IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 98 OF 2020

TANZANIA MILLING COMPANY LIMITED .... APPELLANT

VERSUS

THE ATTORNEY GENERAL .... 1ST RESPONDENT

THE COMMISSIONER FOR LANDS .... 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mzuna, J.)

dated the 26th day of May, 2017
in
Land Case No. 227 of 2012

....

JUDGMENT OF THE COURT

17th March & 7th December, 2023

MWARIJA, J.A.:

The appellant, Tanzania Milling Company Limited was the plaintiff in the High Court of Tanzania, Land Division at Dar es Salaam. It instituted Land Case No. 227 of 2012 (the suit) against the respondents, the Attorney General and the Commissioner for Lands who were the 1st and 2nd defendants respectively. The suit arose as a result of revocation by the President, of the appellant's right of occupancy over Plot No. 46/1A/C/ situated at Pugu Industrial area within the City of Dar es

Salaam held under certificate of Title No. 186075/24 (henceforth "the suit land"). The revocation was made by the President on 20/12/2012 at the instance of the 2nd respondent.

The brief facts giving rise to the dispute are as follows: The suit land was previously owned by Carnaud Metal Box Tanzania Limited, a foreign company. It was later acquired by the appellant on 30/5/1998. The process of revocation started with an advertisement in the Majira Newspaper of 17/11/2011. The Ministry of Lands, Housing and Human Settlement Development (the Ministry) issued a notice reminding the holders of rights of occupancy who were in breach of the conditions contained in their certificates of occupancy that, the Ministry was intending to forward to the President for revocation under ss. 45 (3) and 48 (3) of the Land Act, Chapter 113 [by then R.E. 2002] (hereinafter "the Act"), rights of occupancy over the specified plots of land on account of the owners' failure to comply with the terms and conditions of ownership. They were given fourteen days to show cause why that intention should not be carried out. The appellant's plot of land was among those which their owners' rights of occupancy were intended to be revoked.

The appellant responded to the advertisement by writing a letter to the 2nd respondent. In that letter dated 15/2/2012 (exhibit P2), it denied having received any previous notice stated in the advertisement. It also disputed the allegations of breach of the terms and conditions of its right of occupancy but asked that, if there were any breaches, remedial measures stipulated under s. 47 of the Act should be resorted to instead of adoption by the 2nd respondent, of a harsh measure of revoking the appellant's title deed. The 2nd respondent did not reply to the appellant's letter and as stated above, its right of occupancy was revoked. The plot was thereafter advertised for sale but could not be sold because the highest bidder was a foreigner. As a result, it was reallocated to the Tanzania Investment Centre (TIC) which sold it to the company known as Tanzania Fish Process Limited at TZS 5,100,000,000.00.

The appellant was aggrieved by the act of revocation of its right of occupancy and therefore, filed the suit. It called one witness to testify at the trial. In his testimony, the witness, Ashif Lalji (PW1), who was at the material time the appellant company's Managing Director, testified to the effect that; prior to the advertisement, the appellant had not been served with any notice of intention to revoke the appellant's right of

occupancy. He learnt of that intention through the advertisement in the said newspaper. He went on to state that, despite the failure by the 2nd respondent to reply to the letter written to him by the appellant's counsel on 14/2/2022 to clarify on the nature of the violations or the particulars of non-compliance with the applicable provision of the law so that, the appellant may remedy them, the 2nd respondent proceeded to advertise the suit land for sale. The witness said that he realized that the 2nd respondent had advertised in the Daily Newspaper of 11/5/2015 that the suit land was being auctioned. That, he said, was done without a prior notice to the appellant that its right of occupancy had been revoked. He contended further that, the revocation was not lawful because the appellant did not breach any of the terms and conditions of the right of occupancy. He contended that, the land rent had been paid up to the year 2011 and the appellant had built a wall fence and one office building. He thus prayed for a declaration to the effect that the appellant was the lawful owner of the suit land. He also claimed for general damages for unlawful revocation of the appellant's right of occupancy.

On the part of the respondents, evidence was given by Alpha Honest (DW1) who was at the material time the Ministry's Legal Officer

and Said Juma Kijiji (DW2) who was a Land Officer. DW1 testified that, the appellant violated the terms and conditions of its right of occupancy by failing to pay land rent for eleven years thus having accumulated the arreas amounting to TZS 16,000,000.00. She testified further that, the appellant breached the condition of developing the suit land within the period of 36 months specified in the certificate of occupancy. According to the witness, the appellant was aware of such breaches because in the letter written by its advocate (exhibit P2), it asked the 2nd respondent to apply remedial measures in terms of the provisions of s. 47 of the Act instead of resorting to revocation measure.

She stated also that, the appellant failed to protect the suit land thus allowing trespassers to construct unauthorized structures while the rest of the space was unattended to the extent that, it became a bushy area.

On his part, DW2 testified also that, the right of occupancy over the suit land was revoked because the appellant breached the terms and conditions of ownership. On the nature of the violations, he averred that, the appellant failed to develop the suit land and that, it allowed trespassers to occupy the area. He named them to be Msama Promotions, Coastal Company Limited, a number of homeless old

persons and food vendors. On to the development of the suit land, the witness contended that, apart from the food vendors' hut, there was no any other structure thereon. On the default by the appellant to pay land rent, DW2 said that, he was not aware of any demand note having been issued to the appellant to pay any outstanding amount of rent. He admitted that, the notice published in the newspaper (exhibit P1) was for general public and that, for those who owned the specified plots of land, the nature of violations of the terms of ownership, if any, might have differed from one owner to the other.

Having considered the evidence tendered by the witnesses and after having considered the final submissions of the learned advocates for both parties, the High Court (Mzuna, J.) found that the appellant's right of occupancy was revoked for good cause. The learned trial Judge agreed with the respondents that, the appellant breached the conditions of ownership of the suit land. He found that, it failed to comply with the conditions of developing the land and payment of rent which, until the time of the revocation, the appellant had an outstanding amount of TZS 16,000,000.00. He found also that, the notice of the intention to revoke the appellant's right of occupancy made in the newspaper was a proper notice. He cited to that effect, among others, the case of **Ndesamburo**

v. Attorney General [1997] T.L.R 137 to support his finding. He was also of the view that, the notice issued through publication in the newspaper was sufficient notice because, as held in the case of **Agro Industries Ltd. v. Attorney General** [1997] T.L.R 43, the purpose of a notice is to afford a party an opportunity to put up a case against the intended act, in this case, the intended revocation.

With regard to the contention by the appellant that the location of the suit land as described in the publication was misleading, the learned Judge observed, and correctly so in our view, that, since the appellant understood that the right of occupancy which was intended to be revoked was in respect of the suit land, the description that the suit land is within Temeke Municipality while the correct location is Ilala Municipality, did not affect the appellant because it actually knew from the publication, that its plot was involved and thus responded to the notice through exhibit P2. On those findings the learned Judge dismissed the suit.

The appellant was aggrieved by the decision of the High Court hence this appeal. It raised a total of 20 grounds of complaint in its memorandum of appeal, some of which were repetitive in substance.

At the hearing of the appeal, the appellant was represented by Mr. Audax Vedasto, learned counsel while the respondents were represented by Mr. Hangi Changá, learned Principal State Attorney assisted by Ms. Pauline Mdendemi, learned Senior State Attorney. The learned counsel for the appellant duly filed his written submissions in support of the appeal in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). On their part however, the respondents did not file any reply submissions in terms of rule 106 (7) of the Rules. Mr. Changá informed the Court that, he would exercise his right under subrule (10) (b) of rule 106 of the Rules to submit orally in response to the appellant's written submissions.

Before the hearing of the appeal could proceed, Mr. Vedasto informed the Court that, he had decided to abandon the 10th, 11th, 12th and 13th grounds of appeal. He also consolidated and argued together grounds 1, 4, 7, 8, 16, 17 and 20. All these grounds challenge the finding of the trial court that, the revocation of the appellant's right of occupancy was due to its failure to comply with the terms and conditions of ownership of the suit land. He thereafter, argued together grounds 5, 6 and 15, then grounds 9, 14, 15, 18 and 19. The 2nd and 3rd grounds were argued separately.

For reasons which will be apparent herein, we intend to consider only two sets of the grounds which were argued together, that is grounds 1, 4, 7, 8, 16, 17, 20 and 5, 6 & 15. In the first set, that is grounds 1, 4, 7, 8, 16, 17 and 20 of appeal, the appellant challenges the decision of the High Court contending as follows:

> *"1. That, the Honourable High Court... erred in law to hold to the effect that a right of occupancy in Tanzania can be revoked on the ground that the owner has failed to pay rent before the right holder is given a notice to pay the rent allegedly not paid and fails to comply with it within the specified time.*
>
> *4. That, the Honourable trial court erred in law and in fact to hold that a notice published in the Majira Newspaper of 17/11/2011 (exhibit P1) under s. 45 (3) and 48 (3) of the Land Act requiring the unnamed owners of 60 plots (including Piot No. 46/1A/C, Block 1, Pugu Industrial area in Temeke District which the respondents stated in evidence to be the appellant's Plot No. 46/1A/C, Block 1, Pugu Industrial Area, Dar es Salaam, which is situated in Ilala and not in Temeke District) to show cause within 14 days why their rights of*

occupancy should not be revoked for non-compliance with conditions of right of occupancy; and without evidence that any notice of breach has been given to the appellant previously, was a lawful notice under the law to the appellant to show cause why its right of occupancy should not be revoked for non-payment of land rent.

7. That, the Honourable trial court erred in law to hold to the effect that the respondents are allowed to give an occupier who has committed a breach of condition of occupancy a punishment more severe than a fine provided under s. 46 (1) of the Land Act just because the word used to impose this punishment in section 46 (1) is 'may'.

8. That, the Honourable trial court erred in law to hold to the effect that, by saying that where on a breach which is capable of being remedied by the occupier within a reasonable time, the Commissioner for Lands may serve a notice in the prescribed form on the occupier specifying the action and time required for remedying the breach, section 47 (1) of the Land Act gave the Commissioner a discretion even of concluding that the occupier has failed to remedy the breach even without giving him such notice since the word used is 'may'.

16. That, the trial court erred in law and in fact to place the burden of proof of the issue whether the revocation was lawful on the appellant whose right of occupancy was allegedly revoked rather than on the respondents who formed the decision to revoke the right and who carried out the process and on whom the law has imposed a number of requirements, substantive and procedural, to observe in different circumstances.

17. That, the Honourable trial court erred in law and in fact to hold that the purported notice of revocation, which was made under section 45 (3) and 48 (3) of the Land Act, was a notice from which the appellant was to know that, what was needed of it was a cause in respect of non-payment of land rent, non-meeting of development conditions and so on.

20. That, the trial court erred in law and in fact by holding to the effect that the respondents acted lawfully in the matter."

In the second set, the appellant faults the learned trial Judge as follows:

"5. That, suppose Exhibit P1 constitutes a valid notice of revocation against the appellant for non-compliance with the development

conditions, which is disputed, the trial court erred in law and fact not to hold that the appellant's reply through Exhibit P2 in which he stated to have committed no breach of any condition of occupancy was equally a valid cause shown against the intended revocation.

6. *That, the Honourable trial court erred in law and fact to hold that a right of occupancy can be legally revoked in Tanzania without a notice of revocation and even the order of revocation specifying the ground upon which the revocation is taken.*

7 – 14 .... N/A.

15. *That, the Honourable trial court erred in law and in fact in holding to the effect that the revocation of the appellant's right of occupancy, if any, was in the public interest."*

Submitting in support of the first set of the grounds of appeal reproduced above, Mr. Vedasto argued that, the revocation of the appellant's right of occupancy over the suit land was unlawful because it was not based on any sufficient cause. On the ground relied upon by the trial court that the appellant had breached the terms and conditions of the right of occupancy by failing to pay land rent, the learned counsel

argued that, the High Court acted on the evidence which was not pleaded by the respondents in their written statement of defence. According to the learned counsel, the evidence to that effect was adduced by DW1 who testified after the appellant had closed its case. Mr. Vedasto argued that, such evidence should not have been acted upon because it raised an issue which did not arise from the parties' pleadings.

He went on to argue, in the alternative, apparently that the allegation by the respondents that the appellant had failed to pay land rent was not proved. He challenged the finding of the High Court on that aspect arguing that, it was based on unsubstantiated evidence. He contended that, the evidence of DW1 was not supported by any document showing the alleged amount of the outstanding land rent. In any case, he added, that document should have been tendered by an official of the 2nd respondent responsible for billing and issuing of receipts in that respect. Relying on the provisions of s. 100 of the Evidence Act, Chapter 6 of the Revised Laws, Mr. Vedasto stressed that, the respondents failed to discharge the burden of proving that the appellant had defaulted in the payment of land rent.

With regard to the second set of the grounds of appeal, also reproduced above, Mr. Vedasto contended that, the learned trial Judge erred in finding that, the appellant had also breached the terms and conditions of its certificate of occupancy by failing to develop the suit land hence that the revocation of its right of occupancy was justified. He maintained the argument he made in respect of the first set of the grounds of appeal that, the finding by the High Court was based on the evidence given in support of a matter which was not pleaded by the parties.

To bolster his argument that the findings of the learned trial Judge to the effect that the appellant had breached the conditions of developing the suit land and paying land rent was erroneous, the learned counsel cited the cases of **Makori Wasaga v. Joshua** [1997] T.L.R 88 and **Elia Kasalile & 20 Others v. The Institute of Social Work**, Civil Appeal No. 145 of 2016 (unreported). He stressed that, the trial court's finding was based on the evidence which was adduced in support of a matter that was not pleaded by the parties. Arguing further, Mr. Vedasto stated that, even if the appellant had breached the terms and conditions of paying land rent or failing to develop the suit land within the period specified in the certificate of occupancy, the

remedy should not have been an outright revocation of its right of occupancy.

He argued that, the applicable provisions, which are sections 44 – 50 of the Act, ought to have been invoked. The sections provide for the steps to be taken by the office of the 2nd respondent in case of a default by the holder of a right of occupancy. In the case of a failure to pay land rent land the steps include a demand to pay the rent, demand for payment with interest and demand by way of a suit. The steps are stipulated under s. 50 (1) of the Act. As for the breach of any other terms and conditions, such as a failure to develop the land, the remedy is provided for under ss. 46 and 47 of the Act. The right of occupancy holder who commits that breach may be issued with a notice to pay a fine or a notice to remedy the breach within a specified time. It was thus, Mr. Vedasto's argument that, it is after the steps stated under ss. 46 and 47 (1) – (3) have been taken that the procedure for revocation of a right of occupancy may be commenced under s. 47(4) of the Act.

In reply to Mr. Vedasto's submissions on the argued grounds of appeal, Mr. Chang'a made a brief but focused response. Moved by the interests of justice considerations, he informed the Court, at the outset, that the respondents were conceding to the appeal. His stance to that

effect was based on the apparent irregularities in the process leading to the revocation of the appellant's right of occupancy. He argued that, according to the notice published in the Majira newspaper (exhibit P1) the intention to revoke the appellant's right of occupancy was predicated on ss. 45 (3) and 48 (3) of the Act. Being alive to the apparent misconception in the advertisement regarding the reason for the revocation, the learned Principal State Attorney stated that, from the provisions cited in the publication, the same conveyed a different intention that the rights of occupancy over the plots specified therein including the appellant's plot, were to be acquired in the public interest, not because of breach of the terms and conditions of ownership. Furthermore, he said, the terms and conditions which were allegedly breached were not specified.

He added that, although in exhibit P1, the 2nd respondent indicated that the owners of the plots were being reminded about the alleged breaches, existence of such previous notice was not established and evidence of service upon the appellant was also lacking. The learned Principal State Attorney submitted thus that, the procedure which was adopted in initiating of the revocation process was wrong and in effect,

the revocation of the appellant's right of occupancy was also wrongly made.

In rejoinder, Mr. Vedasto appreciated the position taken by the learned Principal State Attorney of conceding that the appellant's right of occupancy was unlawfully revoked. Being aware that the suit land had subsequently been sold by the TIC to another person (Tanzania Fish Process Limited), he urged us to order the respondents to pay the appellant a compensation of TZS 5,100,000,000.00, the amount which was obtained from the sell of the suit land.

From the submissions of the learned counsel for the appellant and the learned Principal State Attorney for the respondent on the argued grounds of appeal, two issues arise for our determination; **first,** whether or not the appellant's right of occupancy was lawfully revoked and **secondly**, if the first issue is answered in the negative, to what remedy is the appellant entitled.

On the first issue, we agree with both Messrs Vedasto and Chang'a that the appellant was not properly served with a notice of intent to revoke its right of occupancy. As submitted by Mr. Vedasto, the procedure for revocation of a right of occupancy on the ground of

breach of the terms and conditions stipulated in the owner's certificate of occupancy are provided for under ss. 44 – 50 of the Act. Section 45 (1) and (2) (e) which provides for the consequences of breach of conditions contained in a certificate of occupancy, including the failure to pay land rent or to effect development on the land, provides as follows:

> *"45-(1) Upon any breach arising from any condition subject to which any right of occupancy has been granted, the right of occupancy shall become liable to be revoked by the President.*
>
> *(2) The President shall not revoke a right of occupancy save for the good cause.*
>
> *(2A) In subsection (2) "good cause" shall include the following:*
>
> *(a)-(d) .... N/A*
>
> *(e) there has been a breach of a condition contained or implied in a certificate of occupancy.*

The procedure to be taken before any revocation based on the above stated breaches is stated under ss. 46 and 47 as follows;

> *"46 (1) Where any breach of a condition has arisen, the* ***Commissioner may serve a notice in the prescribed form on the occupier***

requiring him to show cause as to why a fine should not be imposed *upon him in respect of such breach.*

(2) The occupier shall, within the time specified in the notice, respond to the notice."

[Emphasis added].

The effect of a failure by the occupier to respond to the notice or pay fine and penalty after being required to do so in terms of sub-section (3) of s. 46 is stated under s. 47 (4) of the Act which states that:

"47-(1) ....

(2) ....

(3) ....

(4) Where it appears to the Commissioner that the notice has not been complied with or that the breach in respect of which the notice was served is continuing or has recommenced, he shall proceed with the enforcement of the revocation of the right of occupancy in accordance with section 49."

What is clear from the provisions which have been reproduced above is that, where a condition of a right of occupancy has been

breached, the Commissioner has discretion to issue a notice to the occupier and it is that notice, issued in the prescribed form, that initiates the revocation process. In our view therefore, the requirement of issuing a notice is mandatory. In this case, the notice which is issuable under s. 46 (1) of the Act ought to have been served on the appellant before the process of revocation of his right of occupancy was resorted to. That was not done.

With regard to the purported notice published in the Majira Newspaper (exhibit P1), we agree with Mr. Vedasto that, such was not a sufficient notice because, **first**, the same was not issued in accordance with the requirements of s. 46 (1) of the Act and **secondly**, as submitted by Mr. Chang'a, it did not convey the proper purpose for which the right of occupancy was intended to be revoked. As shown above, the cause for the intended revocation was the alleged breaches by the appellant, of the terms and conditions of ownership of the suit land. However, in the publication, it was shown that the revocation was intended to be made under *inter alia,* s. 45 (3) of the Act which provides that:

> *"45-(1) ....*
> *(2) ....N/A*

(2A) ....N/A.

*(3) Notwithstanding sub-section (2), the President may revoke a right of occupancy if in his opinion **it is in the public interest** to do so."*

[Emphasis added].

The evidence tendered by the respondents and acted upon by the trial court was wholly on the alleged breaches. The two witnesses' testimony centred on proving that the appellant had breached the terms and conditions of its certificate of occupancy; that, it failed to pay rent and also to develop the suit land in accordance with the conditions stated in the certificate occupancy. That evidence did not support the purpose for which the revocation was made. In the circumstances, we find, with respect, that the learned trial Judge strayed into an error in holding that the revocation was lawfully made.

On the basis of the reasons stated above, we are of the settled mind that, the argued grounds of appeal have merit. The finding on these grounds suffices to dispose of the appeal and thus the need for considering the rest of the other grounds of appeal does not arise. In the event, we allow the appeal and consequently, quash the judgment of the trial court and set aside the orders arising therefrom.

Turning to the second issue, having found that the appellant's right of occupancy was unlawfully revoked, it is obvious that the appellant is entitled to restitution for having been deprived of its land. Considering the fact that the suit land has already been sold and was, at the material time, owned by another person who was the bona fide purchaser, Mr. Vedasto urged us to order the respondents to pay the appellant the amount of the money realized from the purchaser, that is, TZS 5,100,000,000.00.

In our considered view, Mr. Vedasto's prayer is not, under the circumstances of this case, tenable. In the first place, as shown above, the suit land was not sold by the respondents. It was sold by the TIC which was not impleaded in the suit. The sought order cannot thus be made against that entity without having been afforded the right to be heard. Secondly, the amount in question was realized from auction, not upon the valuation of the suit land.

Given the above stated considerations and the fact that the appellant is entitled to compensation for the 2nd respondent's unlawful act leading to the revocation of its right of occupancy over the suit land, we order the respondents to compensate the appellant another plot of land. The plot of land to be allocated to the appellant must be of the

same size as that of the suit land and the same has to be located in an industrial area. This order should be complied with within a period of twelve (12) months from the date of delivery of this judgment.

The respondents shall bear the costs.

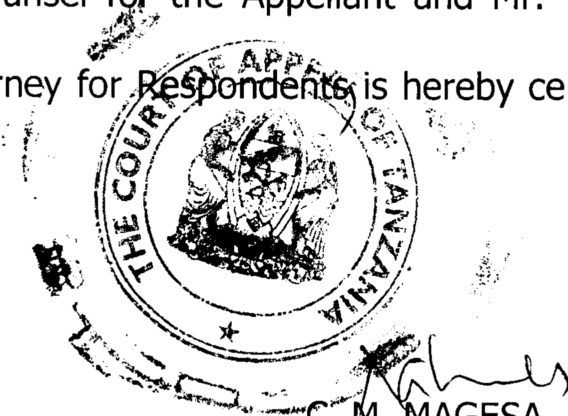
DATED at **DAR ES SALAAM** this 29th day of November, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2023 in the presence of Mr. Living Rafael holding brief for Mr. Audax Vedasto learned counsel for the Appellant and Mr. Pauline Mdendemi learned State Attorney for Respondents is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL