MWALIMU OMARI AND ANOTHER *v.* OMARI A. BILALI

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Mfalila and Samatta, JJ.A.)

CIVIL APPEAL No. 19 OF 1996

(Appeal from the decision and decree of the High Court of Tanzania at Dar es Salaam, Masanche, J., dated 15 May 1990 in Civil Appeal No. 22 of 1987)

Land law – Customary land law – Whether a holder of land under customary law can be reduced into a squatter.

Land law – Customary land law – Title of a holder of a right of occupancy under customary law is recognized by the law of the land, i.e., the Land Ordinance.

Land law – Customary land law – In what circumstances the title of a holder of right of occupancy under customary law can be taken away.

Land law – Customary land law – Whether customary law on land and tenure applies in urban areas.

Land law – Customary land law – No one can hold land under customary law in a planned area - Customary law cannot apply in urban areas.

Land law – Customary land law – Title to urban land is dependent on granted rights of occupancy - Customary law does not operate in urban areas.

Land law – Declaration of urban land as a planning area – Whether such declaration divests the original owners of their customary titles on the land.

The appellants had been occupying a plot of land in Magomeni area, Dar es Salaam, under customary tenure. Subsequently the plot was surveyed and the respondent was granted a right of occupancy on the plot which now became Plot Number 60. A dispute arose over who was the rightful party to occupy Plot Number 60. the matter

came before a Court of the Resident Magistrate who decided for the respondent. On appeal to the High Court, the learned judge upheld the decision of the trial court on the ground that since the appellants were merely holders of a deemed right of occupancy (as their tenure was under customary law) their rights were those of licensees and that therefore they could not hold the land in adverse to anyone. The first appellate court further held that because customary law could not apply in an urban area, the appellants were therefore squatters.

The Court of Appeal in considering whether holders of land under customary law in planned areas have an inferior title to those who are subsequently allocated revisited the cases of *Mtoro bin Mwamba v. Attorney-General* (2) and *Methuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu* (3).

Held: (i) Customary tenure does not apply in urban areas, let alone in the heart of the City of Dar es Salaam.

(ii) The appellants held no titles under customary law, they were squatters.

(iii) Title to urban land is only dependent on granted rights of occupancy because customary law does not operate in urban areas.

(iv) *Obiter:* The title of a holder of right of occupancy under customary law can only be taken away from the holder by an act authorized by a relevant law, i.e., the Land Acquisition Act, not by a simple act of declaring an area a planning area.

(v) It would be wrong in law to hold that a declaration of urban land as a planning area divests the original owners of their customary titles on the land.

(vi) If the appellants in this appeal held customary title on the disputed plot prior to its grant to the respondent, they would be protected by section 33(1)(b) of the Land Registration Ordinance and therefore their title could not be extinguished by the subsequent grant of the right of occupancy on the same plot to the respondent.

Appeal dismissed

Cases referred to:

(1) *Col. Kashmiri v. Naginder Singh Matharu* [1988] T.L.R. 163

(2) *Mtoro bin Mwamba v. Attorney-General* [1953 - 1957] (2) T.L.R. 327

A (3) *Methuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu* [1985] T.L.R.103

(4) *Emmerson v. Madison* 1906 AR 569

B *Dr Lamwai,* for the Appellants

Mr Semgalawe, for the Respondent

JUDGMENT

C (Dated 03 December 1998)

MFALILA, J.A.: This is a second appeal by the two appellants, Mwalimu D Omari and Ahmed Baguo, their first to the High Court was dismissed. The relevance of what we intend to state in this judgment makes it necessary to state as fully as possible what is alleged in the pleadings as well as the evidence which was adduced at the trial.

E In the Resident Magistrate's Court at Dar es Salaam, the respondent filed a suit against the appellants in which he prayed for a declaratory order that he is the lawful holder over Plot Number 60 Block E Magomeni area in the City of Dar es Salaam; for an order to demolish F all improvements carried out on the said plot by the appellants; for a perpetual injunction restraining the appellants and/or their servants from continuing or repeating any of the acts complained of and damages. The basis of these claims, the respondent alleged, is that he is the G holder of the right of occupancy for a term of 33 years over plot Number 60 Block E Magomeni area effective from 1 July 1978. That in violation of this right, the appellants and/or their servants and agents unlawfully entered the plot and without his consent proceeded to carry out certain improvements on the said plot thereby frustraiting H his own efforts to carry out improvements on the said plot. The respondent further claimed that the appellants did all this wrongfully claiming that they were the lawful holders of the said plot.

I In answer to these claims, the appellants stated that they have a title over the plot in dispute by adverse possession, they have been

in uninterrupted possession and control of the said plot since March 1965 and that therefore the respondent's alleged right of occupancy for a term of thirty-three years effective from 1 July 1978 cannot legally operate to extinguish their claim in adverse possession. The appellants also denied trespassing on to the said plot and that the respondent's prayer for a perpetual injunction "is unjust and calculated to defeat their claim in adverse possession."

The appellants' counter claim to this plot therefore was based on adverse possession.

In support of his case, the respondent told the trial court that in 1978 he applied for a plot to the Ministry of Lands and in July, Plot O.60 Block E in Magomeni was allocated to him vide letter of offer dated 25 July 1978. He paid all the necessary dues, took possession of the plot and started to effect some developments on it. He also complied with the order that he should pay compensation for any improvements he found on the plot but his offer to compensate the appellants for their cassava and latrine was rejected. It was when they entered the plot and started effecting developments of their own that he filed this suit against them.

In support of his claim over this plot, the first appellant Mwalimu Omari, told the trial court that he has been living in the Magomeni area since 1995. He cleared a plot on which he built his house. He gave one of these houses to his late son-in-law. Upon the death of his son-in-law, his parents sold the plot to the second appellant Ahmed Baguo and the position remained like this until 1978 when the respondent came and told them to leave because the plot had been allocated to him.

The second appellant, Ahmed Baguo, told an almost identical story as to how he acquired the plot in this unsurveyed area, that he was given the plot by the first appellant Mwalimu Omari. Later he said he applied for a grant of title and that he was offered Plot Number 60 which the respondent also claimed. These contending claims led to this suit. He admitted that apart from the latrine, he never put up

any structure on the plot. He also conceded that while the title to this plot was offered to him in 1980, this was after the same plot had been offered to the respondent in 1978 and that the latter offer was superior to his own. He concluded his testimony by stating that the dispute over this plot was finally taken of the Prime Minister's Office where it was recommended that the respondent's offer be revoked and the same plot offered to the appellants by virtue of the fact that they were physically on the plot at the time it was offered to the respondent. This recommendation, he said, was never acted upon.

In his judgement, the trial magistrate held that since the appellants were merely holders of a deemed right of occupancy (as their tenure was under customary law) their rights were those of licenses and that therefore they could not hold the land in adverse to anyone. He further held that because customary law could not apply in an urban area, the appellants were therefore squatters. In this position they could not defeat the respondent's claim over the plot, the claim which was supported by a statutory grant of a right of occupancy. On the appellants claim that they were also later offered a right of occupancy over the same plot, the trial magistrate said that this cannot help them because all it means is that there was double allocation of the plot, in which case it is the earlier grant which is effective. He therefore entered judgment for the respondent. Against this decision the appellants appealed to the High Court.

The High Court (Masanche, J.) dismissed the appeal holding as did the trial court that as squatters or holders under customary law, the appellants claim over the plot in dispute cannot override the respondent's claim which is backed by a grant of title under the Land Ordinance.

The appellants were yet again dissatisfied with this decision, they sought and were granted Leave to Appeal to this court. However this being a second appeal, they could only appeal on a point or points of law which the High Court framed as follows:

Whether holders of land under customary law in planned areas have an inferior title to those who are subsequently allocated.

In their Memorandum of Appeal to this court, the appellants lodged two grounds as follows:

(a) That the learned judge erred in law and in fact in holding that title to urban land was only dependant on a grant.

(b) That the learned judge erred in law and in fact in holding that a declaration of urban land as a planning area divested the original owners of their customary title to that land.

And asked this court to:

(a) quash the judgments of the courts below

(b) declare the appellants as the lawful owners of the suit land

(c) order the respondent to pay the appellants' costs of and incidental to the appeal and the proceedings in the courts below.

At the hearing of this appeal, Dr Lamwai, learned counsel who appeared for the appellants, argued on the point of law certified by the High Court when granting leave to appeal. He submitted that section 2 of the Land Ordinance provides a possibility of holding land under another system other than the Land Ordinance. This section provides for granted and deemed rights of occupancy which is under customary law. He added that the occupiers by virtue of a deemed right of occupancy must be informed of the impending plan so that he can apply, if he fails to get the grant, then he is entitled to compensation. Dr Lamwai added that if, as it is usual in practice, this is not done, then any grant of a right of occupancy to another occupier cannot be superior to the deemed right. This, Dr Lamwai concluded, is what happened in this case, the appellants as holders of a deemed right of occupancy were not informed of the impending plan hence the subsequent grant of the right of occupancy to the respondent cannot take precedence over the appellants' deemed grant which in the circumstances was a better title.

A On the other hand, Mr Semgalawe learned counsel who advocated for the respondent, submitted that the respondent's offer had priority over the appellants' because it was issued first in point of time, and for this proposition he relied on the decision of this court in *Col.*
B *Kashimiri v. Naginder Singh Matharu* (1).

On our part, we think this is the time to revisit and consider the decision in the old colonial case of *Mtoro bin Mwamba v. Attorney General* (2), and *Methuselah Paul Nyagwaswa v. Christopher Mbote*
C *Nyirabu* (3) the two cases which were so widely canvassed both at the trial and in the High Court. Going by what happened in the two courts below, both in the submissions and judgements, it became quite clear to us that the decisions in the two cases are not entirely
D free from difficulties.

As we indicated at the beginning of this judgement, the appellants' claim to this plot was grounded on adverse possession. The pleadings are silent as to whom the appellants held this plot in adverse because
E adverse possession must always have an object. This question of adverse possession is also tied up with the relative merits and strengths between the two rights of occupancy created by the Land Ordinance i.e. granted and deemed rights of occupancy.

F In the Land Ordinance Chapter113, a right of occupancy is defined as a title to the use and occupation of land and includes the title of natives or of a native community lawfully using or occupying land in accordance with native law and custom. Of course this definition
G should have been stripped off its colonial verbiage yesterday, but be that as it may, under this definition one right of occupancy is created by a direct grant of public land by the President in terms of section 6 of the Land Ordinance, the other one is that of a person or
H persons holding land in accordance with customary law. From this, two contending views were advanced in this case. One view which was advanced by or on behalf of the appellants, was that since the right of occupancy held by the appellants under customary law subsisted prior to the
I grant for the right of occupancy to the respondent and as there was

no evidence adduced that such prior right of occupancy had been revoked or acquired under the Land Acquisition Act 1967, the grant of the right of occupancy over the plot to the respondent in terms of section 6 of the Land Ordinance was ineffectual as in these circumstances the President had no right or capacity to contract or grant such land to another person.

The other opposing view which was canvassed by or on behalf of the respondent, is that a right of occupancy granted in terms of section 6 of the Land Ordinance, confers a superior and overriding title to the one based on customary law even if the latter is older.

In upholding the respondent's claim over this plot, both courts below relied on the decision in *Mtoro bin Mwamba* and *Nyagwaswa* cases on the status of holders of land under customary law, and virtually equated them with squatters and that the effect of the decision in the Nyagwaswa case was to render holders of land under customary law squatters once the area in which their land, is declared a planning area and that thereby they lose all rights except the right to compensation for unexhausted improvements. In the course of this judgement, we intend to look closely at the decisions in these two cases and hopefully reduce some of the confusion.

In the *Nyagwaswa* case, the facts were briefly as follows: The appellant, Nyagwaswa, purchased an unsurveyed piece of land held under customary law in Mbezi Beach Village. It was agreed and the case proceeded on that basis that Mbezi Beach Village though within the jurisdiction of the City of Dar es Salaam, was a registered village under the Villages and Ujamaa Villages Act 1975. Mbezi Beach Village was therefore classified as a rural area within the City of Dar es Salaam. It was described as a Green Belt Area. This sale to Nyagwasa was witnessed by the local CCM Chairman and Ward Secretary.

Subsequently, the respondent Nyirabu obtained or was granted a right of occupancy over the same piece of land under section 6 of the Land Ordinance Chapter 113. Before Nyirabu started building on the plot. Nyagwaswa started to build on it claiming that he was

A the rightful owner of the plot. Nyirabu successfully sued him in the High Court. In deciding in his favour, the High Court held that the right of occupancy issued to Nyirabu was obtained legally and without fraud, that Nyagwaswa had trespassed on Nyirabu's plot and that the
B right of occupancy issued to Nyirabu extinguished all Nyagwasa's prior rights and interests over the said plot. This decision was challenged by Nyagwaswa on appeal to this court and it was in that appeal, (Civil Appeal Number14 of 1985) that this court was called upon to decide
C on the merits of the two competing claims to this plot, one by Nyagwaswa under customary law and the other by Nyirabu under section 6 of the Land Ordinance, and the status of the holder of a piece of land under customary law in an area after it is declared a planning area.

D It is clear from the majority judgement of the court, that the court avoided to resolve this problem directly for reasons which Mustafa, J.A. gave. Instead the court chose to dispose of the appeal on another ground, namely, the absence of consent to the sale by
E the Village Council. But what was the problem? The relative arguments in support of both claims were very forcefully and ably presented by counsel on each side. It was argued in support of Nyirabu's claim that his Certificate of Occupancy was registered and that this was a
F first registration without fraud and that the provisions of section 33(1)(b) of the Land Ordinance could not help Nyagwaswa because there was evidence from which it could be inferred that Nyagwaswa's estate in the disputed land was registerable. Such evidence, it was
G argued, consisted in the value of the building (over 500 000 at that time) which Nyagwaswa was putting up and also the view he expressed that he wanted to own the place for as long as he wanted. This, it was further argued, indicated that Nyagwaswa was putting up a permanent and substantial building and was contemplating occupation for a term
H in excess of 5 years, these facts made his estate registerable. Consequently, Nyirabu as owner of a registered state, held it free from all estates and interests whatsoever as provided by section 33 (1)(b) of the Land Ordinance.

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On the other hand, it was argued on Nyagwaswa's behalf that section 33(1)(b) refers to the interest in the land being registerable, and that Nyagwaswa's interest in the land which derived from customary law was nowhere stated to be registerable, hence Nyagwaswa's interest *vis a vis* Nyirabu's in this plot was protected under sub-section (1)(b) of section 33 of the Land Registration Ordinance.

We think it would make matters clearer if we reproduce at this stage section 33(1)(b) in full.

> Section 33(1) The owner of any estate shall, except in case of fraud, hold the same free from all estates and interests whatsoever other than
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> 1. not applicable
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> 2. the interest of any body in possession of the land whose interest is not registerable under the provisions of this Ordinance.

In the light of these arguments and statutory provisions, this court Mustafa J.A., as he then was, held as follows at page 108:

> In my view the law in Tanzania on land and tenure is still developing and certain areas are unclear and would have to await the necessary legislation. At any rate I am not prepared on the rather inconclusive and tenuous arguments adduced in this appeal, to hold that the rights of a holder of a right of occupancy by virtue of customary law is extinguished and he thereby becomes a "squatter" on an area being declared a planning area.

And on whether or not Nyagwaswa's interest was protected by section 33(1)(b) of the Land Ordinance, the court held at page 109:

> ... I am also of the view that the interest of the appellant (Nyagwaswa) was not compulsorily registrable, and therefore by virtue of section 33(1)(b) of Chapter 334 the right of the respondent (Nyirabu) *vis a vis* the appellant (Nyagwaswa) is not indefeasible and impeachable.

With respect we agree with this view as a correct interpretation of section 33(1)(b) although the question of compulsory registration

A does not come in at all and we think with even greater respect that Nyirabu's interest was subject to Nyagwaswa's right as firmly protected by section 33(1)(b). In other words, Nyirabu's interest though registered, was defeasible and impeachable by Nyagwaswa's right under section
B 33(1)(b). What this amounts to is that a holder of a right of occupancy under customary law cannot under any circumstances be reduced to a squatter. What is a squatter?" By the ordinary dictionary meaning, squatter is a "person who settles on new, especially public land without
C title, a person who takes unauthorized possession of unocuppied premises." Since the title of a holder of a right of occupancy under customary law is recognized by the law of the land, i.e. the Land Ordinance, such a holder does not fit in the above definition of a
D squatter, his title being protected by State. Such a title can only be taken away from the holder by an act authorised by a relevant law i.e. the Land Acquisition Act but certainly not by a simple act of declaring an area a planning area. It is for these reasons that we
E agree with the minority judgement delivered by Makame, J.A. in the following words at page 114:

> When the respondent (Nyirabu) was made an offer of the parcel of land in dispute on 18 July 1978 the area had already been designated and registered
F as Mbezi Village under the Villages and Ujamaa Villages Act 1975. The spirit and effect of the Act and the various regulations made under it, is among other things, to place the land within the jurisdiction of the village at the disposal of the Village and its Kayas, under the administration of
G the village, for the economic and social transformation and development of the village and its inhabitants. The state decided that it should be so, and it would defeat the objective of the law if grants over the same land were made, even by superior authorities without consultation or at the
H very least knowledge, of the village authorities This, I am satisfied, is what happened in the instant case, as is clearly brought out by the testimony of DW3 Ally Kibwana, the CCM branch Chairman of the area and one of the persons who witnessed the transactions between the appellant (Nyagwaswa) and Mmole. There is no evidence that at the time of the said transaction
I the area had already been surveyed. In fact the defence evidence is that

> it had not bee. Once the appellant got the plot in April 1978, he contacted the Kinondoni District Land Office for a survey and title and the same District Land Office turned round and made an offer to the respondent in July 1978, behind the appellant's back as it were, when it knew that the appellant was in possession and wanted a title. According to Kiluluma "the Land Office would not survey a piece of land and allocate it to somebody without involving the Village Council. [emphasis supplied]

With respect, we agree fully with these views on the respective rights of the appellant Nyagwaswa and the respondent Nyirabu although to us it would matter little whether Nyagwaswa's title was registered or not as we are firmly of the view that it was securely protected by sections 2 and 33(1)(b) of the Land Ordinance. The court could therefore have allowed Nyagwaswa's appeal on this ground if there had not been the sticky problem of consent by the Village Council. We therefore think with respect that the provisions of the Land Ordinance as they are and the forceful exhaustive arguments advanced, were sufficient to enable the court to hold that the right of a holder of a right of occupancy under customary law, cannot be extinguished and turn such a holder into a "squatter" upon the area being declared a planning area.

Having avoided to give a direct answer to the issue of relative validity of a right of occupancy under customary law and that granted under section 6 of the Land Ordiance, the court chose to base its decision on another ground, namely, that Nyagwaswa's purchase from Mmole was not sanctioned by the Village Council as the regulations require. To this effect, Mustafa, J.A. stated:

> I am of the view that the sale by Vincent Patrick Mmole to the appellant (Nyagwaswa) of the land in Mbezi was void and ineffective as it took place without the approval of the village council. The appellant had not acquired any right or title in the land which could defeat the title in the land acquired by the respondent (Nyirabu) by virtue of the Certificate of Occupancy issued to him. There was no extinguishing of the appellant's anterior title to the land, he never had acquired a title to or interest in the land in dispute...

The majority of the court thought that there approval allegedly given by the CCM branch Chairman and the Ward Secretary were not sufficient, because these two officials could not constitute "the Village Council." Makame, J.A. (dissenting) thought that the approval given by these two officials was sufficient as it must have been given on behalf of the council whose stamp appeared on the sale documents. Although Makame, J.A.'s approach is more practical, we think it is fraught with dangers of possible abuse by officials who might purport to act on behalf of the Village Council. To stem such likelihood, it is safe to insist, as the court did in this case, on the approval by the counsel as the regulations require. What does all this mean with regard to the situation in this case? With the above analysis of the Nyagwaswa case, one could legitimately say that like Nyagwaswa, the appellants in this appeal having held customary title on the disputed plot prior to its grant to the respondent, were protected by section 33(1)(b) of the Land Ordinance and that therefore their title could not be extinguished by the subsequent grant of the right of occupancy on the same plot to the respondent. But before we can say so, it has to be established that the appellants in this case like Nyagwaswa, held rights of occupancy under customary law over the land in dispute prior to its grant to the respondent under section 6 of the Land Ordinance. This point is of extreme importance because only then can it be said that the two cases are on all fours. In the *Nyagwaswa* case, the land claimed by both Nyagwaswa and Nyirabu was in a village registered under the Villages and Ujamaa Villages Act 1975 Act 1975. The effect of this was that although the area was within the jurisdiction of the City of Dar es Salaam, it was classified as a rural area where customary law applied. In that village, any disposition of land, had to get the approval of the Village Council, and any grant even by superior authorities over land in the village. The question is whether the appellants in the present case are in the same position. The facts as revealed show that the plot in dispute is situated in the Magomeni suburb of the City of Dar es Salaam. The appellants occupied this plot within the City of Dar es Salaam without authorization from the relevant authorities, namely, the City Council or the Land Office. This was prior to the

area being surveyed and demarcated. Customary law on land and tenure does not apply in urban areas, let alone in the heart of the City of Dar es Salaam. The appellants were therefore by definition squatters. The position then is that the present case is radically different from *Nyagwaswa* because in the present case the appellants occupied the land in dispute as squatters and therefore unprotected, while *Nyagwaswa* held the land in dispute under a right of occupancy in customary law and therefore enjoyed the protection under section 31(1)(b) of the Land Ordinance. The question in these circumstances is therefore whether the appellants could hold the land in adverse possession to anyone as claimed. This point was extensively canvassed in the *Mtoro bin Mwamba* case referred to earlier in this judgment. The trial court relying on the decision in *Mtoro bin Mwamba* held that the appellants cannot claim title over the plot in dispute under customary law because no customary law tenure applies in an urban area, therefore the appellants had never had any deemed right of occupancy and that for this reason they were mere squatters. As such, they cannot claim adverse possession against anyone with an offer of a granted right of occupancy. On this point, the Court of Appeal for Eastern Africa (Sir Newnham Worley VP) stated in *Mtoro bin Mwamba:*

> It remains for me to consider the claim based upon adverse possession, which the learned Registrar rejected but which is not referred to in the judgment of the High Court. The learned Registrar rightly held himself bound in the law by a decision of the High Court of Tanganyika in Miscellaneous Civil Appeal Number 5 of 1947 upholding a decision of a previous registrar in Application Number A/633 to the effect that in the case of land held by a native, the inference must always be that the possession was permissive not adverse. The learned Registrar also considered and rejected various submissions made by Mr Morrison with the object of distinguishing the present case. Before us Mr Morrison conceded that the decision of this court in *Mubena v. Registrar of Titles and another* (1949) 16 EACA 79 was against him on the question of permissive occupation but sought to call in aid the decision of the Privy Council in *Secretary of State v. Debendralal Khan* 1933 ILR 61 CAL 262 on the question of overt possession.

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> These points of law were not however fully argued before us and I do not propose to examine them at length, for the reason that in my opinion the appellants' claim on this ground breaks down on the facts as disclosed in the evidence. Even if it be assumed that his possession and that of his
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> father before him was overt and adverse first to the German administration and then to the British it is clear that such possession has been twice interrupted.

Similarly, in the present case, the appellants can only succeed if

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they at least established that at any one time for a continuous period, they asserted a right of occupation adverse to the respondent. There was no such evidence that the appellants ever made any such claim to possession adverse to the respondent. Their claim to this plot

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without any title in these circumstances was inferior to the respondent's who has a title. To this end, we are in agreement with the observations of the Privy Council in *Emmerson v. Madison* (4) at page 575 quoted by the Court of Appeal for Eastern Africa in *Mtoro bin Mwamba* to

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the following effect:

> Nothing can be better settled than that if a person having title can get into possession of land in the actual occupation of a person having no title, he may continue such possession and that the person who was in actual
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> occupation cannot succeed in ejectment against him on the strength merely of his former occupation. The presumption of title which arises from simple occupation and possession is answered and the person who has no title cannot succeed against the person who has both title and possession.

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We are now in a position to revert to the point of law framed by the High Court and to the grounds of appeal. The point of law as framed by Maina J. when granting Leave to Appeal was whether holders of land under customary law in planned areas have an inferior title to

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those who are subsequently allocated. We wish to say with respect that no one can hold land under customary law in a planned area. The statement is therefore legally incorrect. We say this in full awareness that *Mtoro bin Mwamba* is not a direct authority for the proposition

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that customary law does not apply to urban areas, the main issue in that case being the right of a holder under customary law to register

his title under the Land Ordinance. The question of application of customary law in urban areas or the right of holders of land under customary law in planned or urban areas was not directly answered in *Nyagwaswa*. But we want to say now that customary law cannot apply in urban areas for the very good reason that a deemed right of occupancy is not compulsorily registerable whereas in urban areas all titles to land must be registered. This is necessary for smooth urban planning. Therefore if the learned judge was referring to the legal status of those holding land under customary law after the area is declared a planning area in relation to those who are subsequently granted the same land, the answer as we have already stated is that a deemed right of occupancy is equal to the granted right of occupancy under the Land Ordinance hence none takes precedence over the other. Therefore all that the holders of deemed rights of occupancy need to do is to convert these into granted rights of occupancy by having their holdings surveyed and title deeds issued to them. Sections 2 and 31(1)(b) of the ordinance make this quite clear. In the circumstances we think Dr Lamwai was making an understatement when he submitted that all that needed to be done to protect a deemed holder of a right of occupancy was to inform him of an impending plan. Dr Lamwai was also not correct when he submitted that section 2 of the Land Ordinance provides a possibility of holding land under another system other than the Land Ordinance. There is no other system, both deemed and granted rights of occupancy are held under the Land Ordinance and both are equally recognized and protected. But the point is irrelevant in this case because as we have already held, the appellants, for the reasons we have given, were squatters who held no protectable title under the Land Ordinance.

Turning now to the two grounds in the Memorandum of Appeal, we answer the first ground to the effect that the learned judge was correct in holding that title to urban land is only dependent on granted rights of occupancy because customary law does not operate in urban areas. The exception of course is where a rural area is by statute left to exist within an urban area as was the case with Mbezi Beach

Village in the *Nyagwaswa* case. Accordingly we dismiss the complaint in this ground.

With regard to the second ground, it would certainly be wrong in law to hold that a declaration of urban land as a planning are divested the original owners of their customary titles on the land for reasons already stated in this judgment, but no such thing happened in this case because the appellants held no titles under customary law, they were squatters. Accordingly we also dismiss the complaint in this ground. For all these reasons we dismiss the appeal in its entirety with costs.

IVAN MAKOBRAD v MIROSLAV KATIC, VESNA PALADIN AND INGRA

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Makame, Ramadhani and Lubuva, JJ.A.)

CIVIL REFERENCE No. 9 OF 1998

Civil Practice and Procedure – Reference from single judge – Failure to serve Notice of Motion and Record of the Reference on respondent – Application of rules 57, 51, 52 and 45 of Court of Appeal Rules 1979.

Civil Practice and Procedure – Stay of execution - Doubts as to true owner of property in proceedings for stay of execution – Order of stay granted.

Applicant's application for stay of execution was dismissed by a Single Judge. Applicant was dissatisfied; hence this reference. When the matter was called on for hearing, the respondents raised a preliminary objection to the effect that they had not been served with a copy of the Record of Reference. On the merits, it was shown that there was a dispute as to who Ingra was and who owned the property sought to be protected.