

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT ARUSHA
LAND CASE NO. 18 OF 2015

SOLOMON SIMON METINYIKU.....PLAINTIFF
(Suing as an administrator of the estate of the late Cornelio Mollel)

VERSUS

NESERIAN SIMON MOLLEL.....1ST DEFENDANT
JUSTIN SIMON METINYIKU.....2ND DEFENDANT
DENIS MACHALO.....3RD DEFENDANT

JUDGMENT OF THE COURT

S.M. MAGHIMBI, J:

On the 09/04/2015 the plaintiff herein, Solomon Simón Metinyiku suing as administrator of the estate pf the late Cornelio Mollel who died on 30/01/2000 (the deceased), sued two defendants, Justin Simon Metinyiku and Remi Lule. Subsequently on the 19th September, 2016, this court ordered that the plaint be amended hence on the 19/10/2016, the plaintiff herein filed an amended plaint suing the current defendants, one Nesian Simon Mollel, Justin Simon Metinyiku and Denis Machalo. In his amended plaint, the plaintiff prayed for judgment and decree against the Defendants as follows:

- i. Declaratory order that the suit land is the property of the late Cornell Mollel and that the sale of the said property by the Defendants is null and void.
- ii. Payment of Mesne profit at the rate of 200,000/= (Two Hundred Thousand) per month from April 2015 to the date of vacant possession.
- iii. Order for vacant possession.
- iv. Interest at commercial bank (20%) rate on the decretal amount from April 2015 to the date of Judgment and further interest at court rate. From the date of judgment till full and final payment.
- v. Any other relief this court may deem fit to grant.

In this court, the plaintiff was represented by Mr. Joseph Hillary Mulumba while the 1st and 2nd defendants were represented by Mr. Mwaluko, learned Counsel and the 3rd defendant appeared in person, unrepresented. Upon conclusion of the pleadings, the following issues were framed for determination:

1. Who was the lawful owner of the suit property before the alleged sale of April 2015.
2. Whether the alleged sale was lawful.
3. To what reliefs are the parties entitled to.

Before I go into the determination of this case, the brief background of the dispute should be narrated. As per the facts gathered in the pleadings, the first Defendant is a mother to the second defendant and the late Cornelio Swai (the plaintiff) and was one of the five wives of the late Ngulelo or Simon Metinyiku who passed away in 1997. Before his death, the late

Ngulelo Metinyiku distributed his farms to his five wives, whereby the First Defendant as one of his lawfully married wife was given a piece of land which included the suit property. The First Defendant sold the land to the 3rd defendant.

The cause of action to this dispute arose sometime in April 2015 when the first and second Defendants, without the knowledge and consent of the the plaintiff unlawfully sold two plots of land, with a four roomed house, the property of the late Cornelio Mollel (the suit property) to the third Defendant. The estimated value of the suit property was Tanzania shillings 75,000,000/= (Seventy Five Million). This caused unnecessary disturbance and costs to the Plaintiff who in his plaint also claims general damages of Shillings 100,000,000/=. Following the said sale, the plaintiff made several demands of vacant possession to the Defendants who have failed and refused to hand over the vacant possession thereby impeding the Plaintiff to execute his duties as the Administrator of the Estate of Cornell. Fortunately in this case, the first defendant does not dispute to have sold the land to the third defendant. He reason for so doing being that the land beongs to her. This is what will be answered by this court in determining the framed issues.

The first issue framed is on the ownership of the suit property before the alleged sale of April 2015. The plaintiff brought four witnesses which includes himself as the PW1. He also tendered an EXP1, letters of administration of the estate of the late Cornelio Swai. In his testimony he admitted that the first defendant is his step mother and the defendant being raised in their Boma but not the son of their late father. He testified

that the deceased was not the son of Pw1's father Mzee Meitinyiku. That the deceased had had three wives of which he had chased one of them. That the other one is Upendo's mother, and the last wife is called Happiness. PW1 testified further that Cornelio had only one child called Upendo and his estate included a farm with a house inside and a farm which is the suit property, both lands located at Oldadai. That the farms and properties were left for his wife and child.

PW1 testified further that Justine (2nd defendant) then sold the land to Denis (3rd defendant) who built a house inside there. His prayer was that the defendants leave the house so that he can distribute the estate to the heirs.

When cross examined by Mr. Mwaluko, PW1 testified that his father had many wives including Tumbesya, Maria who is his mother and the first defendant whom he never intended to sue her or connect her with this case. That he forgot some of his father's wives as they were eight of them but the deceased's and the 2nd defendant's mother is Mary or Ndete. He testified further that when the 2nd defendant was born in 1958 PW1 was 15 years old and still in school.

PW1 testified further that the deceased has two heirs, Happiness and Upendo and he had authorization from the heirs that he should administer the estate. That their father Mzee metinyiku had many farms including the suit property and each of his wives had their own farms including . The land in dispute was given to Nesian, the first defendant and that the same father also distributed the same farm to Cornelio and Justine. He argued that in their tradition, the woman cannot distribute farms and that

the first defendant's farm was given to the deceased when the first defendant was also there.

When asked if he knew about Baraza la Mila na Desturi la Maavuka, PW1 testified that he didn't know the Baraza and that he is Muarusha by tribe. He testified further that there was a meeting that was held by the elders and the neighbors about the first defendant but it was never declared that he belonged to their family. He denied to have said that the first defendant was involved in the sale of the suit property. However, this issue is featured in the Para 6 of the amended plaint. PW1 also admitted to have ever seen any sale agreement between the second and third defendant and that all he know is that the land has been sold. He also testified that the third defendant is in court as buyer of the house in the suit property and that he filed this case when the third defendant was selling the house.

The plaintiff also called PW2, Happines Amos Mbise who testified to be the wife of the deceased having married him on 02/04/1997 by a traditional marriage and that they were blessed with one child. She also admitted that the plaintiff is the administrator of the deceased estate and that the first defendant is her mother in law. Further that when her husband was alive, they were living at the second defendant's house in Oldadai but she currently live at Mererani. That she left the suit property and her brother in law's house because there arose some misunderstandings and her brother in law chased her out of his house. PW2 testified further that whenever she wanted to develop the house the second defendant used to stop him saying that he had nothing there.

PW2 testified further that she left the suit property and later on she went back and brought some elders and had meetings and her mother in law allowed her to go and finish the house because it belonged to her. That she brought a carpenter to take measurements of the doors and windows and when she wanted to go fix the doors the first defendant refused and threw them outside the house. She also went to TAWLA and they referred her back to the Boma saying that she should begin from there, after having meetings at the Boma and reported back to TAWLA, they advised her to open a Probate on the estate of the deceased and the plaintiff was appointed administrator. That PW1 could not distribute the estate because the first defendant has kept them and he is refusing to release them and had also sold some of the properties. He first sold the land to Remy and when Remy heard that the land had a dispute then he asked for his money back and was refunded and thereafter he sold the land to Denis (third defendant)

When cross examined by Mr. Mwaluko, PW2 testified that she has never registered her marriage and that she did not find her father-in-law alive, she arrived at the time of his funeral. She admitted that she didn't know how many wives her father in law had or that he had already divided his farms to his wives before his death. She further admitted that she had no proof that her mother in law had allowed her to be given the house back. She insisted that the second defendant was the one who sold the disputed land and that there is proof but she was not there when he was selling the house. Further that her father in law divided his farms to his children but she was not there but when she got married she found her husband (the deceased) with the properties that were given to him and he told her he

got them from his father and that the first defendant is her husband's mother but she (PW20 didn't know that the first defendant claims the land belongs to hers or if she says that she is the one who sold the land to the defendant.

When cross examined by the third defendant she admitted that he is the one now in occupation of the land. She also mentioned the boundaries to the land, that on the East there is Steven, on the South there is Richard, and that she had forgotten the one on the North and West. When re-examined by Mr. Hilary, PW2 said she was in court to claim properties that were left by her husband.

PW3's testimony was on his knowledge of the suit property, whereby he testified that the disputed land first belonged to Cornelio Simon (Deceased) and after he died the farm went back to his mother Nesian Simoon. He testified further that after the deceased died, the farm was given back to their mother because his sister in law (PW2) had left, they waited for her to come back and she didn't and then the land was sold. He also testified that it was his mother, the 2nd defendant, who sold the land to the third defendant. He came to this knowledge after being told by his mother herself and that he was the one who signed the sale agreement after being asked by the 3rd defendant. He also testified that the plaintiff is his step brother and the 2nd defendant is his biological brother and the 1st defendant is their mother. PW3 also recognized the PW2 as their late brother Cornelio's wife.

When cross examined by Mr. Mwaluko, PW3 acknowledged that their late father had five wives, including his mother and each of them was given a

piece of land. Further that when he was born, the suit property belonged to the 1st defendant and the same was later sold by her to the 3rd defendant and that if ownership of the land had moved from his mother to Cornelio then she wouldn't have sold the farm.

When cross examined by the 3rd defendant, PW3 testified that he was not there when the land was sold to 3rd defendant.

On re-examination by Mr. Hilary, PW3 testified that the 2nd defendant had given the land to the deceased and after his death she took her land back. She took it back after Cornelio died and his wife had left, after she waited for PW2 to come and she did not come back and that is when she sold the land.

I took liberty to ask the PW3 a question and he admitted that at the time of his death, the deceased was living with his wife, PW2.

PW4 was the person to whom the suit property was sold to him before he was refunded his money back and the land was later sold to the 3rd defendant. His testimony was that the land was sold to him by the 2nd defendant and he was sued in this court and later removed from that case because he was refunded his money. PW4 also testified that the 1st defendant was his wife's grandmother who witnessed the sale agreement of the disputed land between him and the second defendant.

When he was cross examined by Mr. Mwaluko, PW4 testified that he knew the land belonged to the 2nd defendant because he was the one who first sold it to him. He also acknowledged the PW2 as the deceased's wife but they did not have any children but they built a house together which had

reached Linter Stage. He found that house at the suit property. He testified further that it was the first defendant who told him that the disputed land belonged to the deceased, but she also said that now she is in possession of the land. That he was refunded his moner after the third defendant cae up with a better offer.

In her defence, the 1st defendant testified as DW4. Her testimony was that she knows the administrator plaintiff as her husband's son and the deceased plaintiff and the 2nd defendant are her sons. She also testified to have been given a piece of land by her husband. She however denied to have known the PW2 or that she was married to her son as the deceased was still young. That for a traditional marriage to be conducted there has to be some Pombe, meat and cows and that was never done for Cornelio (deceased) as he was still very young. She testified further that the deceased did not own any farm, the farm belonged to her and she is the one who will decide to give the farm to anyone. She also denied the allegation that her son had a child. I She testified further that had she died then the land would have been distributed but she had never given that land to any person. Although the fact that the land was sold to the 3rd is undisputed, the 1st defendant still claims that she is the one who owns the land and that if the farm was sold then it was because she had to go to the hospital. She again turned around and said that she is the one who sold the land so that she could get money to go to hospital.

When cross examined by the 3rd defendant, the 1st defendant testified that he (3rd defendant) is the one that she sold the land to. When cross examined by Mr. Hillary, DW4 testified that she does not remember the

exact year when her husband Mzee Ngulelo passed away, but his grave is outside the house. **She also admitted that the deceased** Cornelio was her second born son and the 1st defendant is the first born. She however did not remember the exact year that Cornelio died.

DW4 denied the fact that the deceased owned any piece of land and that they were all living in the same Boma with his father, Mzee Metinyiku. She again denied to be knowing a person called Happiness Mbise (PW2), seen a person like that or heard a name like Mbise and again denied that her deceased Cornelio never married till the time he met his death. She could not remember the exact time when Cornelio died as she was also sick at the time he died.

Further cross examination by Mr. Hillary revealed that the land in dispute and other pieces of land were given to DW4 by her late husband when she was very young. That when her late husband bought land he will divide between the wives and it was the women who will give the land to their children. As for the disputed land, DW4 testified that she had told Cornelio that she will not give him the land, he should take care of the house and until he matures is when he was going to give him the land and the cows.

Here is where the gist of the whole matter lies. It is an allegation of PW1, PW2 and PW3 that the deceased was given the land by his mother, DW4 who is also the first defendant. As observed in her evidence, she has been going round and round on how she does not PW2 or the fact that her son was married. She also testified that on one side the land belongs to her and at the same time she alleged that she has sold the land to the 3rd defendant. But again during cross examination by Mr. Hillary, she admitted

that the deceased was her son. She indirectly admitted that she had given the land to deceased but only for care taking until he matures. In struggle to convince the Court, the DW4 contradicted herself by saying that the land belongs to the 2nd defendant who is also her son. Where does the truth lies? We are not sure because the evidence of this woman (DW4) is even doubtful to be worth to truth. In my strong view, given the character and doubtful worthiness of the evidence of DW4, the fact that the deceased was in occupancy of the disputed land is not denied by her and that will form the foundation of my determination of this matter.

Going back to the contradictory testimony of DW4, her fall back position after admitting that the deceased was in occupation of the disputed land was that she was not going to pass on the land to the deceased until he matured. But she never defined what that maturity age is or when the deceased was going to mature. She did not even bother to tell us the age or at least the age group that the deceased was. She just kept on narrating that "he was very young" how young is very young, she never revealed. It therefore becomes difficult for this court to determine whether or not the DW4 was telling the truth.

The evidence of the 3rd defendant who testified as DW1 and his witness DW2 only had the substance of establishing how he bought the suitland from the 1st defendant. An issue which was not in dispute because the real question here was the title of the 1st defendant to have sold the land to the 3rd defendant. I have therefore considered his evidence and the substance that he purchased the suitland from the 1st defendant.

DW3 on his part confirmed that the 1st defendant was married to Mzee ngulelo and that the disputed land was initially hers having obtained it from her late husband. He also denied the fact that the PW3 was married to the deceased Cornelio. His attempt to impress the court also contradicted the 1st defendant's testimony because he denied the fact the said land was ever passed to the deceased plaintiff, a fact which was admitted by the 1st defendant. The same contradiction was adduced by the 2nd defendant who testified as DFW5. He denied the fact that the land was ever owned by the late Cornelio which is contrary to the testimony of their mother 1st defendant, who admitted that he had passed on the land to the deceased before he died. That said, I must conclude that the defence evidence was contradictory and did not do them any favor in establishing the issues before me.

In conclusion of the first issue, it is obvious that the evidence on balance of probability is sufficient to prove that the 1st defendant had traditionally passed on the land to the deceased, Cornelio who was her son. She only came to claim the land after he passed away thinking that it automatically bounces back to her. But that is not what the law demands. For as long as the suit property had been passed on the deceased Cornelio, process of repossessing the land by the 1st defendant or any person would have followed during the division of his estate after an administrator having been appointed. As far as the evidence goes, the plaintiff has been appointed as the administrator of the estate of the deceased Cornelio (EXP1). Therefore it must be clearly pointed out that who is before me in this court is Cornelio Mollel, the 1st defendant's son, the said Solomon Metinyiku is only appearing as administrator of his estate. Therefore

Cornelio is here to claim the land that was given to him by the 1st defendant, his mother. A fact which has not been denied by the 1st and 2nd defendants during their testimonies.

What is also revealed from the evidence before me is that the 1st defendant wants to take back what she had already given away something which is impossible. If she had given away her piece of land to the deceased, she cannot just take it away upon his death. Since the whole evidence adduced by both sides revolves around the ownership of the disputed land between the deceased and the 1st defendant, having no objection that the land previously belonged to the 1st defendant and having sufficient evidence as analyzed above to prove that the 1st defendant had passed on the suit property to the deceased, the first issue is answered in favour of the plaintiff, that the late Cornelio Mollel (the plaintiff) was the lawful owner of the suit property before the alleged sale of April 2015. Having gotten the suit property from his mother, the first defendant.

Having so determined the first issue, the second issue is whether the alleged sale was lawful. As the first issue answered, the lawful owner of the suit property is the plaintiff. The question is, if the sale of the suit property was between the 1st and the 3rd defendant, was it lawful? Here is when the principle of *Nemo Dat Quod Non Habet* applies. The latin maxim principle means in English that "*no man can transfer a better title than he himself has*". The aim of the principle is to protect the interest of the true owner when it provides that where the goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the

goods than the seller has. The first issue has already affirmed that the plaintiff is lawful owner of the suit property, and at the time of sale, the 1st defendant no longer *had* a title to the said property. *It is hence obvious that* the purchase of land by the third defendant from someone who has no ownership right to it also denied him any ownership title since a person who purports to dispose of a piece of land which does not belong to her in which automatically she has no interest in, to another, will be in violation of the aforesaid principle will rendering the purported sale void ab initio. That said therefore, the second issue is answered to the negative, the said sale of land between the 1st and 3rd defendant was unlawful hence void *ab initio*.

Having made the above findings on the two issues, the third issue for determination before me is on the reliefs that the parties are entitled to. Since it has been determined that the sale of property between the 1st and 3rd defendant is unlawful, it follows therefore that the suit property remains the property of the plaintiff (as administrator of the deceased Cornelio Mollel) and he should be left with peaceful enjoyment thereto including division of it as part of the estate of the late Cornelio Mollel.

I have noted on clause (ii) of the prayers of the plaintiff, he prayed to be paid mesne profits at the rate of Tshs. 200,000/= per month from the month of April 2015 to the date of vacant possession. To begin with, Section 3 of the Civil Procedure Code, Cap. 33 R.E 2002 (The CPC) defines Mesne profits as such:

*"mesne profits" of property means those profits **which the person in wrongful possession** of such property **actually received** or*

might, with ordinary diligence, have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession”

From the definition above, it might well be agreed that Mesne profits must be drawn from the land itself, rather than any improvements made thereto. It is hence the intermediate pecuniary value of the premises gained by the person in wrongful possession of the suitland. Coming to the case at hand however, the evidence as it stands does not show that the defendants were in any way using the suit property for personal gain over and above the profit acquired by the 1st defendant during the sale of the said property. The current occupier who is hence person in wrongful possession of the suit property is the 3rd defendant. The plaintiff was hence duty bound to prove to the court that the 3rd defendant actually made some profit from the said land.

Going through the evidence adduced by the plaintiff, there is nowhere that he attempted to prove his claim for mesne profits. That figure claimed (the rate of Tshs. 200,000/- per month) it would appear, came from nowhere because no evidence to support it was adduced by the plaintiff. It is trite law that in proving one's claim for mesne profits, the party so claiming the profits is primarily duty bound to establish the number of days the occupation was wrongful and most importantly the correct rate of rent or other value lost for the period in question. Since that was never done by the plaintiff, mesne profit cannot be quantified or awarded by this court. Furthermore, general damages were also pleaded but not in any way

substantiated during hearing of this case. The court will also not do the plaintiff's job by estimating them.

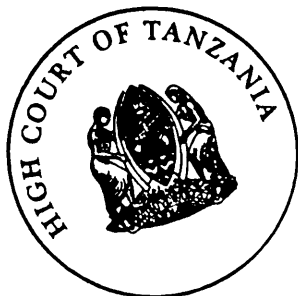
Having made the above findings, this court proceed to make the following orders:-

- i. It hereby declared that the plaintiff Solomon Simon Metinyiku, (suing as the administrator of the estate of the late Cornelio Mollel) is the lawful owner of the suit property.
- ii. the purported sale of the said property by the first defendant to the 3rd defendant is null and void.
- iii. The third defendant is hereby ordered to give vacant possession of the suitland to the plaintiff within sixty (60) days of the delivery of this judgment.
- iv. The plaintiff shall be left with peaceful enjoyment of the suitland, hence the defendants, their agents or servants or any other person acting on their behalf is permanently restrained from interfering with the plaintiff's peaceful enjoyment of the suitland.
- v. The defendants shall pay the plaintiff the costs of this suit.

Dated at Arusha this 06th day of July, 2018.

(SGD)
S. M. MAGHIMBI
JUDGE

I hereby certify this to be a true copy of the original.




S. M. KULITA
DEPUTY REGISTRAR
06/08/2018