IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., MUNUO, J.A., And NSEKELA, J.A.)

CIVIL APPEAL NO. 12 OF 2001

BETWEEN

MWAJUMA MBEGU ..... APPELLANT

AND

KITWANA AMANI ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Mkude, J.)

dated 18th day of May, 1993
in
Civil Appeal No. 25 of 1989

JUDGMENT OF THE COURT

NSEKELA, J.A.:

This appeal concerns a dispute over a plot of land No. 53 Ex Daya Estate which was allocated to the disputants herein at different times. The respondent, one Kitwana Amani, was the plaintiff in R.M. Civil Case No. 6 of 1983. The appellant, Mwajuma Mbegu, was the defendant. The respondent claimed that he was the lawful owner of that property since it was granted to him by the Land Office, Ilala on the 6.2.78. He paid the necessary fees and on the 7.3.78 obtained a building permit from the City Council. The case for the appellant

however is to the effect that she was granted an offer for a Right of Occupancy over that same piece of land from the 1.7.73 to 30.6.74 and thereafter from year to year until terminated in writing by either party giving three months' notice. In the Court of the Resident Magistrate, the trial Magistrate held that the appellant/defendant was the lawful owner of plot No. 53 Ex Daya, Ilala. The respondent/plaintiff was dissatisfied with this decision and appealed to the High Court (late Mkude, J.) which reversed the lower Court's decision and declared that the respondent Kitwana Amani was the lawful owner of the plot in dispute, hence the appeal to this Court.

The appellant through her learned advocate, Mr. R. Maleta, lodged five grounds of appeal, namely:

1. The learned Judge erred in basing his decision on the report prepared by the Principal Secretary, Ministry of Land, (sic) which the (sic) report was not admitted as an exhibit in the trial court.

2. The learned Judge erred in considering the report while the same was not

proceed (sic) and was not served on the appellant at all.

3. The learned Judge erred in holding that the appellant was aware of the revocation of her title to the disputed plot while there is no evidence of service of notice of revocation to the appellant.

4. the learned Judge erred in law and in fact in assessing the evidence of the appellant.

5. The learned Judge erred in drawing conclusion in favour of the respondent.

Mr. Maleta in arguing the appeal combined the first and second grounds of appeal as well as the third and the fifth grounds of appeal. He abandoned the fourth ground of appeal. The main complaint by Mr. Maleta against the decision of the High Court was the reliance of the Court on a report that was prepared by the then Principal Secretary, Ministry of Lands which was not tendered in evidence at the trial. The learned advocate contended that the appellant was the one who had acquired the disputed plot earlier in 1968 from his father and that later on in 1973 the Land Office

allocated it to her. The second complaint revolved around the lack of evidence before the trial court that the President had revoked the appellant's Right of Occupancy according to law. The appellant had testified that after she had noticed that someone was developing the disputed plot, she made a follow-up with the Ministry of Lands but was not given any revocation notice or order apart from being verbally informed that her Right of Occupancy had indeed been revoked by the President.

Mr. El-Maamry, who advocated for the respondent, forcefully submitted that there was only one issue for consideration and determination by the Court and the issue was the revocation of the disputed plot. The learned advocate contended that the appellant was well aware of the fact that her Offer of Right of Occupancy had been revoked. There was apparently an inspection report which showed that she was in breach of a condition to complete building a house within one year. As regards the report by Mr. Minja, Mr. El-Maamry submitted that it was prepared in the course of business and that it was a government report which was an official record.

We take the liberty to quote the relevant part of the judgment of the learned High Court Judge since it was central to the conclusion that he arrived at. This is what the late Mkude, J. said –

> "As a first appellate court this court can re-evaluate the evidence and make findings of fact therefrom. As the letter from Minja was written in the ordinary course of business and forms part of the official records on this matter in the files of the Ministry of Lands I agree with Mr. El-Maamry, learned counsel for the appellant that the trial court was wrong to have disallowed its reference or production by PW3 merely because he was not the author of the letter. That letter sets out the background to the revocation of the title given to the respondent Mwajuma Salehe Mbegu, and says categorically that the title given to her had to be revoked as she had failed to develop the plot as required by the development conditions. The evidence of Mrs. Lucy Bundala, a Land Officer, clearly shows that according to the records in the Ministry of Lands a notice of revocation was sent to Mwajuma Mbegu but no reply was received from her."

It is evident that that the decision of the High Court was essentially based on the contents of the report prepared by Mr. Minja to the Principal Secretary, President's Office and on the testimony of PW4, Mrs. Lucy Bundala. With the greatest respect to the late learned judge, there was no factual foundation on the record on which to base such a conclusion. The learned judge correctly said that Mr. Minja's report had not been admitted in evidence. It was therefore not part and parcel of the court record. Yet somehow inexplicably the learned judge was able to make findings of fact on the basis of a report which was not before the court. Yes, it was a public document in terms of section 3 (1) and 83 (a) (iii) of the Evidence Act, 1967. However, section 87 provides for the mode of proving certain public documents. Section 87 (a) (i) and (ii) provides as under:

> "87. The following public documents may be proved as follows:-
>
> (a) acts, orders or notifications of the Government of the United Republic, the Executive of Zanzibar, the High Commission or the Organization or any

> service thereof or any local authority or of a ministry or department of any of the foregoing –
>
> (i) by the records of the service, authority, ministry, or department certified by the head thereof; or
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> (ii) by any document purporting to be printed or published by order of the Government or other body concerned."

A public document may be proved by the production of the original or by a certified copy under section 86 or in the manner prescribed under section 87 (a) (i) above. Under the circumstances, we are of the settled view that the learned judge erred in taking into consideration a public document which had not been tendered in evidence as proof of the facts stated therein. It is true that certain matters need not formally be proved. The principal matters of which the court will take judicial notice are contained in section 59 (1) of the Evidence Act, 1967 and that report cannot be said to be covered as well. There was therefore no justification at all for the Court to make findings of fact based on a report which was not before the

Court. In the event, we are satisfied that the first two grounds of appeal are justified.

The third and fifth grounds of appeal are closely related to the first two. The complaint here is that the appellant's Offer of Right of Occupancy was not revoked by the President. PW4, Mrs. Lucy Bundala, a Land Officer with the Ministry of Lands, testified that the appellant had a short-term lease of year to year. When the disputed plot was inspected, it was found that it had not been developed. She added that a notice of revocation was sent to the appellant. PW4 however was not certain whether or not the said notice was served upon her or not, though the office records indicated so. Apart from the testimony of PW4, there is no other evidence to the effect that the appellant had been served with the notice of revocation. The appellant when cross-examined by Mr. El-Maamry stated thus –

> "It is not true that my R/Occupancy was cancelled because of failing to develop it. Kobelo told me that the plot was cancelled but I was not satisfied with the reply. I was told the R/Occupancy was cancelled since 1976".

From this evidence, the learned judge concluded that the appellant was aware of the revocation of her Right of Occupancy. In her evidence the appellant denied that she had been served with any notice of revocation from the Land Office but was verbally notified to that effect. The letter of Offer of Right of Occupancy dated the 28.9.73 from the Ministry of Lands, Housing and Urban Development to the appellant contained a number of conditions which included the following –

> "1. Term: From the 1st day of July, 1973 to the 30th day of June, 1974 and thereafter, year to year until terminated by either party giving on the other three months period notice in writing to expire at any time.
>
> 6. Revocation: the President may revoke the Right of Occupancy for good cause including the failure of the Occupier to comply with these conditions.
>
> 8. Notices: Any notice to be given to the Occupier shall be duly given to his last known postal address or left with any person in physical occupation of the land,

or left affixed in a conspicuous position on the land or on any building thereon."

The President could only revoke the Offer of Right of Occupancy by giving to the appellant notice in writing in terms of condition no. 8. Neither PW3 nor PW4 tendered any notice of revocation before the trial Court. On appeal to the High Court there was reliance on the report by Mr. Minja which purportedly recommended that the appellant's Right of Occupancy be revoked. We have already said that it was improper for the learned judge to act on a report which was not before the Court. We should perhaps also mention here that neither the appellant nor the respondent tendered evidence as to whether or not the disputed plot was registered under the Land Registration Ordinance, Cap 334. The only conclusion which in our considered view is justified by the evidence before the Court, is that the appellant's Right of Occupancy was not revoked by the President.

In the result, and for the above reasons, we allow the appeal with costs.

DATED at DAR ES SALAAM this 16th day of January, 2004.

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S. A. N. WAMBURA)
SENIOR DEPUTY REGISTRAR