

TANZANIA / JUDGMENT

20160520 TZHC Mwanza

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20 May 2016

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IN THE HIGH COURT OF TANZANIA AT MWANZA MISC. LAND APPEAL CASE NO. 55 OF 2015
(Arising from the Decision in Land Appeal No. 191 of 2013 of the District Land and Housing
Tribunal for Mwanza at Mwanza dated 11th February, 2015 by Hon. Sillas J.) Chairman) E ..
JOSEPH JI LALA .. II • • ■ • ■ ■ ■ • • ■ I I I ■ • APPELLANT VERSUS
WIN FRIDA GWASA. ■ ~ ■ ■ ■ II ■ ■ • • I ■ ■ ■ RESPONDENT Last Order. •
11/02/2016 Judgment:20/05/2016

JUDGMENT

MAKARAMBA, J.: On 15th November, 2013, WINFRIDA GWASA, the Respondent brought a claim against JOSEPH JILALA, the Appellant before the Mahina Ward Tribunal for blockage of sewage and won and was declared the lawful owner of the disputed land. The Appellant was ordered among other things, to demolish the septic tank he had constructed on the suit land. The Appellant, JOSEPH JILALA, was dissatisfied with this decision and appealed it in the District Land and Housing Tribunal at Mwanza, which dismissed the appeal. The Appellant, JOSEPH JILALA has now come before this Court on second appeal to contest the decision (the District Land and Housing Tribunal for Mwanza at Mwanza in Land Appeal Case No. 191 of 2013 Page 1 of 12 dated 11 th February, 2015 by Hon. Sillas J. Esq Chairman on the following grounds, namely;

1. That, the Appellate District and Land Tribunal Chairman grossly erred in law when he failed and/or neglected to carefully read the entire record of the trial Ward Tribunal, for had he done so he would have noted that the Respondent had stated that she had unconditionally and willingly given the land in dispute to the Appellant to build his toilet-cum bathroom and kitchen thereon.
2. That, without prejudice to the foregoing ground, the learned Appellate Chairman grossly erred in law and fact when he failed to underpin the fact that the Respondent was precluded by the principles of Estoppel, Acquiescence/ Gift and law of limitation from reclaiming the portion of the land in dispute after the Appellant had been in occupation of the same from 2000 a period of 13 years.

3. That, the learned Appellate Chairman grossly erred in law when he failed to discover from the record that the Ward Tribunal had first opined that it had failed to decide the dispute/ but later decided to make a decision against the Appellant quite improperly, which factor occasioned a failure of justice to the Appellant for double-standard treatment. Page 2 of 12 fi
4. That, the Appellate Chairman erred in law when he failed to make a specific finding that in as much as the Ward Tribunal had acted on double-standards its decision was therefore a travesty of Judgment and hence legally incompetent.
5. That, the learned Appellate Chairman grossly erred in law when he decided to visit the locus in quo when similar visit had been made by the trial Ward Tribunal, thereby he reopened the case by acquiring fresh evidence upon which he capitalized his judgment, quite contrary to principles of justice and legal procedure.
6. That, the learned Appellate chairman grossly erred in law when he failed to note that the proceedings of the Ward Tribunal do not incorporate the evidence of a material witness the vendor of the portion of land in dispute one ERASTO NYAGA nor the opinions of each member of the trial Tribunal, quite contrary to law and procedure, thus giving rise to a failure of Justice.
7. That, the learned Appellate Chairman erred in law when he made a decision which is vividly biased in favour of the Respondent while the evidence on record does not bear out that decision.
8. That, the Appellate Tribunal Chairman erred in fact and law for blaming the Appellant's act of refusing and preventing waste water from Respondent's home to flow on to and through his house-yard Page 3 of 12 when in doing so the Appellant adhered to Environmental and Sanitary Laws, and also protected himself and his family and neighbours from contracting diseases caused by such foul water. The Appellant prays before this Court for the following reliefs:-
 - (a) This appeal be allowed in toto by quashing the entire decision of the appellate District Land and Housing Tribunal and that of the trial Ward Tribunal below and set aside the orders made therein.
 - (b) The Respondent be condemned to pay costs to the Appellant in this Court and in the two Tribunals below.
 - (c) The Respondent and his agents or employees be restrained from disturbing the Appellant's peaceful possession and occupation of _ the portion of land in dispute. On the 11 th February, 2016 when the appeal came for hearing both parties were present in person and by consent this Court having explained to them the gist of the appeal, prayed to dispose it by way of written submissions and hence this Judgment. The Appellant in making his submissions elected to abandon the sixth and seventh grounds of appeal for being superfluous and accordingly they were marked withdrawn. Page 4 of 12 I have looked at the remaining grounds of appeal and I am of the firm view that, the first ground of appeal is

broad enough to dispose the entire appeal, thus I shall determine it by considering even the rest of the grounds of appeal. The main contention of the Appellant is that the Appellate Tribunal failed to carefully read the entire record of the trial Ward Tribunal, consequently resulting into an erroneous decision. I have examined both the proceedings and decision of the District Land and Housing Tribunal and trial Ward Tribunal. It is very true as both parties conceded that, both the Chairperson of the trial and Appellate Tribunals misconceived the real issue in question. As Respondent rightly submitted, the dispute was no longer on ownership, encroachment or repossession of the land of the Respondent since the Respondent had unconditionally and willingly given the piece of the land to the Appellant. This is evident in the Statement of Claim the Respondent made before the Ward Tribunal, thus; "Ndugu Joseph Ji/ala ni Jirani yangu/ pindi anajenga m1m1 pia nilikuwa najenga/ baada yapo hapo ujenzi wake alitengeneza "SP Tank" la choo na wakati anajenga palikuwa panaporomoka ndipo akaniomba eneo na mimi kwa sababu nilijua kuwa ni Jirani yangu anatabika niliamua kumsaidia/ nikitumaini kuwa Jirani ndiye nduguyo hivyo nilimshirikisha kwa njia ya meseji hivyo nae hakupinga alikubaliana na/o ndipo akajenga'~ (the emphasis is of this Court) Page 5 of 12 r On the premise of the above statement of claim, the dispute was therefore passage of waste water to the property of the claimant as evident in Statement of Claim by the Respondent before the Ward Tribunal thus; "Hiyo SP tank na chemba mbili na upande aliongeza sijui ni bafu au Jiko, na tuliende/ea kuishi kwa amani baada ya yeye kununua sehemu ya mbele kwa Bwana Bongoman, na ndipo matatizo yalipoanza, kwa kuwa nilinunua nyumba ya Juu ambapo ndiko naishi kwa sasa alinizibia mtaro, kwa kuwa ni eneo lake sikuwa na makuu ndipo nilipoamua kuomba eneo kwa majirani kupitisha mtaro. Nilipomwambia haoni fadhila yangu hivyo basi atoe na yeye iii mimi nipitishe mabomba. Ndipo tulipofika kwa padre kulionge/ea li/ishindikana'~ (the emphasis is of this Court). The dispute between parties therefore arose when the Appellant blocked the Respondent's waste water passage. According to the Respondent, the waste pipe lines ought to have been channeled through the Appellant's area. Thus, the Respondent requested the Appellant to exercise his good neighborhood and kindness to permit the Respondent's waste pipe lines to be channeled through the Appellant's area but it would seem that the Appellant refused. This refusal made the Respondent furious and wondered why it was that difficult on the part of the Appellant to exercise some kindness by allowing the Respondent to channel the waste waters pipes lines while the Respondent had been kind enough to the Page 6 of 12 Appellant by giving the Appellant a piece of plot of land on which to erect his toilet. The Respondent therefore resorted to redeem the plot she had given to the Appellant. This comes out plainly clear in what the Respondent stated during her cross-examination that; "Kuhamisha nyumba ni vigumu, nilihitaji mtaro, kwa kuwa nimeona kuna ugumu toka kwa jirani ndio maana nahitaji eneo langu'~ Based on what I have endeavoured to explain above, it is worth noting that, the Respondent has been claiming for repossession of the disposed land merely on the ground that the Appellant had denied the Respondent access through the Appellant's land, which as it turned out it was given to the Appellant by the Respondent. This makes the only issue for determination to be the status of the land disposed by way of gift. Explaining the legal status of acquisition of land through

unconditional gift basis, the learned Author Abdon Rwegasira in his book titled "Land as a Human Right: A History of Land Law and Practice in Tanzania" at page 117 states that; "Where a person acquires land by way of an unconditional gift, the land becomes his as if he was allocated the same or purchased is from the market. In other word, his title cannot be inferior only for the reason that the land is a gift Unconditional gift inter vivos confers good, absolute and irrevocable title. The position at common law in respect of gifts, which the Tanzania Page 7 of 12 i Land law subscribes to, is that; it is on legal and equitable principles clear that a person sui Juris acting freely, and with sufficient knowledge, ought to have and has power to make, in binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion, and howsoever circumstances'~ In the same book, the author proceeds explain the legal position where a dispute arises between persons where one makes a claim about obtaining land by way of gift thus; "Whenever a dispute arises between persons over land where one person claims to have obtained it by way of a gift, the court of law will consider the following issues in order to decide who of the litigants has got a better title over the disputed land: whether the donor of the gift was sui Juris and competent to give the disputed land; whether there is sufficient evidence of the donation of the disputed land; whether the act of giving was not induced by fraud, undue influence, mistake or misrepresentation, or was not tainted with illegality; whether the gift was unconditional, and, whether the donee of the gift has registered or transferred, in his own name, the interest in land in accordance with the provisions of the Land Registration Act where such interests are compulsorily registrable." Page 8 of 12 On the strength of the legal position as succinctly outlined by the learned author Author Abdon Rwegasira in his book titled "Land as a Human Right: A History of Land Law and Practice in Tanzania" as quoted above, clearly the Respondent having admitted to have given the disputed land to the Appellant as a gift, the land therefore for all intent and purposes becomes that of the Appellant as if the Appellant had purchased it in the market. This makes the Appellant to have acquired an absolute and irrevocable title over the said land. On what the Respondent clearly testified before the Ward Tribunal, this Court is satisfied that; the Respondent willfully and unconditionally gave to the Appellant the disputed land; the Respondent was competent to do so and was not induced by fraud, undue influence, mistake or misrepresentation; and that the disposition was not tainted with any illegality. It is the above reasons, and as the Appellant rightly, the claim of the Respondent to redeem the piece of land which the Respondent had given to the Appellant as a gift was legally impracticable. As I intimated to earlier, the dispute therefore remains on the waste water passage by the Respondent. The Respondent contends that the Appellant has neglected and/or failed to exercise any kindness by not allowing the Respondent to channel waste water pipes through the Appellant's land. The pertinent issue here is, whether this Court being a court of law and equity may invoke its inherent powers to enforce kindness between disputing parties. The answer to this question is simply a big "NO" for the simple reason that it is not within the province of this Court as a court of law and equity to exercise sympathy in the form of kindness, Page 9 of 12 which to me seems to be purely a moral and not legal obligation it being a matter so personal, which can be negotiated and

agreed between the parties without the intervention of this Court. Matters concerning waste water being matters falling within the administrative powers of Local Government Authorities, the parties if so minded may take the matter before those authorities which are competent to determine the fate of the construction of waste pipe lines. This Court having determined that the dispute over construction of waste water pipes over land does not fall within its province, the question of limitation period of suit does not therefore arise and is therefore of no essence and thus it stands dismissed. The Appellant has raised the question of double standard treatment which actually arises from some suspicion of unfair play and biasness by the Ward Tribunal. On the record of the proceedings of the Ward Tribunal, as the Appellant rightly stated, there are two documents which appear to be confusing to the disputing parties. These are the Judgment dated 4th February, 2014 and the other document is the one titled "MAONI YA BARAZA LA KA TA MAHINA '~ which simply translates into "THE MAHI NA WARD TRIBUNAL'S OPINION." According to the latter document, the Mahina Ward Tribunal having visited the locus in quo and realized that the toilet and the septic tank had been built therein, opined not to be in position to make any decision. And that document was never dated or signed by the Chairperson of the Tribunal or any of the officers of the Ward Tribunal. In any event, the "THE MAHINA WARD TRIBUNAL'S OPINION" is so vague, ambiguous and improperly procured by the Ward Tribunal, which Page 10 of 12 • make it bereft of any legal force and this Court cannot act on such document. However, this document seems to contradict the Judgment of the Ward Tribunal which indicates that, the Tribunal had finally determined the suit and issued necessary orders against the Appellant. This could be the only matter which raised the Appellant's suspicion of unfair play and biasness by the Ward Tribunal. I have also noted that, the original copy of the Judgment by the Ward Tribunal was never signed by the Tribunal. Neither the Chairman nor the Secretary and other members/Assessors of the Tribunal signed the original copy of the Judgment, which appears in wet ink handwriting. That aside, the typed copy of the Judgment of the Ward Tribunal shows that it was delivered on 4th February, 2014 but it was stamped and signed on 1st April, 2014. These clearly identified errors therefore renders the Judgment of the Ward Tribunal invalid for having been improperly procured. Furthermore, the typed proceedings of the Ward Tribunal show to have been recorded, dated, and signed on 1st April, 2014, which means that the proceedings were recorded after the Judgment had been delivered, which makes it highly unprocedural and a clear abuse of the Court processes. It is for the above reasons that, this Court hereby declares the proceedings both of the Ward Tribunal and of the Appellate District Land and Housing Tribunal a nullity, thus are hereby quashed and set aside. In the premise, it will not serve any useful purpose for me to proceed to determine the other grounds of appeal. This Court having declared both proceedings of both Tribunal a nullity and having quashed Page 11 of 12 . and set them aside, the prayer of the Appellant for issuing restraining orders fail. In the whole and for the above reasons the Appeal succeeds and is hereby allowed. The Judgment, Orders and Proceedings of District Land and Housing Tribunal for Mwanza at Mwanza in Land Appeal Case No. 191 of 2013 dated 11th February, 2015 by Hon. Sillas J. Esq Chairman and the trial Ward Tribunal of Mahina in Application No. 95 of 2013 are hereby quashed and set aside.

The circumstances of this case and of the parties militate against award of any costs. Each party shall therefore bear its own costs in this matter. It is so ordered. Sgd: R.V.

MAKARAMBA JUDGE Date: 20/05/2016 Coram: Hon. Rujwahuka, DR Appellant: Present in person Respondent: Present in person B/C: Sekela Order: Judgment delivered today in the presence of the both parties in person. ~ . . E.G. RUJWAHUKA DEPUTY REGISTRAR Page 12 of 12 I /

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