

TANZANIA / JUDGMENT

yahaya yusufu khalfani vs idrisa fadhili kasoma 2022 tzhc 14360 28 october 2022

COURT
TZHCDECIDED
28 October 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF KIGOMA) AT KIGOMA MISC. LAND APPEAL NO. 15 OF 2022 (Arising from Land Appeal No. 31/2021 of the District Land and Housing of Kigoma before F. Chinuku - Chairperson, Original Land Case No. 1/2021 of Gungu Ward Tribunal) YAHAYA YUSUFU KHALFANI APPELLANT VERSUS IDRISA FADHILI KASOMA RESPONDENT

JUDGMENT

15/9/2022 & 28/10/2022 L.M. Mlacha, J The appellant, Yahaya Yusufu Khalfani filed an appeal against the decision of the District Land and Housing for Kigoma (the DLHT) made in Land Appeal No. 31/2021 (F. Chinuku chairperson) (original Land Case No. 1/2021, I Gungu ward Tribunal). The respondent, Idrisa Fadhili Kasoma is resisting the f appeal. The grounds upon which the appeal is based read thus;

1. That, the appellant tribunal erred in law and fact without considering the evidence adduced by the Appellant on the fact that the appellant owns his own plot no. 748 Block "A" Gezaulole, within Kigoma Municipality and the Respondent owns his own plot no. 747 Block "A" Gezaulole within Kigoma Municipality. Page 1 of 11
2. That the Appellate Tribunal erred in law and fact by deciding in favour of the Respondent without considering that during the survey of the said Block "A" to both plots 747 and 748 the Respondent was the one who showed to the Land officers the boundaries of the said two plots.
3. That the Appellate Tribunal erred in law and fact by denying the Appellant's witnesses who adduced before the trial tribunal that the Appellant have been using the said disputed plot for more than 40 years their families have been using without being disturbed.
4. That the Appellant Court erred in law and fact by failure to consider the documentary evidence tendered by the trial Tribunal during the hearing of the said suit to wit the deed which gives the Appellant 99 years right of occupancy. Mr. Michael Mwangati represented the appellant while the respondent had the services of Mr. Silvester Damas Sogomba. Counsel made oral submissions for and against the grounds of appeal but before

considering their respective positions, the background of the case will be reproduced to assist us in the discussions. The record shows that the respondent sent the appellant at the ward tribunal stating that his family (the family of the late Yusufu Khalfan) had invaded his land. He told the tribunal that he bought Page 2 of 11 the land in 2004 from the late Rashid Said Kipara for Tshs 150,000/=. He said that sometimes in 2019/2020 the family of the late Kipara approached him and requested him to buy their house which is adjacent the land but they could not agree on the price. They sold it to Mwalimu Fatu Ramadhani. A dispute arose between him and Mwalimu Fatu over the boundary between them but it was solved. Sometimes later he saw children of the late Yusufu Khalfan inside his land. They were with Mr. Rama Mkoko who told him that the land was property of the late Yusufu. He called Mzee Ramadhani Rutafu to try to solve the dispute without success. He then saw them processing surveying the land. They put the land in the program without involving him. While he was absent in Dar es salaam for treatment, they built a foundation in the land. He resisted but they proceeded to build a house by force. He went on to say that he resisted the issue of title and building permit in respect of plot No. 747 Block A. He called two witnesses. Said Hussein Mbogo

- (59) and Hamisi R. Mdada (61) who said that they knew him to own the land (now plot No. 748 Block A Gezaulole). It was the evidence of the appellant, Yahaya Yusufu (42) that he was born and grew at the suit land. That they were neighbours to Mzee Kipara and there was no dispute between them. He sent some money to his mother in Page 3 of 11 2015 to build shop 'frames' in the area. The respondent appeared and resisted. He went on to say that the respondent has a piece of land there which he bought from Mzee Kipara. A dispute arose between them and had to call Land officers for a solution. Sometimes in 2020 the respondent built a building for a milling machine and crossed to their land. He was in Dar es salaam by them. They engaged private surveyors to survey the land. They got a title deed. He then sought for a building permit. He started to build. The respondent prevented him to do so. The police came to arrest his people. They went to the police station where they were advised to go to the land court. He brought his mother, Zuhura Shabani (70) who said that they were neighbours of Mzee Kipara whom they lived without a problem. Problem started with the appellant in 2015. He had two other witnesses who had the same story. The ward tribunal found for the respondent based on the background of the land before the survey. They found the survey and the title deed in respect of plot No. 748 Block A gezaulole as invalid. They neglected them. They declared the respondent the owner of the land. An appeal to the DLHT in 1 Land Appeal No. 31 of 2021 could not be successful. It was dismissed with costs. Page 4 of 11 Submitting in ground one, Mr. Michael Mwangati told the court that the ward tribunal and the DLHT did not have a close look to the areas of dispute in the matter. He said that the Land is surveyed with two plots. The appellant own plot No. 748 Block A Gezaulole while the respondent owns plot No. 747 Gezaulole, Kigoma - Ujiji Municipal. The survey involved the parties and other neighbours. Counsel submitted that the DLHT declared plot No. 748 Block A to be property of the respondent wrongly. That amounts to revocation of title of plot No. 748 without any evidence. In ground two counsel

submitted that the survey involved the local government and neighbours. He referred the court to the evidence of Ramadhani Issa. He went on to say that neighbours and the respondent took part in fixing the boundaries. But the respondent rose up later and said the land is his. Counsel went on to submit on ground three and told the court that the appellant brought witnesses who included his mother Zuhura Shabani who said that he lived with her late husband on the land. They planted plants which included palm oil trees. There was also Ramadhani Issa who corroborated the evidence. He said that the appellant was there long before the survey. He did not agree with the finding that the land belonged to the respondent. Page 5 of 11 In ground four counsel submitted that documents tendered at the ward I tribunal proved that the appellant is the lawful owner of the land. He tendered title deeds and building permits, he said. He said that it was not correct to declare the entire land to be property of the respondent. Counsel argued the court to vacate the decisions of the lower tribunals and declare the appellant the lawful owner of plot No. 748 Block A Gezaulole. He also prayed for the costs. It was the submission of Mr. Silvester Damas Sogomba that the numbers I were obtained in the 2020 survey which allowed the appellant to extend his boundary to the respondent's land. Counsel submitted that the existence of a title deed is irrelevant because it was obtained during the dispute. He went on to say that documents produced showed that the land was owned I customarily. The respondent owned it since 2004. The appellant extended to enter the respondent's land wrongly, he said. Counsel went on to say that the parties were separated by a rood before the survey. The road had been there for a long time. It is wide. The land is near the market. The appellant created a plot across the road where he could build a small building for business. There was no any dispute before he crossed, he submitted. Counsel went on to say that the respondent bought Page 6 of 11 the land in 2004 and owned it peacefully up to 2019, a period of 15 years without disturbance. They were neighbours and lived without any dispute. He said that if the appellant had any dispute he had no reason to wait till the 20/9/2020 surveys. He said that the small house he built was built recently, it is not even roofed. He repeated what he had said earlier that the title deed and building permits have no any effect because they were obtained during the period of a dispute. He supported the finding and decision of the DLHT. He referred the court to the case of Amraltdamodar Maltaser and another T/a Zanzibar Silk store v. Jarwalla T/a Zanzibar Hotel [1980] TLR 31 where it was said that where there is a concurrent finding of facts by two courts the court sitting on appeal should not disturb the decision unless there has been misinterpretation of evidence or miscarriage of justice. Counsel submitted that the evidence was evaluated properly by the courts below. It was found to be weak because the appellant based his claim on the survey but could not establish how he got the land. He challenged the evidence of the appellant's mother who said she used it with her husband as weak. He denied the evidence that the respondent took part in the survey calling it weak because it was denied by the respondent at page 10 of the record. He added that it is only one witness Page 7 of 11 I who said that Mzee Idrisa was involved. He asked the court to visit the locus in quo to see for itself. He argued the court to dismiss the appeal with costs. Submitting in rejoinder, Mr. Michael Mwangai said that it is true that the respondent wrote a letter to the Municipal Director to ask him to refrain to

issue a title in respect of plot No. 747 Block A Gezaulole but at this time the appellant was already in possession of a title in respect of plot No. 748 Block A Gezaulole. That means that the process of survey was already complete. The issue was raised on 13/1/2021 while everything was over. I had time to examine the evidence on record closely. I have considered the submission of parties and the Law. I agree that this being a second appeal, the court has no right to interfere with the concurrent finding of facts unless there is a misinterpretation of evidence or failure of justice. See *Amraltdamodar Maltaser* and another *T/a Zanzibar Silk store* (supra) and *Neli Manase Foya versus Damian Mlinga*, Civil Appeal No. 25 of 2002 (CAT unreported) to mention a few. Having examined the evidence on record, I could not see any misinterpretation of evidence or miscarriage of evidence. I will try to demonstrate. The evidence is that the appellant's father lived with Mzee Kipara and I later the appellant in the area without any disturbance from 2004 up to 2019 in Page 8 of 11 without any dispute. The respondent and the appellant's father lived peacefully. The appellant says that there was a dispute in 2015 but it was not referred to any authority making it irrelevant. But even if we take to be correct, still there is a gap of 11 peaceful co existence. The dispute arose seriously in 2019 but while the parties were under the conflict, the land was surveyed (by a private surveyor) to create two plots; plot No. 747 and 748. The appellant was given the disputed area which was plot No. 748. His other land across the road was also surveyed and I believe he also got a title deed. Plot No. 747 was given to the respondent but despite being given the plot he wrote the Municipal Council not to give him a title deed. This was in resistance to the survey which cut part of what he believed to be his land to create Plot No. 748 and give to the appellant. The appellant was given a title deed and moved quickly to prepare building plans a building permit. We are told that he has built a small house (meant for shop frames) which is not yet roofed. He built it during the period of the dispute. We are told that the appellant owned the land across the road previously. Plot No. 748 Block A is not on that side. It is across the road. It is on the part of the respondent's land. My look at the inserted map showed a likely Page 9 of 11 I hold that plots Nos. 747 and 748 were formerly one piece of land which was subdivided to create two plots. The ward tribunal believed the evidence that the respondent was not involved in the survey. It did not believe Mr. Ramadhani Iddi who said that he participated the survey. Being the trial court was better placed to examine the demeanour of the witnesses. (The district court had the same finding. I share their views. I have no basis to interfere this concurrent finding. The issue now is whether it was legal to survey land and issue a title to one of the disputants. I think that there was no legal justification to survey the land without engaging the parties fully. And if the block was surveyed under majority rule, it was not proper to issue a title deed to plot No. 748 to one of the disputants. The dispute had to be resolved first. The rule is that any title to the land issued *Francis Paul v. The Republic* (CAT), Criminal Appeal No. 251 of 2017 and *Siza Patrice v. The Republic*, Criminal Appeal No. 19 of 2010. without resolving any boundary or ownership dispute is invalid, illegal, null and void. It must be neglected as a document which has no force of law. Indeed, this is what was done by the lower tribunals and I see nothing wrong with their findings and decision. Page 10 of 11 Further, much as the survey may be legal, but on the finding that the appellant did not own the land, which was owned

by the respondent before the survey for his land is on the other side of the road, there was no way in which a title deed to plot No. 748 Block A Gezaule could be issued to the appellant without compensation to the respondent. Any such title deed remain illegal, with no legal effect. This discussion have answered all the grounds of appeal. In the negative and they are dismissed. That said, the appeal is found to be baseless and dismissed with costs. It is ordered so T, i V Judge 28/10/2022 Court: Judgment delivered. Right of appeal Explained. t.M. Cha Judge 28/10/2022 Page 11 of 11

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Prepared on 13 October 2026 · Esheria