IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND APPEAL NO. 60 OF 2019

(Arising from the ruling of the High Court of Tanzania at Mwanza, Misc. Civil Application No. 101/2018, Originating from District Court of Nyamagana Land case No. 51/2000)

NIAELY SAIDI MPARE ..... APPELLLANT

VERSUS

EPHRAEM S. CHUWA ..... 1ST RESPONDENT

MASHAKA NTEMI .....2ND RESPONDENT

MWANZA CITY COUNCIL ..... 3RD RESPONDENT

ILEMELA MUNICIPAL COUNCIL ..... 4TH RESPONDENT

JUDGMENT

12 & 20/05/2020

RUMANYIKA, J.:

The appeal is against judgment and decree of 29/12/2017 of Nyamagana district court (the trial court) wherein with respect to a plot of 25 X 30 paces at Nyamanolo area in the city, Niaely S. Mpare (the appellant) she claimed for vacant possession, demolition order of the 1st respondent's pit latrine and damages but she lost both the war and battle. It is against Ephraem S. Chuwa and 3 others (the 1st, 2nd, 3rd and 4th respondents) respectively.

The two grounds of appeal essentially revolve around a single point namely **the learned trial resident magistrate improperly evaluated the evidence.**

The appellant and 1st respondent appeared in person. Mr. L. Ringia learned defence counsel appeared for Mwanza City and Ilemela Municipal Council the 3rd and 4th respondents respectively. By the order of 11/05/2020 for such reasons appearance of Mashaka Ntemi (the 2nd respondent) was dispensed with.

When the appeal was called on 11/05/2020 for hearing, but following global outbreak of the Coronavirus Pandemic, and pursuant to my order of 06/04/2020 the parties were present online (except the 2nd respondent) by way of Audio Teleconferencing through mobile numbers 0765906750, 0767371790 and 0741560460 respectively they were heard.

Additional to contents of her memorandum of appeal the appellant submitted that the trial resident magistrate falsified and he skipped some evidence deliberately much as the 4th respondent recognized the lawful owner of the disputed plot and she had all the evidence in her favor.

The 1st respondent submitted that the appeal lacked merits because at the **locus Inquo** neighbors and the local leaders testified in his favor and therefore there was nothing to fault the trial court. That is it.

Mr. L. Ringia learned counsel submitted that 90% of the proceedings reflected what had transpired during the trial. Save for some human errors but the appellant's case was not proved on the balance of probabilities.

Leave alone proof that she was administratrix of the estate and whether the late husband lawfully owned it. That the appellant and 1st respondent were immediate neighbors through a participatory exercise their plots clearly demarcated and therefore the issue of improper evaluation of evidence it shouldn't have raised.

As brief as it was, the evidence on records reads as follows:-

The only prosecution witness Niaely Said Mpare stated that together with Mbazi her husband they occupied the disputed 25 X 30 paces plot since year 1982 and duly paid property tax (copy(s) of the receipts – Exhibit "P1") in the name Mbazi M. Mzava. That her husband died in 1998 then through Probate Cause No. 62/2000 Same district court appointed her administratrix of the estate. That previously it was plot No. 184 but then some land officers renamed it No. 007/82. That having trespassed onto, and the 1st and 2nd respondents' built houses extended it caused pollution (copy of letter of her complaints – Exhibit "P2") that she became almost landless. That only the 3rd and 4th respondents were to blame because they revoked her title (copy of letter – Exhibit "P3") and re divided the disputed land. That if anything, she (the plaintiff) she was if anything not involved during the alleged survey or something. That plot Nos. 6003 and 400 belonged to the 1st and 2nd respondents yes, but upon survey they extended to her plot. That's all.

Dw1 Ephraim Sebastian Chuwa stated that he owned plot No. 603 Block "F" Nyamanoro QA and he shared boundary with the appellant among others since, that surveyors of the 3rd respondent having drawn a

sketch map plan thereof he developed the plot in 1992. That the dispute raised only after the appellant's husband died.

Dw2 Mashaka Mtemi ("NIL").

Dw3 Martin Luther land officer for the 4th respondent essentially testified that the disputed was a squatter plot therefore not surveyed. That is it.

Right from the start the central issue was, and still it is whether the appellant lawfully owned the disputed land.

In his conclusion, the learned trial senior resident magistrate is on record having found/held; I will quote his worship **verbatim;**

> "……coming to issues framed **as who is the rightful owner of the land in dispute…… each the plaintiff (the present appellant) and the 1st defendant** (the present respondent) **has right to remain on the land (House)** they are staying for most more than 20 years. **This means, plaintiff has failed to prove her case to the required standard**……the 1st defendant has constructed house in the ground separated by small way with the plaintiff…… **In relation to 3rd and 4th defendants** who were the local Government institution, **after they revoked offers, of the suit plots they area unsurvayed…..In my view revocation per see by the councils does not shake them civilly responsible**

because evidence shows that the parties in this case obtained the said land locally.....Thus, they are not contributors of this land disputes.... **I accordingly dismiss the case ....."**

I am now settled that unlike the 1st respondent who, through his evidence he had the plot around 1992, at least the appellant's Deemed Right of occupancy could be traced way back 1982 say a decade before the former arrived.

If I got him correctly, according to the learned senior resident magistrate upon the surveying land the 4th respondent revoked the appellant's plot and the 1st respondent was allocated the same, that neither the last two respondents nor the 1st respondent was to blame with greatest respect on that one the learned magistrate could not be more incorrect. Not only once land is declared developed/surveyed customary right are never automatically extinguished (the case of **Metusela Nyagwaswa V. Christopher Nyirabu** (CA) Civil Appeal No. 14 of 1985), but also there should be evidence that the alleged revocation was for good cause or for public interest and the intention was communicated to the outgoing occupier which was not the case here. The last three respondents had no automatic right to revoke the individual's right. It is even worse like the appellant testified where the land authorities just in favor of the 1st respondent arbitrarily subdivided the plot and kicked off the lawful occupier without paying her compensation and out of it plot No. 603 "F" also was created leave alone prompt an adequate pay. I think what the 3rd and 4th respondents did it exhibited another dangerous category of constructive

double allocation of land. Contrary to the magistrate's conclusion, the 3rd and 4th respondents are authors of the dispute. I once said, and I wish to repeat myself that where there is double allocation of whatever type the first impression shall be that by so doing the responsible land officer had personal interest out of it to serve and therefore unless the circumstances suggested otherwise, one should be sued in his personal capacity. It is very unfortunate that no land officer was herein sued.

Whether or not the appellant's and the 1st respondent were separated by a thin path it was immaterial in my considered opinion much as in their evidence none of the parties talked about relevance of the path to the disputed plot if anything it was the magistrate's personal sentiments.

It is very unfortunately that having had gone through the procedural hurdles of about two decades the appellant now gets back her plot.

The decision and orders of the trial court are quashed and set aside respectively with consequential orders:- **(a)** by equal shares the 1st and 2nd respondents give vacant possession immediately **(b)** the 1st respondent demolish his pit latrine and or other structures on the disputed land **(c)** the 1st and 2nd respondent pay her shs. 2,750,000/= being compensation for the cesspit tank, trees etc. also shs. 1,800,000/= being general damages and interest. The 3rd and 4th respondents may wish to allocate the 1st and 2nd respondents other plots. Appeal is allowed with costs.

Right of appeal explained.

S. M. RUMANYIKA

JUDGE

18/05/2020

It is delivered under my hand and seal of the court in chambers this 20/05/2020 in absence of the parties with notice (copies to be supplied immediately).

S. M. RUMANYIKA

JUDGE

20/05/2020