Land Law

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 115 OF 2004

RUPIANA TUNGU 3 OTHERS .....APPELLANTS
VERSUS

ABDUL BUDDY & HALIK ABDUL .....RESPONDENTS

JUDGMENT

Date of Last Order: 08/05/2008
Date of Judgment: 27/05/2008

Mlay, J.

According to the memorandum of appeal filed in this court on 15th May 2004, this appeal has been brought by BUPINA TUNGU AND 3 OTHERS against the Respondent who are, ABDUL BUDDY AND HALIK ABDUL. The appeal is against the decision of the district court of Ilala (Kabuta RM in the judgment delivered on 5th day of April 2002 in Civil Case No. 220 of 2002. In the memorandum of appeal, the case has been wrongly referred to as Civil appeal No. 220 of 2002. The appeal is against the whole judgment and decree, on the following grounds:

a) *That the learned trial magistrate erred in law and fact in holding that the land in dispute belong to the respondent without considering the number of years the appellants have stayed in the area without any disturbance from any person in their enjoyment of the land in dispute.*

b) *That the learned trial magistrate erred in law and fact in not considering the improvements which the appellants have effected in the area.*

c) *That the learned trial magistrate erred in law and fact in not considering the are crebility of the evidence adduced by the appellants in the course of the hearing the case.*

d) *That the learned trial magistrate erred in law and fact in holding that the appellants were trespassers in the plot while it was the respondent who invaded the area in dispute.*

e) *That the learned trial magistrate erred in law and fact in not assessing the validity of the title of the respondent which was obtained latter (sic) years while the appellants were already living in the area.*

f) *That the learned trial Magistrate erred in law and fact in not considering the number of residents living in the area*

and they were having their school recognized by the authorities of the state.

The appellants did also file an application for stay of execution pending the hearing and determination of the appeal but the application was subsequently dismissed for want of prosecution.

After the parties had been allowed to file written submissions on the appeal, it became apparent that the consent of the Honourable Chief Justice was required before proceeding further with the matter, in term of section 54 (3) of the Land. Disputes Court Act, Cap 216 RE 2002, because the appeal is on a land dispute and was filed after the said Act had come into operation on 1/10/2003 vide G.N 223/2003.

The consent was subsequently granted vide the circular letter JY/C.20/241 dated 12/11/2007, this case being listed as item 127, but the letter was not brought to the notice of the judge until February 2008, hence the long delay to dispose of this matter.

In their written submissions the Appellants stated as a background to the appeal, that they have been living in the area in dispute for a long time since 1995 before they were

invaded by the respondents claiming to be lawful owners. It is further stated that, and I quote from paragraph 1 of the said submissions;

> *"That the appellants were allocated the land by the village council in 1995 and since then they developed the land by making improvements therein which are houses, crops, and trees such as coconut, mango and orange trees".*

The Appellants further stated that;

> *"Surprisingly, in 2002 the respondent approached the appellants accompanied by police officers alleges (sic) that the appellant have unlawfully invaded his land and destroyed his crops including orange and coconut because something which is not true ..... That after these allegations the respondents filed a case in the District Court of Ilala at Samora which is Civil Case No.220/2002 and the judgment was entered on favour of the respondent, on the ground that the respondent has right*

of occupancy hence he is the lawfully (sic) owner of the land"

On the substantive grounds of appeal, the appellants chose to argue grounds (a) and (f) together. The two grounds allege that the trial magistrate erred not to have considered the number of years the appellants had been on the land and also not having considered the number of residents on the land in dispute. The appellants submitted that, and I quote:

"It is the law that when a person occupies land for more than eleven years without disturbances hence he automatically acquire the lawfully title on that land, in this case the appellants have occupied the land since 1995 and they developed the land until 2002 when the respondents appeared and claimed to be the lawfully (sic) owner. Further more the appellants allocation was done by a competent authority that the village council in 1995 hence they were properly allocated the land....."

The appellants further submitted that and I quote:

> *"It is clearly provided in the LAND ACT NO. 4 of 1999 AND AN Village Act No. 5 of 1999 that the customary right of occupancy and the right of occupancy stand on the same foot that is to say, no one overrides the other, hence they are all recognized by the law to be the same".*

The appellants argued that the trial magistrate misdirected himself by relying on the deed of right of occupancy without considering that the appellants were the first to acquire title over that land.

The appellants also argued grounds (c) and (d) together. Ground (c) alleges that the trial magistrate erred not to consider the improvements made by the appellants on the land in dispute and ground (d) alleges that the magistrate erred to hold that the appellants were trespasser to the land in dispute. The Appellants argued that the trial magistrate should have considered that, "*since 1995 when the appellants acquired the land they developed the land until the respondent claims to be the lawful owner*". They submitted that, "*it is well established that compensation is very important when ones*

land owned customarily is allocated to a person with rights of occupancy.....".

The appellants submission is to the effect that the provisions of section 34 (3) of the Land Act, No. 5 of 1999, applies to their case. They quote the subsection (3) paragraphs (a) and (b), (iv) as stating:

> *"Where a right of occupancy includes land which is occupied by a person under a customary law, it shall be a condition of that right of occupancy that those customary rights of occupancy shall be recognized and those persons so occupying the land shall be moved or reallocated only-*
>
> *a) so far as is necessary to enable the purpose for which the right of occupancy was granted to be carried; and*
>
> *b) in accordance with due process and principles of fain administration being given.*
>
> *i) .....*
>
> *ii) .....*
>
> *iii) .....*

iv) Prompt payment of full compensation for loss of any interest in land and any other losses that are in curried due to any move or any other interference with their occupation or use of land.

Relying on the above provisions, the Appellants argued that, the appellant being lawful owners as they were allocated the land by the village council and they had effected some improvements to the land, the respondents were required by law to compensate the appellants and not to evict them.

On ground (e) in which the Appellants have claimed that the trial Magistrate erred in not assessing the right of occupancy owned by the respondents, the Appellants argued that, "***the issue is not whether the respondent have the deed but the question is when the deed was granted***". They contended that "***mere processing the right of occupancy deed does not extinguish the customary right of occupancy.....".*** They argued that in this case, ***"..... It is clear that the appellant were the first to be allocated the land and not the respondent".***

The appellants did not submit on ground (b) of appeal, which alleges that, the trial magistrate "***erred in law and facts in not considering the credibility of the evidence***

adduced by the appellant in the course of hearing the case".

The Respondents decided to argue the appeal generally. They stated in their submissions that as the proceedings in the lower court will show, the Respondents who were the Plaintiffs, sued the defendants (appellants) over a shamba with title No. 38460 held under L.O. No. 96635. Farm No.1291 at Msongola Area in Dar es salaam Region. They submitted that the Respondents (Plaintiffs) tendered as Exh. P2 certificates of occupancy ie. Title No.38460 and No.37969 in respect of farms No.1291 and 1287 respectively. They contended that a search of the land register conducted on 23/4/2002 showed that title No.37969 held under L.O No. 96634 Farm 1287 and title No. 38460 held under L.O No. 96634 Farm 1291 are owned by ABDUL BUDDY and MALIM ABDUL, the 1st and 2nd Respondents, respectively, effective from 1st October, 1988. they further contended that there was uncontroverted evidence of PW1 that he bought the land in dispute from members of the village and paid compensation. They referred to the evidence adduced by the appellants to the effect that they were given the land in dispute by the village authority in 1995 and to a letter dated 4/7/2003 produced by the appellants, to this effect.

They further quoted the testimony of DW (1st Appellant) in cross examination in which DW1 admitted.

"I didn't have a title in respect of the shamba we were given. I started to live there from 1995. I do not know who owned the shamba before. I don't know whether the plaintiff (for respondent) was the one with the title deed".

The Respondents further quoted from the written submissions by the Appellants at page 2, as stating:

"The appellants were allocated the land by the competent authority that is the village council in 1995 hence they acquired the ownership customarily..... It is clearly provided in the LAND ACT NO OF 1999 and the VILLAGE ACT no 5 of 1999, that customary right of occupancy and the right of occupancy stand on the same foot, that is to say no one overtides the other hence they are all recognized by the law to be the same".

The Respondents submitted that the Appellants submission is legally wrong for a number of reasons. First, if it were true that the appellants were allocated the land in

dispute in 1995, then the said allocation was null and void *ab initio*, as there was no land available which the village council could allocate, because the said land in dispute had been allocated to the Respondents in October, 1988. As a second reason, the Respondents submitted that reliance on the provision of the Land Act No. 4 of 1999 and the Village Act No. 5 of 1999, is of no effect as both statutes have no retrespective effect.

They further quoted the provisions of section 183 (1) of the Land Act, No. 4 of 1999, which state:

> *"unless the contrary is specifically provided for in this Act, any right interest, title power or obligation acquired, accrued established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the a commencement of this Act".*

They further quoted from Sarkar on Evidence 14th Edition Vol. II 1993 at page 1455, where it is stated:

> *"if there are two persons in a field each asserting that the field is his, and each doing some act in the assertation of*

the right of possession, and if the question is which of the two is in actual possession, the answer is, the person who has the title is in actual possession and the other person is a trespasser".

The Respondents argued that in this country, section 100 (1) of the Evidence Act, 1967 provides for the exclusion of oral by documentary evidence.

On the basis of the above, the Respondents concluded that the appellants have miserably failed to prove their ownership over the land in dispute, while the respondents proved their ownership. They prayed that the appeal be dismissed with costs. In their submissions, the respondents appended documentary evidence, which will not be considered in this appeal, as no leave was sought or given to bring additional evidence at this appellate stage.

Although the memorandum of Appeal shows that there are four appellants, including BUPINA TUNGU LUBUGA, the record of the trial Court shows that the present Respondent sued BUPINA TUNGU LUBAGA together with 33 others, alleging that the Defendants (Appellants) "***trespassed into their suit premises and each one at his/ her own time started to develop either by cultivating and planting***

different types of crops and erecting structures thereof ***.....*** " (para 57 the Plant).

The Respondents/ Plaintiffs alleged in paragraph 3 of the plaint that they were the beneficial registered owners of two pieces of land which are located at Msongola Area, within Ilala District and city of Dar es sallam held under titles Nos 37969 and 38466 and described as L.O No. 96634 FARM No.1287 and LO No.96636 FARM No.1291. They further avered in paragraph 4 of the Plaint that upon grant of Right of occupancy to the Plaintiffs in October 1988, they started developing the same.

The Plaintiffs/ Respondents prayed for judgment and decree against the defendants/ Appellants jointly and severally for:

i) An order of pursuant injunction restraining and prohibiting the defendants by themselves, or their agents or workmen from entering or causing anything to be done or carred out on the suit premises.

ii) An order requiring the defendants to demolish and building works or structure erected on the suit premises and remove any plant or building material there from.

iii) An order that the suit premises is a sole property of the plaintiffs.

iv) *Payment of damages Tshs. 10 million as per paragraph 8 above.*

v) *Interest in the decrerial amount .....*

vi) *Costs of the suit*

vii) *Any toher relief.....*

The trial magistrate Kabuta RM having heard evidence from the plaintiffs and four defendant's witnesses, in a short judgment delivered on 5/4/2004, summarized the facts as follows and I quote from paragraphs 2 and 3 of the typed judgment:

> *"in his testimony the first plaintiff produced defendant documents including a title deed to the effects that they legally acquired the shamba. Four defendants on behalf of others gave evidence to the effect that they were given the shamba by Village Authority in 1995. They produced a letter dated 4/7/2003 from Mwenyekiti wa Kijiji cha Buyuni Kata ya Buyuni. The letter has been addressed to this court to show that the defendant are rightful owners of the shamba".*

The trial magistrate then proceeded to make the decision of the court in the 4th paragraph, as follows:

> *" The first issue is who is the lawful owner of the shamba. I have carefully considered the evidence presented in court as well as the exhibits tendered and I am satisfied that the plaintiff are the rightful owners of the shamba.*
>
> *Certificate of occupancy tendered i.e Titles No.38460 and 37969 clearly show that the plaintiffs legally acquired the plot. A mere letter tendered by the defendant side cannot be considered as evidence as regard ownership. Further more the letter was prepared one year after the filing of this matter. I do find that such evidence is an after thought and intended to deny the plaintiffs of their rights.*
>
> *I accordingly enter judgment for the plaintiffs with costs".*

It is this decision which has been challenged in this appeal. Although the judgment of the trial court did not go into the details of the evidence and of the arguments used in

support of the case for each side, a matter which is not the subject of appeal, it did come to grips with the real issue in dispute, which is the ownership of the disputed land.

The court also did consider the material evidence relating to ownership by each side, the Respondents/ Plaintiffs having offered title deeds and the Appellants/ Defendants, a letter from the Village written to the court after the suit had been instituted, purporting to be evidence that the land belongs to the Appellants/ Plaintiffs.

In their written submissions, the Appellants have relied on the said letter and their own oral evidence that they were allocated the said laid by the village council in 1995. The appellants have argued that the allocation of land by the Village Council in 1995, gave the appellants a customary land right over the said land. The appellants have not disputed that the respondents had registered title deeds over the same land. The Appellants have however made two arguments, which appear to be in the alternative. The first argument is that they were the first to be allocated the land and for this reason, they had a better title than the Respondents, whose rights of occupancy were granted later.

First, the factual position of the Appellants contention that they were first to be allocated the land, is not correct. As

correctly pointed out by the Respondents in their submissions, the rights of occupancy over the disputed land as evidenced by the documents produced by the Respondents/ Plaintiffs were granted on 12th October 1988. the Appellants who allege to have been allocated the same land by the village council in 1995, cannot be said to have been allocated the said land before the Respondents. They cannot therefore validly claim that their alleged allocation by the village council in 1995, if true, is superior and preceeds the rights of occupancy granted to the Respondents over the same land in October 1988.

Secondly, as a matter of law, even if it is assumed that the said land was allocated to the Appellants by the Village council in 1995, a question arises whether the Village Council had the legal authority to allocate to the plaintiffs land which did not belong to the village, or was not under the jurisdiction of the village council. As the land in dispute was registered land for which certificates of title had been issued to the Respondents in October 1988, unless there is evidence that the said rights of occupancy had been revoked and the land vested in the Village council, the village council had no authority to allocate the said land to the appellants. Unfortunately the Appellants did not call any witness from the Village Council or offer any other evidence, to show that the rights of occupancy granted to the Respondents had been revoked and the land vested in the village council. In the

absence of such evidence, the Village Council had no legal authority to allocate land which was not under the jurisdiction or ownership of the village council, to the appellants. I therefore agree with the respondents submission that the purported allocation of the land to the Appellants was void *ab initio* and as the result, conferred no title of whatever description to the Appellants. The trial magistrate found correctly in my view that the letter addressed to the court, written in the year 2003 after the suit was instituted, cannot be relied upon as evidence of allocation of land by the village council in 1995. In any event and as already found by this court, the village council did not have the legal authority to allocate land for which a right of occupancy had already been granted to the respondents in 1988. The appellants claim that they had a customary law title to the land is therefore without any legal foundation. The Village council which did not have the authority to allocate the land cannot grant a customary law title to the land. In short, the appellants did not adduce any evidence during trial which could prove that they had any title to the land in dispute.

The Appellants have in their submissions argued that they were on the land for eleven years having an undisturbed quiet enjoyment of the land before the Respondents claimed the said land. The appellants claim is a claim of title for being in adverse possession. The common law principle of adverse

possession applies where the person claiming has been in adverse possession for twelve years. The principle is enacted in the Law of Limitation of this country for bringing actions on land. The limitation period is twelve years, and not 11 years. In the circumstances, even assuming the Appellants claim of quiet enjoyment of the land for eleven (11) years is true, they did not acquire title by adverse possession, as 12 years had not lapsed.

On the other hand, since the Appellants claim that they were allocated the land by the Village council in 1995 and that the Respondents started claiming the land from the Appellants in 2002, simple arithematic will show that only 7 (seven) years had lapsed between the alleged allocation of the land to the Appellants in 1995 and the alleged claim by the Respondents in 2002. This is not only far short of twelve years, but it also shows that the Appellants claim of having had quiet enjoyment of the land for eleven (11) years, is not factually true.

The appellants have argued that they are, by application of the Land Act 1999 and the Village land Act 1999, entitled to compensation for the improvements which they made on the land and they have criticized the trial magistrate for not considering the issue. As the Respondents correctly argued the provisions of the Land Act 1999 and the Village Land Act 1999 are not applicable to the Appellants case simply because the

respondents were granted rights of occupancy over the land in dispute in 1988 and not in the year 2002, when they filed the case in court against the Appellants. Secondly, even the repealed Land Ordinance Cap 131 under which the Respondents were granted the rights of occupancy in 1988, cannot be called in aid of the Appellants. This is simply because when the Respondents were granted the rights of occupancy over the land in dispute, the appellants were not on the land and had not by then, made any improvement on the said land for which they could claim compensation from the Respondents. The Appellants having entered the land in dispute in 1995, some seven (7) years after the Respondents had acquired registered titles over the said land, did not have any right for compensation from the Respondents for any improvements they may have made on the land. Under the repealed law, the duty to compensate rested on the shoulders of the "*incoming occupier*". Since the Respondents had been granted rights of occupancy over the land seven (7) years before the Appellants entered or acquired any right over the land, the Respondents are not in law, "*incoming occupiers*" as they were already in law, in occupation of the land in dispute. To sum up the issue of compensation for improvements made by the Appellants, since the Appellants did not have any interest recognized by law in the land and that the Respondents were in legal occupation of the land when the Appellants entered upon the land in 1995, the appellants have

no claim against the Respondents for compensation. The trial Magistrate therefore made no error in law in not considering the matter or in not awarding compensation to the appellants. On the complaint that the appellants were wrongly found to be trespassers, although the trial magistrate made no specific finding on it in the judgment, the magistrate would have been justified to do so, as the Appellants had no legal right to enter upon or to remain on, the land dispute, as the land had been lawfully granted to the Respondents, seven years before.

Although the appellants did not make any submission on ground (b), I find there was no credible evidence adduced by the appellants to show that they had lawful right to the land in dispute. To sum up this appeal, I find that the whole appeal is without merit and it is dismissed in its entirety.

The Respondents will have the costs of this appeal.

It is ordered accordingly.

J.I. Mlay

JUDGE

Delivered in the presence of the appellants and the 1st Respondent this 27th day of May, 2008. The parties have the right of appeal to the Court of Appeal with leave of this court.

J. I. Mlay

JUDGE

27/05/2008

Words: 4,055