IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 222 OF 2019

VICTOR ROBERT MKWAVI ..... APPELLANT

VERSUS

JUMA OMARY ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mwangesi, J.)

dated the 27th day of October, 2016
in
Land Appeal No. 126 of 2015

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JUDGMENT OF THE COURT

1st & 30th November, 2022

NDIKA, J.A.:

On appeal by the appellant, Victor Robert Mkwavi, is the judgment of the High Court of Tanzania, Land Division at Dar es Salaam ("the High Court") dated 27th October, 2016 in Land Appeal No. 126 of 2015. By that judgment, the High Court reversed the decision of the District Land and Housing Tribunal of Kinondoni ("the Tribunal") in Land Application No. 446 of 2011, which was in favour of the appellant. Consequently, the said court adjudged the respondent, Juma Omary, the lawful owner of the landed property in dispute.

To appreciate the context of this appeal, we provide the abridged facts of the case at the outset. The respondent instituted the action in the Tribunal claiming to be the owner of an approximately one-acre piece of land located at Kunduchi Salasala, initially known as Tegeta Juu, now described as Plot No. 339, Block 'E', Kinondoni Municipality, Dar es Salaam. He asserted that the said property, unsurveyed at the time, was allocated to him by the Kunduchi Mtongani Village Authority on 14th June 1986; that he developed it four years later by constructing a three-room structure; and that he planted permanent and seasonal crops on it.

The respondent pleaded further that in September 2011 the appellant entered upon the property in dispute without any justification or colour of right and erected thereon certain concrete poles demarcating the property's boundaries, raising a rival claim of title to the property. In response, the respondent approached the Tribunal for legal redress. Apart from seeking a proclamation of his alleged title, the respondent sought general damages against his adversary for trespass and a permanent injunction restraining the appellant from trespassing into the property.

In his defence, the appellant denied liability and counterclaimed that he lawfully owned the property in dispute, now described as Plot No. 339, Block 'E', Kinondoni Municipality, Dar es Salaam, as evidenced by the

Certificate of Occupancy, CT. No. 119410, LO 455713 issued in his name on 10th August 2011. He averred that he was allocated the property by the Ministry of Lands, Housing and Human Settlements Development and that he met all the conditions for acquisition of the said title, which included payment of fees. In the premises, he prayed for a declaration that he lawfully owned the property in dispute as well as for vacant possession of the property, *mesne* profits at the rate of TZS. 500,000.00 per month, general damages, and a permanent injunction against the respondent.

Replying to the appellant's defence and counterclaim, the respondent reiterated his alleged title founded upon the alleged customary right of occupancy dating back to 1986. He charged that the said property could not have been lawfully allocated to the appellant in 2011 because his title still existed.

It turned out that the respondent's suit did not proceed to trial. The Tribunal dismissed it on 28th May 2013 for want of prosecution pursuant to regulation 11 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, Government Notice No. 174 of 2003, following the respondent's failure to appear and produce evidence in support of his claim. The Tribunal, then, received evidence on the counterclaim from both parties.

It was certain in the evidence that the property in dispute was surveyed in or about 1998 under a special government scheme dubbed as "the Songas Project" and that it was allocated to the appellant in 2011 as evidenced by exchequer receipts acknowledging payment by him of all applicable fees (Exhibit P1). It was undisputed that he was issued on 10th August 2011 with Certificate of Occupancy, CT. No. 119410, LO 455713 (Exhibit P2) as proof of his title to the property.

However, it was the respondent's case that he occupied and developed the property in dispute after he acquired it lawfully on 14th June 1986 when it was allocated to him by the Kunduchi Mtongani Village Authority as per an allocation letter (Exhibit D1). While acknowledging that the said property was surveyed in or about 1998, he complained that he received no further information from the relevant authorities on the matter only to learn later of the allocation made in the appellant's favour.

The Tribunal took the view that the dispute turned on two correlated questions: one, whether the allocation of the property in dispute to the appellant was lawful; and two, whether a customary right of occupancy would exist in a planning area. In determining the questions, the Tribunal referred to Masanche, J.'s holding in **Mwalimu Omari and Another v. Omari A. Bilali** [1990] T.L.R. 9 that the title under customary law and a

granted right of occupancy in an area declared township or minor settlement cannot co-exist as title to an urban land depended on grant. The Tribunal also considered a passage in that decision, at page 14, that:

> *"Once an area is declared an urban planning area, and land is surveyed and given plots, whoever occupied the land even under customary law would normally be informed to be quick in applying for rights of occupancy. If such person sleeps on such a right and the plot is given to another, the squatter, in law, would have to move away and in law, strictly would not be entitled to anything."*

In the end, the Tribunal entered judgment with costs in favour of the appellant, proclaiming him the lawful owner of the property in dispute. In addition, it ordered the respondent to cede possession of the property.

As hinted earlier, the High Court reversed the Tribunal's decision. Having considered the uncontroverted evidence that the respondent occupied and developed the property in dispute upon a customary right of occupancy, the court held that the appellant could not have been lawfully allocated the said property without the respondent having been paid compensation for it. The learned appellate Judge buttressed his finding on the principle made by this Court in **Attorney General v. Lohay Akonaay and Joseph Lohay** [1995] T.L.R. 80 at 90 thus:

"... customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of [Article] 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution."

The learned appellate Judge then held and ordered as follows:

"... it has satisfactorily been established that the appellant [the respondent herein] did effect developments on the plot of land, which was later allocated to the respondent, the respondent is legally duty bound to compensate the appellant for the developments which he had already made on the plot of land that was allocated to him. In the circumstances, I would direct that the three-roomed house constructed on the plot of land that has been allocated to the respondent its fair value be established and compensated to the appellant before the respondent [the appellant herein] can legally proceed to occupy his newly allocated plot of land."

In this appeal, the appellant pressed seven grounds of appeal, some of which were canvassed collectively in the written submissions in support of and in opposition to the appeal as well as at the hearing. In essence, while the first and seventh grounds fault the learned appellate Judge for analysing

the evidence on record wrongly and arriving at a wrong finding on the ownership of the property in dispute, the common thread in the second, third and fourth grounds is the contention that the learned Judge wrongly based his decision on the question of non-payment of compensation, which was neither pleaded by the respondent nor framed for trial. The fifth and sixth grounds censure the learned Judge's order for payment of compensation to the respondent upon an assessment of his unexhausted improvements on the property. The contention in these grounds is that the said order was against the weight of evidence on record that all original owners of land surveyed under the Songas Project were paid compensation through the Commissioner for Lands before their respective land holdings were reallocated.

At the hearing of the appeal, the appellant was self-represented while Mr. Jamhuri Johnson, learned counsel, held brief for Ms. Stella Simkoko, learned advocate for the respondent. Both parties relied upon their respective written submissions for or against the appeal without much oral argument.

Ahead of dealing with the substance of the appeal, we wish to make one pertinent observation. As hinted earlier, the Tribunal heavily relied in its decision on Masanche, J.'s holding in **Mwalimu Omari** (*supra*) that title to

urban land was only dependent on a grant and that a declaration of land as planning area divested the original owner of their customary title to that land. The Tribunal was certainly oblivious of the position taken subsequently by this Court on appeal from the said decision of Masanche, J. – see **Mwalimu Omari and Another v. Omari A. Bilali** [1999] T.L.R. 432. Briefly, in that case while the Court upheld the view that customary tenure does not apply in urban areas, let alone in the heart of the City of Dar es Salaam where the land in dispute was located, it noted that the appellants in that case held no titles under customary law; they were squatters. More pertinently, the Court made three non-binding chance remarks (*obiter dicta*) as follows: one, that the title of a holder of right of occupancy under customary law can only be taken away from the holder by an act authorized by a relevant law (for instance, the Land Acquisition Act) not by a simple act of declaring an area a planning area. Two, that it would be wrong in law to hold that a declaration of urban land as a planning area divests the original owners of their customary titles on the land. Finally, that if the appellants in the appeal held a customary title to the disputed plot prior to its grant to the respondent, they would be protected by section 33 (1) (b) of the Land Registration Ordinance (now the Land Registration Act, Cap. 334 R.E. 2019) and therefore their title could not be extinguished by the subsequent grant of the right of occupancy on the same plot to the respondent.

It is instructive at this point to note that in his judgment the learned appellate Judge in the instant case did not refer to our decision in **Mwalimu Omari** (*supra*). He anchored his finding on the Court's statement of principle in **Lohay Akoonay** (*supra*) that deprivation of a customary right of occupancy without fair compensation is prohibited by the Constitution of the United Republic of Tanzania of 1977. Having made the above observation, we now turn to the merits of the appeal.

To begin with, we agree with the learned appellate Judge that the evidence is overwhelming that the respondent occupied and developed the property in dispute upon a customary right of occupancy created on 14th June, 1986. It is also in the evidence that the property in dispute was surveyed in or about 1998 and that it was allocated to the appellant in 2011 as unveiled by Exhibits P1 and P2. 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.

It is logical to deal, at first, with the second, third and fourth grounds of appeal. The contention here is that that the learned Judge wrongly based his decision on the question of non-payment of compensation, which was

neither pleaded by the respondent nor framed for trial. The appellant relies on several decisions including **James Kabalo Mapalala v. British Broadcasting Corporation** [2004] T.L.R. 143; **Grace Umbe Mwakitwange v. Suma Clara Mwakitwange Kaare & Others**, Civil Appeal No. 88A of 2007 (unreported); **Captain Harry Gandy v. Caspar Air Charters Limited** (1956) 23 E.A.C.A 139; and **Pushpa d/o Raojibhai M. Patel v. The Fleet Transport Company Ltd** [1960] EA 1025 for the propositions that parties are bound by their pleadings, that cases must be decided on the issues on record arising from the pleadings, and that if it is desired to raise additional issues they must be placed on record by amendment.

Replying, the respondent concedes the alleged omission but counters that he could not plead the question of compensation because he had never been notified that the property in dispute had been acquired by the land allocation authority for it to be reallocated to another person. Moreover, citing **Lohay Akoonay** (*supra*) and **Abel Dotto v. Modesta J. Magonji**, Civil Appeal No. 42 of 2017 (unreported) for the position that no new title would be created unless the previous occupier of the land in issue is compensated, the respondent supports the learned appellate Judge's view that the question of compensation arose automatically.

For a start, we acknowledge the statement of salutary principle that parties are bound by their pleadings and that cases must be determined upon the issues on record arising from the pleadings. As pointed out earlier, it is conceded in the instant case that the compensation issue was neither pleaded nor framed as a specific question for trial. However, in view of the evidence that the respondent's customary title predated the grant of the right of occupancy to the appellant in 2011, it was logical to ask and determine whether the grant was made lawfully. This question naturally entailed determining not only whether applicable fees were paid but also whether the respondent was duly paid compensation to extinguish his customary title. In the premises, we sustain the learned appellate Judge's view that the issue of compensation was a matter of course.

It is striking that despite the above issue having not been pleaded or framed for trial, the parties led evidence on it. While the appellant asserted that all previous owners of surveyed land within the Songas Project area were paid compensation prior to their allocation, the respondent denied being compensated for his property. The appellant made a blanket claim that compensation was paid but he did not specifically say whether the respondent received any such payment. His witness, Amon Kirumbi, a State Attorney from the Office of the Commissioner for Lands, claimed that all

procedures were followed in making the grant but did not specifically state whether compensation was duly paid. In the premises, the learned appellate Judge's finding that no compensation was paid is plainly unassailable. Consequently, the three grounds of appeal under consideration fail.

The foregoing determination takes us to the first and seventh grounds, which, as pointed out earlier, fault the learned appellate Judge's analysis of the evidence on record and finding on the ownership of the property in dispute.

On the above complaints, the appellant rehashes the argument he made on the first appeal that he was allocated the property in dispute in accordance with applicable laws and regulations after the said land was surveyed and acquired by the appropriate land allocating authority. He emphasizes that he paid all requisite fees and that his title to the property was firmly secured by the certificate of occupancy (Exhibit P2). He referred us to Masanche, J.'s holding in **Mwalimu Omari** (*supra*), which, as hinted earlier, formed the basis of the Tribunal's decision.

The respondent's rebuttal is so brief. Apart from maintaining that he is the original occupier of the property in dispute, he denies that the said property was ever acquired from him by the authorities.

It is germane at this point to repeat what we stated earlier 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. Given that it is firmly established in evidence that the respondent received no compensation for the unexhausted improvements he effected on the property, we infer, as we must, that his anterior customary title was not extinguished. This conclusion renders the purported grant of title to the appellant ineffectual. He did not acquire any title to that property. In view of our earlier observation, Masanche, J.'s holding in **Mwalimu Omari** (*supra*) does not advance the appellant's case. We, therefore, find no merit in the first and seventh grounds of appeal.

Grounds 5 and 6, assailing the learned Judge's order for payment of compensation to the respondent by the appellant, pose no difficulty. The disputed order was made upon the view that the appellant, having been granted the disputed title, was legally bound to compensate the respondent for the unexhausted developments the latter made on the property in dispute. It is certain that the order aimed at facilitating the appellant to regularize his grant of title. In our considered view, the order was quite unnecessary. It was made on a wrong assumption that the appellant had

title to the property, but he did not have any because the purported grant in his favour was ineffectual from the very beginning. While we find merit in the fifth and sixth grounds of appeal and proceed to vacate the assailed order for compensation, it must be stated the finding at hand has no bearing on the outcome of the appeal.

In conclusion, we find no merit in the appeal, which we hereby dismiss to the extent stated with costs.

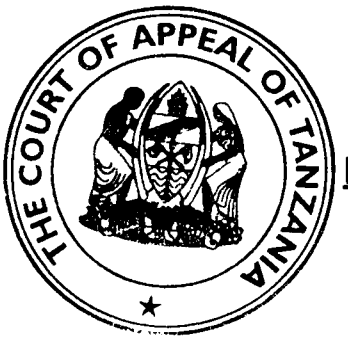
DATED at **MWANZA** this 28th day of November, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered on 30th day of November, 2022 in the presence of the Mr. Heavenlight Mlinga, learned counsel for the applicant and in absence of the respondent via video link, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL