IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL CASE NO. 28 OF 2021

(Arising from the decision of Tabora District Land and Housing Tribunal in Land Application No. 11 of 2011)

NICODEMAS KISALO..... APPELLANT

VERSUS

1. PROF. SAITIEL M. KULABA.....1ST RESPONDENT

2. DISTRICT EXECUTIVE DIRECTOR OF NZEGA DISTRICT AUTHORITY..... 2ND RESPONDENT

Date of Last Order: 24.11.2022
Date of Judgment: 24.02.2023

JUDGMENT

KADILU, J.

This is an appeal in respect of Plot No. 52, Block "T" located at Uchama area within Nzega District in Tabora region. The plot was allocated to the 1st respondent by the 2nd respondent in 2006. Brief facts of this case are that, in 2003, the 1st respondent applied to the 2nd respondent to be allocated a plot of land whereby he was allocated Plot No. 52, the suit property. He was given a letter of offer which was later transformed into a Certificate of Right of Occupancy No. 16347. The appellant is alleged to have trespassed to the 1st respondent's land and used the 1st respondent's construction material to build his own structure thereon. The 1st respondent filed land dispute in the DLHT for Tabora.

The dispute was decided in favour of the 1st respondent. Dissatisfied with the decision, the appellant filed the present appeal consisting of 4 grounds. However, I have condensed the 4 grounds of appeal into 3 grounds for clarity purpose. **Firstly**, the appellant contends that the DLHT erred by entertaining the matter without statutory notice issued to the 2nd respondent. **Secondly**, the DLHT Chairman erred in law and fact by holding that the 1st respondent acquired the suit plot legally while the appellant was not involved in surveying the land in dispute and there is no evidence that he was paid compensation. **Thirdly**, the DLHT Chairman erred in law and fact by declaring the 1st respondent the lawful owner of the disputed land while there is no evidence to support the same.

The appellant prayed the appeal to be allowed with costs and decision of Tabora DLHT to be quashed and set aside. The respondents on their part objected all grounds of appeal and argued that there is nothing to fault decision of the DLHT. They maintained that the 1st respondent is the lawful owner of the suit property as the 2nd respondent observed all legal procedures in acquisition and allocation of the suit land to the 1st respondent. The appeal was argued by way of written submissions. The appellant was represented by Ms. Flavia Francis, the learned Advocate, the 2nd respondent was represented by its Solicitor, Ms. Saraphina Stanley Mkondya while the 1st respondent had no representation.

I will firstly resolve the contention that statutory notice was not issued to the 2nd respondent before filing the dispute in the DLHT. At page 13 of

the DLHT's proceedings, it is shown that the 2nd respondent was issued with summons to appear as a third party. The 3rd party notice was issued on 03/06/2014 and 3rd party proceedings were conducted from 03/06/2015 to 02/09/2015. Therefore, the 2nd respondent was joined in the case as a third party, not the respondent. In law, the requirement of legal notice does not apply to a 3rd party since he is not a respondent and there is no claim against him. See the case of ***Zanfra v Duncan & Another*** [1969] HCD No. 163 in which the court stated that, where the plaintiff elects to sue a single defendant and does not sue the 2nd, even if the defendant joins a 3rd party to the action in order to obtain contribution, the 3rd party does not become a defendant in the main suit.

I am also persuaded by the decision of my learned brother Mkeha, J., in the case of ***Raphael Logistics (T) Ltd (Plaintiff) and Pan African Energy (T) Ltd (Defendant) v Zanzibar Marine & Diving Ltd & 2 Others (3rd Parties),*** Commercial Case No. 83 of 2021, where he stated that when the Government entity is joined as a 3rd party to the proceedings, there is no suit against the Government so as to bring into use the provisions of Section 6 (3) and (4) of the Government Proceedings Act, [Cap. 5 R.E. 2019]. The said Act stipulates as follows:

> *"All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be*

joined as a necessary party. Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)."

As shown, the 2nd respondent which is a local government authority was not party to the suit in the DLHT, but a third party. Thus, there was no need of issuing statutory notice to it as contended by the appellant. Moreover, it is now a settled position that parties are bound by their pleadings. Parties to a suit is not a new fact which was discovered by the appellant after the trial by DLHT. The appellant was supposed to raise this point from the day he was served with the application, but he did not do so. In the case of ***Barclays Bank (T) Ltd v Jacob Muro,*** Civil Appeal No. 357 of 2019, the Court of Appeal observed as follows:

"...For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings..."

Alleging that the statutory notice was not issued to the 2nd respondent is a new point which cannot be entertained at the appellate stage. It is only in exceptional circumstances that the appellate court may allow a new point to be raised before it, regard being that the other party

shall not be prejudiced by the appellant raising the new ground at the hearing of the appeal.

I am also alive of the decision of the Court of Appeal in the case of ***Hamis Bushiri Pazi & Others v Saul Henry Amon & Others***, Civil Appeal No. 166 of 2019 where it was stated that, the court will only look into matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by the trial court. Consequently, I find the first ground of appeal devoid of merit and I dismiss it accordingly.

Another complaint by the appellant is that the 1st respondent did not acquire the disputed land legally because the appellant was not involved in surveying it and there is no evidence that he was compensated. On this point, it is on record that in 2005, the 2nd respondent allocated the disputed plot to the 1st respondent after he had applied for the same. He was issued with a letter of offer from which he then processed and obtained a Certificate of Title No. 16347 in 2006. This was the testimony of PW1 on page 21 of the proceedings and PW2, the Land Officer of the 2nd respondent.

According to PW2, the 2nd respondent acquired the land in dispute, declared it as a planned area and surveyed it. It later advertised to the public for any interested citizen to lodge applications for allocation. The 1st respondent made an application together with other citizens and he was allocated the suit plot as shown above. PW2 testified further that, all procedures for acquisition of land were complied with including payment of

compensation to citizens whose land was so acquired. I should hasten to point out here that under Section 4 (1) of the Land Act [Cap. 113 R.E. 2019], all land in Tanzania is public land vested in the President as trustee for and on behalf of all citizens.

Further, Section 3 of the Land Acquisition Act [Cap. 118 R.E. 2019] permits the President (the Government) to acquire any land where such land is required for any public purpose. When any land is acquired by the Government, the occupier of such land is entitled to compensation in accordance with the law. Thus, under Section 11 (2) of Cap. 118, compensation for land acquisition may be by payment of money, allocation of an alternative land or both payment of money and allocation of alternative piece of land. In the case at hand, PW2 testified that after surveying the appellant's land, the 2nd respondent obtained four (4) plots.

Out of the 4 plots, two (2) plots were allocated to the appellant as compensation for the acquisition of his land. The two plots are Plots No. 56 and No. 58 Block "T", Uchama area. In that regard, I am not convinced by the appellant's contention that he was not compensated. Moreover, I have failed to associate the legality of the 1st respondent's ownership with the issue of compensation by the 2nd respondent and involvement of the appellant in the survey process. Having observed so, I find the second ground of appeal as baseless and I dismiss it.

Lastly, the appellant claims that the DLHT Chairman erred in law and fact by declaring the 1st respondent the lawful owner of the disputed land

while there is no evidence to support the same. The basis of this complaint is the allegation that the 1st respondent acquired the land in dispute illegally. On page 2 of the trial tribunal's judgment, the honourable Chairman indicated that the 1st respondent was legally allocated the disputed land as the plot in dispute is among a 100 project plots obtained in Uchama area after the land was acquired and surveyed.

On the question of illegality, the allegation has to be proved above the balance of probability by filing a counter claim. A mere assertation that the 1st respondent obtained the suit property illegally is not sufficient to warrant a relief to the appellant. In the case of ***Amina Maulid Ambali & 2 Others v Ramadhani Juma***, Civil Appeal No. 35 of 2015, the Court of Appeal stated as follows:

> *"...The appellants have argued that registration in the name of the respondent was done fraudulently. That is an allegation which ought to have been proved through cogent evidence at the trial and it ought to have involved filing of a counter claim."*

As the appellant did not adduce any evidence to prove the illegality and no counter claim was filed in the DLHT, the issue of illegality in obtaining land by the 1st respondent cannot be entertained at this stage for being an afterthought. To this end, I now resolve the issue on whether there is evidence that the 1st respondent is the lawful owner of the disputed land or not. In Tanzania, one may acquire land through allocation, purchase, inheritance, or a gift. As such, ownership of land is usually evidenced by a certificate of title (in the case of a granted right of occupancy), customary right of occupancy, residential licence or sale agreement.

In the instant case, it is not disputed that in 2006, the 1st respondent was granted land by the 2nd respondent as evidenced by Certificate of Title No. 16347. The law is clear that where two or more persons have competing interests over land, a person with a certificate of title thereof is taken to be a lawful owner unless it proved that the certificate was obtained illegally. This position was stated by the Court of Appeal in the case of ***Amina Maulid Ambali & Others v Ramadhani Juma*** (*supra*). As shown earlier, the appellant has not proved any illegality in the process of obtaining a certificate of title by the 1st respondent. Consequently, the third ground of appeal has not been proved.

In the final result and for the reasons as aforesaid, I dismiss the appeal with costs. I uphold the decision of the DLHT for Tabora which declared the 1st respondent as the rightful owner of the suit property.

Order accordingly.

KADILU, M.J.,
JUDGE
24/02/2023

Judgement delivered on the 24th Day of February, 2023 in the presence of Mr. Akram Magoti, Advocate holding brief for Ms. Flavia Francis, Advocate for the Appellant.

THE HIGH COURT OF TANZANIA

KADILU, M. J.
JUDGE
24/02/2023.