kept at the offices of the Commissioner for Lands at Dar es Salaam. The Mtwara office was only established in recent years. There was thus no record at Mtwara on the allocation of land in dispute, or of all the transactions made before the establishment of the Mtwara office.

Both the second and third respondents supported the Tribunal's findings in this regard, arguing that the Tribunal was correct in holding that the suit property was legally allocated to the Mtwara RTC after assessing the evidence presented before the land Tribunal. Even the appellant failed to produce the original certificate of Title No. 11444 (Exh. D2) on whose basis his claim was anchored, they submitted.

The third respondent further stated that the appellant never challenged Exh. D2 when it was admitted or throughout the trial at the Tribunal.

In rejoinder, the appellant stated that there was no dispute that the suit land was owned by the late Lazima Binamu until his term lapsed in the year 1989. There was therefore no need to bring evidence to prove that fact, which was not in dispute. He contended that his focus is not on the admissibility of Exh. D2, but rather, the weight that it ought to have been given in proving the respondent's case.

The evidence on record shows that the first respondent entered into the sale agreement with the 3rd respondents over the suit land and he tendered the sale agreement which was admitted as Exh D1. He was given a Certificate of Title which (Exh. D2). Thereafter, the transfer of the right of occupancy over the suit plot from RTC to was done and he tendered Exh. D3 to prove the same. The transfer to him was completed in 2006. All these exhibits were admitted without objection from the appellant, which was why the Chairman admitted and acted upon them.

It was further contended by the third respondent that neither was there any objection against the admission of Exh. D2, which the appellant alleged was a forgery and was not objected to when it was tendered by the first respondent during the hearing. Nor was a criminal case opened following the fraud allegation.

The 3rd respondents thus dispute the contention that Exh. D2 is a forged document. They narrated the history of Exh. D2, as testified by TW1 and TW2. It shows that Exh. D2 was issued by the land authorities to Mtwara RTC in 1992 after Plot No. 11444 expired in 1989. Mtwara RTC mortgaged the same to NBC. Mtwara

RTC was privatized then PSRC took over its supervision. They then applied for a certified copy of the title because the original got lost. The certified copy was issued to PSRC on 28th September 2001. Then the PSRC transferred the land to the first respondent Hassan Chihonda for Tshs. 4m. The conclusion, therefore, according to the respondents, is that the owner of the suit land is the first respondent.

It is my respectful view that the above adequately explains the non-availability of the original certificate. Furthermore, the unbroken chain of events involving records of the land authorities is proof that Exh. D2 was not forged and therefore it was right for the Chairman to a cord it due weight and a legal substitute of the original certificate of occupancy. It is thus incorrect to say, as the appellant argues, that the allocation of the suit property to Mtwara RTC was tainted with fraud. In light of the totality of the evidence from two independent witnesses who were called by the Tribunal itself, there was no misdirection on his part when he relied on Exh. D2 to find that the allocation was lawful. There would thus be no reason to fault the learned Chairman for finding that the 1st respondent was the lawful owner of the suit land.

Hence, the second and fourth ground of appeal are devoid of merit. I find no misdirection on the Chairman's part in his reliance on the certified true copy of the original of Certificate of Title for his findings against the appellant. Moreover, the trial Chairman was right to recognize as lawful the grant of the suit land to Mtwara RTC, since the earlier interest belonging to the late Lazima Binamu had already expired. Consequently, grounds two and four of the appeal are dismissed.

In the fifth ground of appeal, the appellant alleges that the trial chairperson failed to critically analyze the evidence brought before him, which failure led him to a wrong decision which defeated the right of the deceased Lazima Binamu over the suit property. In support of this ground, the appellant simply relied on his version of events and arguments, which I have already discussed under grounds one, two and four above.

With respect, as I have found that all these grounds did not have merit, I see no need of discussing the various arguments advanced by the parties with regard to this ground, as that would be a superfluous exercise. Suffice it to say that it is my considered view that the Tribunal sufficiently and correctly analysed the evidence before it and accorded each piece of evidence its due and appropriate weight. This ground would therefore suffer a similar fate: It is dismissed.

In the sixth and last ground, the appellant faults the learned trial Chairman in his finding that there is no dispute that the 1st respondent lawfully purchased the suit property from the 3rd respondents while it is clear that the appellant is challenging the legality of that purchase and hence there is a dispute on that question.

More specifically, the appellant is displeased by the statement of the learned Chairman at page 14 of his judgment where he stated that according to the evidence of the 1st respondent, the third party (the third respondent herein), Exhs. D1 and D2, "*…there is no dispute that 1st respondent lawful (sic!) purchased the suit property from the owner, who was corporate body under receivership of third party…*" The appellant laments that this statement was not a correct reflection of the facts, and that the learned Chairman based it only on the respondent's evidence and ignored his (the appellant's) evidence.

The appellant is right in saying that this statement was inaccurate. However, considering the manner in which the learned Chairman dealt with the evidence and the issues, it is clear to me that he fully appreciated the fact that the 1st respondent's purchase of the property is was one of the most important linkages constituting the contentious issue of ownership of the suit land, with the appellant on the one side taking the view that the sale was not lawful, and the respondents maintaining that it was.

Besides, given the overall finding that the learned Chairman arrived at in this case, no prejudice can be said to have been occasioned as a result of that statement, since he would have reached the same conclusion anyway. For, immediately after that statement, the Chairman proceeded to consider the question as to whether the seller (Mtwara RTC) had good title which he could have passed to the 1st respondent, but not after discussing the evidence from both sides. Consequently, this ground is likewise dismissed.

It will be noted that I have skipped the third ground of appeal. That was deliberate. As it will soon be clear, its determination entails some intricate issues of law that require a more extensive explanation and, in view of its outcome, it would be more conveniently dealt with at this final stage.

Under the third ground of appeal, the appellant maintains that the learned trial Chairman erred when he ordered the 2nd respondent to pay him Tshs. 8 Million/= as compensation, without there being any basis for such an order. He submitted that there was neither a claim for compensation, nor evidence to prove the quantum of the compensation, if any, that the Chairman could have relied upon.

In its reply submissions, the first respondent agreed that there was no basis for such a finding, but found no fault in what he viewed as the Tribunal's exercise of its discretion in granting the appellant the sum of Tshs. 8 Million/= as compensation.

The second respondent, the Masasi District Council (against whom the order was specifically made), had a different view. It was their advocate's submission that the Chairman erred in holding that the District Council was required to clear the interest before allocating the disputed land to the first respondent. Because the allocation of the suit plot was lawful, he contended, the order requiring the Council to pay compensation could only have been legally justified if the allocation was effected before expiry of the right of occupancy and the appellant had complied with the conditions attached to his right of occupancy. It was the second respondent's conclusion that it was wrong for the Chairman to order compensation, since the appellant had failed to prove his case.

The third respondents, on the other hand, relied on the argument that Lazima Binamu's right of occupancy in Certificate of Title No. 11444 expired since 1989 and he made no effort to renew it. That allowed the President, to whom the title reverted, to allocate it to Mtwara RTC and issue CT No. 275 in its favour. Like the 1st respondent, the 3rd respondents supported the Tribunal's decision to award the appellant Tshs. 8 Million/= as compensation for interests that were not cleared when the re-allocation was made to Mtwara RTC. In reaching that decision, they opined, the Tribunal considered the evidence of TW2, one of the two witnesses called to give evidence not by any of the parties, by the Tribunal.

In rejoinder, the appellant submitted that the second respondent is precluded from challenging the Tribunal's order for compensation, as it did not file any cross appeal to that effect. Before I resolve that argument, I find it pertinent to discuss the contention brought up by the second respondent, in light of both the law and fact, to the effect that the appellant failed to prove that he was entitled to any compensation. Equally significant is the contention by the appellant himself that he never made any claim for compensation and his admission that there was no evidence to support the order for compensation in his favour.

My perusal of record of the Tribunal confirmed the appellant's assertion that he made no claim or prayer for compensation for any developments done on the suit property which may fall under section 32 (3) of the Land Act. Indeed, the second respondent's contention that no evidence was led to support such a claim is also correct. Hence, the amount of Tshs. 8 Million/= that the Chairman granted to the appellant as compensation was arrived at without neither a claim to that effect, nor any evidence being brought on record or an evaluation of the developments purportedly done by the appellant. In other words, there was no factual basis upon which the Tribunal could make such an order.

As for the law, the provisions of section 32 (3) of the Land Act, on which the appellant depends for the first ground of appeal, is also relevant for purposes of the third ground of appeal, and must be read together with the subsection immediately following, namely, subsection (4). The latter subsection states as follows:

> *"The provisions of subsection (3) shall not operate to preclude the Government or a local authority or other public body from causing the land*

occupied under the right of occupancy to which subsection (3) refers to be developed or redeveloped in such a way that it is impractical to grant a right of occupancy of that land to the former holder of that right of occupancy and where such development or redevelopment takes place, the former holder of the right of occupancy shall not be entitled to any compensation for the loss of any expectation created by the provisions of subsection (3).

My understanding of the above provision is that subsection (3) of section 32 (which provides for the right of compensation) does no entitle the former title holder to compensation for the loss of any expectation created by that subsection. The statement by TW2 while being cross-examined by Mr. Ally Mkali, learned Advocate, that the subject piece of land "normally" cannot be allocated to another person unless the first owner is compensated, has to be taken for what it is: It qualifies the practice as the "normal" practice. That is far from saying that the law requires it. And since the law specifically rules out any such right, one cannot rely on that practice as the basis for a legal claim for compensation.

The ultimate outcome of this finding is that the third ground of appeal has merit, in that the trial Tribunal erred in law in ordering compensation in the sum of Tshs. 8 Million/= against the 2nd respondent and in favour of the appellant, not only without any basis in terms of evidence, but also because the appellant himself never made a claim for compensation in the first place. Moreover, even the law does not recognize it as a necessary right when a term of right of occupancy expires.

However, strictly speaking, the appellant having failed on the other grounds of appeal, the result of a successful prosecution of the third ground would be rather

odd, to say the least. The appellant has not raised this ground in the alternative to his other grounds, especially the first and second grounds of appeal, which constitute the core of his appeal. The third ground is a stand-alone ground which, in the absence of an intention to show that it was raised in the alternative, would ordinarily, have no connection to the outcome of the other grounds. That means, his success on this ground would mean that, since he has not succeeded in all the other grounds, he would lose even the little relief that the trial Tribunal granted him for any interest he might have had in the disputed land.

The situation poses some curious questions of law that present a legal quagmire: Would the court be right in taking away that relief as the appellant himself apparently wants and because the other grounds have not been raised in the alternative? If the answer is no, which would have been the natural one if the circumstances were normal, it would be tantamount to taking away from the appellant a relief already won though apparently unwillingly, after, strangely, a successful appeal? If one were to avoid that oddity and say yes, would the Court be justified in doing that while there is no cross appeal against the Tribunal's order from the 2nd respondent or any of the respondents for that matter? Lastly and perhaps most importantly, having found that there was neither a factual nor legal basis upon which the order was made, would the Court be justified in letting the order stand, and what would be the basis of that justification?

I must admit that these questions have caused me a lot of discomfort. I could not come up with any express provision of the law that provides a satisfactory resolution to the dilemma. Even then, however, I still found it hard to accept the fact that our law was so inadequate as to be incapable of achieving such a just result. In the end, I am glad to say that our law is not that inadequate. I found

the answer in one of the most important provisions in our law, what has come to be known as "the reception clause", namely, section 2 (2) of the Judicature and Application of Laws Act, Cap. 358 (R.E. 2002). It empowers this Court to exercise its jurisdiction—

> "*…in conformity with the substance of the common law,* ***the doctrines of equity*** *and the statutes of general application in force in England on the twenty second day of July, 1920…"* (emphasis mine).

This provision makes this court not only a court of law and justice, but also, and more relevant for the present purposes, a court of equity. Equity is necessary to alleviate the defects of the common law, to correct its rigour or injustice. I am inspired by Prof. Frederick William Maitland, who observes in his book, *Equity: Course of Two Lectures* [Chaytor, A.H. *et al* (eds.) 1920: Cambridge University Press, London]: "*We ought not to think of common law and equity as of two rival systems.*" and that "*[e]quity had come not to destroy the law, but to fulfil it. Every jot and every little of law was to be obeyed, but when all this had been done yet something might be needful, something that equity would require*."

Admittedly, this would be charting out a new course, since there is no precedent that can guide me in a treaded path. But, as Lord Denning once said, in that famous speech in *Packer v Packer* [1953] 2 All ER l27—

> "*If we never do anything which has not been done before, we shall never get anywhere. The law will stand whilst the rest of the world goes on; and that will be bad for both."*

Of course, the maxim "equity follows the law" ensures that equity will not allow a remedy that is contrary to law. Equity was not meant to supersede the common

law where a remedy was already an established, certain and, most importantly, fair imperative that already existed. See *Graf v. Hope Building Corporation*, 254 N.Y 1 at 9 (1930) per Cardozo, J.

In this regard, I am reminded of the succinct words of Professor Peter Cane [(2002) *Responsibility in Law and Morality*, Hart Publishing, Exford-Oregon, p. 18)], who said that a judge in such a situation (where he finds that the law is apparently silent) should endeavour to develop the law:

> "[o]nce it is accepted that the law can 'run out' as it were, there is no escape from the conclusion that the judicial obligation, to resolve disputes properly brought before the courts, **requires judges to develop the existing body of legal materials by adding the normative propositions to it.**" [emphasis mine]

As I stated elsewhere [Twaib F., (2002), "Judicial Ethics: A Conceptual Discussion of the Ethics of Judging", *Journal and Case Law Manual of the Tanzania Women Judges Association*], a judge who finds himself in such a situation has to look from within his inner conscience for some principle with a finer expression that would enable him to resolve the predicament. One useful guide is in the principles of equity and fairness. The late Chief Justice Francis Nyalali referred to such principles as "true law", and encouraged a more spirited application of rules of equity and natural justice: [See Nyalali, F.L. (1994), "The Changing Role of the Tanzanian Bar", Speech Delivered at the Admission Ceremony of New Advocates, Dar es Salaam, 15th December, 1993, and published in *The Lawyer,* Tanzania, September-December 1994, at p.4].

Nyalali CJ's view is that law and justice are not only capable of being achieved simultaneously, they are inseparable. He proposes a method of doing justice—*in every situation, and according to law*—as the application of what he calls "true law" (meaning "…the law that is consistent with the Constitution and Nature as well as Equity and Natural Justice"), as opposed to "travesty of law". By doing so, in the learned Chief Justice' view, true law "can never be in conflict with justice".

Hence, principles of equity may also be applied in resolving what statute law and the practice of our Courts have not provided for, where, as stated by the East African Court of Appeal in *Sultan Sir Saleh Bin Ghaleb & Ors v Saif Bin Sultan Hussain al Quaiti & Ors* [1957] 1 EA 55, where legal rights are to some extent obscure, but the moral aspect is beyond argument, as is the case herein. It is my respectful view that the situation at hand needs to be considered in terms of equity.

The questions that arise in the contradictory circumstances of this case are: One, whether equity will intervene to let a relief that was not claimed but granted by the lower Court or Tribunal stand, even where the party in whose favour it was granted has succeeded in showing that the lower forum did not have any basis for granting the same, and where there is no cross appeal from the party against whom the order was made; two, whether equity will be invoked to let the party keep that advantages of an order in its favour which that party did not even ask for. In the circumstances, equity is known to have answered such a question in the positive. The relevant principle of equity states that, "**equity cannot be used to take back a benefit that was voluntarily but mistakenly conferred without consultation of the receiver**".

Furthermore, as the appellant pointed out, the 2nd respondent, against whom the impugned order of compensation was made, did not cross-appeal. He simply raised the matter in his reply submissions, which was not proper. He should have cross-appealed against the order, but did not. Again, equity teaches us the following: "**equity will not relieve a party of the consequences of his own neglect**" [See *Haji Hassan Chimbo v Mshibe Iddi Ramadhani* (1996) TLR 229 (Maina, J), citing *Caltex (India) Ltd. v Bhagwan Devi Marodia* [1969] SC 405 and [1969]1 SCJ

783, or, stated otherwise, **"equity aids the vigilant, not the indolent"**: See *Showind Industries Ltd. v Guardian Bank Ltd. & Anor* [2002] 1 EA 284 (CCK)]. Admittedly, this equitable principle also applies against the appellant, who did not claim for compensation. However, his fate is rescued by another principle of equity that says: "**Between equal equities the first in order of time shall prevail**".

This maxim operates where there are two or more competing equitable interests; when two equities are equal the original interest (i.e., the first in time) will succeed [see *Cave v Cave* (1880) 15 Ch D 639]. In the present case, the appellant's equitable interest, which arose through the judgment of the Tribunal, came first.

Consequently, applying these three equitable principles, it is clear to me that equity stands on the side of the appellant. That would enable us to avoid a rather odd outcome from the finding on the third ground of appeal. I would refuse the appellant's invitation to nullify the order of compensation, a decision that would be reminiscent of someone who shot themselves in the feet, so to speak. I would also refuse a similar invitation from the 2nd respondent, as he has not cross-appealed against the order. Here again, equity offers a valuable opening that works in favour of the appellant, despite his own assertion that the Tribunal was wrong in granting him the compensatory relief. The relevant equitable principle in this regard runs thus, **"equity cannot be used to take back a benefit that was voluntarily but mistakenly conferred without consultation of the receiver".**

On the strength of the foregoing, this appeal is dismissed, save for the third ground of appeal. However, on grounds of equity discussed herein, allowing the prayer that follows from my finding on the third ground of appeal, would have worse

effect to the appellant, as he would lose even the little that the Tribunal granted him. I hope I have demonstrated that the benevolence of equity requires me to desist from taking such a course.

In the final analysis, therefore, all the grounds of appeal are dismissed, except the third ground. While I agree, in principle, with the merits of the third ground, I decline the appellant's invitation to make an order nullifying the order of compensation the Tribunal made in his favour. I would leave the order for compensation undisturbed.

Given the circumstances, there shall be no order as to costs.

DATED and DELIVERED at Mtwara this 28th day of July 2016.

F.A. Twaib
JUDGE