

TANZANIA / JUDGMENT

seranduki kipara vs francis mpyaliani and others 2021 tzhc 7493 30 november 2021

COURT
TZHCDECIDED
30 November 2021

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF DAR ES SALAAM) AT DAR ES SALAAM LAND APPEAL NO 03 OF 2021
(Arising from iand case No. 48 of2016 ofMorogoro District Land and Housing Tribunai)
SERANDUKI KIPARA APPELLANT VERSUS

1. FRANCIS MPYALIANI RESPONDENT
2. MATEYO NJALA 2nd RESPONDENT
3. SHABANI KISEGENA 3rd RESPONDENT
4. KALONGA CHARLES 4th RESPONDENT
5. MAIKO MASANJA 5th RESPONDENT
6. SELINA MWENGU 6th RESPONDENT
7. DAUDI MABULA 7th RESPONDENT
8. TEKILA KAICHE 8th RESPONDENT
9. KAMBETELA PANGALA 9th RESPONDENT
10. EMMANUEL ULOMI 10th RESPONDENT

JUDGMENT

Hearing date on: 17/11/2021 Judgment date on:30/11/2021 NGWEMBE,J: The appellant Seranduki Kipara is in this court challenging the judgement and decree of the trial Tribunal over a landed property, registered in his name, titled farm No. 35 & 36 located at Wami Luhindo within Morogoro 1 region. The respondents are the decree holders of that landed properties by virtual of the judgement and decree of district Land and Housing Tribunal of Morogoro, delivered on 14th June, 2021. The disputants are struggling In court over the suit land each side claiming ownership. While the appellant claim to be the rightful owner by virtual of title deed Issued by

the Commissioner for Lands way back on 12th March, 1989, the respondents claim ownership under usage and being allocated by the village council way back on 1982 and they have been using it undisturbed throughout until the dispute arose in year 2016. Sometimes in year 2016, the appellant instituted a land dispute in the District Land and Housing Tribunal whose decision is the subject of this appeal. The appellant had four witnesses, while the respondents had seven witnesses. Upon considering those testimonies the trial Tribunal ruled as follows:- "Ugawaji uHofanyika wa eneo lenye mgogoro kutoka katika mamlaka ya ugawaji kwenda kwa mwombaji mwaka 1987 unatamkwa kuwa batili kwa kutofuata utaratibu na sheria za ugawaji" Proceeded to declare that:- "wajibu maombi wanatamkwa kuwa wamiiiki haijai wa maeneo yao. Zuo fa kudumu (permanent Injunction order) iinatoiewa dhidi ya mwombaji, mawakaia wake na watu wowote wanaofanya shughuli kwa niaba yake kutoingia/kuingiwa eneo lenye mgogoro na kutowasumbua wadaiwa kwa njia yoyote He" That being the final verdict of the trial Land Tribunal, the appellant exercised his statutory rights to appeal to this court. With assistance of his advocate Benjamin Jonas, came up with four grounds of appeal, quoted hereunder:-

1. The trial Tribunal erred in law and in fact in grounding its decision on a document which was not tendered and admitted in evidence;
2. The trial Tribunal erred in law and in fact in giving its decision in favour of some of the respondents who did not testify during hearing;
3. The trial Tribunal erred in law and in fact in holding that the procedure of allocating the suit land to the appellant herein were flouted;
4. The trial tribunal erred in law and in fact in not holding that the appellant herein being registered owner of the suit land is the lawful owner of the suit land; and
5. The decision of the Land Tribunal is against the weight of evidence on record. Finally, asked several reliefs from this court including the prayer to allow the appeal and the appellant be declared the lawful owner. On the hearing of this appeal, both parties were represented by learned advocates. While the appellant was represented by Mr. Benjamin Jonas learned counsel, the respondents were represented by Nragira Deo learned advocate. Arguing on the first ground the learned advocate for appellant argued quite strongly that in page 11 paragraph 2 of the trial Tribunal's judgement referred to a document which was not tendered in court during trial. Thus, contradicted section 10 (2) & (3) of Land Disputes Courts Act. Added that the document was neither annexed in pleadings nor notice was filed to that effect nor was tendered and admitted as exhibit. To justify his argument, referred this court to the case of Ismail Rashid Vs. Mariam Msati, Civil Appeal No. 75 of 2015. Also referred to the case of Total Tanzania Ltd Vs. Samwel Mgonja, civil appeal No. 70 of 2018. Arguing on the second ground, that five (5) out of ten respondents appeared and testified in court, but the trial Tribunal declared all ten respondents as rightful owners of the suit land. Referred this court to the judgement of this court between Said H. Lipite & 4 others representing 707 others Vs. The Ministry of Defence and the Attorney General, Land case No.85 of 2016. Submitting on the third ground, he stressed that the evidences of AW4 was

not contradicted by the respondents. The fourth ground was related to registration of the suit land. That the appellant was a registered owner of the suit land. He is a holder of title deed of the suit land since 1987. The suit land has title No. 36213 registered on 13/3/1990 comprising farm No. 35 & 36 owned by the appellant. Supported his argument, he referred this court to the Court of Appeal case in Civil Appeal No. 35 of 2019 between Amina Maulid Ambali & 2 others Vs. Ramadhani Juma. Finally, he submitted on the last ground that, the whole trial Tribunal's judgement was based on a document which was not admitted in court during trial. Thus, prayed the appeal be allowed and the decision of the trial Tribunal be quashed and the appellant be declared the lawful owner of the suit land. In reply the learned advocate for the respondents supported the decision of the trial Tribunal as a well composed judgement. Arguing on the 1st ground, referred this court to page 11 of the judgement, that the Tribunal ordered the respondents to produce letters of allocation by the village council. Those letters proved that the appellant was granted right of occupancy contrary to the lawful procedures. On the second ground, the learned advocate briefly argued that, the villagers are more than 200 who are in that village, but the appellant selected only ten of them in this suit. Submitting on the third ground, insisted that the appellant was duty bound to prove on how he was granted the suit land. That duty is on the shoulders of the appellant not the respondents. Upon failure to do so, the Tribunal cannot be blamed for its decision. On the last ground, the learned advocate argued that, same lacks merits for the respondents had watertight evidences and they occupied the suit land since 1982 to 2016 undisturbed. Therefore, the alleged title deed faulted the applicable laws. In rejoinder, Mr. Benjamin Jonas insisted that the decision of the Tribunal faulted the law and the whole decision is nullity. Thus, rested by reiterating on the prayers made in submission in chief. Having summarized the arguments of learned counsels and much as I appreciate to their arguments, yet I find grounds three and four combined raise fundamental legal issue on whether the Tribunal was right to nullify title deed and certificate of occupancy granted by the Commissioner for lands and registered to the registrar of titles without involving the relevant authorities? In answering this question, may determine the whole appeal. Perusing the applicable laws related to landed properties, the Certificate of occupancy is defined by Land Registration Act Cap 334 R.E. 2019 to mean a certificate of occupancy issued under the provisions of the Land Act. Section 29 of the Land Act Cap 113 R.E. 2019 describe issuance of certificate of occupancy as quoted hereunder:- Section 29.-(1) Where the Commissioner determines to grant a right of occupancy to a person who:- (a) has applied for grant of a right of occupancy; (b) is in occupation of land under a right of occupancy or under an acceptance of an offer of a right of occupancy; or (c) is otherwise entitled to a right of occupancy, he shall issue a certificate referred to as a "certificate of occupancy" to that person. (2) A certificate of occupancy shall be issued in the name of the President and shall be in a prescribed form. (3) A certificate of occupancy shall be deemed to be duly and validly executed if it is signed by the Commissioner and sealed with his official seal and purports to be signed and sealed by the President and further proof of such execution shall not be required for the purpose of registration" Likewise, the Land Registration Act (supra) section 40 describes certificate of occupancy as a document admissible indicating rightful ownership of land. The section is

quoted hereunder:- Section 40 "I certificate of title shall be admissible as evidence of the several matters therein contained" This position of law clearly indicates that, first certificate of occupancy must be issued and signed by the Commissioner for Lands on behalf of the President. Second such certificate is admissible as evidence of occupancy excluding other documents related to the said land. Third, in case one questions its authenticity and validity must do so by involving the relevant authorities like the Commissioner for Lands, Registrar of Titles and the Attorney General as the chief legal advisor of the Government. Fourth, nullification of certificate of right of occupancy is done only by the President under his own hand or under his instructions. In this appeal, it is undisputed, the appellant is an owner of a certificate of occupancy issued under section 9 of Land Ordinance bearing title No. 36213 by land officer No. 108053 related to land farm No. 35 and 36 Wami Luhindo Morogoro District for a term of thirty-three years issued on 6th April, 1989. In the contrary the respondents testified during trial that they were allocated their land by the Village council on 1982 and they were occupying it throughout undisturbed until when they were sued in year 2016. The evidences of both parties were cogent enough to convince the trial Tribunal to decide in each party's side. The appellant called Land Officer who testified as AW4 (Mr. Kenneth Essau Mwenda) testified to have followed all legal procedures in surveying and allocating the suit land to the appellant. Added that the appellant was issued certificate of occupancy, which same was registered to the Registrar of Titles on 13/3/1990. According to the testimonies of AW4, the suit land belongs to the appellant. Concluded in his testimony by saying that the respective certificate of title was surrendered to the commissioner for Lands vide permit No. FD 179616 of 3rd February, 2016. The purpose of such surrender the area is due for Township Planning. Plots of residence are now being surveyed and the Director of Town Planning has consented to that effect. Assuming such testimony is the current status of the suit land, it goes like a day followed by night, that none of the disputants have good title over that land. Since that is not one of the grounds of appeal, I leave it to another relevant case. Perusing various precedents and as rightly cited by the appellant, the circumstances of this appeal is similar to the Civil Appeal No. 35 of 2019 (Supra) whereby the Court of Appeal provided a living guidance at pages 6 to 8 as quoted extensor hereunder:- "7/7 our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained" While citing the case of Leopold Mutembei Vs. Principal Assistant Registrar of Titles, Ministry of Lands, Housing & Urban Development and the Attorney General, Civil Appeal No. 57 of

2017. The court held: "The registration under a land title system is more than the mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transaction that confer, affect or terminate that ownership or interest. Once the registration is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title" In this appeal, the respondents and the trial Tribunal alleged that the survey and registration of the suit land was done contrary to the laid down procedural laws.

That Is an allegation which ought to have been proved by cogent evidences at trial and It ought to have Involved filing of a counterclaim and joining the Commissioner for Lands, Registrar of Titles and the Attorney General. The proceedings of trial Tribunal, there Is no way this court can say that the respondents proved ownership of the suit land. In the case of Khalfan Abdallah Hemed Vs Juma Mahende Wang'anyi, Civil Case No 25 of 2017 (unreported) when adopting the principle laid In the case of Hemed Said Vs. Mohamed Mbiiu [1984]TLR 113,the court held:- "The person whose evidence is heavier than that ofthe other is the one who must win" Similar to this appeal, the testimony adduced by the appellant was heavier and reliable than that of the respondent. Had the trial Chairman directed properly his minds to the evidences and applicable laws, obvious would have decided otherwise, than what he did. Accordingly, this ground was crucial In the whole appeal. Once determined. In the manner I have stated above, I find no need to determine grounds 1,2 & 5, because this ground alone answers the core dispute of the parties. 10 I would therefore, safely conclude that based on available documents and evidences on record, the appealant is a true owner of the suit iand. In totality, this appeal has merits same is aiiowed, I proceed to quash the decision of the trial Tribunal and order that the appellant is the lawfui owner of the suit iand. Costs be borne by each party. I accordingly order. Dated at Dar es Salaam in chambarathis 30^^ day of November, 2021 P. J. NGWEMBE JUDGE 30/11/2021 Court: Ruiing delivered at Dar es Salaam in Chambers on this 30^^ day of November, 2021 in the presence of Niragira Deo for Benjamin Jonas for the Appeilant and Niragira Deo for the Respondent Right to the Court of Appeal explained. •5r Uj PJ. NGWEMBE X 'i.'V Jfc. JUDGE 30/11/2021 11

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