

TANZANIA / JUDGMENT

CHEKANI

COURT
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28 June 2024

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,. ' IN THE HIGH COURT OF TANZANIA (MOROGORO SUB - REGISTRY) AT IJC MOROGORO LAND
APPEAL NO. 6729 OF 2024 EMMANUEL JOHN 1 ST APPELLANT STANLEY
D MAKUMBO 2No APPELLANT SHUKURU ATHUMANI 3Ro
APPELLANT SYLVESTER ATHUMANI 4TH APPELLANT VERSUS FRANKLIN
CHEKANI. RESPONDENT

JUDGEMENT

DATE OF JUDGEMENT- 28TH JUNE 2024 MANSOOR, J. The dispute is over a piece of land described as Plot No. 423 Block E Tubuyu B, Tungi Ward within Morogoro Municipality, containing 2015 square meters, herein shall be referred as "the Suitland". Il Page Briefly, the facts of the case are that Franklin Chekani, who was the plaintiff at the District Land and Housing Tribunal in Land Application No. 157 of 2018, now the respondent in this appeal, claims that the Suitland is his land having been allocated by the Assistant Commissioner for Lands for Morogoro Zone. When the land was surveyed in 1999, him and his mother applied to be allocated the Suitland, they were allocated two plots, i.e. Plot No. 432, which is the Suitland, and Plot No. 433. Plot No. 432, the Suitland, was given to Franklin Chekani, and in 2009, he was issued with the Certificate of Title No. 277851 LO No. 85285, dated 14th September 2009. Before the Certificate of Title was issued, in 2000, January 25 th, Franklin Chekani was issued with the Letter of Offer with Ref No. MMC/432/E/TUNGI, by the Morogoro Municipal Council. Franklin Chekani claims that the appellants herein, who were the defendants at the Trial Tribunal invaded or trespassed the Suitland in 2017, he reported the trespass to the Municipality, and in 2018 he decided to institute a case at the Trial Tribunal. Emmanuel John, the first appellant herein, claims that the Suitland is his land. He claims that he owns a farm of 2 ¾ acres in Tubuyu B Area since

1976. That he cleared the virgin land in 1976 and started farming in 1978. He says he did not want his land to be surveyed in 1997, and so he continued 21 Page " farming on his un-surveyed land, and built houses, but his houses were marked X, and following this, he wrote a letter to the Municipal Director. The letter was received as evidence and marked as Exhibit 'D1'. He says he has been complaining about the trespassers to police, and on 08th February 1994, he was given a letter by the Kingolwira Ward Executive Officer for ownership of the un-surveyed land titled "hati ya kumiliki eneo la squatter. In this letter the Suitland was identified and described as Plot No. 788{fb/SQ, this letter was admitted as evidence and

marked as Exhibit 'D2'. He says his land was never surveyed. Stanley D. Makumbo said he got the suit land in 2017, having purchased the land of 33 meters wide and 20 meters long from Victor Wilbadi Mwenda for THz 1,500,000/=. The Sale agreement was witnessed by John Emmanuel, who is the 1st appellant herein, amongst the three witnesses. The Sale Agreement between Victor Wilbadi Mwenda and Stanley D Makumbo was received as evidence and marked as Exhibit 'D4'. The said Victor Wilbadi Mwenda purchased this Suitland from Emmanuel John, the 1st appellant herein. The 4th appellant, known as Sylvester Athuman or Sylvester Athumani Ligenzi, said he purchased the land described as Plot No. 3919{fB/SQ from 3I Page Stanley D. Mkumbo. He paid THz 6,000,000 as the purchase price. The Sale Agreement was reduced in writing dated 23 rd February 2018. The Sale Agreement was executed by the Vendor and Purchaser and witnessed by the Magistrate of Morogoro Urban Primary Court, commonly known as Nunge Primary Court. The trial Tribunal received expert evidence from Emmanuel Kusena, who confirmed to the Tribunal that the land in dispute or the Suitland was surveyed on 10th February 2006. He tendered before the Tribunal the Survey Plan No 33839 for Plots 267 to 280 and Plots No 415 to 475, thus confirming that the land was not a squatter and has been surveyed since 2006. He also confirmed that Franklin Chekani was issued with the Certificate of Title No. 85285 for Plot No. 432 Block E Tungi, within Morogoro Municipality. The Tribunal visited the locus in quo with the Surveyors from Morogoro Land Office. It was confirmed at the Locus that the appellants herein, are claiming ownership of the land which is known as Plot No. 432 Block E Tungi Morogoro, and they have erected buildings in the plot, the same plot which was already allocated to the respondent since 2000/2009. 4j Page The Tribunal therefore was satisfied that Franklin Chekani, the respondent herein is the rightful owner of the Suitland known as Plot No. 432 Block E Tungi Area, within Morogoro Municipality comprised in a Certificate of Title No 85285, and he was declared so to be the rightful owner of the Suitland. Consequently, all the appellants herein were declared to be trespassers and they were ordered to demolish their structures erected on the Suit land. The Tribunal also issued a permanent injunction restraining the appellants herein from interfering with the respondent's peaceful ownership of the Suitland. They were also ordered to pay the costs of the suit. Aggrieved, the appellants who are represented by Advocate Asifiwe Alinanuswe, filed an appeal raising the three grounds of appeal as follows:

1. The District Land and Housing Tribunal erred in law and facts by deliberately ignoring the documentary evidence tendered by the appellants;
2. That the Tribunal erred in law and facts by not ordering joining the Municipal Council and Tungi Ward who allocated the same piece of land to two different people; SI Page
3. That the Tribunal erred in law and facts by making a decision in favor of the respondent despite the fact that there was no valid evidence to prove that the 1st appellant was compensated when his land was surveyed. During the hearing of the Appeal, the appellants were represented by Advocate Asifiwe Alinanuswe, while the respondent was represented by Advocate Derick Vincent. The Counsel for the Appellants presented his arguments in

support of the first ground of appeal. He said the Tribunal erred as it failed to consider the documentary evidence tendered by the appellants at trial. He said Emmanuel John (DWI) tendered exhibit 'DI', which is a Certificate to own the squatter land issued by the Ward Executive Officer in 1994, but in its decision, at page 9 of the judgement, the Tribunal ruled out that DWI did not bring any proof of ownership of the Suitland. The Counsel argues that this was an error as the Tribunal did not state as to why it did not consider this exhibit. He argues further that the 1st appellant got the Certificate of ownership (Exhibit 'DI') from the competent authority, the Ward Executive 6 I Page Officer, and this was enough proof for proving that the 1st appellant lawfully and legally owned the Suitland. Regarding the 2nd ground of appeal, the Learned Counsel argues that the Tribunal erred in failing to join the necessary party in the proceedings. He said, the Tribunal ought to have ordered the joinder of Morogoro Municipality as the necessary party, as it was the planning authority which surveyed the land in 2006 without compensating the landowners. He said the Morogoro Municipality surveyed the land and this is as per the evidence of expert witness Emmanuel Kusena, who testified at the Tribunal. This expert witness told the Tribunal that the survey took place in 2006, but the evidence of the appellants shows that the 1st appellant was occupying the land since 1976 and so he was found on the land during the survey exercise and ought to have been compensated or given the plot. The Counsel argues that if the Municipal Council was joined as a party, it would have exhibited the procedure of survey and who they found in the land during the survey exercise. The appellants would have been compensated by the Municipality for taking their land. The Counsel refers to the case of Tanzania Railway Corporation vs GBP TZ Limited, Civil Appeal No. 218 of 2020, the CA sitting at Tabora, in which it was held that failure to join the 71 Page Commissioner for Lands in the suit was fatal and that the Court itself can order to join the necessary party under Order 1 Rule 10 sub-rule 2 of the CPC, for avoiding multiplicity of suits. He argues that, even if the appellants did not ask to join the Municipal Council, the Tribunal had the duty to order the joining of the necessary party, in the same way it did when it ordered for the opinion of the expert witness. Regarding the 3rd ground, the Counsel argues that, the Trial Tribunal erred in declaring the Suitland the property of the respondent by saying that the 1st appellant was compensated when the land was taken from him. He continues to argue that Susan John Chekani, the respondent's witness, on page 4 of the judgement, said she heard that the land in Tungi had been surveyed in 1999. There was no any other evidence put forward that shows that the indigenous people were compensated during the survey of the land. On this issue, the Counsel refers to the decision of the High Court in the case of Kihonda Pitsa Makaroni Inds Limited vs BR Shindika t/ a Stella Sec School, Land Case No. 197 of 2005 (unreported), available on tanzlii, Where Hon Judge Matuma had held that "" if the land is surveyed, and if there was no compensation to the indigenous people found on the land during the survey, the Certificate of Title issued would be invalid. Judge Bl Page Matuma said the action of surveying the land without compensation is equal to land grabbing. He said "The act would be land grabbing'~ The Counsel rests his submissions and urged the court to hold that failure to compensate the indigenous people found on the land during the survey, there cannot be a valid Certificate of Title. He thus prayed that the appeal be allowed, with

costs. Advocate Derick Vincent for the respondent made very brief reply submissions. He stated that the Tribunal considered Exhibit '01' in its judgement, but at page 9 of the Judgement, the Tribunal stated that there was no proof that the p t appellant proved that he owned the land since 1974. Attacking the 2nd ground of appeal, the Counsel said, in the entire evidence of the appellants, they claimed that the land was never surveyed, it was a squatter, but they were already served by the Certificate of Title showing that the respondent is the owner of the disputed land and never bothered to claim for compensation from the authority that surveyed the land. He argues further that during t he visit at the locus in quo, and the evidence of the expert witness proved t hat the entire street was surveyed, and it is not only 9 I Page the Suitland that was surveyed, and if the survey was to be nullified it will affect the entire Tungi residents who were all issued with the Certificates of Titles since 2006. He said this ground is an afterthought and cannot be raised during the appeal. Regarding the 3rd ground, the Counsel for the respondent argues that the issue that was determi ned by the Tribunal was who owns the Suitland, and the Tribunal never adjudicated on an issue of compensation. The land was surveyed since long time, and the appellants could have demanded compensation, but they never did so. During trial, the appellants never claimed for compensation. They only said the land was never surveyed. The Counsel therefore prayed for the dismissal of the appeal with costs as all grounds of appeal were unmeritorious. Having gone through the records and in consideration of the Counsels rival arguments, the issues for determination in this appeal is whether the appellants herein were able to prove that they owned the land through the documents they produced before the Tribunal, and secondly, if it was fatal for the Tribunal to proceed with the trial without joining the Morogoro Municipality, and so an issue of compensation to the appellants. 10j Page As summarized hereinabove, the 1st appellant produced Exhibit 'DI' which was a letter dated 27th December 2011 written by the Chairperson of Tubuyu Street in Tungi Ward to the Municipal Director for Morogoro asking the Municipal Director to help Emanuel John Elias to sort out the issue of trespass. This letter did not mention or even describe the Suitland, this letter cannot be said to be a proof of ownership of land. The 1st appellant also produced a Certificate of ownership of Squatter land "HATI YA KUMILIKI ENEO LA SQUATTER" dated 08th February 1994 issued by the Ward Executive officer for Kingolwira Ward, in this letter the land was given Plot No. 788/Tb/SQ. This Certificate did not describe the demarcation, size or area or even the location of the land, and therefore it cannot be proof of ownership of land. In any case, the Ward Executive Officer has no powers or authority to allocate land to the Villagers as that power is vested to the Village Land Council and the Village Assembly. DW3, Stanley David Makumbo produced Exhibit 'D3', which also is the Certificate for ownership of Squatter land for Plot No. 3919/TB/ SQ, this Certificate is not dated and was issued by the Ward Executive Officer of Tungi Ward. He also produced Exhibit 'D4' which is the Sale Agreement between Victor Mwenda and DW3. Exhibit 'D3', apart from not being dated, Ill Page it also did not describe the location, size or demarcation of land, and it was issued by the Ward Executive Officer, an officer with no power or authority under the Land Act to allocate land. Again, there was no proof that Victor Mwenda was the owner of the disputed land to cloth him with power and authority to pass it over to DW3. The appellants

were duty bound to give proof that the land in question fell under a certain village and that the Village Council and Village Adjudication Committees, which also maintain the village land registries, recognised the long occupancy of the land in question by either Emmanuel John or his parents or the other appellants. There was no proof of ownership either customarily or by allocation by the proper village organs authorised to allocate land to the villagers. All what was brought to court was the communications and exchange of letters between them and the Village Leaders and the Municipal Director and two documents purported to be Certificates of Ownership of land issued by the Ward Executive Officer, an officer who is not authorised to allocate land. The Court cannot give right to any person in the absence of proof. On the other hand, the respondent was able to furnish to Court not only the Letter of Offer for the Suitland but also a Certificate of Title No. 85285 for 12 I Page plot No. 432 Block E, Tungi Area in Morogoro Municipality issued by the Commissioner for Lands, which was received by the Court as evidence and marked as Exhibit 'P1' and 'P2', respectively. The evidence of the respondent was corroborated and supported by the evidence of the expert witness who confirmed before the Court that the land was surveyed in 2006, he produced the approved survey plan which was admitted as evidence. He also confirmed that the Suitland was allocated to the respondent herein, and the Certificate and Letter of Offer issued were genuine documents issued by the Commissioner for Land and Morogoro Municipal Council. From the above analysis of the evidence, it is crystal clear that the respondent's case, who was the plaintiff at the Trial Tribunal was able to prove his case on the required standards in civil proceedings, and the Judgement of the Chairman of the Trial Tribunal cannot be faulted. As to whether it was necessary to join the Municipal Council as a party, and that it was the duty of the Tribunal to join the Municipal Council, I agree that Sub-rule (2) of Rule 10, Order 1 of the Civil Procedure Code, [Cap 33 R: E 2022] herein referred as the 'CPC', gives a wide discretion to the Court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question to Bl Page implead a party has to be decided on the touch stone of Order I Rule 10 of the CPC which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case. In the present case, the subject-matter of the dispute between the appellants and the respondent was on ownership of the Suitland. Parties herein were required to produce proof of ownership, which they did, and the Tribunal had made a finding as to who owns the Suitland. There was no case of compensation after the land was surveyed. The appellants never said the suit land was surveyed and they were not compensated. The appellants said the land is a squatter and never surveyed. It is cardinal principle that parties are bound by their pleadings. This fact was never pleaded by any party in the proceedings, thus the Tribunal could not have raised it suomoto. The appellants never even raised a counter claim in which they could have raised an issue of compensation after survey. In fact, the 1st appellant said he refused to have his land surveyed, and so he maintained that his land was never surveyed. He ought to have established that the Suitland was his land. 14 I

Page He needed to establish customary title, which he failed, and jumped into establishing that he was allocated the land by the Ward Executive Officer, which also failed as the land was not described, and again the Ward Executive Officer had no power to allocate land. There was no case of any collusion between the respondent's and the Municipal Council is alleged. It has been established that the Suitland was surveyed since 2006, and no one amongst the appellants disputed the survey otherwise they would have filed a case for compensation against the Municipality within the prescribed time. This is a case of trespass which took place in 2017, almost 11 years after the land was surveyed. The issues which was decided is the issue of whether the appellants have a right, title and interest in the suit premises and the appellants therefore are proper and necessary parties as they have interest in the subject-matter of the litigation and their presence were necessary and proper to effectively adjudicate upon and determine the cause of action in the suit. There was no need to join the Municipal Council as there was no issue of double allocation committed by the Municipality. The suit could be adjudicated and the rights of the parties could be declared without necessarily joining the Municipality. Therefore, even the second ground of appeal is unmeritorious and it is hereby dismissed. 15 I Page Regarding an issue of compensation after the land was surveyed, this ground of appeal is totally misplaced as the case before the Tribunal was on an issue of ownership whereas the appellants claimed to own a squatter land. It was later established that the land was not a squatter land but surveyed and people have been allocated the surveyed pieces of land since 2006. The appellants were required to prove the land was never surveyed and was a squatter. They failed to prove that the land was a squatter and never surveyed. The appellants were also required to prove ownership of the premises or Suitland, and that the land was surveyed when they were in occupation of the suit land, and that their premises or crops were there and were identified as one of the properties which were affected by the survey exercise, and if so whether the permanent improvements on their land were valued, and what was the value of the improvements. The appellants were obliged to prove as required under the provisions of the Evidence Act, [Cap 6 R.E 2022] Under Section 101 of the Evidence Act (supra) the general or stable burden of proving a case lies on the plaintiff. This section reads: 16 I Page _J "101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. "102" When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person". The principle is stated in section 102 from the point of view of what has been sometimes called the burden of leading or introducing evidence by a party. If the Tribunal were to entertain an issue of compensation, it would have turned the appellants herein into the plaintiffs and the burden of proof in the case would have been on the appellants to prove by cogent evidence that they owned the land prior to the survey and that there were unexhausted improvements made on the land and the value of those improvements which were affected by the survey. As I said, the case before the Tribunal was not about whether the appellants were compensated after or during the survey, but whether the land is still a squatter land, and that the appellants herein are the owners of the Suitland or not, the issue which was correctly determined by the Trial Tribunal. 17 I Page ; , Consequently, and in view of the aforesaid, the appeal lacks

merits, thus dismissed, with costs. DATED AND DELIVERED AT MOROGORO THIS 28TH
DAY OF JUNE 2024 ~\ (gJJy-r, ~ I ((LA!IFA MANSOOR.) JUDGE 28TH JUNE 2024 18 I Page

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