

TANZANIA / JUDGMENT

MKUNGU STEPHANO ANOTHER VS VICENT LUGANGIZYA

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MWANZA SUB REGISTRY) AT
MWANZA LAND APPEAL NO. 8588 OF 2024 (Arising from Ukerewe District Land and Housing
Tribunal in Application No. 125 of 2009 dated 06/02/2024, certified and collected on 28/03/2024)
MKUNGU STEPHANO..... 1st APPELLANT SAADA
STEPHANO..... 2nd APPELLANT VERSUS VICENT LUGANGIZYA
KABATI..... 1st RESPONDENT S.I. ISANGI AUCTION MART AND COURT
BROKERS..... 2nd RESPONDENT

JUDGMENT

31st July & 15th August, 2024 A. MATUMA, J. "Administration of justice is a noble duty. It should be kindly executed. An administrator of justice like Magistrates or Judges should always be curious to justice whenever executing their adjudication duties. They should not let matters which appears before them detrimental to justice to go unchecked and dully determined" i That is what I said in the case of Dastan Eia versus The Republic (DC) Criminal Appeal No. 01/2020 in the High Court of Tanzania at Kigoma. I repeated so in several other cases due to what I observed on some matters I presided through which I noted that some adjudicators to have acted without curiosity to justice by allowing technical litigants to defeat justice which was otherwise apparent on the face of record. Thus, for instance in the case of Danstan Elia supra, the Police Officer obtained a detailed Caution Statement from an insane person showing that the accused confessed the crime of murder and gave details on the manner the crime was committed. When the matter came for trial not only the court but also the prosecutors were left wordless when we noted that the accused before the court was a complete insane man. He did not even know that he was in the court room. He was busy with his activities which are normally done by insane or idiots. Even the report from the Mental institute and the historical background of such accused indicated that he was an insane who cannot state anything meaningful. But from this person a police officer recorded a well detailed statement showing the confession to the crime. Without curiosity to justice, such statement may be used in evidence in disregard to how and in which manner the police officer 2 managed to speak and record the statement of a person who cannot even speak properly. Also, in the case of Patrick S/O Ezron versus Republic, (DC) Criminal Appeal No. 51 of 2020 (HC) at Kigoma, the appellant who was allegedly 20 years old as per the charge

sheet for rape and impregnating a 16 years school girl was convicted for rape by his own plea of guilt and sentenced to a custodial term of thirty (30) years. Immediately after such sentence, the prosecutor withdrew the charge of impregnating a school girl. The appellant in that case Patrick Ezron appealed to the High Court and I was privileged to preside over such an appeal. When the appeal came for hearing I was shocked to see a minor entering into the courtroom. I inquired whether he was the very appellant and it transpired to me that he was him. I asked him his age and he told me that at that time he was 18 years old in the meaning that at the time he was charged at the trial court, he was only 16 years old. I asked the learned state Attorney to comment on whether the appellant's age in the charge sheet really corresponded to his apparent age. The learned state attorney M/S Edna Makala doubted the age stated in the charge sheet. Therefrom I made some inquiry on the matter only to find that the appellant's parents had in possession of a birth certificate indicating the real age of the appellant who was still a child. Had the trial Magistrate been curious to justice, he/she could have not acted on the age of the accused before him/her as stated in the charge sheet without further inquiry because the apparent age of such accused was suggesting otherwise. Because of the lack of curiosity to justice a minor found himself incarcerated to prison for thirty years. Why I decided to start with such a memorial situation, it is because in the instant case, the parties seem to have dropped into the hands of judicial officers who did not care for justice. As a result they were not given proper guidance and as such they found themselves litigating in court for more than eighteen (18) years unnecessarily. This is a very pathetic matter as it can be seen in the herein above brief history of the matter. The appellants are family members of the late Stephano whereas the 1st appellant is the son of the late Stephano and the 2nd appellant is the widow of the late Stephano and thus a mother of the 1st appellant. On the other hand, the 1st Respondent is the son of the late Kabati Kikwile. The two deceased persons Stephano and Kabati are clan relatives. None of the parties claimed ownership of the Suitland but each claimed that the Suitland belonged to their respective deceased persons and thus beneficiaries. Nevertheless, the 1st Respondent sued one Bahati Stephano the son of the 2nd appellant and brother of the 1st appellant at Ngoma Ward Tribunal vide Land suit No.2 of 2007. In other words, the 1st Respondent Vicent Lugangizya sued for the estate of his late father, and Bahati Stephano was sued to defend the estate of the late Stephano. That can be seen just on the first page of the judgment of the Ward Tribunal in which it is recorded that the first Respondent lodged his complaints against "familia ya marehemu Stephano" although only Bahati Stephano was cited as the Respondent with no any title of representation. The trial tribunal having heard the suit ex-parte against Bahati Stephano ruled out that the suit land be divided to the two and each continue to use part of that suitland as they used to cultivate. Just to qustes, the tribunal held; —x 5 "Ni kweli mdai hulilima shamba hiio na hadi sasa kuna zao lake la mahindi, pia huwakodishia baadhi ya watu na baadhi yao nao wameHma mazao ya chakula kama mihogo tendo linalopelekea kutaka apewe shamba tote kwa kuona kuwa ni mall ya baba yake na yeye ndiye mrithi wa shamba hiio lakini Mawazo hayo aHyapata baada ya mgogoro kati yake mdai na mdaiwa. Hivyo baraza Hkaamua mdai aendeiee kuiima eneo au shamba ambao hulilima siku zote kwa kufuata mipaka waiyokubaiiana na familia ya ndugu Stephano hapo awaii. Baraza pia iiiiimpa mdaiwa haki ya kuendeiea kuiitumia au kuiima shamba ambao siku zote hulilima kwa kufuata mipaka waiyokubaiiana na mdai biia biia kuvuka mipaka na kuiima eneo ia mdai. Haki

hii kwa mdaiwa imetoiewa kwa sababu mdaiwa ameishi katika shamba hiio na kuiiima zaidi ya miaka theiathini" From such decision, the 1st Respondent herein started to disturb the whole family of the late Stephano seeking to evict them from the whole suitland. Some family members of the late Stephano including the 1st appellant herein, Getrude Stephano and Mriba Stephano became aggrieved and decided to institute a fresh case to the District Land and Housing Tribunal for Mwanza vide Land Application No. 11 of 2008. On 30/04/2008, the District Land and Housing Tribunal struck out such suit on the ground that whoever was aggrieved by the decision of the Ward Tribunal should have appealed; "This tribunal after it heard the applicant realized that this case was heard and decided by the Ngoma Ward Tribunal of Ukerewe the decision which is still valid in the eyes of the law. The applicant is advised to follow legal procedure as to appeal or Revision of the Ward decision. Application is struck out for it is improperly filed after it is was finally decided by the Ward tribunal of Ngoma" After such decision, the 1st Respondent through Misc Application No. 140 of 2008 applied for execution of the Decree but misleadingly applied for execution of the Decree of the District Land and Housing Tribunal in Land Application No. 11/2008 purporting to be a Decree Holder against Getruda Stephano, Mribo Stephano and Mkungu Stephano (1st appellant herein) as if the District Land and Housing Tribunal heard the matter on merits and issued the Decree. Despite such misleading application, the chairman of the District Land and Housing Tribunal appointed the 2nd Respondent herein to execute the Decree against the appellants in respect of the decision of Nyanzenda Ward Tribunal case No. 03 of 2005 the case which had never been in place between the parties. But again the execution orders was issued against the 1st appellant and his two relatives who had not been defeated by the 1st Respondent in any suit by any court or tribunal. The 2nd Respondent without bothering on whether there was really a decree from Nyanzenda Ward Tribunal through case No. 3 of 2005 against the appellants executed the non-excising decree by demolishing the appellants' properties including dwelling houses. The appellants having been rendered homeless through such execution and believing that they lawfully occupied the suit premises filed Land Application No. 125 of 2009 claiming for Tshs. 11,494,400/= as the value of the destructed and demolished properties, Tshs,7,000,000/= as general damages, Tshs.2,000,000/= as disturbances and interests thereof. The Respondents entered the defence that the demolished houses were in execution of the decree and the trial chairman accepted that defence and proceeded to dismiss the application before him. The appellants became further aggrieved hence this appeal with a total of five grounds whose complaints are to the effect that; 8

- i. That there was no evidence to show that the 1st respondent lawfully owned the suit premises. ii. That it was erroneous to execute a non-existing decree of Nyanzenda Ward Tribunal in case No. 3 of 2005. Hi. That the decision of Ngoma Ward Tribunal was wrongly ignored, iv. Failure to consider the appellants' evidence.
- v. Failure to take into consideration the doctrine of adverse possession because the appellants have been in occupation of the Suitland for more than forty years. At the hearing of this appeal, the appellants were present in person. The 1st respondent was also present in person and was along with the 2nd respondent represented by M/S Elizabeth Muna Jerome learned advocate. The 1st appellant submitted on the grounds of appeal that the 1st

respondent is not a lawful owner of the suit land. That execution of the decision of Nyanzenda Ward was wrong because the only decision available relating to their relative Bahati Stephano was of Ngoma Ward Tribunal in which each party was given a portion of the Suitland but the Respondents have executed the decree by making total eviction from the whole Suitland making them homeless and farmless. 9 He also submitted that even the execution was carried on to their respective residences and farms against the decision of Ngoma Ward Tribunal which decreed the 1st Respondent to only part of the suit land which he himself used to cultivate. The 2nd appellant merely joined hands with the 1st appellant. On her part Elizabeth Muna Jerome learned advocate argued that the matter at the District Land and Housing Tribunal was just relating to execution proceedings and not ownership of Land but this appeal tends to challenge issues of ownership which were not at issue in the lower tribunal. She cited the case of Hussein Mapunda versus Alfred Mwandali, Civil Appeal No. 393 of 2021 (CAT) to the effect that the appellate Court should look into matters which were decided by the lower court. She then prayed for the dismissal of this appeal with costs. Having heard the parties as such, I invited the 1st Respondent in person to address me on the complaints made by the appellants that the execution was made to evict them from the whole land against the decision of Ngoma Ward Tribunal which divided the Suitland to the two families. 10 The 1st Respondent admitted that indeed they made execution to the whole Suitland because he was not satisfied with the decision of Ngoma Ward Tribunal to divide such land while it is whole belonged to him. He also argued that despite the fact that he was aggrieved by the Ward Tribunal's decision, he asked the tribunal to fix boundaries to the division made but the tribunal refused. In the circumstances, he was to make a total eviction to the suit land as a whole because up today no boundaries demarcating it to the two families. Having heard the parties as herein above and taking into consideration the historical background Supra, I find it that this appeal can be determined generally by determining one issue as to whether the execution process was lawful. That was the crucial issue delt and decided by the District Land and Housing Tribunal in that the execution was lawfully and properly done. On my part, I find that the chairman of the District Land and Housing Tribunal was wrong to reach such a decision. First of all, there was no any decree from Nyanzenda Ward Tribunal to be executed by the respondents against the appellants. 11 The 2nd respondent acted carelessly to execute a non-existent decree. He ought to have demanded the decision and decree of the Nyanzenda Ward Tribunal to satisfy himself of the existence of such decision and decree to be executed. This is because he was appointed through Wise. Land Application No. 140 of 2008 to execute the decree of the Nyanzenda Ward Tribunal. The District Land and Housing Tribunal in the instant matter was thus wrong to rule out that the execution was lawful while it was carried on a non-existing decree. But even if we assume that the decision referred was meant to mean Ngoma Ward Tribunal, yet such a decision was not against the appellants but one Bahati Stephano. The 1st Respondent did not apply to execute the Decree against Bahati Stephano but he applied for execution against the appellants whom he had not obtained any decree against them. Therefore, Bahati Stephano who litigated with the 1st Respondent was not cited in the execution proceedings and thus not accorded the right to be heard. Those who were cited

including the appellants had no any case decided against them in favour of the 1st Respondent (' 12 But again, even if it is assumed that the suit at the trial tribunal was against the appellants and decided in favour of the 1st Respondent, such a decision did not decree the 1st respondent to the whole suit land but only part of it. In that respect, the appellants should have not been affected anyhow to their residences and farms. Unfortunately, as declared by the 1st respondent himself at the hearing of this appeal, they made total eviction to evict the appellants from the whole Suitland because the 1st Respondent was of the view that the Ward tribunal erred to divide it without justifiable cause and that when it was asked to fix boundaries it refused. In that respect, the execution was not carried out to satisfy the decree but to satisfy the wishes of the 1st respondent. That being the case the District Land and Housing Tribunal erred to rule out that the execution was lawful. With the herein observations, I find that the execution process was motivated with ill-will motive to evict the appellants who were not parties to any suit with the 1st Respondent and assuming that they were parties to the Ward Tribunal's decision, then the ill-will motive is depicted from the execution process in which the eviction of the appellants was made against the whole suit land contrary to the decision which decreed only 3 part of the suit land to the 1st Respondent. In that respect I find merits in this appeal. I allow the appeal and quash the decision of the District Land and Housing Tribunal. The appellants are entitled to damages suffered as a result of the unlawful execution. I, therefore, award them against both respondents Tsh. 11,494,400/= as the value of the destructed and demolished properties. This is because during trial the respondents did not dispute the value of such properties as pleaded. They only concentrated on justifying the demolition purporting that it was in the execution of the decree. The decreed amount herein should be shared equally by both respondents i.e S. I. Isangi Auction Mart and court Brokers has to pay half of the decreed amount Supra i.e. Tshs. 5,747,200/= and the rest half be paid by the 1st Respondent. The 2nd Respondent is also burdened because she carelessly executed the non-existing decree of the Nyanzenda Ward Tribunal and even if it is assumed that the execution of the decree was that of Ngoma Ward Tribunal, she carelessly executed the decree to satisfy the wishes of the 1st respondent against the decree itself which decreed the 1st respondent to only part of the Suitland. If at all the trial Ward tribunal refused to fix boundaries to the Suitland as lamented by the 1st respondent, that means the decree was not 14 executable. The appointed Court Broucker (2nd respondent) should have sought the guidance of the appointing court as to how could execution be carried on in the absence of clear boundaries made in the judgment and revealed on the locus in quo. Executing unclear decree to the detriment of innocent people is nothing but careless and neglect of legal duty. Court Broker as an officer of the Court must execute his duties in accordance to the law. He cannot execute a none existing decree or a decree against a none party to the decree and or execute the decree against the decree itself or the decision thereof. The 1st respondent is further condemned to pay the appellants general damages for disturbances occasioned against them for more than 18 years. During all this period the appellants were being disturbed and finally evicted from the Suitland without there being any case against them. I am aware that the 1st respondent purported the struck-out order in Land Application No. 11/2008 Supra as a decree against the appellants.

That is wrong. The struck-out order Supra restored the parties to the original suit No. 2/2007 of Ngoma Ward Tribunal in which the appellants were not parties and thus no decree was issued against them. The appellants pleaded general damage to the tune of Tshs. 7,000,000/= but I award The appellants and their respective families should continue to reside and cultivate their respective premises and farms and the 1st respondent should continue to use only that portion he was decreed against Bahati Stephano. I further find that the District Land and Housing Tribunal ought to have scrutinized the legality of the decision of the Ward Tribunal of Ngoma before allowing the execution process even if no appeal was made against such decision. This is because the law is settled that whenever there are unpleasant features in the lower court's records, the appellate court is duty bound to exercise its Revision powers to remedy the situation. See: PAUL JACOB V. THE REPUBLIC, Criminal appeal no. 2 'B' of 2010 and Editor, Majira News Paper and 3 Others vrs Rev. Fr. Riccardo Enrico Riccion and 26 Others, Civil Appeal no. 35 of 2013. Since the litigation at the trial tribunal was between the 1st Respondent and one Bahati Stephano both of whom were claiming ownership of the suitland to their respective deceased fathers, they had no locus standi in the matter in the absence of letters of administration of their respective estates. Again, the decision made at the trial tribunal was not executable because it lacked clear demarcations of the division made to the suitland. That is 16 why the 1st Ressonndent decided to use the loophole to make total eviction. Not only that but also, not all interested parties to the suitland were involved in the suit but the execution process was intended to evict them without having been accorded opportunity to defend their interests. With all these, I step into the shoes of the District Land and Housing Tribuna and do what they ought to have done. I quash the decision of Ngoma Ward Tribunal in respect of case no. 2 of 2007 and restore the parties to their original position which existed prior to that case. Whoever claims interest in the suitland or part of it should take the necessary legal steps to establish his interests. Having said all these, I do hereby allow this appeal with costs on the grounds and reliefs stated above. Right of further appeal explained. 17

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