

A for leave or application for a certificate on a point of law. The contempt proceedings are therefore adjourned *sine die* pending the disposal of the intended appeal. There shall be no order as to costs.

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MWAJUMA MBEGU v. KITWANA AMANI

C

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Mroso, Munuo and Nsekela, JJ.A.)

D

CIVIL APPEAL No. 12 OF 2001

(From the judgment of the High Court of Tanzania at Dar es Salaam, Mkude, J.
dated 18 May 1993, in Civil Appeal Number 25 of 1989)

E

Appeals – Powers of appellate Court – Power to re-evaluate evidence taken by Trial Court and to make factual findings therefrom – Whether appellate Court can make factual findings based on a document not adduced at the trial.

F

Evidence – Public Documents – Report of Principal Secretary – Whether the report is a public document of which judicial notice can be taken – Sections 3(1), 59(1) and 83(a)(iii) of the Evidence Act 1967.

G

The appellant's Right of Occupancy over a piece of land was purportedly revoked by the President and the land granted to the respondent. It was not in dispute that the President could only have revoked the Right by giving the appellant Notice of Revocation. There was no firm evidence that such notice was given to the appellant.

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Accordingly, in a suit the appellant instituted in the Resident Magistrate's Court the trial magistrate held that the appellant was still the rightful occupier of the plot. On appeal to the High Court, that decision was reversed. The decision of the High Court was essentially based on a report prepared by the Principal Secretary, Ministry of

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Lands, which recommended to the President that the appellant's Right be revoked.

That report was however not adduced in evidence. The crucial issue, on further appeal, was whether the High Court was right to act on a document that was not before the Trial Court.

Held: (i) Though a first appellate Court has power to re-evaluate the evidence adduced at the trial and make factual findings therefrom, it cannot make such findings based on a document that was not before the Trial Court;

(ii) The report prepared by the Principal Secretary, though a public document, was not a document of which judicial notice could be taken.

Appeal allowed

Statutory provision referred to:

(1) Evidence Act 1967, sections 3(1), 59 and 83(a)(i), (ii) and (iii)

Mr Maleta, for the Appellant

Mr El-Maamry, for the Respondent

JUDGMENT OF THE COURT

(Dated 16 January 2004)

Nsekela, J.A.: This appeal concerns a dispute over a plot of land number 53 Ex Daya Estate which was allocated to the disputants herein at different times. The respondent, one Kitwana Amani, was the plaintiff in RM Civil Case Number 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 February 1978. He paid the necessary fees and on the 7 March 1978 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 January 1973 to 30 June 1974 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

A owner of Plot Number 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 his learned advocate, Mr R Maleta, lodged five grounds of appeal, namely:

- C (i) 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.
- D (ii) The learned judge erred in considering the report while the same was not proceed (*sic*) and was not served on the appellant at all.
- (iii) 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.
- E (iv) The learned judge erred in law and in fact in assessing the evidence of the appellant.
- (v) The learned judge erred in drawing conclusion in favour of the respondent.

F 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 latter. 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 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

A 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 B 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:

C (i) 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-

D (1) by the records of the service, authority, ministry, or department certified by the head thereof; or

E (2) 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 F 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 G 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 H 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 I Bundala, a Land Officer with the Ministry of Lands, testified that

A 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 B 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:

C 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.

D 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 September E 1973 from the Ministry of Lands, Housing and Urban Development to the appellant contained a number of conditions which included the following:

1. Term: From 1 July 1973 to the 30 June 1974 and thereafter, year to F 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 G 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 H 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 thereof.

The President could only revoke the Offer of Right of Occupancy I by giving to the appellant notice in writing in terms of condition number 8. Neither PW3 nor PW4 tendered any Notice of Revocation

A 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
 B 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 Chapter 334. The only conclusion which in our considered
 C 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.

**LALAGO COTTON GINNEY AND OIL MILLS
 COMPANY LIMITED v. LOANS AND ADVANCES
 REALIZATION TRUST (LART)**

**COURT OF APPEAL OF TANZANIA
 AT DAR ES SALAAM**

(Lubuva, Mroso and Nsekela, JJ.A.)

CIVIL APPEAL No. 51 OF 2002

G (From the Judgment and Decree of the LART Loans Recovery Tribunal at Dar es Salaam, Ms offe, J. dated 12 June 2002 in Tribunal Case Number 13 of 2001)

Civil Practice and Procedure – Appeals – Appeal from the LART Tribunal to the Court of Appeal – Enabling and applicable legal provisions.

H *Statute – Interpretation of statutes – Meaning of “Registrar” – Whether the Registrar of the LART Tribunal is also “Registrar” under the Court of Appeal Rules – Rule 76 of the Tanzania Court of Appeal Rules 1979.*

I *Constitutional Law – Right of appeal as a constitutional right – Appeal from the LART Tribunal to the Court of Appeal – Relevant laws not providing for*

the procedure applicable in such appeals – Whether appellant may for that reason be denied the right to appeal – Article 13(6)(a) of the Constitution, section 20(1) of the Loans and Advances Realization Trust Act 1991, section 4(1) of the Appellate Jurisdiction Act 1979, and rules 76(1) and 3(2)(a) of the Tanzania Court of Appeal Rules 1979.

Civil Practice and Procedure – Appeals – Notice of Appeal – Notice of appeal and signature of the Registrar – Notice of appeal not signed by the Registrar – Validity and effect of such notice – Rule 76 of the Court of Appeal Rules 1979.

In an appeal against the decision of the Loans and Advances Realization Trust (“LART”) Tribunal, the Notice of Appeal was not signed or endorsed by the Registrar of the High Court or the Registrar of the LART Tribunal but by some other unknown person. The LART Act 1991 provided that a judgment or order of the Tribunal “shall be challenged in the Court of Appeal” but the Appellate Jurisdiction Act 1979 and Rules made thereunder did not include in their provisions appeals from the LART Tribunal, nor were the Court of Appeal Rules 1979 incorporated in the provisions of the LART Act to govern appeals from the decisions of the LART Tribunal. The respondent accordingly raised a Preliminary Objection to the effect that the Notice of Appeal was invalid as it offended rule 76(1) of the Court of Appeal Rules 1979.

Held: (i) The LART Act 1991, as amended by Act Number 6 of 1994, now provided for a right of appeal from the decisions of the LART Tribunal to the Court of Appeal but the Appellate Jurisdiction Act 1979 was not amended so as to include appeals from the LART Tribunal and, therefore, the Court of Appeal Rules 1979 do not as yet provide for appeals from the decisions of the Tribunal;

(ii) The Registrar of the LART Tribunal before whom the impugned Notice of Appeal was lodged was not the Registrar of the High Court envisaged under rule 76(1) of the Court of Appeal Rules 1979;

(iii) Since by the provisions of article 13(6)(a) of the Constitution the right to appeal to a higher Court is a constitutional right, it would be wrong in principle to deny an appellant the right to appeal to the Court of Appeal against a decision of the LART Tribunal simply because section 20(1) of the LART Act 1991, which provides for appeals to the Court of Appeal did not provide for procedures to apply in appeals to the Court; therefore, pursuant to rule 3(2) of the Court of Appeal Rules 1979, those