

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO.1 OF 2015

FRED MASATU ----- PLAINTIFF

VERSUS

1. Jane Masatu

2. PameraMukeira Bernard

3. NIC Bank (T) Ltd

4. Mwanza City Council----- DEFENDANTS

JUDGEMENT

Ebrahim, J.:

The plaintiff and the first defendant are siblings. Their father, the late Samwel Masatu died on 11th May 2000. Upon his death, their mother Damary Masatu (widow) was appointed as the administratrix of her husband estate by Mwanza Urban Primary Court on 21.09.2000 as per **exhibit PE1**. Unfortunately as fate would have it, before Damary Masatu could fully administer the estate of the late Samwel Masatu, she passed on. That was when on 20th September 2013, the plaintiff was appointed as a successor administrator of their father's estate- **exhibit PE2**.

According to the facts narrated in amended plaint, the bone of contention in this case is that the deceased, the late Samweli Masatu left a

house located on Plot No. 94, Block F Nyakato Mwanza among other properties. The Plaintiff being an administrator of their late father's estate could not distribute the house to the rightful heirs because the 1st defendant made a transaction with the 4th defendant and sold a house to the 2nd defendant while she was not the administratrix of the deceased estate. Following such transaction, the 2nd defendant transferred the right of occupancy from Jane Masatu to himself. The transaction made, led the 3rd defendant to have ownership of Plot No. 94, Block F, Nyakato, Mwanza through the mortgage conducted by the 3rd defendant. The plaintiff then filed a caveat in respect of the disputed house on 27.03.2013 "**exhibit PE 3**" to stop any transaction in respect of the said house. The disputed house was meant to be sold through auction on 13.09.2014 but it was not.

The Plaintiff is therefore praying for judgement and decree of this court on the following orders:

- i. A declaration that the first defendant was not the administratrix of the estate of SAMWEL MASATU.
- ii. A declaration that the said sale by the first defendant to the second defendant was/is null and be set aside on the grounds, inter alia, that the first defendant had no saleable interest to pass to the second defendant.
- iii. A declaration that the mortgage ought to be rescinded and/ or set aside as having been procured illegally and the 3rd defendant Bank had notice and/or constructive notice of the illenality.

- iv. An order that the 3rd defendant Bank to deliver up the mortgage deed to be cancelled.
- v. That the title deed of the disputed property be rectified and the deceased name be restored thereon.
- vi. General damages against the 1st and 4th defendant the quantum whereof to be determined by this court.
- vii. Costs of this suit.
- viii. Any other relief(s) or order this Court may deem just and appropriate to grant.

On 04th October 2016, this Court ordered the suit to proceed exparte on the 1st and 2nd defendants. The duos were duly served through substituted services in Mwananchi Newspaper No. 5905 of 27.09.2016 but they neither entered appearance nor filed their defence.

On being served with the amended plaint, the 3rd defendant denied to have knowledge of all the facts claimed by the plaintiff. The 3rd defendant averred further that the house with Certificate of Title No. 16098 has been mortgaged to the 3rd defendant by the 2nd defendant to secure a loan of Tshs. 400,000,000/-. The same house is earmarked for sale by the 3rd defendant in exercise of her options as a Mortgagor to recover the outstanding loan amount. The 3rd defendant challenged the filing of caveat by the plaintiff as an afterthought and contended that the Plaintiff claim is time barred having been filed over thirteen years from the death of the

deceased to the time when the plaintiff discovered about the mortgage. She thus prayed for the suit to be dismissed with costs.

The 4th defendant equally contested the claim by the Plaintiff. She argued that the plaintiff's appointment as an administrator has been made after a lapse of 13 years and the suit has been filed after 15 years from the death of Samweli Masatu. The 4th defendant further invalidated the letter of offer as alleged in the plaint in the presence of Right of Occupancy No. 16098. Lastly, she denied the involvement on the basis that she has no legal authority to approve any transfer of ownership but the office of the Commissioner for Lands/Authorised Land Officer. She also prayed for the suit to be dismissed with costs.

At the hearing of this case, the following were the agreed issues for determination by the court:

- 1. Whether the disputed property bearing Plot No. 106 Block F Nyakato Mwanza is the same as Plot No. 94 Block F, Nyakato , Mwanza.*
- 2. Whether the 1st defendant had lawful authority to transfer the disputed property to the 2nd defendant.*
- 3. If the 2nd issue is answered in the affirmative, what is the status of the transfer from the 1st defendant to the 2nd defendant; and the mortgage between the 2nd defendant and the 3rd defendant?*

- 4. Whether the approval by the 4th defendant on the transfer of the right of occupancy of the disputed property from the 1st defendant to the 2nd defendant was lawful.*
- 5. To what relief(s) if any parties are entitled to.*

The plaintiff in this case was represented by Mr. Nasimire, learned advocate. The 3rd Defendant was represented by Mr. Mnyiwala Mapembe, learned advocate; and the 4th Defendant had the services of their solicitor, Mr. Masunga.

In making his case, Plaintiff adduced his own and only evidence as **PW1**. The **3rd defendant** called two witnesses, Mr. Leonard Isoma, Recovery Officer at NIC (T) Ltd Bank who testified as **DW1**; and Mr. Anatoli Bwekumburwa, Cartography Technician from the office of Registrar of Titles (**DW2**). As for **the 4th defendant**, she called only one witness, Mr. Jeremiah Mpembe, Assistant Land Officer from Mwanza City Council (**DW3**). In the course of composing this judgement, the Court found it apt to call for discovery under **Section 176(1) of the Evidence Act, Cap 6, RE 2002**. I therefore called again **Mr. Jeremiah Mpembe**, Assistant Land Officer from Mwanza City Council, and this time as a court witness (**CW1**). The observations of the court shall reflect in the due course.

On 09.07.2018, the court ordered parties to file final submissions on or before 09.08.2018. Only the Plaintiff and the 3rd defendant adhered to the order of the court. The filed submissions shall be considered in addressing the issues before the court.

Whether the disputed property bearing Plot No. 106 Block F Nyakato Mwanza is the same as Plot No. 94 Block F, Nyakato , Mwanza.

Before addressing the 1st issue in this case, I would like to address the issue of time limitation raised again by the 3rd defendant in her final submission.

Citing **Section 9(1) of the Law of Limitation Act, Cap 89, RE 2002**, Counsel for the 3rd defendant insisted that from the date when the deceased passed to the filing of this suit, 15 years have passed. Therefore according to **item 22 column one Part 1 to the Schedule of the Law of Limitation Act, Cap 89 RE 2002** limitation period of 12 years for recovery of land has passed. He made further reference to the **case of Evarist Shirima Vs. Frank Osher and Others**, Land Appeal No. 17 of 2007 (HC- Arusha) (Unreported); and the case of **Yusuf Same and Another Vs. Hadija Yusuf** (1996) TLR 347. He made further reference to **Section 35 of Cap 89**.

As the undisputable facts of this case would reveal, the deceased Samwel Masatu died intestate on 11th May 2000 and the plaintiff was appointed as administrator of the deceased estate on 20th September 2013 following the death of the 1st administratrix. According to the evidence present in court, **DW2 and DW3**, Jane Masatu was the first person to be registered as the administratrix of the late Samwel Masatu on 07.12.2005 through transfer by bequest. The first defendant then transferred ownership to the 2nd defendant in 2009.

The question now comes, is the suit time barred? **Section 9 (1) of the Law of Limitation Act, Cap 89 RE 2002** provides for accrual of right of action for a person who institutes a suit to recover land of a deceased person. That right shall be deemed to have accrued on the date of the death. Nevertheless, **Section 9(2) of the same Act read together with Sections 4 and 5** provides as follows:

"(4) The period of limitation prescribed by this Act in relation to any proceeding shall, subject to the provisions of this Act hereinafter contained, commence from the date on which the right of action for such proceeding accrues".

"5- Subject to the provisions of this Act, the right of action shall in respect of any proceeding, accrue on the date on which the cause of action arises."

"9(2) – where the person who institutes a suit to recover land, or some persons through whom he claims, has been in possession of and has, while entitled to the land, been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of dispossession or discontinuance."

Thus, in my reading of the above provisions of law, it is not automatic that instituting a suit to recover land after passage of 12 years from the date of the death of deceased divests the claim over the said land. It depends on the facts of each case. The same is true only if it can be proved that there has been a dispossession or discontinuance on that land to the person who claims right over the period of 12 years from the date of death. Going by the facts of this case, the discontinuance or dispossession of the disputed land by the 1st defendant occurred on 07.12.2005 where it is alleged that she was registered as the administratrix of the estate of the deceased on the disputed property through transfer by bequest. There is no any other evidence of dispossession from the Plaintiff prior to that date. This means the deceased possessed the property when he passed on and no title passed over before 2005. That being the position therefore, time to claim right over the disputed property started to accrue in 2005 and that was when cause of action against 1st defendant arose. I subscribe to the position held in the case of **RamadhaniNkongelaVs.**

Casian Paulo, [1988] TLR 56, which made reference to **section 4 of the Law of Limitation Act**. Counting from 2005 to 2015 when this suit was lodged it is barely 10 years. Therefore, I hasten to say it again that, the suit is not time barred.

Counsel for the 3rd defendant made reference to **Section 35 of Cap 89** that an administrator of the deceased estate shall be deemed to claim land as if there has been no interval between the grant of letter of administration and the death of the deceased. Again such position would have been true in our case if the administrator instituted a claim after the lapse of the accrual of right to claim such land. I further distinguish the circumstances of the cited cases of **Evarist Shirima and Yusuf Same (supra)** with the instant case on the basis that in both cited cases, the administrator instituted a claim over land when the right to action has already lapsed. I therefore reiterate what I ruled on the points of preliminary objection that the suit is not time barred.

In the final submission, Counsel for the 3rd defendant also discussed extensively the issue of fraud and legal requirement to prove it in a civil case, particularly the instant one. I shall address the issue in the cause of determining substantive issues.

As for the first issue, it need not detain me much. **PW1** told the court that the plot owned by the deceased was initially numbered as Plot No. 106, Block F Nyakato. The same plot was later changed to Plot No. 94 Block F. This assertion is backed by the testimony of **DW3** who gave a brief background of the disputed property. He testified that when the land was allocated to the deceased Samwel Masatu in 1987, it was Plot No. 106 Block F Nyakato, Mwanza, low density. In 2005 when Jane Masatu was registered in the Certificate of Title as an administratrix of the deceased estate, the Plot Number changed from the provision No. 106, Block F Nyakato to Plot No. 94. From the above testimonies, it is indisputable that Plot No. 106 Block F Nyakato, Mwanza is the same as Plot No. 94 Block F Nyakato Mwanza which is the disputed property. The first issue is therefore answered in affirmative.

The second issue is *whether the 1st defendant had lawful authority to transfer the disputed property to the 2nd defendant*. For the purpose of sequence and consistence, in addressing 2nd issue I shall also address the 4th issue on *whether the approval by the 4th defendant on the transfer of the right of occupancy of the disputed property from the 1st defendant to the 2nd defendant was lawful*.

The answer to the 2nd and 4th issue is on the evidence adduced by PW1, DW2 and DW3 and documents tendered in proof of their claims. In addressing these issues, I firstly need to focus on whether the 4th defendant legally changed the name of the deceased on the disputed property to the 1st defendant.

In essence PW1 told the court that following the death of Damari Masatu who was the first administratrix of the estate of the late Samwel Masatu (**exhibit PE1**); he became the administrator of the late Samwel Masatu on 20.09.2013(**exhibit PE2**) and that from 2002 to 2013, there was no person administering the deceased's estate. He could not distribute the disputed property to the rightful heirs because the 1st defendant who is not the administratrix of the late Samwel Masatu's estate made a transaction through the offices of the 4th defendant and sold the property to the 2nd defendant. Consequently ownership was transferred to the 2nd defendant who mortgaged the property to the 3rd defendant.

DW2, working at the office of Registrar of Title as Cartography Technician said that one of his responsibilities is to inspect title before it is registered. Testifying on exhibit DE1, it was registered to the 1st defendant as an administratrix of Samwel Masatu on 07.12.2005 who later transferred

the title to Pamela Mukeria Bernard on 23.12.2009. The 2nd defendant then took a loan with NIC (T) Limited which was registered on 13.08.2012. Responding to cross examination questions he said that the assent to bequest was File Document No. 17463 of 23.12.2009 registered in the name of Jane Masatu.

Jeremiah Mpembe, Assistant Land Officer of Mwanza City Council testified as **DW3** when he was called as the witness for the 4th defendant. He also testified as **CW1** as a Court witness. Explaining the procedure for transfer of title (ownership) on probate, he said that the documents needed are Form No. IV on the appointment of the administrator of the Estate, a letter from court ordering the Director to change ownership and a judgement. He testified further that in case of division of properties there has also to be a judgement and Form No. VI. Speaking about Plot No. 94, Block "F" Nyakato, Mwanza, he said that Jane Masatu was appointed in lieu of Damari Masatu to administer the estate of Samwel Masatu. Then in 2005 Jane was availed with a Certificate of Title as an administratrix of Samwel Masatu. Responding to cross examination questions, he admitted that in **Probate Case No. 280/2002**, Jane Masatu was the administratrix of Damari Masatu. Cross examined further, he changed his statement and

said that Jane Masatu was appointed to replace Damari Masatu as an administratrix of Samwel Masatu.

Following the contradictory statements by DW3 and wanting to get to the bottom of the issue, the court called for discovery as previously explained.

CW1 (DW3) under oath, while referring to the file from the Office of Mwanza City Council with reference no.**MCC/L/14754**; produced in court Form No. IV of Jane Masatu appointed as the administratrix of the estate of Damari Masatu. The said Form No IV was admitted as **exhibit CE1**. Exhibit CE1 had no folio number and it is the only document in the file in respect of the transfer of Certificate of Title No. 16098 (**exhibit DE1**) to Jane Masatu as **A Legal Personal Representative of Samwel Masatu (deceased)** together with exhibit PE1. When questioned further by the court and cross examined, he admitted that the documents needed to effect such registration were Judgement of the Court, Introduction Letter from the Court introducing the appointed administrator of the deceased, Form No. IV and Form Number VI. Conspicuously those documents were not in the file. What else is in the file is **Form L.R.20 – Application by Legal Personal Representative** of Jane Masatu to be registered as Legal Personal Representative of the late Samwel Masatu which was admitted as **exhibit "CE2"**. All in all exhibit CE1 is clear that 1st Defendant

was appointed to be the administratrix of the late Damari Masatu and not Samwel Masatu nor replacing the administration of Damari Masatu in administering the estate of Damari Masatu. What never ceases to amaze this court is how could the 4th defendant register 1st defendant as a Legal Personal Representative whilst exhibit CE2 was not accompanied by any document that legalize her to be the administratrix of the late Samwel Masatu?. I am saying so because; requirement of registration of letter of administration is under the Land Registration Act. The disputed property is registered land, hence letters of administration and all other relevant documents including Form No. VI of the administratrix ought to be in the file. More so, if at all Jane Masatu was appointed as the replacement of the late Damari Masatu, she would have been appointed under **Rule 2(b) of the First Schedule of the Magistrates' Courts Act, 1984** and not as a first appointment. Hence the replacement would have been in the same Probate Case No. 114/2000 and not a new file of Probate Case No. 280/2002.

Need I belabour much; it is obvious from the above observations and in answering to the 2nd issue, the 1st defendant had no lawful authority to transfer the disputed property as she was not the administratrix of the estate of the late Samwel Masatu. Certainly the maxim "**Nemo Dat Quod**

Non Habet” fits in ten with the facts of this case. That being said, in answering to 4th issue, I must first say that there is conclusive proof that the 4th defendant had no legal basis of transferring the disputed property to the 1st defendant as a legal personal representative, consequently the said transfer was illegal. Then it answers the issue that the approval of transfer of the right occupancy by any authority including the 4th defendant from the 1st defendant to the 2nd defendant was illegal.

Having answered those two issues in the negative, the question now comes to the 3rd issue as to the status of the right of occupancy between the 1st defendant, 2nd defendant and the mortgage deed between the 2nd defendant and the 3rd defendant.

This Court has already ruled out above that the transfer of the disputed property done by the 4th defendant to the 1st defendant was illegal and so was the transfer to the 2nd defendant from the 1st defendant. As stated earlier, the 2nd defendant who for argument sake would have been a bonafide purchaser subject to proof of having no notice at all or even constructive did not appear in court nor filed his defence. Hence the claim against him is uncontested. We therefore remain with the 3rd

defendant who from the submissions of her Counsel I could name her as a **"Bonafide Mortgagee"**.

Counsel for the 3rd defendant argued in the final submission that even if the 1st Defendant had no good title, of which they disputed, the mortgage transaction between herself and the 2nd defendant cannot be rescinded. The basis of the 3rd defendant's argument is that she satisfied herself that the mortgagor is the registered owner of the property pledged as security for the loan. Counsel for the 3rd defendant made reference to the cases of **Omari Yusuph Vs. Rahma Ahmed Abdulkadir**, (1987) TLR, 167 (CA); and **SalumMateyo Vs. Mohamed Mateyo** (1987) TLR 111(HC) to the holding that the purchaser is justified on the assumption that what is contained in the register is true and is all that there is about the property.

At this juncture, I wish to state that the circumstances of the cited cases differ with this case on the basis that both cases were on individuals i.e. bonafide purchasers. However, even if I were to take the principle illustrated in those cases, firstly, there is no any document to evidence the search that was tendered in court by the 3rd defendant to prove that she actually conducted the search diligently. The moment the 3rd defendant

alleged that she is a **bonafide transferee**; onus was on her to prove that she conducted that search. Secondly, under the very obvious circumstances I put the standard of due diligence higher to the institutions like a Bank in our case than individuals. This is because, banking is a business based on trust and it is entrusted with other people's money believing that they are professionals and entrusted to the risk. It follows therefore that they have to be extra cautious in dispersing people's savings and thus have a duty to go extra mile in conducting due diligence search. Coming to our instant case, yes, the 3rd defendant had a duty to trace root cause of the title especially after knowing from the title that the 2nd defendant is not original owner and she has the 2nd title. Banks being professionals have all needed resources to conduct the due diligence to the higher standard. All in all no such proof has been presented in court. Thirdly, it is obvious that the 3rd defendant derives her right of mortgage from the 2nd defendant but not from the 3rd party who is the plaintiff in our case. That being said, whatever claim the 3rd defendant has, she should direct to her mortgagee.

I would therefore not hesitate to say from the findings of this court that, the mortgage between the 2nd defendant and 3rd defendant in so far as the

disputed property is concerned is vitiated by lack of title of the 1st defendant as the same was illegally procured.

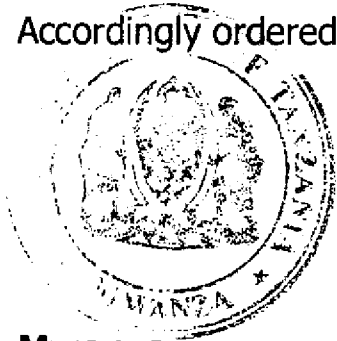
Counsel for the 3rd defendant submitted at length on the allegations of fraud claimed by the Plaintiff. I must state out rightly that having gone through the evidence produced in court, the Plaintiff has not managed to prove such allegations against the 3rd defendant as the law requires. Nevertheless, it does not take away the fact that the transaction pertaining to the transfer of title of the disputed land to the 1st defendant then to the 2nd defendant and finally to the 3rd defendant occasioned by the 4th defendant was illegal.

From the foregoing, I enter judgement for the Plaintiff and grant reliefs to the parties as follows:


1. It is hereby declared that the 1st defendant is/was not an administratrix of the estate of the late Samwel Masatu.
2. The sale by the 1st defendant to the 2nd defendant was illegal and hereby nullified and set aside as the 1st defendant had no title to pass.
3. The mortgage deed between the 2nd defendant and the 3rd defendant in respect of Plot No. 94 Block F Nyakato Mwanza with Certificate of Title 16098 is rescinded.

4. The Registrar of Titles is hereby ordered to rectify records by discharging Certificate of Title No. 16098 from liability as collateral in the mortgage deed between the 2nd defendant and the 3rd defendant.
5. The Registrar of Titles to rectify the records and restore the deceased's name of Samwel Masatu on the Certificate of Title No. 16098 in respect of Plot No. 94 Block F Nyakato Mwanza.
6. All the defendants shall bear the costs of this suit.

Accordingly ordered



Mwanza
21.12.2018



R.A. Ebrahim
Judge