

TANZANIA / JUDGMENT

19830822 TZHC Tanga

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IN H- - AT TANG4 OIVILAppEAL Np, 7 OP 1980 (Origiz1 Civil Case No. 7/80 of the) (BMCurt of Tanga. at Tang,,,...) Before: B.P. MOSHX, Bs4 , - PRM SALIM& LI,,,...AppEM4RT (Orig., Defendant) Versus FATUML ,A.WAI EB11M. - (orig. Plaintiff) JUDOBMENT eya 1 J: The parties are bath female. The bone of contention Is a piece of land; not for ultivctiofljut for construction and/or dwelling purposes v an equally hot, if not burnj21g issue. It is described as Plot no I Block 38, Ngamiani area of the Tanga Munioipality The . appellant is claiming ti -tie to only a portion of it. The respondent on the other hand lays claim to the Whole of it It is the respondent Who fivly referred the dispute between herself and the appellant to the Court of the Resident Jilagistrate, Tanga, where she went brandishing a certificate of oecup1ncr issued to her under section 9 of the land- Opirtance on 8th Ju'y, 199, for a term of thirtyi.ukhree years in respect of the same pieoe of land, i,e. Plot no1 I Blook 38, Ngainiani Area, Tanga Municipalityj whith I shAl., hereafter, be refering to simply as 'the disputed piece of lane) or 'the piece of land in dispute'. The said certificate of occupancy was tendered and admitted in evidence at the hearing of the suit and marked P,X, In the Court below the reondeut prayed, inter alia1 for an orde2' of eviction against the appellant from the disputed piece of land as a trespasser; an order for the appellant to demolish and/or remove her but tlieyefrom; an injuction restraining the appellant and/or her aervantagents from continued occupation of the diaputed piece of land; damages for trespass, etc. The learned PDiD*ipal Resident Magistrate who heard the case at first instance resolved the dispute in the following texms and. I quote • I (I - i from his Judgement "In th fj.nU anl..ysi.s, therefom, the case for the plaintiff (now the responthnit) succeeds and fails to the extents shown hereunder:- 1'

1. The defendant is hsreby evicted from the plot in dispute 2 The defendant and her servants and her agents are hereby restrained frua interfering in any manner With the plaintlffs peaceful possession and occupation of the plot in dispute: 3.' Prayer for darages for trespass is hereby dieznissed 4 No order as to costs" Aggrieved the appellLant has now appealed to this Court I The facts of thu case are not in dispute. This makes the nArrative thereof an extremely easy task to perform. I will go straight to it Prior to 1975 the di.pwted piece of land comprised two separate and distinct surveyed plots. They were described as Plot no.1 and Plot no. 15. The rest of their description i.e. the Block number and the ares Were the same., that is to say Block 38, Ngamiani area, Tan The said Plot no.1 was. offered to, accepted and occupied by the appellant Plot no. 15 'belonged' to the respondent. Both the appellant and

the respondent occupied their respective pieces of land, i.e. Plots I and 15, on a short term Of occupancy * The one issued to the appellant was issued on 26/12/70 Exhibit DI, and they were paying land rent and service charges on year to year basis as a way of renewing their titles In this. connection or to this end the appellant paid up the necessary rent or charges up to '4 until 19819 WE D2 6 It is clear from the evidence on record that although the short terna, rights of occupancy were jased to the parties only in 1975 actual occupation by them of their respective plots took place very much earlier on in terms of By Gernment Notice no. 185 publicheed on 23/4/65 in the official gazette the then Minister for Lnde Settlement and Water Development declared the areas at Ngamiani and MsambWez4, Tanga, to be a Redevelopment Area under section 35 of the land Acquisition Ordinance, Cap 118 w as. amended by the land Acquisition Ordinance (Amendment) Act t No. 3 of 1964 On that day, ie., 23/4/65, therefore, all interests in or over the said areas which, needless to say,

- included the disputed piece of .and, were extinguished and the area the UtLol and eubGt to the disposition of the Presjdent However, under section 37 of the same Orditiance rights.. of-004g1A47 were issued to those Who were already in occupation of pieces of land in the same development area,, Por reasons best known by the lAnd officers at Tanga the actual documentation was not done until 1975 when the offers were given to the parties. The offers were 1 however, Makdated to 1965 This,. briefly, is the background of how the parties came to be in legal occupation of their respective plots Soaetiiae, in the course of their occupation of their areas the repondent built what the leard Princtpal Resident Magistrate described as a permabent houSe, The appellant, on the other hand s only managed to put up a pal. In J%avvs. thatched hut on her plot s no.1. At the hearing of the suit in the Court)elow she, bowevex 1 attested that had it not been for the respondent 'a claims which gave rise to these proceedings she too Would, by now, ba priding over a permanent house on her portion of the piece of land in ieputo In support of her claim on this aspect of the case she tendered in'evidence the l4lding permit, 1)3, whiob she obtained from the appropriate authorities to the same end It is dated 25th September1 19760 In 1915 Tanga Mj.ni..cipa. 8,ir%reysors engaged themselves in exercises of redemarcation a3id/or reorganization of all plo'ts in the winicipality of Tan, including Ngamiani Tbe3r were purporting to do so in açord.amnce with the terms of the Tanga Master Plan. According to one Bvarist Njau (PW), who described himse].f as a town planning officer, a etadard plot under the s4d Tamga Master Plan comprises 4 1 000 ecuare feet of land Neither PLOT no 1 15 satisfied this requirernent. The two of them, lying adaQent to each other as they did however, did satisfy the rqjurement but as a sin3c pott The two plots measured a little over 5i00 0 equare.leet The two p3.otg, ns land 15,were therefore, analgained into,, one plot and named Plot No.1 Block 38, Ngam.ani 4rea, Tanga, t,e1 the disputed p,69e of land aking the then state of improvement on the previous p,ots nos and 15 as the guiding ' : • •
- inciple the. Zixid Officers ffe red the 'new plot to the x'eaponent. This was done before and/ or Without revoking the right, 'lbeit of a short term ; which the apCl1ant was then enjoying over the piece of land, in dispute or rather on a portion thereof o The offer to the respondent was in December, 1977. According to Salehe Musa Meumi (pW3.) and Francis Ramadhani

(pW2), the then Tanga District and Regional Land Officers, respectively, the appellant was offered another plot, "ten paces away" but she turned down the offer. The end result was, and it still is, that the appellant did not move away from her original Plot no. 1. A portion of the piece of land in dispute. Whereas the respondent went forward with the registration of her "right" over the disputed piece of land. In her memorandum of appeal, drawn on her behalf by learned

- Counsel the appellant advances five reasons of appeal, These may be
- however, be reduced into a single reason namely that the learned trial Magistrate erred in law and in fact - in holding. that the disputed piece of land belongs to the respondent and that she was, therefore, entitled to any orders for eviction and injunction. In his judgment, which is dated 3/10/80, the learned Principal Resident Magistrate found it established that the appellant had paid up the necessary and/or requisite rent up to the period ending 30/6/81. Her right of occupancy was, thus, at least valid to that time. The learned trial Magistrate says in his judgment: "One would have expected the land office to have revoked the defendant's (flow the appellant's) short term of occupancy (exhibit D) after the plot in dispute was issued to the plaintiff (not the respondent) in 1975. (The underscoring is mine) - \$. . With respect, there is a misdirection here. To be honest, the point here has caused me some little anxiety. In that I am not hundred percent sure if the word underlined, i.e. after, is indeed the word which the learned Principal Resident Magistrate had in mind at the material time. To my mind the proper word is 'and', 'indeed', it must be before. The reason for this is obvious. I will, nevertheless, have occasion to mention and/or refer to it later in this appeal. Judgment. Be it as it may, suffice it for the time being, to say that it is clear from the judgment under query that the learned trial Magistrate appreciated the fact that failure on the part of the Land officers to revoke the appellants right of occupancy or even that of the respondent for that matter was the cause and/or the beginning of what he described as the "present problem". If I may digress a little according to my knowledge of the law of real property in this country there is no way of terminating a Right of Occupancy, be it native customary or registered, short; or long term except under section 10 of the Land Ordinance, Cap 113; or by consent and/or voluntary surrender by the holder; or by acquisition under the Land Acquisition Ordinance, Cap. 48, and/or the Town and Country Planning Ordinance, Cap. 378 in which case provision for payment of compensation for forfeiture thereof is made. Since the learned Principal Resident Magistrate made a specific finding of fact to the effect that the appellants right of occupancy was not revoked I will desist from saying anything further on this question of revocation of rights of occupancy. On the issue of the Land Officers' admitted failure to revoke the appellants right of occupancy the learned trial Magistrate ended up by saying, and I quote from his judgment: - "The result is that the position to date remains the same - that the plot in dispute has two valid rights of occupancy -
- the long term right of occupancy (exhibit P1 issued to the plaintiff and the short term right of occupancy exhibit D1) of

- of the deferidant" Nothing could be nearer the truth as a matter of fact than this observation by the learned trial Magistrate which incidentally fully supported and justified by the evidence both documentary, i.e. P1 and D1, and oral i.e. the testimony of PW1 and PW2, As a matter of law, however, Such a situation is impossible. The question that arises is, what happens when such situations arise? I hasten to say that the position at law in such situations is that the right of the person which was the first in time WJS or 3 subsite In the instant matter the appellant already had a right over the disputed piece of land or a portion thereof before the LW v. the respondent by the Land Officers Tnio, in Jaw, is in substance. A man cannot give that which is not there or do not exist. Mah, da no h bet,...i.e. a man cannot give that which he has not. At the hearing of the appeal, learned Counsel for the respondent, Mr. Mamba, argued that since there was evidence of a Master Plan for the Municipality of Tanga which includes Ngamiani area then the provisions of the Third Schedule of the Town and Country Planning Ordinance came into play. The said Third Schedule; to Oap378 is in respect of 'provisions relating to redistribution of land in areas scheduled for detailed schemes to which section 27, Cap. 378, applies.' The first item of this third schedule reads:
 - i. All land to which the provisions of section 27 and this Schedule have been applied within an area Scheduled or likely to be scheduled for a detailed scheme shall be pooled and the boundaries of all plots and holdings therein shall be expunged" With respect to the learned Counsel for the respondent, declaration under section 27 that the provisions of the Third Schedule shall apply to any area of the land, in preparation of a scheme is a matter of law and not conjecture. The same is to be by publication in the Government or official Gazette. I have not been able to lay my hands or set my eyes upon any such publication or notice in the official gazette, To my mind no such notice as is relevant to the instant matter, therefore, exists. No wonder. Mr. Mramba himself did not quote any such notice to me. Likewise the coming into effect of any other planning scheme be it a Master Plan is a matter of law. The relevant piece of legislation is the Town and Country Planning Ordinance, Cap. 378. In the instant matter at least four land officers, to wit PW1, PW2, PW3 and one Sadiki Mrisho Wtuta (Wt) who was present at the time he gave evidence submitted to the Ministry of Lands Headquarters 1 gave evidence and made references to the so-called Tanga Master Plan. It appears to have unduly influenced the learned Principal Resident Magistrate who, in his judgement and without much ado, said: 'In 1974 the Tanga Master Plan came into being...' Again, later he said: 'It is an established fact that from the inception of the Tanga Master Plan in 1974 plots and 15 which comprised the plot
 - i. A plot due to exist as such, and in their place the plot in dispute came into being? Ranadhani (PW2) said that the Tanga Master plan came into being in 1974. At the hearing of the appeal Mr. Mramba
- for the respondent said: that the said Master Plan came into effect in 1972, As aforesaid the coming into effect of a scheme or any planning scheme or even a mere inception thereof is a matter of law and must be published in the official Gazette. This was not done, At any rate no

relevant Government notices were quoted by PW1, PW2 1 PW3 and DW1 in this matter. As a matter of law it will, therefore, be erroneous for anyone merely to assume something on whose word of mouth it is that the said scheme did come into effect. Even if I were held to have erred on this point I am of a considered and firm view that the formulation of the Master Plan or Scheme for any urban area does not ipso facto, put an end or extinguish existing property rights of any occupier, and I so hold. In his judgement the learned Principal Resident Magistrate also had the following to say: "The sad part of the whole affair is that the defendant was made to quite innocently believe, on account of the failure by the land office to revoke her short term right of occupancy (Exhibit D1), that the plot in dispute belonged and still belongs to her. But the truth is bitter as it may sound it remains to be that plot 1 Block 38 upon which the defendant's short term right of occupancy (Exhibit D1) was based was no more as from 1975". With the greatest respect to the learned Principal Resident Magistrate the effect of the failure by the 'Land office' to revoke the appellants right of occupancy is albeit only of a short term means that, at least, up to and until 30/6/1981 she, i.e., appellant, was a lawful occupier or in lawful occupation of the disputed piece of land or a portion thereof. And in so far as her right over the said piece of land was still subsisting, valid and good in law the same could not legitimately be given to some person other than the appellant herself. Since the defendants, nevertheless, claim the same said right to the respondent

- i; y
- the grant of the thirty-three year Right of Occupancy to her I
- 8 - that which he has filed or that which he has already granted or donated; For these reasons and on my evaluation of the evidence I find that this appeal has merit and it, therefore, is hereby allowed. The judgement of the learned Principal Resident Magistrate is quashed and the resultant orders are set aside. It is further directed that the appellant now be allowed to enjoy her Right of Occupancy under the framework of the law of this Country. The respondent- Will pay the fees in this Court as well as in the Court below' ¶ (H.E.D, Sisyia) Judge 22/8/33

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