

**IN THE COURT OF APPEAL OF TANZANIA**

**AT KIGOMA**

**(CORAM: MUGASHA, J.A, SEHEL, J.A. And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 500 OF 2021**

**BILALI ALLY KINGUTI ..... APPELLANT**

**VERSUS**

**AHADI LULELA SAID .....1<sup>st</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF VINCENTIAN**

**CONGREGATION.....2<sup>nd</sup> RESPONDENT**

**KIGOMA UJIJI MUNICIPAL COUNCIL.....3<sup>rd</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>th</sup> RESPONDENT**

**FERUZI BARAKA (Administrator of the estate of the  
late HAMIS BARAKA, the deceased) .....5<sup>th</sup> RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Kigoma)**

**(Mugeta, J.)**

**dated 28<sup>th</sup> day of July, 2021**

**in**

**Land Case No. 01 of 2020**

**.....**

**JUDGMENT OF THE COURT**

7<sup>th</sup> & 13<sup>th</sup> June, 2023

**SEHEL, J.A.:**

This is an appeal against the decision of the High Court of Tanzania at Kigoma in Land Case No. 01 of 2021. In that case, the 1<sup>st</sup> respondent sued the appellant and the rest of the respondents over a piece of land measuring 100 meters length with 50 meters in width located at Kamala Street, Bangwe Ward within Kigoma/Ujiji Municipality (the suit property).

He alleged to have acquired the suit property through purchase from the appellant on 23<sup>rd</sup> August, 2016 at a consideration of TZS. 28,000,000.00. Upon purchase, the 1<sup>st</sup> respondent demarcated the area by putting beacons which later were uprooted by the 2<sup>nd</sup> respondent who claimed that the suit property belonged to her. Hence, the 1<sup>st</sup> respondent decided to sue the appellant as well as the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents claiming for the following reliefs:

- 1. A declaratory order that the plaintiff [in this appeal the 1<sup>st</sup> respondent] be declared lawful owner of the suit property.*
- 2. The 1<sup>st</sup> defendant [in this appeal the 2<sup>nd</sup> respondent] be declared trespasser to the suit property.*
- 3. Perpetual injunctive order restraining the 1<sup>st</sup> defendant from entering in the suit property and to give vacant possession to the plaintiff.*
- 4. Alternatively, in case the trial court declared that the 4<sup>th</sup> defendant [in this appeal the appellant] had no title to pass, the 4<sup>th</sup> defendant be ordered to refund the plaintiff TZS. 28,000,000.00.*
- 5. General damages as may be assessed by the court.*
- 6. Costs of the suit be provided for."*

The 2<sup>nd</sup> respondent disputed the claim and averred in her written statement of defence that she bought the suit property from Feruzi

Baraka, the administrator of the estate of the late Hamis Baraka on 19<sup>th</sup> September, 2008 who then transferred the ownership to her. She also averred that she applied for a certificate of title which was issued to her by the 3<sup>rd</sup> respondent on 23<sup>rd</sup> September, 2021.

The 3<sup>rd</sup> and 4<sup>th</sup> respondents jointly filed their written statement of defence disputing the 1<sup>st</sup> respondent's claim. They averred that the appellant had no title to pass to the 1<sup>st</sup> respondent as the same was lawfully granted to the late Hamis Baraka and later on transferred to the 2<sup>nd</sup> respondent.

Apart from confirming that he sold the suit property to the 1<sup>st</sup> respondent, the appellant alleged, in his written statement of defence, that he had good title to pass to the 1<sup>st</sup> respondent as the same was acquired through purchase from the family of Ramadhani Rafu in 2010 who customarily owned it. He further averred that the 3<sup>rd</sup> respondent fraudulently surveyed, demarcated and registered the suit property as Plot No. 294 Block "A", Kamala Street, Bangwe Ward in Kigoma/Ujiji Municipality without involving the real and customary owners thereof.

At the commencement of the trial, two issues were framed before the trial court for determination. One, who was the lawful owner of the disputed property, and two, what reliefs are the parties entitled to. For

the first issue, the trial court observed that the 3<sup>rd</sup> respondent issued the offer of letter to Hamis Baraka as the original owner of the land and the administrator of his estate disposed it to the 2<sup>nd</sup> respondent, hence it declared the 2<sup>nd</sup> respondent as the lawful owner of the suit property. The trial court was not convinced by the evidence of the appellant that the suit property belonged to the family of Ramadhan Rafu. In that respect, it held that the 1<sup>st</sup> respondent had no good title to the suit property to pass it over to the 1<sup>st</sup> respondent. Accordingly, the appellant was ordered to return the purchase price of TZS. 28,000,000.00 plus TZS. 5,000,000.00 as general damages to the 1<sup>st</sup> respondent. The appellant was also ordered to pay costs of the suit to the respondents.

When the appeal was called on for hearing on 7<sup>th</sup> June, 2023, Mr. Ignatus Kagashe, learned advocate, appeared for the appellant, whereas, Messrs. Sadiki Aliko and Daniel Rumenyela, both learned advocates, appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. The 3<sup>rd</sup> and 4<sup>th</sup> respondents enjoyed the legal services of Messrs. Lameck Merumba and Allan Shija, both learned Senior State Attorneys assisted by Mr. Erigh Rumisha, learned State Attorney. The 5<sup>th</sup> respondent was absent. Last year, when the appeal was called on for hearing, it was reported by that the 5<sup>th</sup> respondent is no more, thus the hearing of the

appeal was adjourned to allow the appointment of his legal representative and compliance with Rule 105 (1) of the Tanzania Court of Appeal Rules, 2019 as amended (the Rules). Given that twelve months have lapsed and no application had been made by a legal representative of the 5<sup>th</sup> respondent to be a party in the proceedings of the present appeal, the Court allowed the hearing of the appeal to proceed in the absence of the 5<sup>th</sup> respondent in terms of Rule 105 (2) of the Rules.

Submitting on the 1<sup>st</sup> ground of appeal, Mr. Kagashe relied on Order XXII Rules 1, 2, 4 and 6 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) and argued that at the time the case was instituted on 26<sup>th</sup> June, 2020, Feruzi Baraka (the 5<sup>th</sup> respondent) was already dead. He argued that since it was reported by Baraka Hamis (DW3) that, one Feruzi Baraka passed away in 2013, the trial court ought to have dealt with that eventuality first before proceeding with the trial. Mr. Kagashe further contended that the service to the said respondent by publication was not effective.

When probed by the Court as to whether there was any proof of death of the 5<sup>th</sup> respondent, and if the counsel for the parties had addressed the learned trial judge on that issue, Mr. Kagashe was quick

to admit that no evidence was placed before the trial court to establish that the 5<sup>th</sup> respondent was dead at the time of the institution of the case. He also admitted that none of the counsel for the parties probed DW3 on the death of the 5<sup>th</sup> respondent to ascertain whether the 5<sup>th</sup> respondent was no more. Nonetheless, he insisted that the trial proceeded against the dead person thus vitiated the trial proceedings.

Thereafter, Mr. Kagashe combined the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal into one ground, to wit, the High Court judge erred in law and in fact in its analysis and evaluation of both oral and documentary evidence adduced by the parties before the trial court thus leading to a wrong verdict in favour of the 2<sup>nd</sup> respondent. Submitting on the consolidated grounds of appeal, Mr. Kagashe argued that the appellant purchased the suit plot in 2010 from one Hamis Rafu and legally sold it to the 1<sup>st</sup> respondent on 23<sup>rd</sup> August, 2016 at a consideration of TZS 28,000,000/= as evidenced by exhibit P1. He faulted the trial court's finding that the suit property was legally allocated to the 2<sup>nd</sup> respondent upon sale by the 5<sup>th</sup> respondent. He contended that there was no evidence to prove that there was a letter of offer issued to Nditegeyeko Hamis and no proof that it was revoked in 2004 and later issued to the late Hamis Baraka because the 3<sup>rd</sup> respondent did not produce the Land

Form No. 19 establishing that the said Hamis Baraka applied for a grant of title to the suit property. He further submitted that DW6 did not establish that the process of initial survey of the suit land in 2000 was participatory involving the customary occupiers of suit property and their leaders. Mr. Kagashe concluded by submitting that according to exhibit D13, the suit property was formerly owned by the family of Ramadhan Rafu who lawfully sold it to the appellant at a consideration of TZS 10,000,000/= as un-surveyed land and later on, in 2016, sold the same to the 1<sup>st</sup> respondent. He thus urged the Court to reverse the findings of the trial court and to find the appeal meritorious. In the alternative, he prayed that the proceedings and judgment of the trial court be annulled on account of the 1<sup>st</sup> ground of appeal. He also pressed for costs.

Replying to the appeal, Mr. Aliko outrightly informed the Court that he was objecting to the appeal. Responding to the 1<sup>st</sup> ground of appeal, he submitted that the 1<sup>st</sup> respondent impleaded the 5<sup>th</sup> respondent because the latter sold the suit property to the 2<sup>nd</sup> respondent but during trial, they failed to trace the 5<sup>th</sup> respondent, hence, substituted service through publication in Mwananchi newspaper was effected upon him. Mr. Aliko further conceded that Baraka Hamis (DW3), the son of the late Hamis Baraka, at page 138 of the record when he was cross-

examined by the counsel for the 2<sup>nd</sup> respondent, informed the trial court that the 5<sup>th</sup> respondent expired in 2013 but there was no further details or proof given by that witness. He added that even the counsel for the appellant who was in court on that date did not probe further on that issue. For that reason, Mr. Aliko contended that the argument that there was non-compliance of Order XXII Rule (2) of the CPC is an afterthought given that there was no concrete evidence establishing the death of the 5<sup>th</sup> respondent. Mr. Aliko further impressed upon us that since the appellant has not stated how the omission prejudiced him, he submitted that the appellant, was not prejudiced for non attendance of the 5<sup>th</sup> respondent.

In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, Mr. Aliko was brief and focused that the appellant failed to prove that the survey conducted in year 2000 and the allocation of the suit plot to Hamis Baraka was unlawful. Mr. Aliko referred us to our decision in the case of **Amina Maulid Ambali & Two Others v. Ramadhani Juma**, Civil Appeal No. 35 of 2019 [2020] TZCA 19 (25 September, 2020; TANZLII) to reinforce his argument that the appellant must prove through cogent evidence the registration in the name of the respondent was fraudulently done. It was the submission of Mr. Aliko that there was no such cogent evidence on



record because the evidence available shows that at the time the appellant sold the suit property to the 1<sup>st</sup> respondent in 2016, it was already surveyed and allocated to Hamis Baraka.

Lastly, Mr. Aliko argued the 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal, together, that the High Court rightly ordered the appellant to refund the 1<sup>st</sup> respondent the purchase price because the appellant admitted at paragraphs 1 and 2 of his written statement of defence that he sold the suit property to the 1<sup>st</sup> respondent at a consideration of TZS. 28,000,000.00. He added that the same was proved by the appellant himself in his testimony, at page 162 of the record of appeal, as well as exhibit P1. Mr. Aliko further submitted that when the 1<sup>st</sup> respondent was purchasing the suit plot from the appellant there were no beacons on that plot. He thus believed that it was not a surveyed plot. The counsel, thus implored us to treat the 1<sup>st</sup> respondent a *bonafide* purchaser who came to know later that the suit plot he had bought was a surveyed property. Responding to exhibit D13, Mr. Aliko contended that the meeting was convened by one side of the family of Ramadhan Rafu and did not involve the family of Feruzi Baraka thereby denying the 2<sup>nd</sup> respondent right to be heard. He thus implored the Court not to give any weight to such evidence.

Mr. Rumenyela fully supported the submissions by the 1<sup>st</sup> respondent's counsel and added that exhibit D12 shows what the appellant sold to the 1<sup>st</sup> respondent a "shamba" and not the suit property which was already surveyed and a title deed duly issued. Therefore, it was his submission that the shamba referred to in exhibit D12 might not be the same area in dispute. Relying to the case of **Amina Maulid Ambali & Two Others v. Ramadhani Juma** (supra), Mr. Rumenyela contended that the appellant failed to establish during trial that the certificate of title issued to the 2<sup>nd</sup> respondent in respect of the suit property was fraudulently obtained. He added that at the time of tendering the said certificate of title, the counsel for the appellant did not object to its admission in evidence. Finally, the learned counsel prayed to the Court to dismiss the appeal with costs.

Mr. Shija, who submitted on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents also joined hands with the submissions made earlier on by the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and added further that exhibit D3 appearing at page 193 of the record of appeal indicated and proved that the suit property was a surveyed plot and was allocated to the 2<sup>nd</sup> respondent. Mr. Shija maintained that if there was any dispute that there was fraud, the same was supposed to be proved. He concluded on

that issue by submitting that, issuance of the certificate of title is conclusive evidence that the 2<sup>nd</sup> respondent is the legal owner unless proven otherwise. In respect of the 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal, Mr. Shija concurred with the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel and had nothing to add. As regards to the 1<sup>st</sup> ground, it was Mr. Shija's submission that the complaint was an afterthought.

Mr. Kagashe had a brief rejoinder to the reply submissions by the respondents' counsel. On the 1<sup>st</sup> ground, Mr. Kagashe insisted that the 5<sup>th</sup> respondent was a necessary party and the status of the 5<sup>th</sup> respondent is a legal issue thus, it can be raised at any time. He also maintained that the certificate of title in respect of the suit property was not lawfully obtained because at the time of allocation, it was not the property of Hamis Baraka. He sought reliance to exhibit D13 which he submitted that it was the result of the committee formed following the recommendation from the 3<sup>rd</sup> respondent as evidenced by exhibit D9. To reinforce the point that the suit property was not surveyed at the time the appellant sold the same to the 1<sup>st</sup> respondent, Mr. Kagashe referred us at page 121 of the record of appeal where the 1<sup>st</sup> respondent testified to have bought un-surveyed land and that he did not see beacons and that the dispute arose after the 1<sup>st</sup> respondent had built therein a poultry

hut. The counsel for the appellant reiterated his earlier prayer that the appeal be allowed with costs.

Having heard the contending submissions, we wish to start with the 1<sup>st</sup> ground of appeal where the appellant complained that the suit filed in 2020 was vitiated because, he said, the 5<sup>th</sup> defendant was already dead as he died in 2013. We are alive with the legal position that a suit instituted in the name of a dead person is a nullity and it is as if no suit was filed, thus, a legal representative cannot be joined as a party to such a suit -see: the cases of **Juma A. Zomboko & 42 Others v. Avic Coastal and Development Co. Ltd & 4 Others**, Civil Application No. 576/17 of 2017 [2021] TZCA 3541 (16 November, 2021; TANZLII) and **Exim Bank Tanzania Limited v. Yahya Hamisi Musa (As the Administrator of the estate of the late Hamisi Musa Mohamed t/a Mapilau General Traders)**, Civil Appeal No. 275 of 2019 [2022] TZCA 598 (30 September, 2022; TANZLII). Nonetheless, that legal position is applicable where it has been established before the trial court either by oral or documentary evidence, as it was in the cases we cited, that the cited person in the suit is dead. In the appeal before us, Mr. Kagashe admitted that apart from mere testimony of DW3, there was no further proof that the 5<sup>th</sup> respondent had passed away before

the institution of the suit in 2020 by the 1<sup>st</sup> respondent. Mr. Kagashe also conceded that after the evidence of DW3 which was given in a one casual sentence that the 5<sup>th</sup> respondent died in 2013, none of the parties probed the witness further for the purpose of seeking further evidence on the death of the 5<sup>th</sup> respondent. Given that there was no concrete evidence establishing the death of the 5<sup>th</sup> respondent, we find that this ground of appeal is baseless and an afterthought.

For the remaining grounds of appeal, that is, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal we find that they all raise one critical issue that is who is the lawful owner of the suit property. In resolving this issue, we first wish to point out the obvious fact that there is no dispute, the suit property was surveyed in 2000 by the 3<sup>rd</sup> respondent but parties locked horns on the propriety of that survey. They all rely on the principle we stated in the case of **Amina Maulid Ambali & 2 Others v. Ramadhani Juma** (supra) that:

*"...when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be lawful owner unless it is proved that the certificate was not lawfully obtained."*

Mr. Kagashe heavily relied upon exhibits D8, D9 and D13 to drive home his argument that the survey was done without involving the then

customary owners of the suit property namely the family of Ramadhani Rafu. We shall thus have to closely scrutinize the said exhibits to see whether they establish the said customary ownership of the suit property by the family of Ramadhani Rafu. According to the evidence of Steven Ambrose (DW6), the acting head of Urban Planning Department within the office of the Municipal Director of Kigoma Ujiji Municipal Council, the family of Ramadhani Rafu through a letter dated 30<sup>th</sup> January, 2017 lodged a complaint to the offices of the 3<sup>rd</sup> respondent (exhibit P7) claiming that the suit property belonged to the family of Ramadhani Rafu hence requested the 3<sup>rd</sup> respondent to bar any further development on the suit property. Upon receipt of exhibit D7, the 3<sup>rd</sup> respondent replied to the family members of Ramadhani Rafu detailing the history of the suit property as contained in their records vide a letter dated 24<sup>th</sup> February, 2017 (exhibit D8). This exhibit D8 gives clear picture as to how the 2<sup>nd</sup> respondent came into possession of the suit property. It shows that in 1999 the suit property was granted to one Nditegeyeko Hamisi subject to payment of compensation to the original owner of the suit property, one Hamis Baraka. However, up to 2001 the said Nditegeyeko failed to effect compensation hence in 2004 his ownership was revoked and the suit property reverted back to the initial owner. Hamisi Baraka died in 2007 and in 2008, the 5<sup>th</sup> respondent was

appointed the administrator of his estate. In 2009, the 5<sup>th</sup> respondent sold the suit property to the 2<sup>nd</sup> respondent. We therefore find that this exhibit does not prove in any way fraudulent transaction on part of the 3<sup>rd</sup> respondent in surveying the suit property.

Exhibit D9 is a letter dated 30<sup>th</sup> June, 2017 written by the Ministry of Lands, Housing and Human Settlement and Development as such, it did not come from the office of the 3<sup>rd</sup> respondent. Further, that exhibit was addressed to the 3<sup>rd</sup> respondent and gave general directives to the 3<sup>rd</sup> respondent to form a team in order to deal with complaints arising from land disputes around Bangwe area. As such, we find that this exhibit did not specifically deal with the suit property hence not relevant to establish fraudulent actions on part of the 3<sup>rd</sup> respondents in surveying the suit property.

Lastly, exhibit D13, this is a letter from Bangwe land Village Committee forwarding the minutes of the meeting held on 6<sup>th</sup> March, 2017 to the 3<sup>rd</sup> respondent to the effect that the suit property belonged to the family of Ramadhani Rafu. Here, we entirely concur with the trial court that the said Committee did not involve the family of Hamis Baraka, as such it denied the other side the right to be heard thus the resulting findings cannot be relied upon.

Having analysed the evidence which, the counsel for the appellant relies upon to establish fraud on the part of the 3<sup>rd</sup> respondent, we asked ourselves whether such evidence was enough to prove fraud. There is a plethora of authorities to the effect that allegation of fraud in civil proceedings must be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases. For instance, in the case of **Omari Yusufu v. Rahma Ahmed Abdulkadr** [1987] T.L.R. 169 the Court said:

*"...it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases..."*

Again, in the case of **City Coffee Ltd v. The Registered Trustee of Iloilo Coffee Group** [2019] 1 T.L.R. 182, the Court stated thus:

*"....it is dear that regarding allegations of fraud in civil cases, the particulars of fraud, being serious allegation; must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a*



*balance of probabilities generally applied in civil cases."*

Based on the above position of the law and our finding on the relevance or otherwise of exhibits D8, D9 and D13, we are satisfied that the appellant failed to discharge his duty of proving the allegation of fraud to the required standard on the balance of probabilities.

Having overruled the allegation of fraud we remain with the undisputed fact that the suit property was surveyed in 2000 and it was legally done. We have earlier on stated that exhibit D8 gives the history and ownership of the suit property up until the survey and the issuance of the certificate of title to the 2<sup>nd</sup> respondent. The fact that the 2<sup>nd</sup> respondent was issued with a certificate of title is further evidenced by Fr. Linto Stephen (DW1), Baraka Hamis (DW3) and Steven Ambrose (DW6). Taking into account that the 2<sup>nd</sup> respondent has a valid title over the suit property then she is the lawful owner of the suit property. In that respect, since the appellant purchased the suit property from Ramadhani Rafu who was not the rightful owner, he had no good title to pass over to the 1<sup>st</sup> respondent. Accordingly, we find the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal meritless and proceed to dismiss them all.

That said, we find no reason to disturb the findings of the High Court that ordered the appellant to return the purchase price of TZS. 28,000,000.00 to the 1<sup>st</sup> respondent, to pay the 1<sup>st</sup> respondent TZS. 5,000,000.00 being general damages and the appellant to incur costs of that suit. In the end, we thus find the appeal lacks merit and is hereby dismissed with costs.

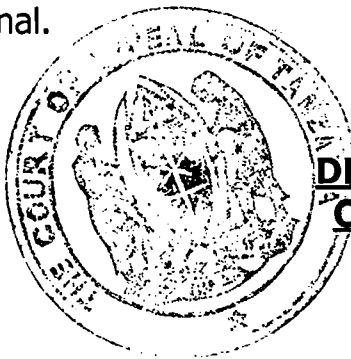
**DATED at KIGOMA** this 13<sup>th</sup> day of June, 2023.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The judgment delivered this 13<sup>th</sup> day of June, 2023 in the presence of Mr. Ignatus R. Kagashe, learned advocate for the appellant, Mr. Damian Rumanyela, learned advocate for the 2<sup>nd</sup> and 5<sup>th</sup> respondents also holding brief for Mr. Sadiki Alik, learned advocate for the 1<sup>st</sup> respondent and Mr. Celestine Ngailo, learned State Attorney for the 3<sup>rd</sup> and 4<sup>th</sup> respondents is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**