

TANZANIA / JUDGMENT

20121030 TZHC Mwanza

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA J (LAND DIVISION) AT MWANZA
LAND APPEAL NO. 23 OF 2010 (From the Decision of the District Land and Housing Tribunal of
Mwanza at Mwanza in Application No. 159 of 2005) SIXBERT
EVARIST APPELLANT VERSUS · ST MWANZA CITY
DIRECTOR 1 RESPONDENT · ND JANE JACKSON
LYIMO 2 RESPONDENT

JUDGMENT

MWAMBEGELE, J.: The facts of this case are very simple. Sometimes in 1986 - 87, Kiseke area within the City of Mwanza was surveyed. Lumala village fell within the Kiseke surveyed area. One Evarist Madukulu lived in the village and his land on which - he allegedly lived produced four plots - Plots No. 225, 226, 235 and 236 Block 'M' Kiseke. Plot No. 236 was allocated to the said Evarist Madukulu. The other three plots were allocated to others as follows: Plot No. 225 was allocated to A. Hamis, Plot No. 235 was allocated to one Bakatwa Membo and Plot No. 226, 1 :. which the subject matter of this case, was allocated to one Gerald Vedastus. The said Evarist Madukulu complained to the first Respondent over allocation of other plots to strangers. The first Respondent, perhaps upon realising his . . complaints were genuine, revoked the titles in respect of Plots No. 235 and 225 and reallocated them to the said Evarist Madukulu. This means that out of the four plots that came out of his land, three were allocated to him. It is said, he went on claiming the remaining plot; Plot No. 226 (henceforth the disputed plot) but could not succeed getting it until death met him in 2000. In another development, Gerald· Vedastus sold the disputed plot to one Jackson Lyimo late husband of Jane Jackson Lyimo; the Second Respondent. The transaction took place on 28.06.1998. After the death of the said Evarist Madukulu, his son Sixbert Evarist; the Appellant was appointed administrator of his estates. He continued to make a follow up to the first Respondent over the disputed plot. Having realised the efforts did not bear any fruits, the Appellant filed an application in the District Land and Housing Tribunal seeking for orders among others that the allocation of the disputed plot to the second Respondent was null and void, the 2 . . , : i · c : : _ . · . " ~ : : , , : , · · . < · -- . . - ' . _ ... · . ' .. ~ .. _ . : , · · - .. ' Apiaellant's family be allocated the disputed plot. and compensation of Tshs. 15,000,000/=. He lost the case. Aggrieved, the appellant has appealed to this court filing three grounds of appeal; namely:

1. That the trial erred in law_ and fact in holding that the first Respondent lawfully allocated the suit land to one Gerald Vedastus
 2. That there was ample evidence of record to prove that the late Evarist Madukulu lawfully occupied the application premises during all material_ time; and
 3. That as a whole the decision of the trial Tribunal is aga.inst the cogent and the law applicable. The appeal was argued before me on 23":10;2012 during which the Appellant had the good services of Mr. Rutaindurwa, learned Counsel while the first _ Respondent spoke through Mrs. Manzi, learned Counsel and the second person appeared in person and unrepresented. 3 Mr. Rutaindurwa consolidated the second and_ third grounds and argued on them together. In sum, he. submitted that in view of the fact that the late Evarist Madukulu occupied the land (mder customary rights before the survey he had a right to be allocated_ all the plots in the four or, arternatively, he must be compensated for the plot_ that was not allocated to him. Mr. Rutainndurwa cited to me Obed Mtei Vs Rukia Omari 1989 TLR 111 which held that after the land is surveyed third party interest must be considered. And he added that in the event allocation of the plot fails, the occupier of the disputed land before the survey must be adequately compensated. To buttress this argument Suzana Kakubukubu and Two Others Vs Walwa Joseph Kasubi and the Municipal Director of Mwanza 1988 TLR 119 (HC) was cited. He submitted that there is no evidence that third party interest was cleared before and after the survey. On the second g,round, Mr. Rutaindurwa adopted the arguments in the first consolidated ground. For the first Respondent, Mrs. Manzi submitted that from the evidence of Ezekiel Kitilya who testified in the Tribunal as DW1, Evarist Madukulu never owned the disputed land before and after the survey. The evidence-of DW1 is supported by the testimony of Leonard Machunde DWS who testified to the 0 4 .,• .. . :.' •• V effect that in 2009 he found a cowshed in the disputed . plot whil.e in 1986 .
- 87 during the survey there was nothing on the disputed plot. Mrs. Manzi went on -to submit that an inspector of the .first Respondent; Charles Steven who testified as DW2 had inspected-the disputed land and found there a mud house. He issued a Demolition Notice which was defied by the Appellant's father. Evarist Madukulu was given two reasons why he should demolish the mud house - first, that he was building in a plot that was not his and the second reason was that he was doing so without a building permit. He did not comply. The mud house was therefore demolished by the first Respondent. She went on to state that there was no third party interest to be considered in respect of _the disputed land as the land had nothing to be compensated because before the Land Act, the bare land had no value as to attract compensation. Mrs. Manz~ stated that the Appellant's father was allocated three plots, even if it was assumed that the disputed plot belonged to him before the survey, there was no way he could be allocated all the plots. On her part, the second Respondent; a lay person was very brief and to my mind rightly so - lay as she is, there was little she could contribute to this legal wrangling of the legally trained minds. She, however supported Mrs. Manzi's 5 •' J'.

- submission and reiterated her story she stated in the Tribunal. She submitted that she is a widow. That her husband who is now deceased bought the disputed plot from one Gerald Vedastus on 28.06.1998 at Tshs. 470,000/=. In a short rejoinder, Mr. Rutaindurwa submitted that Asubuhi Oti no testified that they had names. of those found living in the surveyed land. Mr. Rutaindurwa seemed do submit that Evarist Madukulu's name is in the list of those found living in the surveyed land. On the demolished mud house, Mr. Rutaindurwa submitted that there was no way Evarist Madukulu could demolish the same as he was not compensated for the same. He concluded that if the first Respondent decided that the disputed plot should not be allocated to Evarist Madukulu, that could be fine but that there was need to compensate him adequately. This issue in the present case was traversed well by this court in Mwalimu Omari and Another. V Omari A. Bilali, 1990 TLR 9. The facts of the instant case fall almost in all fours with the facts in that case. Briefly, the facts were that at Magomeni there was an area which at first had not been surveyed. Mwalimu Omari occupied this area. At some stage, it was decided the area be 60 and 61. The area was surveyed and two plots came out of it; plot No. 60 and plot No. 61. Plot No. 61 was allocated to Mwalimu Omari; a person who occupied the land before it was declared a planning area. Plot No. 60 was allocated to Omari A. Bilali under the land legislation after the same was surveyed. However, Mwalimu Omari wished it (Plot No. 60) to be allocated to Ahmed Banguo who was in occupation of it as he (Ahmed Banguo) had bought that parcel of land on which plot No. 60 stood before the area was surveyed. Omari A. Bilali sued Mwalimu Omari and Ahmed Banguo in the Resident Magistrates' Court claiming that he was the legal owner of the disputed plot; that is plot No. 60 after he was allocated the same under the land legislation. The Resident Magistrates' Court decided in favour of Omari A. Bilali. Dissatisfied, Mwalimu Omari and Ahmed Banguo appealed to the High Court against the decision of the Resident Magistrates' Court. The High Court held that the Resident Magistrates' Court was correct to arrive at the decision it arrived at. Masanche, J. (as he then was) held: "Once an area is declared an urban planning area, and land is surveyed and given plots, whoever occupied the land even under customary law would normally be informed to be quick in applying for rights of occupancy. If such person sleeps on such a right and the plot is given to another ... strictly, would not be entitled to anything." In the present case, Evarist Madukulu was allocated three plots out of the four that came out of the land he occupied before the area was surveyed. It is undisputed that he did not receive any compensation in respect of the dispute plot. The reason why the Appellant's father was not compensated has been made clear to us by the submission of Mrs. Manzi in the light of the testimony of Ezekiel Kitilya who testified as DWI in the Tribunal - Evarist Madukulu had never owned the disputed plot before and after the survey. Worse more, the disputed plot had nothing to be compensated as per the then land legislation. To this I wish to quote the decision of the Court of Appeal in Manyara Estates Ltd & others Vs National Development Credit Agency, [1970] 1 EA 177, at P. 189 in which it was stated: "An unexhausted improvement is ... the extent to which the owner of the right of occupancy has during the term of his tenure permanently improved the land. It has to be an

improvement that attaches to the land itself and that goes with the land. In fact 8 it represents the value of the occupier's interest in the land once his right of occupancy has ceased". The question is: did the Appellant's father improve the land before valuation? I have asked myself this question and answered myself in the negative. As rightly submitted by Mrs. Manzi, there was ample evidence at the trial to the effect that during the survey nothing was found on the disputed plot worth compensating. In an attempt to put the cat before the horse, the Appellant's father erected a mud house on the plot but the officers of the first Respondent were fast enough to note the anomaly and ordered demolition which order he defied and the first Respondent demolished it according to law. I find and hold that the disputed plot was legally allocated to Gerald Vedastus. Gerald Vedastus therefore had good title to pass to the Jackson Lyimo. The Appellant should be satisfied with the three plot allocated to his father which to me seems more than adequate. He should not liken himself with Charles Dickens' Oliver Twist. I further find and hold that the Jane Jane Jackson Lyimo; second Respondent, as an administrator of the estates of the late Jackson Lyimo; is the lawful owner of the disputed plot. This appeal was filed without any scintilla of merit. It must be dismissed and it is hereby dismissed with costs. DATED at MWANZA this 30 day of October, 2012. J. C. M. MWAMBEGELE JUDGE

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