IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 113 OF 2018

LABAN R. MAMPANGWA ..... APPELLANT

VERSUS

BABU ABDALLAH SOLANKI ..... 1ST RESPONDENT

MISKY BABU SOLANKI ..... 2ND RESPONDENT

KIBAHA MUNICIPAL COUNCIL ..... 3RD RESPONDENT

(Appeal from the Judgment and Decree of the District Land and Housing Tribunal for Kibaha at Kibaha)

(J. Njiwa, Chairperson)

Dated 29th day of July 2016

In

(Land Application No. 11 of 2011)

JUDGMENT

Date: 16 & 27/02/2023

NKWABI, J.:

The trial tribunal decided in favour of the 1st and 2nd respondents in this appeal where it declared them the lawful owners of plot No. 217 and 218 Block B Mkoani, Kibaha town council. It ordered the appellant to demolish his house which was unlawfully built into the suit land within 45 days from the date thereon. The appellant was able to obtain leave of this Court to appeal out of time. He lodged his appeal having six grounds of appeal.

During the submission in chief which proceeded in writing, the appellant's counsel, Mr. Victor Kikwasi raised an issue over non-joinder of the necessary party to Land Application No. 17 of 2011. He said, the allegation by the 1st and 2nd respondents in land application over illegal survey which led to the allocation of the suit premises would not be properly determined without joining the authority responsible for surveying lands. It was contended that where a complaint that the land was illegally surveyed and allocated, the court/ tribunal has to satisfy itself with the alleged illegal survey and proceed to determine the issue of ownership, therefore joining the Director of lands and surveys was inevitable. Mr. Kikwasi cited **Edna Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 289 of 2018 CAT (unreported). He pressed upon this Court to revise the decision of the trial tribunal.

On the side of the 1st and 2nd respondents, Mr. Frank Chundu, learned counsel argued that they joined the 3rd respondent who allocated the plot to the appellant.

Then, for the appellant in rejoinder submission, it was insisted that the claim on illegal survey of the land cannot be determined without the director of lands and survey made a party to the suit.

All I understand the submission for the 1st and 2nd respondent argument is that the appellant is bound by his own pleading. That position can be seen in **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161

> *"The function of pleadings is to give notice of the case which has to be met. Party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute."*

Indeed, in paragraph 5 of his pleading the appellant merely stated that the land authorities approved the architectural maps ..." without even mentioning the authorities by their names. This complaint of non-joinder of the Director of Survey of lands is lame and it is dismissed for being an afterthought.

I also accept the view of the 1st and 2nd respondents that non joining Director of lands and surveys is inconsequential to the proceedings as the 3rd respondent is the authority that allocated the plots. The 3rd respondent is the necessary party since she is the one who had the duty to dispose from

individuals the land subject to fair compensation and allocate it to others, See **Godfrey Nzowa v. Selemani Kova & Another,** Civil Appeal No. 183 of 20189 CAT (unreported):

> *"... there are non-joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential."*

Now, I consider and determine the merits of the appeal. Mr. Kikwasi, learned argued together the grounds numbers 1, 2, 3, 4, and 6 that they suggest double allocation. He contended that the evidence proves that the appellant was allocated the suit premises in 2001 by the 3rd respondent and in 2010 he procured building permit while the 1st respondent was allocated his plot in 2009 by being given by his mother-in-law. He added the 1st and 2nd respondents did not complain about trespass. It was further argued, the one who acquired it earlier in point in time will be deemed to have the better or superior interest over the other as per **Ombeni Kimaro v. Josephat Mishili t/a Catholic Charismatic Renewal,** Civil Appeal No. 33 of 2017 CAT (unreported).

It was also argued that when Khadija Faras Kasungo transferred the title, she had no better title over the suit premises. Also, it was contended that to avoid to deal and determine the issue of double allocation, the trial tribunal called its witness Aron who testified that the suit premises is different from plot No. 182. He added, TW1 ought not to be relied upon for he was irrelevant to the case and did not tender documentary evidence and ought to have testified on whether the survey and allocation were illegal. It is maintained further that the evidence of deference of location of plot No. 182 and plot No. 217 is irrelevant and has to be ignored. He finally urged the grounds of appeal be allowed.

In rebuttal submission, for the 1st and 2nd respondents, it was submitted that the evidence does not indicate double allocation. PW3 bought the pieces of land and she is the one who was using the land and requested for surveying where four plots were obtained two of them the subject of this matter. It is further maintained that the appellant claim ownership of plot No. 182 Block "B" Kibaha Town which in fact is distinct from plots No. 217 and 218 block "B" Mkoani area in Kibaha town. It is insisted that Plot No. 182 never existed as it cannot be traced anywhere.

For the 3rd respondent, learned State Attorney insisted that the plot differ and the appellant was not allocated by the 3rd respondent the disputed plot. It is prayed for the 3rd respondent that the appeal be dismissed.

In rejoinder submission, the counsel for the appellant insisted on the question of double allocation citing the impleading of 3rd respondent. He insists that there is admission of double allocation in the reply submission. It is added that the 1st and 2nd respondents failed to prove that there is no double allocation.

I have closely considered the evidence on record and the submissions of both parties, I am of the view that the appellant has no land allocated to him but he was merely swindled by the officer who purported allocate plot number 182 Block, Kibaha Town to the appellant. The 1st and 2nd respondents trace their ownership of the land to PW3. The appellant ought to have proved that the respondents or PW3 were compensated for, else, he cannot be heard to have ownership of the land. But that is even not the case because the 3rd respondent does not say so in evidence.

In his defence, the appellant said the plot No. 182 Block B Kibaha Town was allocated to him by the 3rd respondent in November 2001. According to him,

he did not make any search for he was allocated the plot by the 3rd respondent (government entity). He obtained it legally.

But, exhibit P4 are sale agreements the latest being executed on 29/05/1991 whereas PW4 a retired prison officer was a witness of PW3 in the sale agreement. PW5 surveyed the area which had not been surveyed.

Nevertheless, the issues that were framed by the trial tribunal and acknowledged by the counsel of the appellant on 18th July, 2012 there was no issue of double allocation. They read as follows:

"ISSUES FRAMED

1. *Who is the lawful owner of the disputed area.*
2. *Whether the 2nd respondent allocated the disputed area to the 1st respondent.*
3. *To what reliefs are parties entitled to."*

There is no way the 1st respondent and 2nd respondent could be dispossessed of their pieces of land granted to them by their mother without compensation. But there is no any attempt to show that that the 3rd respondent dispossessed PW3 or the 1st and the 2nd respondents of their pieces of and paid compensation to them. In the premises, there was no

double allocation but mere trespass on the land of the 1st and 2nd respondents.

The land officer from the 3rd respondent testified that they were not able to resolve the dispute and advised the parties to head for legal action who categorically stated that the appellant and the 1st and 2nd respondents own plots which have different numbers. The appellant failed to produce the site plan.

In answering the question from the chairman, DW2 said there was overlapping demarcation and approved survey and that the latter shall prevail. But how can it prevail where there was ownership? There could be no legal disposition of a plot (piece of land) from its owner without not only compensation but adequate compensation, DW2 did not state if the prior owner of the plot was compensated. TW1 Iron, a Land Surveyor, at the scene clarified and told the appellant to go and ask the town director to show him his plot.

I think that the decision of the trial tribunal is supported by the position of the law as propounded in the case of **Rashid Baranyisa v. Hussein Ally** [2001] TLR 470 it was held that:

"(i) the mere act of designating the area a trading Centre and surveying it did not have the effect of extinguishing the deemed right of occupancy of the respondent over the land and reducing him into a squatter.

(ii) The purported allocation of the plot to the appellant was ineffectual."

See also **Victor Robert Mkwavi v. Juma Omary,** Civil Appeal No. 222 of 2019, CAT (unreported) at page 9 where it was stated:

"Our settled jurisprudence, as stated by the Court in ***Mwalimu Omari*** *(supra) and* ***Lohay Akoonay*** *(supra), instructs us that a preexisting customary right of occupancy cannot be extinguished by a subsequent grant of the right of occupancy on the same plot of land unless compensation was duly paid before the grant was made."*

While there is evidence to the effect that the plots in dispute were surveyed from the land of the PW3. She gave the pieces of land to the 1st and 2nd respondents her siblings, then the proper survey and valid title to the plots in the circumstances, are those of the 1st and 2nd respondent. I have re-evaluated the evidence in the record on the guidance of **the Registered**

Trustees of Joy in The Harvest v Hamza K. Sungura, Civil Appeal No. 149 of 2017, CAT (unreported):

> *"... it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

The re-evaluation of the evidence that has been briefly shown above clearly shows that the appellant's evidence was weaker compared to the evidence in favour of the 1st and 2nd respondents.

In regard to the 5th ground of appeal, it was submitted for the appellant that the chairman failed to act judiciously and find and order that the 1st and 2nd respondents failed to prove what was alleged and shifted the burden to the appellant. He concluded that the chairman was biased. He prayed the appeal succeeds. The counsel for the 1st and 2nd respondents disputed the claim that the learned Chairman was biased. Nonetheless, that suggestion was reiterated in the rejoinder submission by the counsel for the appellant.

With respect to the counsel for the appellant, I do not purchase the argument of the appellant on the 5th ground of appeal. There is no any

indication of bias on the part of the trial tribunal. Rather the evidence on the 1st and 2nd respondents in this appeal has more weight than that of the appellant.

To conclude, all the grounds of appeal preferred by the appellant are wanting in merit, thus, the appeal is dismissed with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 27th day of February, 2023.

J. F. NKWABI
JUDGE