IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTY

(AT ARUSHA)

LAND CASE NO. 54 OF 2015

M/S EAST WEST (1991) INVESTMENT

COMPANY LIMITED .....PLAINTIFF

Versus

KARPESH SANGAR .....1ST DEFENDANT

AMECTHA KARPESH .....2ND DEFENDANT

VICKY MWAKALUKWA .....3RD DEFENDANT

PAUL LEON .....4TH DEFENDANT

HIJAT JUMA URASSA .....5TH DEFENDANT

ARUSHA CITY COUNCIL .....6TH DEFENDANT

MAIGE, J

JUDGMENT

The Plaintiff, **M/s East West (1991) Investment Company Limited**, is a limited liability company duly incorporated under the Companies Act,

Cap. 212, R.E., 2002. In accordance with the Certificate of Incorporation (exhibit **PE1**), the plaintiff was incorporated on 4th February 1992. In this case, the plaintiff has pursued an action for trespass on land described as plots numbers **310, 305, 302 and 301 Block "G"** Njiro area within the City of Arusha (together, "the suit properties") against **Karpesh Sangar** , **Amectha Karpesh**, **Vicky Mwakaluwa**, **Paul Leon** and **Hijat Juma Urassa**, the first, second, third, fourth and fifth defendants, respectively. The first two defendants are alleged to have trespassed unto plot number 310 ("the suit property no.1"), the third defendant plot number **305** ("the suit property no.2") , the fourth defendant plot number **302** ("the suit property no. 3") and the fifth defendant plot number **301** (the suit property no. 4"). The sixth defendant being an allocating authority, has been sued as a necessary party.

The plaintiff though incorporated in 1992, traces the root of title on the **suit properties** way back in 1991. She claims to have acquired the same by way of allocation from the sixth defendant. There is no factual clarification in pleading as to how possible could the **suit properties** be acquired, in her name in the pre-incorporation period. Nevertheless, in his testimony, Mr. **ANSELM MINJA**, the sole prosecution witness who is also a director and shareholder in the plaintiff's company, told the Court that, the pre-incorporation acquisition of the **suit properties** was subsequently ratified by the board of directors of the plaintiff by way of special resolution.

Whether the plaintiff was capable of acquiring a landed property before being incorporated was a subject of debate after the closure of the prosecution case. The counsel for the first three defendants raised a motion under order XIV rule 2 of the **CPC** for disposal of the suit on account of impossibility of the plaintiff to acquire the **suit properties** in the period of her non-existence. My predecessor in office, Madame Justice Dr. Opiyo, viewed the issue in so far as it consisted of some facts which would require further ascertainment by way of evidence, premature. She therefore, continued with the trial with a note in her ruling that, the issue of pre-incorporation transection would be dealt with in the final judgment. However, before the defense case commenced, she was transferred to the Tanga High Court Registry and, for the same reason, I took over the proceeding as a successor Judge in terms of order XIII rul3 7 of the **CPC**.

It is important to unveil that, though the plaintiff alleges that the letters of offer on the **suit properties** were issued in 1991, she has relied on a letter of offer issued by the sixth defendant in February 2010 to establish her title on the suit properties (exhibit **PE2**). It was testified that, the plaintiff could not produce the original letter of offer because it was destroyed by fire in an accident that occurred in 2008. To substantiate the assertion, the plaintiff exhibited a letter from the 6th defendant responding to her request for a new offer after the original one had been destroyed by fire (Exhibit **PE3**).

The trespass under discussion is alleged to have been committed in or about September 2008 on different occasions. Coincidentally, the destruction of the plaintiff's original offers is claimed to have happened in the same year as well. The plaintiff claims further that, on report of the trespass to the Arusha Zone Assistant Commissioner for Land, an inquiry into the dispute was made and the Commissioner established that the **suit properties** belonged to the plaintiff. The plaintiff has placed reliance on the report in exhibit **PE6** signed by Kwera M. Kwera, representing himself as municipal Land Officer. He was not called as a witness however. It may perhaps be relevant to observe that, the said Kwera, was also the one who signed into the new letter of offer in exhibit **PE2** as well as into the various correspondences between the plaintiff and the sixth defendant relied upon by the plaintiff.

Subsequent upon the issuance of the report, it is further claimed, the Commissioner directed the sixth defendant to expunge all forged certificates of title from the register (exhibit **PE**). The plaintiff blames the sixth defendant for not complying with such directions despite being severally requested so to do. To establish his assertion, the plaintiff exhibited the statutory notice in exhibit **PE7**. The plaintiff therefore calls upon the Court to grant the following reliefs against the defendants and each of them. First, declaration that she is the lawful owner of the **suit properties**. Two, declaration that the first five defendants are trespassers

over the **suit properties**. Three, an order compelling the 6th defendant to revoke the disposition made to the 1st to the 5th defendants and consequently rectify the register thereof and register the plaintiff as the lawful owner of the same. Four, an order for injunction restraining the first five defendants and/ or its agents from interfering with or obstructing construction and development to be effected on the **suit properties**. Five, for general and exemplary damages against the defendants for trespass.

In their Joint written statement of defense, the first two defendants, deny the allegation and raise a defense of bonafide purchaser for value without notice on account that they purchased the **suit property no. 1** from Daud Kilua in May 2008 and it is now registered in the name of the second defendant as per CT No. 23434 exhibited as **D2.** Through their sole witness Karpesh Sangar (DW1), the first two defendants narrated in details the process involved in acquiring the said property including pre-sale search to the land registry (exhibit **D2**). **DW1** further testified that after acquiring the property they constructed a house therein upon procuring a building permit from the relevant authority (exhibit **D3**). He therefore prayed that the suit be dismissed with costs.

Just like the first two defendants, the third defendant has totally denied the assertion in the plaint and pleaded a defense of bonafide purchase for value without notice. In her testimony through **Lusekela James Mwaluka** (DW2) who represented himself as her son and lawful attorney,

the third defendant claimed to have purchased the **suit property no. 2** from William Samwel on 15th March 2008 at the purchase price of TZS 2,500,000/= (exhibit **D4**). DW2 claimed to have signed into exhibit **D4** on behalf of the third defendant pursuant to a power of attorney donated to him on 9th March 2008 (exhibit **D5**). Exhibit **D5** authorizes DW2 to deal with any matter relating to the acquisition, transfer and registration of the **suit property 2** until completion. Aside from the power of attorney in exhibit **D5**, DW2 produced another power of attorney dated 26th February 2016 which was tentatively admitted as **D3A** with a judicial note that the issue of admissibility raised by the counsel for the 6th defendant and the plaintiff should be considered in the final judgment. DW2 testified further that, after the purchase of the **suit property no. 2**, he submitted the conveyance documents together with the certificate of title in the name of William Samwel to the 6th defendant for consent of disposition. It is his testimony that the original certificate of title has never been returned to him. A document purporting to be a certified copy of the said certificate of title was tentatively admitted as **D6** with judicial note that the issue of admissibility raised by the counsel for the plaintiff would be considered in the judgment. The third defendant further challenged the claim by the defendant on account that the plaintiff which was incorporated in 1992, could not acquired the property in 1991. Finally, the third defendant prayed that the suit be dismissed with costs.

The fourth defendant did not file a written statement of defense despite being duly served. He did not appear as well. As a result, my predecessor

judge ordered that the suit proceeds *ex parte* against him. On her part, the fifth defendant also refuted the allegation in the plaint and claimed to be a bonafide purchaser for value without notice having purchased the suit **property nos. 3 and 4** from the fourth defendant in 2008 and obtained a certificate of title therefor(exhibit **D11**). She urges the Court to dismiss the suit with costs.

In her written statement of defense, the sixth defendant denied the allegation that the plaintiff is the lawful owner of the suit properties. She also denied that she has any authority to revoke the grant to the first five defendants. She finally prays for a judgment against the plaintiff.

In view of the factual contentions reflected in pleadings, the following issues were framed for determination. **First**, who is the lawful owner of the suit property. **Two,** what reliefs are the parties entitled to.

In the conduct of this matter, the plaintiff was represented by advocate Innocent Mwanga. The first and second defendants were represented by Mr. Elibarik Maeda, learned advocate and the third defendant by advocate Magdalena Sylvester. The sixth defendant was represented by Miss. Kisarika, learned state attorney. The firth defendant appeared in person. At the end of the trial, parties were allowed to address the Court generally by way of written submissions. I recommend the counsel for their very

instructive submissions. I have duly taken them into account in this my judgment.

Before I direct my mind on the substantive issues, it is obligatory to consider the issue of admissibility of the documents which were tentatively exhibited as **D3A** and **D6**. The admissibility of the power of attorney in exhibit **D3A** was objected by the counsel for the 6th defendant and the plaintiff on account that it was witnessed by two different notaries. Equally objected, was the admissibility of a certified copy of the certificate of title in exhibit **D6**. It was questioned on account that it differed with a copy of a CT attached in the written statement of defense.

Considering the age of the case and time constraint, I thought it prudent to tentatively admit the documents with a judicial notice that, the issue of admissibility would be considered in my final judgment. My approach was not without authority. I was inspired by the decision of Supreme Court of India **BIPIN SHATILAL PANCHAL VS. STATE OF GUJARAT AND ANOTHER , 2002 (1) LW (Cr.) 115**, which was quoted with approval in my decision in **REPUBLIC v. SHULE S/O TANZANIA AND ANOTHER CRIMINAL SESSION NO. 212 OF 2013, HIGH COURT, MWANZA REGISTRY.** In the said decision, the Supreme Court of India facing a similar issue, took the view that, for the purpose of accelerating trials, admission of a document with a note that its admissibility shall be

considered in the final judgment is the best approach. In their own words, their Lordships, the Justices of the Supreme Court of India had the following to say:-

> *Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed. The above procedure if followed will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witness. Second is that the superior court, when the same objection is re-canvased and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding the objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that the measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.*

In **SHULE TANZANIA *SUPRA***, I stated how should the above principle apply in Tanzania in the following words:-

> *In my opinion therefore, where an objection to admissibility of evidence other than on insufficiency of stamp duty on instrument is*

raised, the trial court my, in appropriate cases, make a note of such objection and mark the objected document tentatively as an exhibit subject to such objections being considered in the final judgment. I should perhaps make it very clear that, the procedure should not be applied if the tentative admission of evidence would lead to failure of justice. Every case has to be decided according to its own merit.

In my humble view, the principle under discussion is relevant in Tanzania because, as I observed in the authority just referred, the existing practice of determining each and every objection as to admissibility of evidence whenever raised, can in some cases, be an obstacle towards steady and swift disposal of proceedings.

Having made an account of the procedure that I have employed in tentatively admitting the documents in question , it is now desirable to address the issue of admissibility of the same.

It was submitted in respect of exhibit **D3A**, that for the reason of being witnessed by two notaries, the same cannot be admitted into evidence. In rebuttal, it was submitted for the third defendant that, the document was only witnessed in Botswana, and the seal of advocate Fredrick Nyiti of Tanzania was only fixed to confirm the attestation in Botswana. She submitted further that, the document is admissible under section 94 of the Evidence Act.

Without spending much time, I think, the preliminary objection is meritorious. While the seal of advocate Fredrick is stamped aside the attestation clause, the attestation clause itself does not suggest that it was he who witnessed the execution. In any event, he being in Tanzania, and the execution in Botswana, he was incompetent to witness the same. On the face of it, the attestation clause indicates that it was Banyatsi Mmekwa, an attorney at law of Gaborone, Botswana who attested it. Quite unusually, the attestation is not evidenced by any seal. I do not think in the circumstance if the presumption under section 94(1) of the **Evidence Act** may apply. On that account therefore, I will sustain the preliminary objection and hold that the document tentatively admitted as **D3A** is not admissible in law and it shall thus not be given any consideration in the determination of this matter.

This now takes me to the admissibility of the certificate of title in exhibit **D6**. It is doubted because its contents do not tally with a photocopy accompanied with the written statement of defense in that, page 2 of the certificate of title is missing in the document attached in the written statement of defense. In her submission, Miss. Magdalena while admitting that one page was mistakenly omitted, she submitted that, the omission did not affect the substantial validity of the document. I have read and compered the two documents. I have no doubt that they constitute one document save that, one page is missing in what is attached in the written

statement of defense. I do not think that the mere missing of one page in the document can have the effect of taking the plaintiff by surprise. Regard being had of the fact that the authority in whose custody the original file is, has certified exhibit **D6** as a correct copy of the original. Taking the circumstance of this matter as a whole, it is my view that there has been substantial compliance of the notice requirement. For the interest of justice and in upholding the overriding objective policy in the administration of justice, I will invoke my inherent power under section 95 of the **CPC** and hold that the document is admissible notwithstanding the missing of one page in the attached document. The preliminary objection is therefore overruled and exhibit **D6** shall remain part of the record.

Let me now consider the substance of the suit. I propose to start with the first issue on the ownership of the **suit properties**. It is common ground that, the plaintiff is a juristic person who was incorporated in 1992. In accordance with the pleading and evidence, the plaintiff claims to have acquired the **suit properties** in 1991. As a matter of fact therefore, the plaintiff was not in existence when the **suit properties** were being allocated in 1991. That the plaintiff ratified the transection soon upon incorporation though not pleaded, was raised and addressed during actual hearing. **PW-1** testified that, subsequent to incorporation, the acquisition was ratified by the board of directors of the plaintiff, on 10.02.1992, by way of special resolution (exhibit **PE7**). Exhibit PE7, I have read it, far from making reference of "letters of an offer given by the Arusha Municipal Council" does to make reference of the description of the **suit**

properties. The plot numbers of the **suit properties** are not there. Much could be said.

In her submission on this issue, Miss Magdalena Sylister, learned advocate for the third defendant who was supported by her learned friend advocate Elibariki Maeda for the first and second defendants submitted, with all forces that, the pre-incorporation acquisition of the **suit properties** was null and void regardless of the purported ratification in exhibit **P7**. She submitted, in the first place that, for the reason of being not in existence at the time of allocation, the transection purporting to have been made for the plaintiff was, in terms of section 11(2) of the **Law of Contract Act, Cap. 354 R.E., 2002** ("LCA)", null and void for want of capacity. She placed heavy reliance on the authority of the Court of Appeal of Tanzania in **ASHA JUMA VS. HAWA JUMA ZAKUMBA, CIVIL APPEAL NO. 118/2009**, where a letter of offer was issued to the appellant while she was still under the age of minority and the Court of Appeal as per Her Ladyship Kimaro, JA, as she then was, held that the letter of offer was void for want of capacity. She further referred the Court to the English authority in **NEWBORNE VS. SENSOLD (GREAT BRITAIN) (1953) 1 ALL ER 708** in support of the proposition that, a contract executed before incorporation is null and void.

On whether the contract would be validated by the post incorporation ratification, it was the counsel submission that, in so long as there was not

executed a new contract, a contract executed before incorporation could not have any legal effect. To cement her view, the counsel referred the Court to the English authority in **NATAL LAND AND COLONISATION COMPANY LIMITED VS. PAULINE COLLIERY AND DEVELOPMENT SYNDICATE LIMITED (1904) A.C. 120** and the commentary of the learned jurists, Clive M. Schmitthoff and James H. Thompson in **PALMER'S COMPANY LAW, 21st EDITION(LONDON) STEVENS & SONS LIMITED.**

On their parts, the fifth and sixth defendants did not make any comment on the issue. Nevertheless, whereas the fifth defendant submitted that there was sufficient evidence on the record to establish that she was the owner of the **suit properties number 3 and 4**, the sixth defendant submitted that, the evidence is such that the **suit properties** belong to the plaintiff.

In his submission in rebuttal on this issue, Mr. Innocent Mwanga, learned advocate for the plaintiff contended that the authorities cited by the counsel for the first, second and third defendants are irrelevant because under section 40 (1) and (2) of the **Companies Act No. 12 of 2012**, a contract entered into before incorporation has a legal effect. He placed reliance on the authority of the Privy Council in **COSMIC INSURANCE CORPORATION LTD VS. KHOO POR (1981) N.I.J** which was

considering the provision of section 35(1) of the **Singapore Companies Act, 1967.**

I have fittingly considered the rival submissions. For the reasons which shall be apparent gradually as I go on, I am preparing myself to answer the first issue against the plaintiff. Under section, 11(2) of the **LCA** as judicially considered in **ASHA JUMA VS. HAWA JUMA ZAKUMBA** *SUPRA*, a contract entered by a person without capacity is null and void. In this matter, the plaintiff claims to have acquired the **suit properties** prior to her incorporation by way allocation having purchased them from the sixth defendant. Who applied for allocation for and on behalf of the company, is the question which cannot find any answer in pleading. Nor in the evidence of **PW1**. Yet, there is admission, in the testimony of **PW1** on cross examination that, the plaintiff acquired the **suit properties** in her own name and not through any promoter.

It was submitted for the plaintiff that, the pre-incorporation acquisition has, under section 40(1) and (2) of the Companies Act, 2002 a force of law. The said provision provides as follows:-

> *"40-(1) A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly"*

It may perhaps be relevant to observe that, the alleged acquisition of the **suit properties** by the plaintiff and the subsequent ratification happened in 1991 and 1992 when the current Companies Act was not in existence. As a matter of law therefore, the provision of the new enactment cannot operate retrospectively. Regard be had on the fact that the issue pertains to substantive law. In my opinion therefore, the instant dispute is governed by the repealed Companies Act of 1932 which was based on the English Companies Act of 1929. The current Companies Act, which is partly based on the English Companies Act of 1948 and 1985 is therefore inapplicable in the circumstance. Equally so for the authority in **COSMIC INSURANCE CORPORATION LTD VS. KHOO POR (1981) N.I.J** relied upon by the counsel for the plaintiff in so far as it was dealing with the provision of section 35(1) of the **Singapore Companies Act, 1967** which is not worded similarly with any of the provisions of the old Companies Act nor the current one.

My careful reading of the repealed Companies Act could not come across any express provision dealing with pre-incorporation transections. In terms of section 2(3) of the **Judicature and Application of Laws Act** therefore, the applicable principle of law in the circumstance was common law as of the reception date. Under common law, I agree with Miss. Magdalena and Mr. Maeda, a company cannot adopt or ratify a transection purporting to have been made on its behalf before incorporation. There are many judicial pronouncements from common law on that position. For

instance, in **KELNER VS. BAXTER (1866) L.R. 2C.P. 174**, it was held that, if a person contracted on behalf of a company which was nonexistent, he himself would be liable on the contract. Just as, if a man signs a contract for and on behalf "of his horses", he is personally liable. The Judicial Commitee of the Privy Council adopted the said principle in **NATAL LAND AND COLONISATION COMPANY LIMITED VS. PAULINE COLLIERY AND DEVELOPMENT SYNDICATE LIMITED, *supra*** where it remarked at page 6 of the judgment as follows:-

> *Their Lordships do not think it necessary to say weather the agreement was or was not voidable on the grounds alleged or on other grounds appearing in the correspondence, because they are clearly of the opinion that there was no contract between the Appellants and the Respondents . The contract was made with Mrs. De Carrey, and even if she can be treated as having made it on the behalf either of unincorporated Syndicates, who were the promoters of the Respondent Company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain a benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from Kelner v. Baxter (L. R.. 2C.P. 174) downwards.*

Admittedly, the general common law rule in **KELNER VS. BAXTER** admits one exception which has now been codified, with modifications, under section 36C of the **English Companies Act** which is worded similarly with section 40(1) of our **Companies Act, 2002** reproduced elsewhere in this judgment. It is to the effect that such contract can have a

force of law if the company enters into a new contract to put its terms into effect. The commentary of the learned jurists, Clive M. Schmitthoff and James H. Thompson in their **PALMER'S COMPANY LAW** may be instructive. They remarked at paragraph 3.002 as follows:-

> *Before its incorporation a company has no capacity to contract. Consequently, in common law nobody can contract for it as an agent because an act which cannot be done by the principal himself cannot be done by him through an agent nor can a pre-incorporation be ratified by the company after its incorporation. There is however, nothing to prevent the company when incorporated from entering into a new contract to put into effect the terms of the pre-incorporation contract.*

Commenting on whether the clause " *subject to any agreement to the contrary"* in section 36C (1) of the **English Companies Act, 1985**, can apply as to legalize pre-incorporation transections by ratification, the learned authors stated at paragraph 3.003 as follows:-

> *It is doubtful whether the phrase "subject to any agreement to the contrary" can also be interpreted , as meaning that the parties may agree that the company , after formation, may ratify the contract. The English courts would probably answer this question in negative. It is regrettable that the United Kingdom Legislature has not yet seen fit to introduce this change.*

I think, the commentary above is quite relevant in Tanzania in as much as the statutory provisions on the subject matter between the two countries are similar in all respects. Therefore, assuming, which is not, that the provision of section 40(1) of the current **Companies Act** was applicable in

the circumstance, it would have not been of any assistance to the plaintiff. The core statement in respective provision is that; *a contract purporting to be made by or on behalf of a company prior to incorporation, is tantamount to a contract made by the person purporting to act for the company and such person is personally liable for it.* The modification clause "*subject to any agreement to the contrary*" in the provision, in my reading, signifies that, such a contract can have effect in the incorporated company if there be executed a new contract between the company and the other party putting into effect the terms of the pre-incorporation contract. This has not been the case in the instant matter.

In my opinion therefore, for the reason of being issued in the name of the plaintiff before its formation, the plaintiff's purported letter of offer is null and void and cannot not be validated by the so called ratification in exhibit **PE7**. It is so held. Once the purported offers by the plaintiff are nullified, the new offer claimed to have been issued in substitute thereof is in the same token nullified. Consequently, the plaintiff has no title on the **suit properties**. Issue number one is therefore answered against the plaintiff. She is not the lawful owner of the suit properties or either of them. As to what relief the parties are entitled to, it is nothing other than a dismissal of the suit with costs. In the final result, the suit is hereby dismissed with costs.

It is so ordered.

Right to appeal duly explained.

I. MAIGE

JUDGE

29/07/2019

Delivered in the presence of Mr. Innocent Mwanga for the plaintiff who is also holding the brief of Mr. Nyalila for the sixth defendant, Mr. Elibariki Maeda for the 1st and 2nd defendant who is also holding the brief for Miss Magdalena for the third defendant and the fifth defendant in person this 29th July 2019.

I. MAIGE,

JUDGE

29/07/2018