

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**PC. CIVIL APPEAL NO. 67 OF 2017**

**CHACHA MANTAGE .....APPELLANT**

**VERSUS**

**1. FLAVIAN MATHEW NYENDIMKUU .....1<sup>ST</sup> RESPONDENT**

**2. MAUSEN KAMELA.....2<sup>ND</sup> RESPONDENT**

*15/3/2018 & 10/4/2018*

**JUDGMENT**

**I.P.KITUSI,J.**

Chacha Mantage, the appellant, and Flavian Mathew Nyendimkuu, the first respondent, are wrestling over an undiscribed piece of land situated at Kunduchi Mtongani in the city of Dar es Salaam. For reasons that will be appreciated shortly later, one Mahusein Kamela, the second respondent and Raymond Aleukanga not a party, and now deceased, are relevant to these proceedings.

In this wrangle which dates as far back as 1980, the appellant and the first respondent have two different versions each, regarding their respective claims over the suit land. I will start with the version of the first respondent who was the first to knock the doors of the Court vide Civil Case No. 44 of 1985 before Kawe Primary Court, in Kinondoni District. He sued the second respondent from whom he alleged to have purchased the suit land in 1980 for Shs 1,500/=. The second

respondent denied to have sold the land to the first respondent, but finally it was the latter who won the day by being declared the rightful owner of the said suit land.

There is no dispute that this decision of Kawe Primary Court was challenged by way of appeal to the District Court of Kinondoni, and later to the High Court. But there are, again, different versions as to what were the outcomes. I will come back to the outcomes later after referring to the appellant's version as to the basis for claiming ownership to the suit land. The first respondent claims that he finally won the case by being declared the rightful owner of the suit land.

The appellant was not a party to the proceedings that I have just referred to, but he came in much recently when the first respondent on the basis that he won the appeal, and was declared the owner, moved the Primary Court of Kawe to execute its decision in Civil Case No. 44 of 1985. The appellant raised an objection claiming that he was the rightful owner of the suit land, having purchased it from Raymond Aleukanga. At the time of these objection proceedings in 2016, the suit land that was formerly unsurveyed had now been surveyed and described as Plots No. 2119 and 2120 Block "L" Mbezi. The appellant's version is that the said Raymond Aleukanga had good title to the suit land, as a result of Court decisions on appeal.

So what were the court decisions on appeal from Kawe Civil Case No. 44 of 1985?

For the appellant, Mr Job Kerario learned advocate submitted that the District Court of Kinondoni (Hon. Jibrea PDM) allowed the appeal against the decision of Kawe Primary Court Civil Case No. 44 of 1985 and declared Raymond Aleukange the rightful owner of the suit land after getting satisfied that the second respondent from whom the first respondent had purchased it was a mere keeper with no title to pass. The first respondent's appeal to the High court was unsuccessful before Hon. Kyando, ( As he then was). So according to the learned counsel, Raymond Aleukanga won the appeal before Kyando J(as he then was) passed good title to the present appellant, as opposed to the second respondent who was unsuccessful and therefore had no title to pass to the first respondent. It has been submitted that since the respondents did not challenge the decision of Kyando, J( as he then was) then the first respondent cannot execute the decision of Kawe Primary Court, it having been quashed by this court(Kyando J.)

The first respondent did not file any written submissions as ordered by the court, the effect of which shall be determined later. However his version of what were the outcomes of the appeals can be gathered from an affidavit he filed at Kinondoni District Court in support of his application for revision. Under paragraph 4 and 5 of that affidavit the appellant believes that Hon. Kyando, J( as he then was) overturned the decision of Hon Jibrea – PDM ( as he then was) and decided the issue of ownership of the suit land in his favour.

The first respondent had previously ventured to execute the judgment by demanding vacant possession but the appellant would always stand on his way through applications and/ or objections. What appears to be surprising to the first respondent is that in those previous occasions the Primary Court of Kawe in its order dated 7<sup>th</sup> February 2012 granted him the prayer for eviction of the appellant from the suit land. The appellant's application to have this order revised by Kinondoni District Court was unsuccessful, and so was his appeal to the High Court, Pc Civil Appeal No. 16 of 2013. Despite these facts which ordered the first respondent to proceed with execution, he went back to Kawe Primary Court, only to have the appellant upheld in yet another objection.

The Primary Court of Kawe in its decision dated 29<sup>th</sup> April 2016 dismissed the first respondent's application for execution on two grounds, First it observed that there was no decree in Civil Case No. 44 of 1985 for him to execute. Secondly the court was of the view that it had no jurisdiction over the matter because land matters under the new Land Act have to be determined by the relevant Tribunals.

Aggrieved, the first respondent filed Civil Revision No. 13 of 2016 inviting the District Court of Kinondoni to examine the record of Kawe Primary Court to satisfy itself on the correctness, legality and propriety of its order dated 29/4/2016. In its Judgment dated 23<sup>rd</sup> March 2017 the District Court (Hon Lihamwike – RM) held that the trial Primary Court was wrong in saying that there was no judgment for the first

respondent to execute. The reason for this holding was that the High Court (Hon Kyando], as he then was) declared the first respondent the lawful owner of the Suit land upon him fulfilling certain conditions.

As regards jurisdiction, the learned Resident Magistrate took the view that the Primary Court of Kawe being the court of first instance was, in terms of section 32 (a) and (b) of the Civil Procedure Code [cap33 R.E. 2002] mandated to carry out the execution. This decision is subject of this appeal, which raises five grounds, as follows;

1. That the learned Resident Magistrate erred in law and in fact by entertaining a matter which was time barred.
2. That the learned Resident Magistrate erred in law and in fact by entertaining revision proceedings as an alternative for appeal over the land dispute between the appellant and the respondent.
3. That the Learned Resident Magistrate erred in law and in fact by not making any finding in his judgment as to what extent his decision was or was not influenced by the non- appearance in Court as well as non- filing of written submissions by the 2<sup>nd</sup> respondent in the lower court proceedings, one Mauseni Kamela who is reportedly dead since 1993, as required by the court.
4. That the learned Resident Magistrate erroneously took it for granted that the regularization 'exercise as regards' ownership of the suit land by the 1<sup>st</sup> Respondent was properly conducted to the

satisfaction of what was envisaged in the Judgment of Hon. Kyando, J.

5. That the Learned Resident Magistrate grossly misinterpreted the decisions of Kinondoni District Court Civil Appeal No. 28/1986 by Jibrea, DM, and that of the High Court (PC) Civil Appeal No. 45/1987 by Hon. Kyando, J which were delivered on 10<sup>th</sup> April 1987 and 17<sup>th</sup> Feb. 1989 respectively.

As my starting point I shall briefly discuss the position as regards the first respondent's failure to file written submissions as ordered. The law is settled that such inaction constitutes failure on his part to prosecute his case. See the case of **NIC of (T) and Another V. Shengema Limited**, Civil Application No. 20 of 2007, CAT (unreported). However as I said, there are sufficient materials to inform me in determining the relevant issue before me. In my view I have to look for a needle in the haystack by resolving the issue, who won the appeal before Kyando, J (as he then was). Here is where the bone of contention lies, as it is the appellant's word against the first respondent's.

Fortunately, though strangely in my view, both the appellant and the first respondent rely on the same judgment to claim title to the disputed property. It seems therefore that this is more a matter of giving my interpretation of what this court's (Hon Judge Kyando's) judgment was all about, than determining any other issues. This I can easily do by first reproducing the part that I consider most relevant which runs thus;

*" In this instant case too, I advise the appellant to regularise his occupation of the land he bought from the respondent by now applying for and obtaining the consent of the village council to the transaction. Once he obtains it, the land will then become lawfully his, but if he fails to obtain it i.e the consent, it ( the piece of land) will have to remain the property of the respondent. The appellant will then be entitled to compensation for unexhausted improvements he may have carried out on to the shamba. In the final result this appeal fails and is dismissed, with costs"*

First of all, it must be noted that Raymond Eleukanga from whom the appellant claims he purchased the land, was not a party to the appeal before Kyando J( as he then was). That appeal whose decision each party relies on was between the present first respondent as the appellant and the present second respondent who was the only respondent. Therefore, if on the one hand the appeal was decided against the appellant ( present first respondent ),it was not, by that fact alone, in favour of Raymond Eleukanga or the present appellant who were not

parties. This is because the appellant's alleged title is derived from Raymond Eleukanga and not the second respondent.

I am saying this because the appellant's sole ground for claiming ownership of the land by virtue of this court's decision must be the fact that the last part of the judgment dismissed the appeal. My position is that this ground is thin whether the phrase was intentional or a slip, because it did not thereby make strangers to the proceedings entitled to anything.

But more importantly in my view is the plain substance of this court's judgment in which the learned Judge declared the present first respondent rightful owner of the land upon regularizing his ownership. It was further ordered that if the first respondent failed to regularize the ownership then he would be entitled to a refund of the money he had spent in purchasing the land and compensation for unexhausted improvements on it.

There is no way this order would have worked in favour of the present appellant either way. If the first respondent regularized his ownership as he has been claiming in the numerous proceedings that would have sealed his title to the land. If however, he failed to do so, the land would have gone back to the second respondent. My perusal of the record does not show any order of the court subsequently declaring the second respondent the rightful owner by refunding and compensating the first respondent.



As I am about to conclude, I wish to refer to some of the applications and objections that are, in my view, an abuse of court process. On 7<sup>th</sup> December 2012, the Primary Court of Kawe ordered the appellant evicted from the suit land. He filed Civil Revision No. 4 of 2012 at Kinondoni District, but lost. He unsuccessfully appealed to this court vide Pc Civil Appeal No. 10 of 2013. The appeal was dismissed for being time barred. The ideal situation would be that the order of Kawe Primary Court dated 7<sup>th</sup> December 2012 was operative. However instead of either obeying the Court order of giving vacant possession or challenging this court decision in Pc. Civil Appeal No. 16 of 2013 the appellant went back to the suit land to wait for the first respondent to execute the judgment. This appeal arises from objection proceedings which were entertained when there was an unchallenged order of eviction by the Primary Court of Kawe.

What the appellant is doing and has been doing is an abuse of court process. Court orders are meant to be obeyed by the parties.[See **Goslamp Holdings Corp. V. Percy Beda Mwindadi & 5 others**, Misc. Commercial Application No. 14 of 2016, High Court, Commercial Division, (unreported)]

For those reasons, this appeal has no merits, it is dismissed with costs.

  
**I.P.KITUSI**  
**JUDGE**  
**10.4.2018**