IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MUGASHA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 42 OF 2017

ABEL DOTTO ..... APPELLANT

VERSUS

MODESTA J. MAGONJI ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Mlacha, J.)

dated the 25th day of July, 2016
in
Land Appeal No. 44 of 2016

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JUDGMENT OF THE COURT

10th & 12th October, 2018

NDIKA, J.A.:

This is a second appeal by Abel Dotto, the appellant herein, who lost an action instituted against him and Mwanza City Council by Modesta J. Magonji, the respondent, in the District Land and Housing Tribunal of Mwanza District at Mwanza in Land Case No. 142 of 2012. In that action, the respondent sued for ownership and possession of landed property described as Plots No. 45/1 and 41, Block 'B', Ilemela, Mwanza City. Dissatisfied by the aforesaid outcome, the appellant appealed in vain to the

High Court sitting at Mwanza in Land Appeal No. 44 of 2016. He now appeals to this Court.

Briefly stated, the facts giving rise to this appeal are as follows: it was the respondent's case at the trial that she acquired the land in dispute in 1990 from her father in law upon the latter donating it to her. At the time, it was an unsurveyed scrub land. Having cleared it, she erected on it a small thatched dwelling house in 1991. In 1994 she temporarily left for Uzinza, Sengerema. On her return in February, 1995 she found a small foundation developed on a part of the land by her neighbour, one Daniel Nyanda. She complained to the relevant authorities against the encroachment and the said Nyanda was restrained from developing the land any further.

In 1996, certain surveyors came to the land in dispute. They surveyed and demarcated it by affixing beacons on its boundary. On 21st August, 1996 the relevant authority (Regional Land Development Officer) issued her an offer of right of occupancy over the land (Exhibit P.1). She duly accepted the offer by paying requisite fees. In 2005, certain surveyors from the City Council came again to the disputed land and subdivided the

said land. She resisted the subdivision to no avail. Her account was materially supported by PW2 Sudi Mapalala, a local leader at the time, and PW3 Edward Felician, her son.

On the other hand, the appellant claimed that he purchased and took possession of the disputed land on 19th March, 1996 from the said Nyanda. At the time the land was surveyed but had no any documentation of title. On 18th October, 1996 an offer of right of occupancy over that land was issued by the relevant authority in the name of Daniel M. Nyanda. The land was then described as Plot No. 45 but it was subsequently changed to Plot No. 41. He could not develop that land immediately but when he started erecting a structure on it, the respondent rose up and staked her rival claim of title.

The appellant maintained that his land was different from the respondent's land. According to him, his land was Plot No. 45 but it was changed to Plot No. 41 while his opponent's land was Plot No. 45/1 and was later renumbered as Plot No. 42. In support of his claim of title, the appellant tendered in evidence a number of documents that were collectively marked as Exhibits RW.1. These included a handwritten sale

agreement between him and the said Nyanda dated 19th March, 1996 for the sale of certain unnamed land in Ilemela on which there was an unfinished structure and some building materials; a letter to the City Land Officer, Mwanza dated 7th January 2008; an offer of right of occupancy over Plot No. 45, Block 'B', Ilemela, Mwanza Municipality, dated 18th October, 1996 issued in the name of Daniel M. Nyanda; and a survey plan of the area in which the disputed land is located bearing number 32690/D12235/10.

We wish to observe at this point that the record of appeal contains a number of documents that do not appear to have been tendered and admitted at the trial. These include several exchequer receipts in the name of Daniel M. Nyanda vide which fees for land rent paid were allegedly paid and acknowledged; two survey plans of the area in dispute and a string of documents related an apparently unexecuted transfer of title from the said Daniel M. Nyanda to the appellant.

As hinted earlier, the respondent was adjudged by the District Tribunal the lawful owner of both pieces of land, namely, Plot No. 45/1 (now known as Plot No. 41) and Plot No. 45 (now described as Plot No.

42), Block 'B', Ilemela, Mwanza City. The tribunal found that the respondent was the original owner of the disputed land and that the same was allocated to her before the authorities surveyed and re-allocated it to the said Daniel Nyanda, an act that was deemed unlawful and ineffectual.

Moreover, besides issuing an eviction order against the appellant, the tribunal decreed the appellant, in the alternative, to pay the respondent compensation for the unexhausted developments she effected on the disputed land.

On the appellant's first appeal, the High Court was of the same mind with the trial tribunal's finding that the respondent occupied the land in dispute long before the surveys and that the appellant surfaced at a later stage. He faulted the three successive survey plans on record that culminated into the subdivision of the respondent's land and resulted in a part of the land being unlawfully allocated to the appellant. In the upshot of it, the learned appellate judge declared the changes in the survey plans as well as the offer of right of occupancy issued in the name of Daniel M. Nyanda illegal and of no effect. He, too, confirmed the respondent the lawful owner of both plots now described as Plots No. 41 and 42, Block 'B',

Ilemela, Mwanza. He further directed the relevant authorities to issue an appropriate document certificate of title to the respondent but made no mention of the order on compensation issued by the trial tribunal in alternative. Accordingly, the appeal was dismissed with costs.

In this Court, the appellant has lodged a Memorandum of Appeal premised on three grounds, which we paraphrase as follows:

1. That the first appellate court erred in law for failing to delineate which plot was given and offered to the respondent between Plots No. 45/1, Block 'B' that was later changed to Plot No. 42 and Plot No. 45, Block 'B' that was also changed to Plot No. 41 offered on 18th November, 1996 in the name of Daniel Nyanda before it was transferred to the appellant.
2. That the first appellate court erred in law for failing to distinguish between the right of ownership of the land in dispute and the claim of compensation from the Mwanza City Council that surveyed the land in dispute.
3. That the first appellate court erred in law for failing to hold that at the time institution of the action by the respondent the twelve years'

limitation period had lapsed and that the respondent's claim of title had been extinguished.

At the hearing of the appeal before us, the appellant had the services of Mr. Emmanuel J.N. Sayi, learned advocate whereas the respondent appeared in person, unrepresented.

Before we heard the appeal in earnest, Mr. Sayi raised a preliminary issue on which he sought the Court's guidance. He said that after being engaged by the appellant recently, he noted that one of the parties at the trial, Mwanza City Council, was neither impleaded as a respondent to the appeal in the High Court nor a respondent to the present appeal. Moreover, he stated that the District Tribunal had ordered on 3rd April, 2014, at the request of a Mr. Kitia, Solicitor representing Mwanza City Council, that Ilemela Municipal Council be joined as a party to the proceedings following its detachment from Mwanza City Council and establishment as a separate Local Government Authority. That order was not complied with and the said Ilemela Municipal Council was never made a party to the proceedings. Mr. Sayi seemed to submit that the trial proceedings were materially vitiated by the non-joinder of the said Council.

After a brief dialogue with Mr. Sayi who, then, succumbed that there was no fatal omission, we ordered the hearing to proceed as scheduled. It was our view that despite the non-joinder of Ilemela Municipal Council at the trial as well as the non-joinder of Mwanza City Council both in the first appeal to the High Court and now this appeal, this Court could continue with the appeal by dealing with the matter in controversy so far as regards the rights and liabilities of the appellant and the respondent now before the Court. We premised our reasoning on the provisions of Order I, rule 9 of the Civil Procedure Code, Cap. 20 RE 2002.

For the appellant, Mr. Sayi prefaced his oral submission by adopting the written submissions that the appellant had personally lodged earlier. At first, he dealt with the third ground of appeal. Referring to page 58 of the record of appeal, he submitted that the respondent admitted that the disputed land was initially encroached upon and taken over by the said Daniel M. Nyanda in 1994 when she went away to Uzinza, Sengerema. Recalling that the initial action by the respondent for recovery of the said land was lodged in the Ward Tribunal of Ilemela in 2007 vide Land Complaint No. 30 of 2007, he argued that the respondent slept over her right to recover the land for the period of thirteen years he reckoned from

1994. The learned counsel contended that the appellant's right of recovery was extinguished by the appellant's adverse possession by 2006. In this regard, the learned counsel cited Item 22 of Part I of the Schedule to the Law of Limitation Act, Cap. 89 RE 2002 prescribing the twelve years' limitation period for a suit for recovery of land.

On being probed by the Court as to whether the appellant's possession of the property in dispute clocked the statutory period of twelve years after he took it over from Daniel M. Nyanda in 1996, the learned counsel candidly conceded to the futility of his argument and sought to abandon the third ground of appeal. Indeed, it is plain that the appellant could only have relied upon the principle of adverse possession had he established that he had long and uninterrupted occupation of the property in dispute throughout the statutory period of twelve years: see, for example, our recent decision in **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016 (unreported). In the instant case, the appellant's purported occupation of the land from 1996 only lasted eleven years by the time the respondent sued for recovery of the land.

Mr. Sayi, then, dealt with the first and second grounds of appeal conjointly. Briefly, he criticized the first appellate judge for failing to evaluate the evidence on record properly. He particularly assailed the learned judge's finding that the subdivision of the land in dispute was illegal. Mr. Sayi submitted that the said conclusion was against the weight of evidence as he referred to the survey plan (Exhibit RW.1) and the appellant's own testimony at page 67 of the record. The nullification of the subdivision, he added, could not be justified on the claim that the respondent had not been paid any compensation.

In opposition to the appeal, the respondent revisited the entire evidence on record at length and emphasized the fact that she was the original occupier of the disputed land since 1990. She cast the blame for the current dispute to land surveyors and other official that subdivided the land on three occasions and then allocated a part of it to Daniel M. Nyanda. The appellant, she added, was not the owner of the disputed land for he had no proof of title other the documents of title issued to the said Daniel M. Nyanda.

Rejoining, Mr. Sayi maintained that the subdivision was not illegal.

We have carefully considered the competing oral and written submissions of the parties in the light of which we examined the evidence on record. It is undisputed that the respondent occupied the land a few years before the successive surveys were conducted. There is also no disagreement that the partitioning of the said land resulted from the surveys. We thus do not find any fault in the contemporaneous finding of the High Court and District Tribunal putting the ownership of the land in the respondent before the successive surveys. On this aspect, for example, the first appellate judge observed, at page 142 of the record, that:

> *"It is also agreed that the land was surveyed in 1995 and that prior to the survey Mr. Daniel Nyanda was occupying a plot other than the suit land. The evidence shows that Mr. Daniel Nyanda made a move towards the plot [in dispute] in 1995 (sic) and met resistance from the respondent. It is thus obvious that the appellant bought the plot [in dispute] while already [it was a subject of the] dispute. It is as if Daniel Nyanda was shifting the dispute to the appellant."*

The first appellate judge went on, at the same page, to lay bare the illegality of the successive surveys and the subdivision:

"It appears that Plot No. 45 was divided in 1996. It is after this exercise that the offers were issued. The respondent was given an offer of a right of occupancy on 21st August, 1996 in respect of Plot No. 45/1, Block 'B', Ilemela. Mr. Daniel Nyanda was given his offer on 18th August, 1996 in respect of Plot No. 45, Block 'B', Ilemela. It appears that the new Plot No. 45 falls wholly in the original Plot No. 45, hence the present dispute."

Like the first appellate court, we hold that the land allocating authority had no right to divide the respondent's land and allocate away a half of it to Daniel Nyanda without due regard to the respondent's customary title over that land. The aforesaid customary title could only have been extinguished had compensation been paid to the respondent upon the disputed land being allocated to Daniel Nyanda but in this case none was paid – see for instance **Methuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** [1985] TLR 103; and **Mwalimu Omari and Another v. Omari A. Bilali** [1999] TLR 432.

In view of the foregoing discussion, we agree with the concurrent finding of the trial tribunal and the first appellate court that the disputed

land belonged to the respondent. In the premises, we find no merit in the first and second grounds of appeal and they both fail.

In the final event, we hold that the appeal lacks merits and is hereby dismissed with costs.

DATED at **MWANZA** this 12th day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL