

IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA
CIVIL APPEAL NO. 47 OF 2008
FROM ORIGINAL DECREE IN CASE NO 75 OF 2002
DM'S COURT AT MWANAKWEREKWE AND CIVIL APPEAL
NO. OF 2004 OF RM'S COURT AT VUGA

KAHLAN MASSOUD KAHLAN (APPELLANT)

VERSUS

VUAI ABDALLA KHAMIS (RESPONDENT)

JUDGMENT

MWAMPASHI, J.

This is a second appeal and it is against the decision of the Regional Court at Vuga wherein the Regional Court upset the decision of the District Court Mwanakwerekwe in Civil Suit No. 75/2002 whereby the suit for trespass filed by the appellant Mr. Kahlan Masoud Kahlan against the respondent Mr. Vuai Abdalla Khamis was adjudged in his favor and the respondent was ordered to remove his building from the appellant's plot of land.

The brief background from which this appeal arises is as follows; The appellant sued the respondent for trespass in the District Court claiming that the respondent had trespassed over his plot No. 268 situated at Magogoni within the municipality of Zanzibar, the plot which had been allocated to him by the Government through the letter of offer No. 799 dated 21/03/1991 issued by the Commission of Land. The appellant further claimed that the respondent has erected a building which has not only extended to his plot but

it also blocked a public street and therefore making it difficult for his house to be accessible. The respondent's main defence was that he had his building over the plot well before the area had been declared a planned area, surveyed and before the plot was allocated to the appellant. The district Court after hearing evidence from both sides and after visiting the plot in dispute decided that although the area within which the plot in dispute is situated had been declared a planning area and had been surveyed and although the large part of the area had been invaded and people were erecting their buildings without following the plan still the respondent had trespassed over the appellant's plot and he had to remove his building from the appellant's plot because the plot in dispute had properly been allocated to the appellant by the Government after the area had been surveyed and also because it was clear that the respondent's building had extended to the plot in dispute.

Being aggrieved by the decision of the District Court the respondent successfully appealed to the Regional Court among the appellant's grounds of appeal to the Regional Court and on which the Regional Court based its decision was the ground that the suit by the appellant ought to have been dismissed by the Primary Court because the appellant had claimed over the public street in his own capacity instead of doing so by way of a representative suit as it is provided under Order 1 rule 8 of the Civil procedure Rules, Cap. 8 of the Laws of Zanzibar. The other ground was that the respondent had owned the plot in dispute before the same was later allocated to the appellant. The Regional Court did also hold that since it was

in evidence that the whole area had been invaded and people were erecting buildings without following the plan then the area was not a planning area and was not surveyed and the respondent could not be condemned of trespassing over the respondent allocated plot which was according to the same plan which was not being followed. It is this decision by the Regional Court that has aggrieved the appellant hence this appeal at hand.

Before this Court the appellant has been represented by Mr. Suleiman Salim Abdalla learned advocate of Nassor and Associates, Advocates while Mr. Uhuru H. Khalfan learned advocate has represented the respondent.

According to the memorandum of appeal, six grounds have been raised to support this appeal as follow:-

1. That the Honourable Magistrate erred in law and fact by deciding that the case filed was of the nature of a representative suit.
2. That the Honourable Magistrate erred in law and fact by holding that the disputed plot was not in a surveyed area.
3. That the Honourable Magistrate erred in law and fact by ignoring the fact that the appellant had been granted the Right of Occupancy by Government.

4. That the Honourable Magistrate erred in law and fact in not analyzing the evidence of the appellant as a result he awarded the disputed plot (area) to the party who had never had prior ownership.

5. That the Honourable Magistrate erred in law in putting too much reliance on the respondent's evidence without any legal base hence injuring the interests of the appellant.

6. That the Honourable Magistrate erred in law and fact in delivering her judgment without giving proper analysis and evaluation of the evidence.

In his submissions in support for the appeal Mr. Suleiman learned advocate for the appellant has asked this Court to allow the appeal on the grounds raised. As for the first ground he has argued that the appellant's suit in the District Court not only for trespass but also for easement and that the respondent's building did not only extend to the appellant's plot but it did also block the public street. Mr Suleiman has further argued that under those circumstances there was no need for the appellant to sue under a representative suit under Order 1 rule 8 of the Civil Procedure Rules because he is the one who is mostly affected by the blockage of the street (road). To cement his point Mr. Suleiman has referred this Court to an Indian case of

Ramaseshayya VS. Ramayya (1957) asir. 964 where the India Court held that Order 1, rule 8 of the Indian code of civil Procedure does not debtor a member of the village community from maintaining a suit in his own right in respect of a wrong done to him though the act complained of may also be injurious to some other villagers.

Arguing on the second and third grounds Mr. Suleiman has insisted that it was wrong fro the Regional Court Magistrate to hold that the area within the plot in dispute is situated was not a surveyed area and that it was also wrong for the Magistrate not to put into consideration the fact appellant had been granted the right of occupancy over the plot by the Government. Mr. Suleiman has referred this Court to the evidence given by PW3 the officer from the Land department, PW4 who was from the municipal council, DW3 who used to be the Sheha of the area and even the evidence from the respondent himself, the evidence which was to the effect that the plot in dispute is within the surveyed and planned area notwithstanding the fact that the area has in fact been invaded and there are building which have been built without following the plan. Mr. Suleiman has emphasized that once a person is granted a plot of land over planned area no other person can claim the same plot under customary titles as it was held in the case of **MTORO BIN Mamba vs. the Attorney General(1953)TLR 327**, **Mwalim Omar & Another vs. Oma A. Bilal (1990) TLR.9** and that of **Metusera Nyangaswa vs. Nyirabu (1985) TLR. 14.**

As for the fourth and fifth grounds it has been submitted by Mr. Suleiman that the Regional Court Magistrate failed to appreciate the trial Court's findings which were properly based on the evidence on record. Arguing on the last ground of appeal Mr. Suleiman has contended that the Regional Court Judgment was not in accordance with ORDER XX111, rule 3 (2) of the Civil procedure Rules, Cap. 8 as it lacked the proper analysis and evaluation of the evidence on record and that it did not contain the required ingredients. On this point this Court has been referred to the case of **George Mingwe v.R (1989) TLR. 10.**

Mr. Uhuru learned advocate for the respondent has opposed this appeal arguing that all the grounds raised in support of the appeal are baseless. On the first ground it has been submitted by Mr. Uhuru that because the appellant's claims as per paragraphs 4 and 5 of the plaint included trespass over a public street which is not only used by the appellant alone but also by other people who had therefore the same interests with him, then the appellant was supposed to institute a representative suit in accordance with Order 1, rule 8 of the Civil Procedure Rules, Cap 8 Mr. Uhuru has referred this Court to the case of **Lujuna Shbi Ballonzi, Senior V. Registered Trustees of Chama Cha Mapinduzi (1996) TLR. 203** where it was held that a suit in the nature of representative suit must be filed in accordance with Order 1, rule 8 of the Civil Procedure Code. Mr. Uhuru has further contended that an Indian case cited by Mr. Suleiman cannot be relied upon because its facts are not known.

As for the second and third grounds. Mr. Uhuru has argued that although the evidence on record showed that the area was surveyed, there was evidence that houses were being built over the area without following the plan. He has also contended that there was also ample evidence showing that the respondent had a hut on the plot in dispute before the area was surveyed and allocated to the appellant and also that the President did order that those who had been at the area before the survey should not be disturbed. Under these circumstances. Mr. Uhuru has argued, the decision by the Regional Court Magistrate was justified. After all it was wrong for the area to be surveyed and plots to be allocated to individuals without first paying compensation to those who had property at the area before the survey, including the respondent, Mr. Uhuru has added.

On the fourth and fifth grounds of appeal it has been submitted by Mr. Uhuru that the evidence given in the trial Court was properly analyzed by the Regional Court Magistrate and that the respondent had prescriptive right over the plot in dispute. He has further argued that the evidence and the circumstances were in the respondent's favor that is why even the Government authorities had found it difficult to evict him. As on the last ground Mr. Uhuru has argued that the Regional court Judgment was not short of anything and that it never contravened the provision of Order XX111, rule 3 (2) of the Civil Procedure Rules, Cap. 8.

In his short reply Mr. Suleiman has insisted that it is the appellant who is being mostly affected by the respondent's building because other people have alternative ways of getting to their destinations but not the appellant. He has also argued that the respondent had no but at the plot before the area was surveyed because beacons would not have been put over the respondent's hut and the plot would not have been allocated to the appellant without first solving the problem as it was for the DW2 who was properly compensated for his property. Mr. Suleiman has therefore prayed for the appeal to be allowed.

From the nature of the appellant's complaint or case to the District Court i.e that the building erected by the respondent has extended to his plot and has blocked a public street making it difficult for the appellant's house to be accessible, I am of the same view with Mr. Suleiman that it was not wrong for the appellant to sue the respondent without invoking the provisions of Order 1, rule 8 of the Civil Procedure Rules, Cap 8 of the laws of Zanzibar. The Regional Court did err in upsetting the decision by the District Court on a ground that the suit by the appellant was of the nature of a representative suit and therefore that it needed to be instituted in accordance with Order 1, rule 8. The appellant's suit was maintainable without joining any other interested person firstly because the suit involved two complaints which could be combined in one suit because they had arisen from a single act by the respondent. The complaints were that his plot had been trespassed upon by the respondent whose building had extended to his plot and that at the same

time the building had blocked the public street (road) making his house not easily accessible. The appellant and the general public have common interest on the blockage for the public street but under the circumstances of the case the appellant is the one who is likely to suffer most and in fact he is suffering special damages as he can easily get to his house while the general public might have some other alternative. It is also unthinkable how the appellant could have joined to the suit the general public which cannot be ascertained. Discussing On Order 1, rule 8 of the Indian Civil Procedure Code as amended by the CPC (Amendment) Act, 1999, which is pari material to our Civil procedure Rules, S.C Sarkar in the book titled **Sarkar Code of Civil Procedure**, 9th Ed, 2000, Vol. 1, at page 740 puts it as follows:-

*Under rule 8 the plaintiff cannot sue on behalf of
The public generally, but on behalf of limited and
Clearly defined class with which he has a
Common interest and a common right. The body
Of persons represented must be sufficiently definite.*

It is further emphasized by the same author at page 739 on the same Order 1, rule 8 that:-

*Being purely an enabling rule it entitles under
Certain circumstance only some of the
Interested persons to bring a suit on behalf of*

*All, but it does not force to represent many if
His action is maintainable without the jointer
Of those persons.....son a suit by a plaintiff
Suffering special damage along with other for
Declaration of right of way across a public
Street lies without recourse to Order 1, rule 8.*

The appellant's suit was therefore properly before the Court as the appellant was not required to sue in a representative capacity. After all, the respondent was supposed to raise the issue or the objection to the propriety of the suit before the Court at the earliest possible opportunity i.e before the hearing of the case was commenced, but he did not do so and for that reason his complaints at this stage cannot be entertained.

The second and third grounds of the appeal also have merits. It was wrong for the Regional Court Magistrate to hold that the area was not a planning and surveyed area just because the area is now covered by buildings built without following the plan. Since there was enough evidence on record that the area had been declared a planning area, that it had been surveyed, that plot of land over the area had been demarcated and also that the plot in dispute had been properly allocated to the appellant, the fact that the area had been invaded and that buildings are being erected over part of it without following the plan, does not in any way make the area to be not a planning

and surveyed area. The Regional Court Magistrate did therefore err in holding that the area within which the plot in dispute is situated is not a planning and surveyed area just because people have invaded the area. The Regional Court was supposed to discourage the invasion of the area and not to condone it. The culture of disrespecting Government development plans and projects should not be condoned by the Court.

Because there is ample evidence on record that the plot bearing number 268 was properly allocated to the appellant, after the area had been declared a planning area, through the letter of offer dated 21/03/1991 which contains in its schedule a survey plan clearly showing the boundaries of the plot then the respondent's claims that he has any rights over the plot because he had a hut over the plot before the area was surveyed becomes worthless. It is also surprising how the dispute between the parties arose in 2002 and not in 1991 when the plot was allocated to the appellant if at all respondent already had a hut over the plot by the time the plot was being allocated to the appellant. If really the respondent had that alleged hut over the plot in dispute, it is also unusual that the plot could have been allocated to the appellant without first taking care of the alleged hut belonging to the respondent. All in all the High Court of Tanzania in the case of **Mwalim Omar and Another vs. Omar A. Bilali (1990) TLR 9** while dealing with the same issue had these to say:-

Once an area is declared an urban planning area

And land surveyed and plot demarcated whoever

*Occupies land under customary law has to be quick
To apply for right of occupancy. If such person on
Such right and the plot is given to another, he
Becomes a squatter in law would have to move
Away; he strictly would not be entitled to anything.*

From the above findings and observations on the first three grounds of appeal this appeal succeeds. The Regional Courts decision is upset and the decision by the District Court is restored. The respondent has to remove his structure (building) from the appellant's plot (Plot No. 268) as well as from the public street (road) as shown and the survey plan. Appeal allowed with costs.

Sdg: ABRAHAMA MWAMPASHI, J

25/08/2009.

Delivered in Court this 25th day of August, 2009 in the presence of Mr. Uhuru
(adv) for the respondent who also holds brief for Mr. Suleiman
(Adv) for the appellant.

Sdg: ABRAHAM MWAMPASHI, J