

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 385 OF 2019

ABBAS ALLY ATHUMAN BANTULAKI.....1ST APPELLANT

KCB BANK TANZANIA LIMITED.....2ND APPELLANT

AND

KELVIN VICTOR MAHITY (Administrator of the

Estate of the late PETER WALCHER) RESPONDENT

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

(Amour, J)

dated the 7th day of December, 2018

in

Land Case No. 116 of 2014

.....

JUDGMENT OF THE COURT

6th July & 18th August, 2022

LILA, JA:

The respondent is a successor administrator to his late brother Erick Peter Walcher. The latter was, on 27/2/1998, appointed the administrator of the estate of his late father Peter Walcher who died intestate on 2/2/1995. Initially, Erick Peter Walcher instituted this suit against the appellants. Unfortunately, he did not survive to pursue his claims to its conclusion as he passed away before the hearing and determination of the suit. It was then when the respondent applied and was duly appointed administrator of the estate of Peter Walcher and

was inclined to amend the plaint in line with the change of administrator.

As pointed out above, it is common ground that Erick Peter Walcher was duly appointed administrator of the estate of his deceased father Peter Walcher and upon his death, the respondent replaced him after being duly appointed so and that the late Peter Walcher was a registered owner of a parcel of land known as Plot No. 145 Bahari Beach Kinondoni District, Dar es Salaam allocated to him under a Letter of Offer with reference No. D/KIN/A/28708 Of 19/10/1987 (exhibit P.1) (the disputed plot or land) on which he erected certain structures. The respondent was introduced to the first appellant by his late brother Erick during his life time as being a person sponsoring the efforts to have the disputed land registered in his (Erick Peter Walcher) name as administrator of the estate. PW1 tendered a notice referenced LD/OPT/05/810/3 of 22/2/2005 from the Registrar of Titles to Erick Walcher, Land Form No. 29: notification of disposition in respect of Plot No. 145, Bahari Beach, Dar es Salaam dated 8/2/2005 and an application by Legal Personal Representative in respect of Plot No. 145, Bahari Beach Area, Dar es Salaam dated 8/2/2005 (exhibit P3).

As to what triggered institution of the suit and the center of the dispute between the parties herein before the High Court of Tanzania (Dar es Salaam Registry), each side has its own story.

In his amended plaint and evidence on record, the respondent claimed that after the late Erick Peter Walcher was registered as legal personal representative of his late father he started processing a title to the disputed plot in his own name but his efforts met a snag as he found the Letter of Offer missing. He made an official search at Land Registry Dar es Salaam and found the suit property already registered under Certificate of Title No. 81833 in the name of the 1st appellant, Abbas Ally Athumani Bantulaki, and he had already mortgaged it to secure a loan advanced to him by the 2nd appellant. So as to regain possession of the suit property, he instituted the suit claiming that registration of the suit land in the name of the 1st appellant was obtained fraudulently and prayed for declaration that the disputed plot belongs to Peter Walcher and nullification of both the Tittle Deed issued to the 1st appellant and the mortgage deed. Such claims were maintained in the amended plaint lodged by the respondent.

On their part, through their joint written statement of defence to the amended plaint as well as their evidence on record, the appellants

refuted all the claims by the respondent in the amended plaint and, instead, alleged that Erick Peter Walcher expressed his desire to sell the plot to the 1st appellant but the plot was trespassed and the 1st appellant had to assist him in the conduct of the suit against the trespassers to its conclusion after which they executed a sale agreement. That after full payment of the agreed amount, Erick Peter Walcher prepared a transfer deed which he executed before Mr. Zakaria Maftah, learned advocate after which he (first appellant) proceeded to register the plot into his own name and later used the Title Deed as collateral to secure a loan from the 2nd appellant. For those reasons they prayed the suit be dismissed with costs. The 1st appellant did not end there as he raised a counter – claim praying for a declaration that he lawfully bought the plot from Erick, sustenance of the mortgage deed and payment of damages for embarrassment.

In all, the contention by the 1st appellant, in whose name the title to the land is currently registered, is that he bought the disputed land from Erick Peter Walcher in his capacity as a registered legal personal representative. Against this factual background, we wanted to satisfy ourselves whether the sale by Erick Peter Walcher, on which the appellant's claim of ownership to the disputed plot rested, could pass

good title to the appellant and whether the learned trial judge's order vesting ownership of the disputed land to the respondent was legally proper. Accordingly, we, *suo motu*, raised the issues to the counsel of the parties so that they could address us on them ahead of hearing the appeal on merits.

Before us for hearing of the appeal were Mr. Elisa Abel Msuya and Ms. Regina Anthony Kiumba, learned counsel who advocated for the appellants and Mr. Wilson Edward Ogunde and Mr. Magusu Mugoka, also learned counsel representing the respondent.

Mr. Msuya addressed us on the above issues for the appellants. While exhibiting his professionalism and sticking to the record of appeal, he argued that in both the former and the amended plaint, the main relief sought by the plaintiff was for a declaration that the disputed plot belongs to the late Peter Walcher but the High Court, in its judgment, declared the respondent (then plaintiff) the rightful owner of the disputed plot and ordered the Registrar of Titles to register him so. While referring the Court to sections 94, 99, 101 and 104 of the Probate and Administration of Estates Act, Cap. 352 of the Revised Edition 2019 (the Act), he insisted that even being a legal representative does not make one the owner of a property but an administrator only. As regards

the sale agreement, Mr. Msuya argued that in terms of section 101 of the Act, since Erick Peter Walcher was a legal personal representative, he had capacity to sale the disputed plot but, he added, in the sale agreement (Exhibit P1) found at page 386 of the record of appeal, there was no indication that he was selling the plot in his capacity as administrator or legal representative of the deceased estate although it was only at the bottom part of exhibit P1 that it is indicated that he was an administrator. Worse still, he added, the reason for selling the disputed plot was not shown which was wrong for the reason that any sale of the deceased property should be for the benefit of the rightful heirs.

Mr. Ogunde for the respondent, apart from giving the background to Mr. Erick Peter Walcher's registration as legal personal representative in terms of section 67 of the Land Registration Act, Cap. 334 R. E. 2002 (the LRA), he argued that there was no compliance by Erick Peter Walcher to the requirement of the law hence, in terms of section 68(1) of the LRA, he was incapable of validly disposing the suit plot rendering the sale between him and the 1st appellant *void abinitio*. He also agreed with Mr. Msuya that the relief granted by the trial High Court was not sought by the plaintiff in his plaint hence was improperly granted. His

reference was to the order that the suit property belonged to the respondent and the records of the Registrar be accordingly adjusted.

Both learned counsel were of a concurrent view that to correct the two apparent mishaps, the Court should invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) to quash and set aside the findings and consequential orders by the learned trial judge and then give proper guidance on both issues.

As earlier indicated, the foregoing arguments by the learned counsel of the parties invite the Court to adjudicate on the two issues; one, whether there was a valid sale of the disputed plot between Erick Peter Walcher and the 1st appellant and, two, whether the relief granted to the respondent as being the rightful owner of the disputed plot was justified.

As demonstrated above, in this case it is not in dispute that Erick Peter Walcher was duly appointed administrator of the estate of the late Peter Walcher who died intestate and also that Erick Peter Walcher proceeded to register himself as a legal personal representative of the deceased Peter Walcher. A little intervention is necessary here to put the record proper. In terms of section 67 of the LRA, an administrator of the deceased property is permitted to apply for a deceased property to be

registered in his own name. So, exhibit P3 is a response or acknowledgment by the Registrar of Titles that he had received the application by Erick Peter Walcher. The law is clear that by being duly appointed administrator of the estate of the late Peter Walcher, Erick Peter Walcher became a legal representative of the deceased for all purposes and all the properties of the deceased person are vested on him (see section 99 of the Act). Further, the provisions of section 67 of the LRA, a legal representative is required to apply to be registered as owner of a deceased property in the place of the deceased and upon being so registered he becomes vested with the mandate to exercise various powers stipulated therein in terms of section 68 of the LRA including disposition.

In the instant case and as indicated above, Erick Peter Walcher applied to be registered as owner of the disputed plot but neither of the parties was forthcoming or produced any proof that he was duly registered so. Instead, it seems clear to us that it was when Erick Peter Walcher initiated the process to register himself as owner of the disputed land in terms of section 67 of the LRA that he found the Letter of Offer missing which occurrence halted the process of being registered as owner and he instituted the present case. On the clear terms of

section 68 of the LRA he lacked mandate to sell the property of the deceased (the disputed land). That section categorically states:-

*"68-(1) **No** assent to the vesting of any devise or bequest of any registered estate or interest, or **disposition by a legal personal representative, shall be registered unless such estate or interest is registered in the name of such legal representative.**"* (Emphasis added)

Based on the above exposition of the law, we feel no remorse in associating ourselves with the concurrent views by the learned counsel of the parties that there was no valid disposition of the disputed land between Erick Peter Walcher and the 1st appellant and the registration of the latter as owner of it is thereby rendered invalid and ineffectual.

Besides, we have also seriously examined the purported sale agreement between Erick Peter Walcher and the 1st appellant (exhibit D1) which reads in part:-

"MKATABA WA MAUZO

MKATABA HUU unafanywa leo tarehe 19 mwezi APRIL, 2005 KATI YA ERICK PETER WALCHER wa Sanduku la Barua 12642, Dar es Salaam (ambae ni MUUZAJI) kwa upande mmoja wa mkataba huu NA ABBAS ALLY ATHUMANI BANTULAKI wa Sanduku la Barua 25328, Dar es Salaam (akiwa MNUNUZI) kwa upande wa pili wa mkataba huu.

KWAMBA Muuzaji ni msimamizi wa mirathi ya marehemu PETER WALCHER, ni mwenye nyumba mmiliki wa nyumba ya marehemu, anania ya kumuuzia Mnunuzi nyumba hiyo iliyoko katika kiwanja nambari 145, BAHARI BEACH, Dar es Salaam, kwa thamani ya Shilingi Milioni Sita (6,000,000/=) tu..." (Emphasis added)

From the highlighted part of the excerpt, it is undisputable that in selling the disputed plot, Erick Peter Walcher presented himself as an administrator of the estate of the deceased Peter Walcher. It therefore turns out that both counsel's standpoint that there was no indication that Erick Peter Walcher presented himself as the legal representative misses support and collapses. We have, however, asked ourselves whether the purported sale agreement could pass a valid title to the 1st appellant.

A requirement to appoint an administrator of the estate or executor of the will of the deceased is not a luxury but is done with a purpose. That takes us to section 99 of the Act which prescribes the general duties of an administrator or executor in these terms:-

"99. The executor or administrator as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such."

On the wording of this provision, it is plain that an administrator steps into the shoes of the deceased with legal mandate to exercise all the powers the deceased would exercise under section 100 and 101 of the Act including the power to dispose of any of the deceased estate but he does so in his representative capacity. The Court had an occasion to consider the above provision in **Joseph Shumbusho vs Mary Grace Tigerwa and Two Others**, Civil Appeal No. 183 of 2016 (unreported) and stated that:

*"As legal representative of the deceased's estate, all the deceased's estate are vested to him and has all the powers over the deceased assets as the deceased would have, **save that he is acting in a representative capacity.**"*
(Emphasis added).

To insure that they exercise their mandate in a representative capacity, the Act sets up conditions for the grant. Section 66 of the Act, puts it as a mandatory condition that upon grant, the administrator has to take an oath that he will administer the estate faithfully. It stipulates that:-

"Upon the grant of any probate or letters of administration the grantee shall take an oath faithfully to administer the estate and to account for the same."

On the basis of this provision, administrators' actions are bound to be for the benefit of the rightful heirs and are precluded from embezzling or in any way misapplying the deceased estate. In so doing, the Court interpreted it as creating a fiduciary relationship. The Court underscored this stance in **Shumbusho's case** (supra), where it observed that:-

"Section 66 of the Probate and Administration Act requires the grantee of the probate or letters of administration to take an oath that he/she will faithfully administer the estate of the deceased and will account for the same. That is the administrator will faithfully administer the deceased's estates by first paying the just debts of the deceased, distributing the residue according to the law, making and exhibiting a full and true inventory of the deceased's properties and credits and rendering a true account of the administration. The rationale of exhibiting the inventory and accounts is to keep the beneficiaries informed and have transparency in the execution/administration of the deceased's estate. It is therefore implicit in the Probate and Administration Act that a legal representative owes a fiduciary duty to the heirs and beneficiaries. By way of emphasis, we wish to reiterate here that such a fiduciary duty is inferred from the oath taken by the grantee of the probate or letters of administration.

Then, the Court went further to state:-

"...By virtue of his position, the appellant was supposed to act in good faith at all times for the sole benefit and interest of the estates of the deceased and to the beneficiaries of the estate including but not limited to providing information to the beneficiaries and heirs..."

The above discussion escalates on the need for the administrator to act on behalf and for the benefit of the heirs. That much it must be reflected in every aspect including disposition of the deceased asset. It is on these lines that an executor of a will or administrator is barred from taking advantage from the deceased estate by purchasing part of the deceased property (see section 103 of the Act) which we are of the decided view applies even where he sells the deceased property. Now looking at exhibit D1, there is no indication whatsoever in exhibit D1 and from the testimonies of PW1 and DW1, as rightly submitted by both counsel, that Erick Peter Walcher sold the disputed land on behalf or for the benefit of the heirs, the respondent inclusive. A mere indication that Erick Peter Walcher was an administrator of the late Peter Walcher's estate was not enough to show that he was selling the disputed land on behalf and for the benefit of the beneficiaries or rather the rightful heirs and others having interest on it. Not surprising that PW1 instituted the suit against the 1st appellant which act is sufficient proof that, as a

member of the family of Peter Walcher and hence a rightful heir, he was not aware of the disposition of the suit land to the 1st appellant by Erick Peter Walcher. That is clear from his testimony at page 323 of the record where he stated that:-

"The late Erick Peter Walcher used to do his own business without involving others. It is not true that the late Erick Walcher wanted to sale the property for Tshs. 100,000,000/=."

The foregoing contention is supported by Khamisi Nonga Haule (PW2) and Bakari Athuman Makange (PW3) who denied knowledge of the disputed land being sold to the 1st appellant by Erick Peter Walcher.

From the above, it is our firm position that Erick Peter Walcher did not exercise and act with ultimate good faith in the alleged sale of the disputed land hence no good tittle could pass to the 1st appellant. Accordingly, the purported sale was void *abinitio*. Ownership of the disputed land remains the property and part of the estate of the late Peter Walcher.

We, next, proceed to consider the propriety of the High Court's order vesting the suit land into the respondent's ownership. The learned counsel for the parties concurred that the order was inherently faulty for

it did not arise from the reliefs sought by the respondent in the plaint. We entirely agree with them. Settled law is to the effect that parties are bound by their own pleadings the rationale of which is to let the parties face a case they know as presented in the pleadings and to avoid surprises. (See **Scan Tan Tour Ltd vs The Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported) and **James Funge Ngwagilo vs Attorney General** [2004] TLR 161). Similarly, the court is equally bound by the pleadings of the parties. It is required to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. According to its nature and character it has to pronounce itself on the claim made by the parties. To do otherwise, it would be to enter upon the realm of speculation. We are fortified in this stance by the passage in **Morghan's Law of Pleading in India**, 10th Edition at page 25 that:-

***"The Court cannot make out a new case altogether and grant relief neither prayed for in the plaint nor flows naturally from the grounds of claim stated in the plaint."**(Emphasis added)*

From the exposition above, the trial judge was bound to consider and if satisfied that the claim was sufficiently established, only grant the reliefs sought in the plaint or naturally a result or consequential to the

suit. The respondent's prayer as reflected in the amended plaint, in the present case, was among others, for the suit land to be declared the property of the late Peter Walcher. Clear as it was, it was erroneous for the trial judge to make an order declaring the respondent as the lawful owner of the suit land and his name be so registered.

In the final analysis and for the foregoing reasons, we are of the decided view that the purported sale of the disputed plot by Erick peter Walcher did not pass tittle to the 1st appellant and the High Court's order declaring the respondent the lawful owner of the disputed plot was invalid and ineffectual.

The findings above conclusively determine the appeal rendering it unnecessary to consider the merits or otherwise of the grounds of appeal raised in the memorandum of appeal.

For the foregoing reasons, we allow the appeal and accordingly hold that the purported sale of the disputed plot by Erick Peter Walcher to the 1st appellant did not pass title to the later and the High Court's order declaring the respondent the lawful owner of the disputed plot was invalid and ineffectual. Consequently, exercising our mandate under section 4(2) of the AJA, we hereby quash and set aside the purported sale of the disputed land between Erick Peter Walcher and the 1st

appellant. We similarly quash and set aside the High Court order declaring the respondent a lawful owner of it and his registration as such. Ownership of the disputed land reverts to the late Peter Walcher. The more so, that land could not stand as collateral in the loan advanced to the 1st appellant by the 2nd appellant. The mortgage deed based on that title could not be invalid. We make no order for costs.

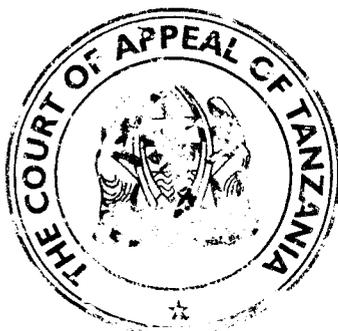
DATED at **DAR ES SALAAM** this 16th day of August, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of August, 2022 in the presence of M/s Irene Mchalo, learned counsel for the appellant and Mr. Wilson Ogunde and Magusu Mugoka, learned Counsels for the Respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL