

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA**

LAND CASE NO.53 OF 2014

SPLENDORS (T) LTD.....PLAINTIFF

VERSUS

1. DAVID RAYMOND D'SOUZA

(Under irrevocable special power of attorney by Mary Mushi
& Jerry John as the Administrator of
Christina S. Mugamba – Deceased).....**1ST DEFENDANT**

2. JANE PHILOMENA BABSA.....2ND DEFENDANT

JUDGMENT

Date of Last Order: 01/08/2018

Date of Judgment: 03/08/2018

BEFORE: S.C. MOSHI, JUDGE

The suit involves a landed property prescribed as Plot No.13 Block "I" area "F" which is located within Arusha City, herein referred to as the suit land. The plaintiff generally claims that it purchased the suit land from one Christina Mugamba at a consideration of Tanzanian shillings 40,000,000/= whereas the 2nd defendant claims that she acquired the land upon the death of her mother.

At the commencement of hearing the following issues were framed:-

1. Who is the lawful owner of the suit land?
2. To what reliefs the parties are entitled to.

During the hearing the plaintiff was represented by Mr. Jabir, advocate whereas the 1st defendant was represented by Mr. Mughwai, and the 2nd defendant was represented by Mr. Ngemela. The 1st defendant admitted the plaintiff's claim against him and he had no claim against the 2nd defendant; hence a judgment on admission was entered against him under Order XII Rule 4 and Order XV Rule 2 of the Civil Procedure Code, Cap.33 R.E. 2002.

For the plaintiff the case was as follows; MEINRAD MENONO D'SOUZA, testified among other things that, he is a practicing advocate and a director of the plaintiff's company. Previously he was Secretary of the company when his father was still alive. The plaintiff is a family owned company. Christina Mugamba was a spouse of John Malasi; they are both deceased. In September, 2002 the plaintiff acquired land from Christina Mugamba; the land prescription is Plot No.13 Block "I" area "F" within Arusha City.

They signed a sale agreement on 7/9/2002. He was personally present during the signing of the sale agreement. He was assisting his father Joseph Conrad D'souza. Before they purchased the property the company did due diligence and they were assured that Christina Mugamba was the lawful owner. Christina Mugamba told them that she had been in possession of the land, since 1984. They signed the sale agreement on suit land. Christina Mugamba (Christina) had shown them several land rent receipts paid to Arusha Municipal Council in her name; she also told them that she had never been sued over the property throughout the period she stayed in the property. The utility bills; water and electricity bills were in

Christina's name. Having satisfied, they entered into the agreement (The sale agreement between Christina Samuel Mugamba and Splendors TZ Ltd was admitted as exhibit P.1). They paid T.Shs. 40,000,000/= as consideration for the property. The agreement was signed on 7/9/2002 when Christina Mugamba was alive. The witnesses to the agreement on part of Christina were her two sons; one of them was Jerry John.

Christina told them that she had lived on the property since early 1980's up to 2002; up to the time the plaintiff intended to buy the property. They were satisfied that she lived in that property. Christina had also shown them land rent receipts in her name and a Transfer Deed form Emmanuel Shete to Christina Mugamba.

Christina said that she acquired the property from Emmanuel Shete a relative on part of Christina Mugamba's mother's side. She told them that she acquired the land in 1987. The approval by land office was in December, 1987.

His father and Christina had mutually agreed that she would keep on living on part of the property. Christina died in 2004. They took the rest of the property after her death. The company paid the land rent still in the name of Christina Mugamba up to 2011 without areas. They are in possession of the building till today and they have a care taker whose name is Ramla Dharan. Two children of Christina Mugamba, Jerry John and Mary Mushi were appointed as administrators of the Estate of Christina Mugamba.

In the course of following the issue of transferring the land in company's names the set back was the death of Christina Mugamba and the death of his father. The administrators of Christina Mugamba had appointed his father under special power of attorney. A few months later his father died. The appointment was in March, their father died in May. After death of his father his brother David D'souza was appointed in his place.

Upon buying the land, the company was given a copy of rent receipts, copy of transfer deed form Emmanuel Shete to Christina Mugamba dated sometimes 1987, water bills and electricity bills. After the agreement they kept on paying land rent up to the time when dispute started in 2011

They were also handed over a letter of offer in the name of Emanuel Shete which was issued in 1987. The letter of R/O in the name of Emmanuel Shete dated 20th July, 1987 and transfer of R/O in favor of Christina were admitted in court as ID .2

After purchasing the property; in 2002 they wanted to build the boundary in a proper way. The fence was low and brick layers were removed. They applied to the municipal council for permit in September, 2002. The permit was granted and they paid for fees with the municipal council. The permit was in name of Christina Mugamba because the transfer wasn't yet done to the company's name.

They started hearing claims for 1st time from Jean Babsa between 2004 and 2005. She claims to own the property through her mother Luis

Zalaka which made them question as many years had passed when Christina Mugamba was in uninterrupted occupation. She had never paid any rent land. The title was a short term title and it was not registered by the registrar in Moshi. They discovered that she had a title when they opened a suit in 2012.

On 12/2/2011 at 11 o'clock at night, he was called by the care taker of the property Ramla Dharan she told him that people were breaking the property and taking things.

When he got at the site he saw several people between 15 and 20 people whom were led by Abas Mkindi also known as Darwesh, Hussein Dhalo who is related to Jean Babsa breaking the house. Darwash showed him an offer that was in names of Shete Kasa, Ana Bilasau Kasa and Luis Zalaka. Darwash said that he was there on behalf of Jean Babsa

By 2011 from 1970 over 40 years have passed they found that Jean Babsa's claim to be fictitious thus they opened a suit which was struck out hence this suit.

The valuer certified that the partially demolished building is worth Tsh. 67,188,000. It shows the state of the property after demolition valuation was done in April, 2014. The market value of the land as of April, 2014 was Tshs. 500,000,000/=.

He prayed that their company be declared lawful owner of suit land, the title deed in the name of Jean Babsa be nullified, general damages as a result of the trespass, costs of re-building the premises to the tune of Tshs.

67,188,000/=, costs of the suit and any other and further relief that the court may deem just to grant.

PW2, BETTY SANARE MOLLEL stated *inter alia* that, she works with the Arusha City Council, she is a Land Officer. She is told that there's dispute over the plot in question. She perused through the file that relates to the property. The record on the file shows that the original owner was Bilasau Kassa. Bilasau Kassa died. They appointed Shete Kasa as Administrator of his deceased. A short term offer was prepared for Shete Kasa as an administrator of the estate. They later prepared an offer in the name of Shete Kasa. He owned the land, paid land rents till when he died. They later appointed another administrator, Sophia Kassa. Sophia Kassa paid for rent she too died. They then appointed Emmanuel Shete Kasa as administrator of the estate. Emmanuel Shete Kasa transferred the Land to his name and was given an offer. He then sold the Land to Christina Mugamba. The transfer was allowed. The last person i.e the owner is Christina Mugamba.

According to the record, the dispute arose when David D'souza wrote to their office requesting if there were any encumbrances on the plot and who's the owner. The office informed him that there were no encumbrances and the owner was Christina Mugamba; the correspondence letters were admitted in court and marked as Exhibit P.3 and Exhibit P.4.

After the response the office received a Notice to sue the council (Exh. P.5) from Advocate Materu, advocate. Materu said that the owner of

the land was Jean Babsa who acquired it from her parent Louis Zalaka who was a joint owner.

Then the office wrote a letter regretting on the earlier letter. The letter indicated that the notice shows that there's a will and joint owners. They said that after receiving the advocate's notice they recognized that the owner was Jean Babsa There was also letters from the Zonal Commissioner who said that they were informed of the complaint and dispute over the plot. Nothing should proceed until the matter is settled. However the office proceeded to allocate or give ownership to Jean Babsa

Granting ownership to Jean Babsa was illegal because there was a dispute. they should have 1st settled the dispute before granting her ownership. There's no record indicating that the office made efforts to settle the dispute. The office prepared a draft of the title deed which was registered.

Christina's offer was not cancelled but the letter [exh.P7] says that the office nullifies it.

The record (Exhibit P.6 & P.7) doesn't show that the occupancy was cancelled but the letter shows that they nullified. It was written within the time when the caveat was to be removed and the matter was to be referred to court.

PW3: JEREMIAH JOHN MALASI is Christina's son, he stated among other things that, he witnessed the execution of the sale agreement between his mother and the plaintiff; he signed the sale agreement as a

witness. Christina Mugamba passed away in 2004. He and Mary Mushi are the administrators of Christina's estate. Their affairs were taken care by Joseph D'souza who helped them on legal issues. They later gave powers of Attorney to David D'souza.

PW4 MARY MUSHI she testified among other things that she is a daughter of Christina mugamba who is now deceased. She is an administratrix of the estate of Christina Mugamba; Jerry John is a co-administrator. When her mother was alive they were living at Pangani, Swahili Street (The suit). Her mother bought that plot of land. They were living on that property; Part of it was rented out to tenants. Her mother lived there from 1984 to 2004 when she died. One tenant, Veronica Mmasi had problems in paying rent. Veronica sued her mother. Her mother won the case.

Currently the owner of the suit land is splendors Tanzania. Her mother sold the land to splendors per the agreement (Exhibit P.1). She does not know Jean Philomena Babsa (2nd defendant). Her mother was never sued by Jean Philomena Babsa

That was the end of plaintiff's case, for defence the case was as follows.

DW 1: JEAN PHILOMENA BABSA, stated among other things that, she knows plot No. 13 Block one Area F. Pangani Street. She is the registered owner of this plot. The plot belonged to her great grandfather, Brasau Kassa. When he passed away he left it to shette Kassa, Anna Brassau and Lours Zalaka. Shete Kassa is uncle to Anna Brassau and grandfather to her

mother. Anna is her grandmother; she is a mother to her mother Louis Zalaka. The property was registered in the names of Anna Brasau, Luois Zalaka and Kassa in 1970.

When her mother passed away in 2005, she applied for the property to be registered in her name and the application was granted. She applied after she was appointed to be administratrix of Luois Zalaka who is her mother. The land was registered in three names as Co- owners of the property. Shete Kassa passed away in 1974 or 1975. Anna Brassau passed away in 1971 or 1972. The last surviving owner was her mother Louis Zalaka. Before the plot was registered in her name the lawful owner was her mother.

In 1984 the owner was her mother she allowed John to stay there. They didn't know that the property was sold in 2004. Her mother had the title of that property. In 2002 the owner of the property was still Louis Zalaka. The seller of the property had no title to the property i.e. Emmanuel to Christina, Christina to plaintiff. Her aunt called her and informed her that her house was sold. That is when they came and opened a police case here in Arusha.

After her mother's death she applied to be administrator of her estate which she was granted; she continued to process the title. The Title deed was issued in her name in 2011.

Exhibit P.6 was addressed to Jean Philomena Babsa It's written by Kiwele M. Kiwele, Municipal Director copied to David Raymond D'souza.

After receiving it they started the process of getting all the documentation put together for the title deed.

The municipal office wrote another letter saying that they found that the sale by Christina Mugamba was incorrect so they confirmed her as the owner of the property. Exhibit P.7 cancels a letter that is dated 18/2/2011. Exhibit P.6 shows that, David D'souza wanted to register the property in the name of Jerry and Mary Mushi whom he was representing; it was 22/2/2011.

The property was already demolished in 2004. It had no ceiling, no windows and no roof, doors. It was demolished by Mzee D'souza, that's why they reported to the police. She is the owner of the property. She prays the case to be dismissed with costs. She didn't trespass on the property. On 12/2/2011 the property belonged to her.

DW2: NICHOLOUS STEVEN MBWAMBO, is a legal officer with the Registrar of titles. HE said that, according to their records, plot 13 Block "I" Area "F" was registered on 25/8/2011 in the name of Jean Philomena Babsa The office received application to register it from the Land Commissioner. The application was accompanied with the draft titles showing that Jean Philomena Babsa was granted Right of Occupancy. The office passed through the record, it satisfied itself that there was no other registration made for that plot; they proceeded with Registration. The title was registered and Numbered 33262.

That was the end of defense case.

Now, coming back to the issues; the first issue is who is the lawful owner of the suit land? I have considered the evidence as a whole. The plaintiff's evidence is to the effect that, they bought the land from Christina Mugamba. Christina told them that she had lived on the property since early 1980's up to 2002; up to the time the plaintiff intended to buy the property. They were satisfied that she lived in that property. Christina had also shown them land rent receipts in her name and a Transfer Deed from Emmanuel Shete to Christina Mugamba. There is also evidence to the effect that the Municipal Land office informed David D'souza that the record shows that the owner of the plot is Christina Mugamba; that Christina Mugamba was a bonafide purchaser.

However, there is evidence by the land officer to the effect that, their office granted a right of occupancy to Jean. The office recognized that the owner of the suit land was Jean Babsa; the office allocated the land and gave ownership to Jean Babsa

There is 2nd defendant's evidence to the effect that, the plot belonged to her great grandfather, Brasau Kassa. When he passed away he left it to shette Kassa, Anna Brassau and Louis Zalaka. The property was registered in the names of Anna Brasau, Luois Zalaka and Kassa in 1970. Luois Zalaka is her mother and the last surviving owner. After her mother's death she applied to be administrator of her estate which she was granted; she continued to process the title. The title deed was issued in her name in 2011. The position of law as regards joint ownership in case of death of joint occupier is section 159 (4) (b) and (c) of the land Act Cap. 113 R.E 2002.

It is my view that the evidence in its totality establishes that the 2nd defendant is the owner of the property. She got title over the land when the title deed was issued in 2nd defendant's name in 2011.

It is evident that Christina lived in the suit property, she had paid land rent and she had a Transfer Deed from Emmanuel Shete and an offer that was later nullified; however, it is evident that Christina had no title over the land. In this respect see the case of **Farah Mohamed V. Fatuma Abdallah** (1992) T.L.R. 205 in which case the court held among other things that:-

- 1. A right of occupancy or an offer of a right of occupancy cannot be inherited by mere possession of documents of title.*
- 2. He who doesn't have a legal title to land cannot pass a good title over the same to another.*
- 3. Documents purporting to transfer ownership of a right of occupancy must be registered otherwise those documents are invalid and ineffectual.*
- 4. Transfer of a right of occupancy without consent of the president is ineffectual and unenforceable.*

The standard of proof in civil cases is on the balance of probabilities; it is my view that the plaintiff has failed to prove its; see the case of **Melita Naikiminjal & Loishilaari Nikiminjal V. Sailevo Loibanguti** (1998) T.L.R 121 where the court held among other things that, "The appellants being the plaintiffs, failed to discharge their burden of proving the case on a balance of probabilities"

All in all, basing on the evidence as stated above, it is my view that the 2nd defendant has a good title over the land. I therefore find that the 2nd defendant is the lawful owner of the land.

That said I dismiss the suit with costs.

Right of Appeal is explained.


S.C. MOSHI
JUDGE
03/08/2018