IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 8 OF 2019

(Originating from Land application No.75 of 2011 before the District Land and Housing Tribunal of Kinondoni, before Hon R.L. Chenya)

ALFRED HERMAN MOSHI ..... APPELLANT

VERSUS

COL.MASELU (RTD)..... 1ST RESPONDENT

MUSA M MPAKATIKA.....2ND RESPONDENT

JUDGMENT ON APPEAL

S.M MAGHIMBI, J:

The appellant, being aggrieved by the decision of the District Land and Housing Tribunal of Kinondoni ("The Tribunal") in Land Application No.75 of 2011 ("The Application"), has lodged this appeal to this Court on the following grounds:

i.) That the trial chairman glossily erred in law and in facts by not establishing when acquisition of the farm held under the Certificate of Title No. 27037 belongs to Hamza Aziz took effect.

ii.) That the trial chairman glossily erred in law and facts by not establishing the lawfulness of ownership of the vendors who sold plots of land to the 1st and 2nd respondents.

iii.) That the trial chairman erred in law and in fact by concluding that in Civil Case No. 183 of 1993, it was ruled that the original owner be paid compensation and the suit land continued be owned by wananchi and that the said wananchi include the 1st and the 2nd respondents.

iv.) That the trial chairman glossily erred in law and in fact by dismissing the applicant's application and holding in favour of the respondents in spite of the overwhelming evidence submitted by the appellant against respondents.

v.) That the trial chairman glossily erred in law and fact by not determining the issue no.4 as framed before the hearing started which is on reliefs the parties are entitled.

vi.) That the trial chairman erred in law and fact by failure to thoroughly consider the final written submissions filed by the counsels of the parties subject to the order of the tribunal.

It was the appellant's prayer that this appeal be allowed by setting aside the whole judgment and decree of the tribunal, the appellant be declared the lawful owner of Pot No. 2054 Block "J", SalaSala Kinondoni Municipality, grant general damages to the tune of 30,000,000/= and costs of this application.

During the hearing of this appeal the appellant enjoyed the service of Imam Hassan Dafa learned advocate and the respondents were represented by Mr. Job Kerario, learned Advocate. On the 1st October,

2019 the court ordered the hearing of this appeal to proceed by way of written submissions.

While making his submissions in cupport of the appeal, Mr. Dafa opted to abandon the 6th ground of appeal. Submitting on the 1st ground of appeal, Mr. Dafa argued that the disputed land was forming part of the property of the late Hamza Aziz held under Certificate of Title No. 27037 until when it was illegally acquired by the government. He then posed a question as to when Hamza Aziz's land was legally acquired. He submitted that the revocation of the suit land led to the filing before the High Court, a Civil Case No. 183 of 1993 between Hamza Aziz and the Minister for Lands, Housing and Urban Development ("herein referred to as the previous suit") whereby it was decided that the farm forming a part of the disputed land was acquired/revoked in violation of the Land Acquisition Act, Cap. 118 R.E 2002. Further that in the same decision dated 22/09/2009, the court blessed the negotiation between the parties and ordered that acquisition be subject to payment of compensation in accordance with the valuation conducted according to the agreement of the parties. He argued that the decision had an effect of nullifying the revocation of the land dated 17/01/1991.

As to when the revocation was legalized, Mr. Dafa submitted that in the previous suit, the court held:

"*There were protracted arguments by the parties including a failed mediation before the defendant Attorney General told the Court that the best way to move forward was to evaluate the suit property and upon*

evaluation of the same, parties would conduct negotiations premised on the amount arrived by the valuer. The plaintiff was agreeable to this course of action and on this basis the court through the order dated 25th October, 2002 ordered valuation of the suit property and thereafter parties to negotiate settlement."

He hence argued that by accepting the offer from the Attorney General to have the suit property valued and then negotiating the amount of compensation, Hamza Azizi consented for his land to be taken over by the Government. Further that since Hamza Aziz's land was officially revoked upon final payment of compensation to his estate. He hence submitted that at the time of hearing of this matter at the trial tribunal in 2018, the tribunal was informed that the compensation was yet to be finalized as it was upon payment of compensation.

Mr. Dafa combined his submissions for the 2nd and 3rd grounds of appeal. He submitted that the trial chairman failed to establish the lawfulness of the ownership of the disputed land by one Lazaro who sold that land to the 1st respondent and the lawfulness of the disputed land by the 2nd respondent who claims to have owned it by longtime usage. He argued that even if the 1991 revocation was proper, the said Lazaro had no power to sell land which was under the custody of the president. He argued that no evidence was adduced to the effect that the said Lazaro was duly allocated by the relevant authority the land he purportedly sold to the 1st respondent.

Mr. Dafa submitted further that in his pleadings (vide the joint Written Statement of Defence filed at the Tribunal), the 2nd respondent pleaded to be the original owner of the disputed land before 1991. He argued that when testifying as DW2, the same 2nd respondent testified that he bought the piece of land in 1992 from on Ali Kinoga and that same was testified by his DW3 arguing that this is contrary to Section 110(1) of the Law of Evidence Act, Cap. 6 R.E 2002.

Mr. Dafa submitted further that the tribunal's holding that the respondents are the lawful owners of the disputed land was based on the non-existing order of the High Court that after the original owner is compensated, the land continued to be owned by wananchi arguing that there is no such order in the decision of the High Court.

On ground No. 4, Mr. Dafa's brief submission was that looking at the evidence adduced during the hearing, there was heavier evidence adduced by the appellant as opposed to the light and contradicting evidence adduced by the respondent as he had submitted above. And on the 5th ground of appeal, he submitted that issue No. 4 framed during trial was not discussed in the judgment. He prayed that the appeal is allowed with costs.

In his reply, Mr. Kerario started by pointing out that Mr. Dafa wrongly termed the appeal as a memorandum of appeal instead of the word petition referring to Section 38(2) of the Land Disputes Courts Act, 2002. With due respect to Mr. Kerario, it is he who has wrongly cited the law. This is a first appeal emanating from the Tribunal in its original

jurisdiction hence the provisions of Section 38(2) of the Act are inapplicable as they apply to appeals to this court but originating from the Ward Tribunal. This point is without merits and I find it just that I dismiss it at this point.

On the substance of appeal, Mr. Kerario submitted that the fact that the tribunal did not establish when the acquisition of the farm held under the Certificate of Title No. 27037 belonging to Hamza Azizi took effect cannot be taken as a presupposition of the validity of the claim by the appellant that he indeed lawfully purchased the piece of land in dispute. That this argument cannot stand because at the time the piece of land was purportedly sold to the appellant, by the children of Hamza Aziz, the previous suit had been decided and there is no evidence that Hamza Aziz had two separate farms.

He submitted further that the argument as to when the revocation took effect has no much effect to this appeal as it cannot exonerate the vendors (the children of Hamza Aziz) from the blame for having unlawfully sold the appellant a piece of land which was part and parcel of a large farm and in respect of which compensation had been paid and hence making double payment to the family of Hamza in respect of the same piece of land. He argued that there was no evidence to show that no payment/compensation had been paid in respect of the land that was sold to the appellant, neither was there evidence led to show that the piece of land in dispute was not part of the larger farm in respect of which compensation had been paid. Further that there was no evidence

to show that the late Hamza Aziz gifted the said land to his children and that the purported sale agreement was executed in June, 2008.

Mr. Kerario submitted further that the decision of the tribunal was also the logical conclusion in holding that it was unlawful on the part of any member of Hamza Aziz's family to continue claiming any right over the farm/land in respect of which compensation had been paid. That what was done to the appellant was clearly fraudulent, and the appellant is entitled to claim back his money from the vendors. Further that the question of ownership of the vendors who sold plots of land to the 1st and 2nd respondents is quite simple to answer like the rest of wananchi who have been in undisturbed the occupation of their respective pieces of land within Hamza Aziz farm, after the previous suit and have had longtime usage since 1991. That this good evidence against any claim by the appellant who came to the suit land in 2008 purporting to have purchased the land in dispute from the people who had no good title to pass because they had been compensated for the whole farm leaving the whole farm to wananchi.

He argued that the duty of establishing that the vendors had good title to pass was upon the appellant and not upon the tribunal, citing the case of **Presidential Parastatal Sector reform Commission Vs. Azania Bancorp Limited [2006] T.L.R 1** where the Court of Appeal of Tanzania held that:

"in the absence of evidence, disputed matters of mixed fact and law cannot be resolved by considering written submission of learned advocates only".

That even if the 1st respondent is taken to have unlawfully purchased land, that he came into physical possession much earlier than the appellant and that the respondents are among those people who actuated Hamza Aziz to go to court in 1993 unlike the appellant who was not in the group of wananchi of SalaSala who have continued to live in their respective plots to date and that the 1st and 2nd respondents acquired their plots from their fellow wananchi of salasala. He pointed out that the appellant tendered as EXP1 a sale agreement dated June 2008 which was to the effect that the land that the appellant purchased was unsurveyed piece of land divided from the large farm comprised under CT No. 27037 from the area famously referred to as Hamza Aziz farm. He argued that it is inconceivable to imagine how unsurveyed land can at the same time be comprised under or within land which is surveyed and has title deed leaving a contradiction on whether un surveyed land can be within a surveyed land?

On the appellant's prayer of Tshs. 30,000,000,/= as a general damages, Mr. Kerario submitted that it is a bad prayer because the assessment of general damages is the duty of the trial court and the same depends upon the results of the case.

In his rejoinder, Mr. DAfa argued that throughout their submissions, Mr. Kerario admits that the disputed land was part of the large piece of land

belonging to Hamza Aziz but they did not establish how the people who sold the land to the respondents acquired title to that land. Further that the appellant has managed to establish how he acquired the disputed land.

Having gone through the parties' rival submissions on this appeal, the main contention is on the status of the disputed land prior to the previous suit which will then determine which subsequent transfer of the suitland; between the transfer to the appellant and the one to the respondents; was legal.

As far as the evidence during trial is, the disputed land was part and parcel of the estate of the late Hamza Aziz whereby the Civil Case No. 183/1993 blessed the revocation of ownership on certain terms and condition, a decision issued in the year 22/09/2009. It must however be noted that the issue of revocation was not tabled for determination duringhearing of the previous suit. The only issue there was the quantum of compensation to be paid to the then plaintiff (the deceased Hamza Aziz). Therefore so far as the previous suit is concerned, the issue was not ownership of the land, that had already passed to the government, the issue was on the amount of compensation.

In his evidence during trial, the appellant testified to have purchased the suitland in 2008. It is worth noting that first, the judgment in the previous suit was delivered in 2009 and as said earlier, the ownership of the land was not in dispute, rather the amount of compensation. And as correctly argued by Mr. Kerario, there is no place that the appellant proved that the

farm in dispute in the previous case was different from what was sold to him. Even in the records of the trial tribunal the testimonies of the PW2 and Pw3 shows clearly that the suit land and the disputed land is the same land used to be owned by the Late Hamza Aziz, no evidence were adduced to show that the piece of land in dispute was not part of the larger farm owned by Hamza Aziz in the previous suit.

Having found that the suitland was the same as in the previous suit, it goes without saying that after they have been compensated, the family of Late Hamza Aziz was not supposed to continue claiming ownership of the disputed land. I therefore agree with Mr. Kerario's argument that the vendors are to be blamed for having unlawfully sold the appellant a piece of land which was part and parcel of a large farm and in respect of which compensation had been paid hence making double payment to the family of Hamza in respect of the same piece of land there was no evidence to show that no compensation had been paid in respect of the land that was sold to the appellant.

On their part, the respondents claimed to have bought the suitland in 1993 which is the time when the land was already revoked in 1991 a evocation that was blessed by the previous suit. They have successfully shown that the onweship of the late Hamza Aziz was revoked and the farm was taken back to Wananchi hence the vendors to the 1st respondent and the 2nd respondent occupied the land as the outcome of the revocation. Considering that both parties started owning the land way back in the 1993 and 1991, and the appellant claimed to have bought the land in 2008, it

means that by the time the purported sale agreement (EXP1) was executed, the respondents had occupied the land for more than at least 15 years without any disturbance.

Therefore at this point, it is safe to conclude that in the transaction exhibited by EXP1, the children of the late Hamza Azizi had no title to transfer to the appellant herein as the ownership therein was no longer in the estate of the late Hamza Azizi. Furthermore, if we were to bless the transaction vide EXP1, then the estate of the late Aziz would have been double paid, vide the decree in the previous suit and the amount begotten as consideration in EXP1.

Having made the above findings, I see no reason to interfere with the findings of the trial tribunal. The appeal before me is without merits and is hereby dismissed with costs.

Dated at Dar es Salaam this 16th day of March, 2020

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S.M MAGHIMBI

JUDGE.