

TANZANIA / JUDGMENT

zubeda ahmed lakha vs hajibhai kara ibrahim others 2022 tzca 310 25 may 2022

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA (CORAM: MWARIJA. J.A.. MWANPAMBO, J.A. And MASHAKA, J.A.,[^] CIVIL APPEAL NO. 238 OF 2018 MRS. ZUBEDA AHMED LAKHA..... APPELLANT VERSUS

1. HAJIBHAI KARA IBRAHIM
2. THE MINISTER OF LANDS, NATURAL .RESPONDENTS RESOURCES AND TOURISM
3. THE ATTORNEY GENERAL (Appeal from the Judgment of the High Court of Tanzania atTabora) (Mchome, dated the 31stday of August, 2000 in Civil Case No. 15 of 1994 JUDGMENT OF THE COURT 29th March & 25th May, 2022 MWANPAMBO. J.A.: The High Court of Tanzania sitting at Tabora tried a suit in Civil Case No. 15 of 1994 whereby Mrs. Zubeda Ahmed Lakha, the appellant, who sued the respondents for the revocation of her right of occupancy involving land hitherto known as Plot No. 153, Block 'A' Lumumba Road, Kigoma Municipality comprised in certificate of Title No. 6793, henceforth, the suit premises. As the High Court dismissed the suit, the appellant has preferred the instant appeal. According to the pleadings, most of the facts are not in dispute and these are as follows: The appellant and Hajibhai Kara Ibrahim, i the first respondent, were sister and brother respectively. It was common ground that the latter had been invited by the former to stay with her at the suit premises in the year 1974. It was not disputed too that the appellant acquired title to the suit premises through transfer from Noorallah Gulam Hussein Rajpa Ladak way back in 1970. Similarly, it was common ground that after staying with the first respondent for some time, the appellant left to the United Kingdom (the UK) to take care of her ailing husband. She left her property in the care of the first respondent under an oral arrangement. While the appellant was away, the first respondent used to pay annual land rent in relation to the property to the Land authorities at her request. There was no issue involving default in the payment of land rent at any time. Despite the appellant staying in the United Kingdom, she used to visit Tanzania from time to time and at all material time, she never suspected anything wrong concerning her property least from her own brother; the caretaker. It was not until 1993 when she learnt that ownership to her house left in the care of the first respondent had been transferred to him without her knowledge and consent. Her attempts to have the questionable transfer reversed ended in vain.

Subsequently, she conducted an official search in the land register in Mwanza Land Registry vide exhibit P3 which revealed that her right of occupancy over the disputed house had been revoked by H.E. the President through the second respondent on 24/05/1985. Further, the official search showed that the plot on the suit premises had been sub-divided into three plots to wit; Nos. 153/1, 153/2 and 153/3 and reallocated to the first respondent, Ladhu Jaffer and William Bidyanguze, respectively. Her further attempts to follow up with the Land office landed into a revocation instrument (exhibit D5) and copies of letters of offer to the new allocatees of the land in dispute. As a result of the foregoing, the appellant instituted the suit challenging revocation of her right of occupancy and subsequent re-survey of the land, sub-division and reallocation to third parties as aforesaid. By and large, her case was that the revocation of her title was illegal because no notice was issued to her before the President revoked her title and that the revocation was triggered by conspiracy between the first respondent and some Government officials in the Ministry of Lands. She prayed in consequence that, the High Court declares the revocation and allocation of the land to the first respondent illegal and his continued stay on that land be held to be trespass. The High Court was further asked to declare the appellant 3 as a lawful owner of the disputed premises followed by an order for vacant possession, an award of general damages and costs. Not amused, the first respondent distanced himself from the alleged conspiracy with the second respondent's officers resulting into revocation of the appellant's right of occupancy and allocation of one of the plots after sub-division to him. On the contrary, he contended that the revocation was a result of the appellant's own wrong doing by selling part of her land to one Ladhu Jaffer in breach of the conditions prescribed in the certificate of occupancy (exhibit PI). Besides, whilst admitting that he was entrusted with the suit premises, he contended that the arrangement was for two years only and thereafter, the appellant sold the house to him for £11,000 as purchase price allegedly paid to the appellant by Ramzan Kara Ibrahim staying in the UK. The second and third respondents' case was that the right of occupancy was lawfully revoked as a result of breach of conditions 2 and 3 in the certificate of occupancy. The appellant's case was prosecuted through two witnesses; herself as PW1 and Gulam Raza (PW2). The substance of the appellant's evidence was that the revocation of her right of occupancy 4 was invalid as it was made without notice to her. She denied having sold part of the land on the suit premises to any person neither was the house condemned to be unfit for human habitation as alleged by the second respondent. In his defence, the first respondent maintained that he occupied the house in dispute initially as an invitee and subsequently, from 1990 as an owner having purchased it from the appellant. He was resolute that the appellant had no cause for complaint against revocation having sold part of the land to Ladhu Jaffer for TZS 40,000.00. All the same, the first respondent admitted in cross-examination that, although he bought the house from the appellant in 1983, he did not pay the purchase price neither was there any signed sale agreement. Similarly, he admitted that the affidavit for sale tendered as exhibit P8 was made after the institution of the suit. The last witness was Francis Matalis (DW2), Regional Land Development Officer for Kigoma region at the material time. Like DW1, this witness admitted that the appellant was the registered owner of the suit premises before her right of occupancy was revoked in 1985.

DW2 cited disposition of the right of occupancy without the consent of the Commissioner for Lands contrary to condition 3 in the certificate of occupancy as the main reason for the impugned revocation. He admitted having recommended to the Commissioner for Lands for revocation of the right of occupancy by reason of sale of part of the land to Ladhu Jaffer upon information from the first respondent. As to whether there was notice prior to revocation, DW2's evidence was that there was no requirement for any notice prior to revocation but even if that was the case, the appellant was an absentee land lady for a long time who left no address through which such notice could have been sent. He also alluded to the house being dilapidated and unfit for human habitation as a reason for the revocation but without more. According to DW2, in so far as the revocation was proper, the sub-division of the plot and the ultimate reallocation to the first respondent of plot No. 153/1 by reason of his long occupation in the premises was in order. From the pleadings, the trial court framed six issues for determination of the suit but boiling down to three main issues, that is to say; one, whether the appellant breached any of the conditions in the certificate of occupancy, two, whether the revocation of the appellant's right of occupancy was proper and; three whether the sub-division of the plot and the re- allocation to the first respondent of one of the plots were proper. 6 The trial court made affirmative findings on all issues having believed the respondents' evidence in support of the first issue that the appellant had disposed of the part of the land on the plot in contravention of the grant which entitled the President through the second respondent to revoke the title as he did. Regarding propriety of the revocation, the learned trial Judge found that since the appellant breached the conditions of the grant, the revocation was proper with or without notice. The learned trial Judge reasoned that at any rate, had notice been a requirement prior to revocation, it would not have been practically possible to serve the appellant who was an absentee land lady for a longtime as she left no address for that purpose. Having made an affirmative finding on the propriety of the revocation, the trial court concluded that the sub-division of the plot into 3 plots and allocation of plot No. 153/1 to the first respondent as proper. In the end, the trial court dismissed the appellant's suit, hence the instant appeal. The memorandum of appeal consists of six grounds of appeal. The first ground faults the trial court's finding that the appellant breached the conditions in the right of occupancy and thus her title was rightly revoked. The complaints in grounds 2,3,4 and 5 are directed against the trial court's finding that there was any disposition by way of sale of part of the suit premises capable of passing title to the first respondent. Lastly, the trial court is faulted for holding that the appellant failed to prove her case against the respondents. Mr. Mugaya Kaitila Mtaki, learned advocate represented the appellant during the hearing just as he did before the trial court. The first respondent was ably represented by Mr. Cosmas Tuthuru, learned advocate whilst Messrs. Ponziano Lukosi and Lameck Merumba, learned Principal State Attorney and Senior State Attorney respectively, represented the second and third respondents. Mr. Mtaki had filed written submissions in support of the appeal so did the learned advocate for the first respondent in reply pursuant to rule 106 (1) and (7) respectively of the Tanzania Court of Appeal Rules, 2009 (the Rules). The second and third respondents opted to be heard orally having failed to file their written submissions in reply. The learned advocate for the

appellant formulated five issues out of the six grounds of appeal but in effect they all boil down to two issues, that is to say; one, whether there was breach of the conditions in the certificate of occupancy (exhibit PI); two, whether there was any operative disposition of the right of occupancy by way of sale of the suit premises. The last ground of appeal which relates to whether the appellant did not prove her case is consequential, whose determination is dependent on the outcome of the two above

issues.

Mr. Mtaki commenced his submissions with the second issue before addressing us on the first one. The substance of his submission was that since the reason which triggered the revocation of the appellant's title was the alleged sale of suit premises to the first respondent, it was incumbent for the trial court to have been satisfied that the alleged sale was operative in the eyes of the law. According to the learned advocate, the alleged disposition by way of sale was not in conformity with Regulation 3 of the Land Regulations, 1948 (the Regulations) in force at the material time. To bolster his submission, the learned advocate cited some of the Court's previous decisions in *Methusela Paul Nyagwaswa v. Christopher Mbote Nyirabu* [1985] T.L.R 110 and *Chandrakant Vinubhai Patel v. Frank Lionel Marealle & Another* [1984] T.L.R 231 for the proposition that any disposition of a right of occupancy without the consent of the Commissioner for Lands is inoperative, unenforceable and void. In his oral submission, the learned advocate argued that in the first place that there was no evidence proving sale of part of the suit plot to Ladhu Jaffer as a reason for the revocation of the right of occupancy. Besides, Mr. Mtaki argued that neither DWI's testimony nor exhibits D1, D2 and D3 proved existence of any valid and operative sale of the suit premises to first respondent at for £11,000 allegedly paid on his behalf by Ramzan Kara Ibrahim. He argued further that, at any rate, exhibits D1, D2 and D3 purportedly proving sale of the suit premises to the first appellant were executed after the institution of the suit which explains why they were not pleaded and annexed to the first respondent's written statement of defence. He argued further that, since the impugned sale was not in writing and in the prescribed form neither had the requisite consent from the Commissioner for Lands as required by the Regulations, it was an error on the part of the trial court to find that there was any operative sale constituting breach of condition 3 in the certificate of occupancy. He also referred to our decision in *Malmo Montagekonsult AB Tanzania Branch v. Margaret Gama*, Civil Appeal No. 86 of 2001 (unreported) citing the decision of the full bench in *Abualy Alibhai Azizi v. Bhatia Brothers* [2000] T.L.R 288 reiterating the proposition that there can be no operative and effectual disposition of a right of occupancy in the absence of the requisite consent. Submitting on ground one, subject of the first issue, Mr. Mtaki conceded that in terms of section 10 (1) of the Land Ordinance, Cap. 113 (repealed), the President had power to revoke a right of occupancy upon good cause. However, the learned advocate argued that there was no good cause behind the impugned revocation. He advanced two but interrelated arguments. One, there was no proof of breach of any condition in the certificate of occupancy by way of disposition since the alleged sale to Ladhu Jaffer was no sale in the eyes of the law constituting breach triggering exercise of power to revoke the title under section 10 (1) of the repealed Land Ordinance. Two, that the

revocation was bad for want of notice to the appellant. At the Court's prompting, the learned advocate argued that contrary to the view taken by the trial court on service of notice, the appellant was not an absentee land lady neither was there any proof that the second respondent had prepared any notice to show cause but failed to deliver it to the appellant's last known address. On the above submissions, the learned advocate urged the Court to allow the appeal with costs. ii Not surprisingly, Mr. Tuthuru supported the trial court's findings. To start with, Mr. Tuthuru argued that notice prior to revocation for breach of the condition in the certificate of occupancy was not a legal requirement and so the second respondent breached no law. Relying on the decision of the High Court in *Rajabu Hasara v. Saraya Rashidi* [1983] T.L.R. I II, the learned advocate argued that since notice before revocation was not a legal requirement, it was not open for the appellant to challenge the second respondent by way of a suit rather through a judicial review. With respect, that decision is of no avail to the respondents in view of *Patman Garments Industries Ltd v. Tanzania Manufacturers Ltd* [1981] TLR 304 whereby the Court held that judicial review is one of the means of challenging a revocation order but not the sole means. The learned advocate contended that in any event, the appellant left no address through which notice could have been sent before revocation. We understood Mr. Tuthuru suggesting that the appellant was to blame for her alleged failure to leave an address with the Land office in Kigoma. As to the complaint on the sale of the suit premises to the first respondent, initially, Mr. Tuthuru was adamant that the appellant sold the same. A little later, he conceded that the sale was ineffectual to 12 constitute disposition amounting to breach of condition 3 in exhibit PI on the basis of which the President revoked the appellant's title. Nevertheless, the learned advocate was resilient that the allocation of one of the plots to the first respondent after the sub-division was proper. Mr. Merumba who addressed the Court for the second and third respondents had similar arguments with the first respondent's advocate. He contended that the High Court rightly found that there was breach of the conditions in exhibit PI which constituted good cause for revocation under section 10 (1) of the repealed Land Ordinance. The learned Senior State Attorney was equally supportive of the trial courts' finding that the second respondent was not legally bound to issue any notice before revocation the more so considering that the appellant was an absentee land lady for a long time who had not left any address for that purpose had such notice been a requirement. Before winding up his submissions, Mr. Merumba found himself unable to maintain his stance on the effect of the revocation without prior notice. He also conceded to a question put to him by the Court that revocation without notice to show cause was tantamount to denying the appellant right of hearing before her right of occupancy was revoked. In the absence of evidence on record proving that the second respondent prepared any notice and made attempts to serve the appellant through her last known address, Mr. Merumba could not stand by the trial court's finding in that regard. Finally, the learned Senior State Attorney expressed doubts on the evidence of sale of the suit premises to Ladhu Jaffer on the basis of which the second respondent revoked the appellant's title as wanting. In his rejoinder, Mr. Mtaki urged the Court to allow the appeal considering that the revocation of the appellant's right of occupancy was triggered by an inoperative sale of the suit premises which fell below proof of the existence of good cause envisaged by section 10

- (1) of the repealed Land Ordinance. Having heard the learned arguments in the context of the issues before us, we wish to preface our discussion with the obvious, that is, onus of proof on the issues before the trial court. It is plain from the pleadings that the respondents alleged that the appellant's title was revoked on good cause because the appellant sold the suit premises to Ladhu Jaffer without the consent of the Commissioner for Lands in breach of condition 3 in the certificate of occupancy. That means that the respondents were bound to prove those allegations as required by section 110 (2), 112 and 115 of the Evidence Act [Cap. 6 R.E. 2019]. Section 112 of Cap. 6 places burden of proof as to the existence of a particular fact to the person who wants the court to believe that such facts exist. On the other hand, section 115 of Cap. 6 is dedicated to the burden of proving facts especially within the knowledge of a particular party in civil proceedings as it were. There is no doubt that sale of the suit premises disputed by the appellant was within the respondents and for that matter the burden of proof rested on them. It is obvious to us that the determination of the 3rd and 4th issues framed by the trial court was dependent on resolution of the 1st and 2nd issues; whether the appellant was in breach of her right of occupancy conditions and whether the revocation was proper. As stated earlier, the burden of proving such allegation was solely on the respondents. The appellant had no duty to prove any of the allegations for, as we held in *Charles Christopher Humphrey Richard Kombe t/a Humphrey Building Materials v. Kinondoni Municipal Council*, Civil Appeal No. 125 of 2016 (unreported) subscribing to the commentaries in the works of Sarkar's Laws of Evidence, 18th Edition, M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis thus: "...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. ...The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."[at page 1896] It can hardly be disputed in this appeal that the respondents' allegations on the sale were negative propositions as far as the appellant was concerned and thus incapable of proof by her. Luckily, Messrs. Tuthuru and Merumba conceded in their submissions that on the evidence placed before the trial court, the alleged sale of the suit premises to the first respondent or Ladhu Jaffer was not in accordance with Regulation 3 of the Regulations for want of consent from the Commissioner for Lands. We respectfully agree with the learned counsel and hold that on the authority of the cases cited by Mr. Mtaki, to wit; *Methusela Paul Nyagwaswa, Malmo Montagekonsult AB Tanzania Branch and Chandrakant Vinubhai Patel* (supra), the purported sale was inoperative and incapable of constituting a disposition of the suit premises and transferring ownership to neither the first respondent nor Ladhu Jaffer. Indeed, as it turned out, the documents relied upon by the first respondent were in fact made outside the country and not in the prescribed form but more seriously, after the institution of the suit. The position with regard to the alleged sale to Jaffer was no better. There was neither any sale agreement nor did the said Ladhu Jaffer testify before the trial court proving that the appellant sold part of the suit premises to him. With respect, the learned trial Judge overlooked the obvious fact that the appellant had no burden of proof on the alleged breach rather, the respondents, which

appears to explain why he believed DW2's testimony as a gospel truth that the appellant breached condition 3 in exhibit PI. That finding on the 1st issue was, with respect, against the weight of evidence. It is accordingly reversed with the net effect that the 1st issue should have been answered in the negative, that is to say; the appellant did not breach any of the conditions in exhibit PI. In view of the above finding, the answer to the 2nd issue should have been answered alike. We say so alive to the fact that the power of the President to revoke a right of occupancy under section 10(1) of the repealed Land Ordinance was not open ended. It made it unlawful for the President to revoke a right of occupancy except for good cause. As we held in *Patman Garments Ltd (supra)*, the President could exercise his power to revoke a right of occupancy for good 17 cause upon proof that any of the conditions prescribed by the law are fulfilled and that such exercise in the absence of proof of existence of good cause was unlawful. It is beyond peradventure that there was no good cause warranting the President through the second respondent in pursuance of section 10 (1) of the repealed Land Ordinance to exercise the power of revocation of the appellant's right of occupancy in as much as there was no evidence of breach of the conditions in exhibit PI. In consequence, we find it inevitable to endorse the submissions by Mr. Mtaki that since the revocation of the appellant's title was not made upon good cause, the revocation order expressed in exhibit D5 executed on 24/05/1985 was illegal; it was null and void. So were the subsequent sub- divisions of the suit premises into three plots by which the first respondent was allocated plot No. 153/1 Lumumba Road, Kigoma. Having held that the revocation was unlawful, we do not find it necessary to belabour on whether or not notice to the appellant was required before the impugned revocation. In the event, we find merit in the appeal and allow it as prayed by the appellant. We thus quash the judgment of the trial court and substitute with an order entering judgment for the appellant with a declaration that the revocation of her right of occupancy and sub- 18 division of plot No. 153 Block A, Lumumba Road, Kigoma Ujiji was illegal and that she is still the lawful owner of the suit premises. The appellant shall have her costs here and the trial court. DATED at DAR ES SALAAM this 24th day of May, 2022. A. G. MWARDA JUSTICE OF APPEAL L. X S. MWANDAMBO JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL The judgment delivered this 25th day of May, 2022 in the presence of Mr. Mgaya Mtaki, learned counsel for the appellant also holding brief of Mr. Cosmass Tuthuru, learned counsel for the 1st respondent and Ms. Pauline Mdendeni, learned counsel for the 2nd and 3rd respondents, is hereby certified as a true copy of the original. F DEPUTY REGISTRAR COURT OF APPEAL 19 division of plot No. 153 Block A, Lumumba Road, Kigoma Ujiji was illegal and that she is still the lawful owner of the suit premises. The appellant shall have her costs here and the trial court. DATED at DAR ES SALAAM this 24th day of May, 2022. A. G. MWARIJA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL The judgment delivered this 25th day of May, 2022 in the presence of Mr. Mgaya Mtaki, learned counsel for the appellant also holding brief of Mr. Cosmass Tuthuru, learned counsel for the 1st respondent and Ms. Pauline Mdendeni, learned counsel for the 2nd and 3rd respondents, is hereby certified as a true copy of the original. '&r 19

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