IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT KIGOMA

LAND APPEAL NO. 19 OF 2019

(From the decision of District Land and Housing Tribunal of Kigoma in Land Appeal No. 39 of 2016)

ANDREA BANYKIKWA .....APPELLANT

VERSUS

ELINA D/O JUSTINE .....RESPONDENT

JUDGMENT

11th February,2020 & 12th February, 2020.

Before Hon: A.K. MATUMA -JUDGE.

In the Ward tribunal for Murusi at Kasulu the respondent Elina Justine Sued the appellant over a dispute of land now plot **No. 395 Block "U"** at Murusi area within Kasulu District in Kigoma Region. She lost the suit at the Ward tribunal and successfully appealed to the District Land and Housing Tribunal for Kigoma. The District Land reversed the decision of the Ward tribunal and adjudged for the respondent, the appellant become aggrieved hence this appeal with six grounds of appeal which were drawn under the services of **Mr. Ignatus .R. Kagashe** learned advocate. The grounds are: -

1. *That, the learned chairman erred in law and in fact in holding that the right (s) of a customary owner of land upon being surveyed is merely compensation for unexhausted improvement*

2. *That, the learned chairman erred in law and in fact in reversing the ward tribunal's decision in favour of the Appellant merely because of the Respondent's possession of title document(s) without scrutiny to the legality and as to how and when the same were acquired vis a vis the Appellant's presence thereat.*
3. *That, since the Respondent testified to have acquired the suit land as compensation from the District authority having taken her other landed property (plots) elsewhere at the time the suit land was in Appellant's possession, the learned chairman erred in law and in fact in legalizing the Appellant's superimposition of title by the District authority to the Appellant's.*
4. *That, the learned chairman erred in law and in fact in allowing the Respondent's first appeal notwithstanding the fact that initially the same had no cause of action against the Appellant but the District authority who was not a party herein.*
5. *That, the learned chairman erred in law and in fact in differing with the opinion of lay assessors and the unanimous decision of the ward tribunal without sound reasons.*
6. *That, generally the decision of the ward tribunal in favour of the Appellant who had developed the suit land with a residential house was fair and legally sound in terms of section 16 (1) of the Ward Tribunal's Act Cap. 206 R.E 2002 that than that of the District Tribunal.*

At the hearing of this appeal **Mr. Kagashe** learned advocate did not enter appearance and his client the appellant informed this Court that he passed

in the office of his advocate on his way to this court for hearing and had agreed with his advocate to meet here in Court but he has not seen him. He was however ready for hearing in the absence of his advocate and the appeal was accordingly heard inter- parties.

The brief facts of this matter is that, the respondent Elina Justine had his farm somewhere (undisclosed). The Land Officer surveyed the farm and got in it four plots. She was given only one plot while the three given to some other people. She was not satisfied and started to complain for the remaining three plots but in vain. At one time one **Bumombo** ***"Mwenyekiti wa Jumuiya ya Wazazi Tanzania"*** visited the area. She went and complained to him and the said ***"Mwenyekiti"*** ordered the District Land Authority to compensate her the taken plots. It is from such order she was taken to and allocated the plot in dispute.

The appellant complained of the re-allocation stating that the plot in question is his lawful land which he purchased from one Nyambula on the 05/05/2005 and started to develop it. He contended that up to 2014 when the plot was allocated to the respondent he had contracted a house which was not yet finished.

At the hearing of this appeal, the parties having been unrepresented and both lay persons argued for and against the grounds of appeal generally by explaining how each got into possession of the dispute plot hence lawful possessing it.

In the circumstances, the six grounds of appeal can simply be determined by answering two issues which arises from such grounds of appeal:-

i. ***As to whether the appellant was the lawful owner of the Dispute plot before its reallocated to the respondent***

ii. ***Whether the land authority legally and justifiably allocated the dispute plot to the respondent.***

Starting with the first issue I find that the appellant testified at the trial that he purchased the dispute plot from one Nyambula on the 5/5/2005 and after some years in 2014 he started construction of the house only to find that Elina Justine the respondent was also complaining that she owns the plot. His evidence was corroborated by his witness Mustafa Yusufu who is the brother of Nyambula.

This witness testified to have witnessed the sale of the dispute plot by his brother to the appellant and he signed the sale agreement.

He further testified that he was shocked to have seen the respondent starting to make some cleanness thereat. He phoned the appellant to find out whether he has sold the plot but the appellant informed him that he has not sold it.

> *"Andrea Banyikwa akawa amenunua eneo hilo. Aliponunua eneo hilo akawa ameendeleza kwa kuweka tripu mbili (2) za mawe. Baada ya hapo tulipata mshtuko kuona mama mmoja anakuja kupalilia hiyo sehemu/eneo.*
>
> *Ikabidi tukapeleka taarifa huko anakoishi Rungwe Mpya. Tukawa tumemuuliza Banyikwa eneo lako umekwisha kuliuza?* ***Akawa amekataa kuwa hajauza****".*

The evidence of the appellant was further corroborated by his second witness namely **Elias Mpene** who testified;-

"Mimi Elias Mpene, alinijia Andrea Banyikwa akaniambia kwamba kuna kiwanja nimekipata huko chini, kwa hiyo ninakuomba kama rafiki yangu wa karibu uwe shahidi wangu. Nikamkubalia tukaenda kwenye eneo, akatoa pesa kwa ajili ya kununua kiwanja".

Such evidence of the appellant at the trial was in material particular supported by the evidence of the respondent and her witnesses. In her evidence at the trial the respondent testified that she was ready to compensate the appellant for his stones and bricks on the locus in quo but the appellant refused;-

"Mtendaji akaniuliza uko tayari kumpa gharama ya mawe na matofali. Nikajibu niko tayari. Naye Andrea Banyikwa akakataa".

Her witness Ephrahim Angomwile from the Land Office confirmed under cross examination that the dispute plot was not originally owned by the respondent.

"Hilo eneo ambalo Elina Justine amemilikishwa na Idara ya ardhi limetokana na eneo la Elina Jastine? Jibu: ***Hapana****".*

This signifies that Elina is a stranger to the dispute plot and her witness did not testify as to how the land office came to take the area/plot in question before its allocation to the respondent. In fact this witness confessed at the trial that the land office had no plots to allocate to the people and that his office has been causing troubles to some people by its tendency of double allocations and reallocation respectively;

"Idara ya ardhi sehemu mbalimbali Tanzania inasemekana kugonganisha watu katika viwanja. Je idara ya ardhi Kasulu hilo tatizo lipo au halipo?

Jibu: ***Tatizo hilo lipo****".*

In the circumstances, the respondent was allocated a plot of another person without due diligence and in complete disregard of the existing rights of ownership.

In fact, witness number 2 of the respondent **Olivetha Frujence** confirmed the appellant's ownership of the dispute land before the reallocation to the respondent. She testified that at the time the respondent was being shown the boundaries Nyambula's wife appeared and warned them that her deceased husband had sold such plot to the appellant.

> *"Eneo hilo mwanzoni kabisa aliyesema ni eneo lake ni marehemu Haruna (Nyambula)... siku moja (Bagambi) (alleged land officer) akaja na watu wanne, katika watu hao wanne alikuwemo na Elina Jastine. Nikasogea pale nikaona wanavyoonyeshana mipaka ya kiwanja.*
>
> *Baadaye mke wa Haruna (Nyambula) akafika kwenye eneo hilo mbona kiwanja hiki ni cha marehemu mme wangu alikuwa amemuuzia baba Hwago (Andrea Banyikwa)"*

Despite of such warning, the group of four people including the respondent ignored and did not take any pre-caution of the future conflict between the original owner and the respondent who was being allocated.

Basically the land office never involved neighbours in the dispute area when they decided to pick it and reallocate the same as confirmed by the respondent's own witness Olivetha during cross examination;

> *"Hiyo siku walipokuja kumgawia walikuita kama jirani au walikubahatisha.*
>
> *Jibu: **Tuliwaona wanakuja tu na hawakutushirikisha".***

In the circumstances of the evidence and analysis herein it is undisputed fact that originally Nyambula @ Haruna owned the dispute plot and then sold it to the appellant in the witnesses of some people.

The appellant and the respondent did not however tender in evidence their respective documents despite of speaking on them during trial and at the first appellate court.

Even though their oral evidence is admissible and accepted as it was held in the case of ***Loitare Medukenya V. Anna Navaya***, Civil appeal no. 7 of 1998, Court of Appeal at page 4;

> *"we think with due respect, the learned Judge in the High Court grossly misdirected herself by holding in effect that only documentary evidence can support a sale.* ***Oral evidence is also admissible."***

I accordingly admit and accept the oral evidence of the parties and weigh that of the appellant to be heavier than that of the respondent on the balance of probabilities. The first issue is therefore concluded in the affirmative that the appellant lawfully possessed the dispute land before its subsequent reallocation to the respondent.

The second issue is whether the land authority legally and justifiably allocated the dispute plot to the respondent.

In regard to this issue the law is very clear as to what procedure should the land authority follow before any reallocation.

In the case of **Village Chairman – KCU Mateka versus Anthony Hyera [1988] TLR 188** it was held that land authorities are forbidden to reallocate the land in possession of another without prior consultation and consent of the original owner. It held;

> *"The respondent was not consulted prior to the reallocation of the land by the appellant to Osmund Nduguru. Common sense and equity forbid a village government to allocate land within its jurisdiction which is under the possession of another villager who is developing it without the prior consent of the villager".*

In the instant case, it is not only the appellant who owned the land was not consulted at all of the intention to deprive him the land and reallocate it to the respondent but also the nearby villagers and local leaders of that respective area were not consulted at least to establish that the plot in question was free from any encumbrances.

In the case **Anthony Hyera** supra, the court went on that;

> *"A village government which allocate land which is already under development and in possession of another person would not only bring law lessness and anarchy to the villages but would also retard the development of the villages".*

The herein above quoted holding is authenticated in this matter as the respondent before me has stated that the appellant threatened to kill her the fact which has been disputed by the respondent. I have however ignored the allegations as they are criminally based and should be dealt through a proper channel.

Even though the respondent in her testimony at the trial noted the law lessness and anarchy which would happen in future as a result of the dispute over the reallocation. She thus testified;

"Andrea Banyikwa akatoa karatasi mfukoni inayoonyesha kuwa amenunua. Afisa ardhi akamwambia kwa kusaidia andika barua ya maombi... Afisa ardhi akamwambia Banyikwa ***fuatilia kwa utaratibu.***

Tulipotoka nje nikamwambia Banyikwa kuwa ***mimi siyo mgomvi wako. Mgomvi wako ni Mkurugenzi*** *aliyenipeleka kwenye hicho kiwanja".*

In the circumstances, the reallocation was just a deprivation of land from one citizen and give it to another. The same amounts to trespass in land which is forbidden under our laws. The court of appeal of Tanzania had time to determine a matter of a similar nature in the case of **Agro Industries Limited versus Attorney General [1994] TLR 43** and held;

"In the eyes of the law a trespasser is a trespasser, be it a public enterprise, a private enterprise or an individual. Public interest requires that legal property rights should be protected against trespassers and the revocation of the rights of occupancy in this case was done to protect the interests of trespassing public enterprise and therefore it was not done for public interest".

In the like manner in the instant case, the land officer/ land authority deprived the appellant his legal property right to safeguard the interests of the respondent whom they had also deprived her plots after she has complained against them to **Mwenyekiti wa Jumuiya ya Wazazi Tanzania.**

So they were camouflaging their mischiefs against the respondent by throwing her into conflict with the appellant.

Again, I had time to rule out on the tendency of land authorities depriving land from innocent citizens arbitrarily and allocating the same to some

other people or institution in the case of **Judith Yoas and fifteen (15) others versus Kibaha Housing Cooperative Society Limited (KIHOCOSO), land appeal No. 129/2017 at Dar es salaam**. In that case, I ruled out that;

> *"...to grab one citizen a land and give it to the other without justifiable cause amounts not only to discrimination but also to oppression, land degradation and humiliation which were characteristics of colonialism".*

In the instant case there was no whatsoever justification to deprive the respondent her farm by allocating it to some other people and allocate her to the land of the appellant without prior consultation or adequate compensation. If at all the respondent was in need of some more plots why was her not allocated from her own land! Why should her be allocated to the land of another citizen living her own land allocated to some other people. Those who were allocated her own land are peacefully enjoying possession but the appellant is thrown into a litigation battle to protect his land which is forcefully trespassed by the respondent in the assistance of the land authority.

The appellant is being oppressed and discriminated which are among the characteristics of colonialism as I had herein above ruled.

In the above named case of **Judith Yoas and fifteen (15)** others, I further held that;

> *"I find it quiet unfair, inhuman, illegal and oppression to force people from their land for interests of other private persons. That is not accepted at all costs. Colonialism has gone let it go forever".*

I reiterate the same holding in this case and rule out that it was quiet unfair, inhuman, illegal and oppression to deprive the respondent her land and reallocate her the appellant's lawful land without justifiable cause. The respective land authority acted as a colonial master. The same is estopped at all costs as such habit would not only cause law lessness, but also anarchy and retardation of development of individual citizens who are forced into troubles and litigations instead of running their development activities.

I therefore find the second issue in the negative. The land authority had no any justifiable legal cause to reallocate the dispute plot to the respondent.

I thus set aside the decision of the District land and Housing tribunal which merely denied appellant's right on the reason that his land has already been surveyed and allocated to another person. A mere survey does not deprive the original owners their rights over the land. People on unregistered land must be given notice of the intended survey to their respective areas, and after the survey they should be given first priority to own the plots born from their land after the survey.

They cannot be evicted and rendered homeless and landless merely because their lands have been surveyed.

There is no law that dictates that people who used to stay on unregistered land are not qualified to reside on surveyed land. The learned chairperson of the District land and Housing tribunal having found that through the

record, it is undisputed fact that the appellant purchased the dispute land from the original owner one Nyambula (deceased), erred in law and facts to differ with the opinion of her lay assessor that the decision of the Ward tribunal was proper which should have been confirmed.

The Ward tribunal in its decision held;

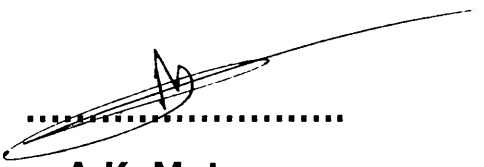
> *"Elina Justine katika kesi hii hana haki kwa sababu idara ya ardhi ilimpa kiwanja kwenye eneo la mtu mwingine.*
>
> *Andrea Banyikwa katika kesi hii ana haki kiwanja ni mali yake, hivyo aendeleeze kiwanja chake kwa sababu alinunua kwa mmiliki halali".*

I hereby restore the said Ward tribunal's decision and confirm it as a proper judgment in the circumstances of this case. The respondent is hereby declared a trespasser over the land and I order her to give vacant possession to the appellant without undue delay. The District land authority of Kasulu District is hereby ordered to cancel the purported registration of the respondent as the lawful owner of the dispute plot and in lieu thereof register the appellant Andrea Banyikwa to be the lawful owner of the said plot no. 395 Block "U" at Murusi within Kasulu District.

If the respondent is still interested to fight for her taken plots by the land office, she should undergo the due process to deal with the said land authority together with those who were allocated her land. She should stop embarrassing the appellant whom they have unnecessarily stopped to develop his lawful land.

This appeal is therefore allowed with costs, both the costs at the Ward tribunal, District land and Housing tribunal and in this Court. Right of further appeal to the court of appeal of Tanzania subject to the requirements of the relevant governing Laws is fully explained to both parties.

It is so ordered



A.K. Matuma

Judge

12th February, 2020