

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM DISTRICT REGISTRY)

CIVIL CASE NO. 225 OF 2013

GEORGIO ANAGNOSTOU1ST PLAINTIFF

OURANIA ANAGNOSTOU2ND PLAINTIFF

VERSUS

EMMANUEL MARANGAKIS.....1ST DEFENDANT

COMMISSIONER FOR LANDS2ND DEFENDANT

ADMINISTRATOR GENERAL3RD DEFENDANT

JOSEPH ANTHONY GONSALVES4TH DEFENDANT

17/11/2017 & 2/1/2018

JUDGMENT

I.P.KITUSI,J.

This case presents few but intricate issues related to some assets in the estate of Diana Ranger, a Tanzanian of Greek origin, the deceased. She died intestate on 6th May 2006 in Dar es Salaam without children of her own who would have been the direct rightful beneficiaries of her estate. This fact seems to be the epicenter of the case as it invites the general question; whether, in view of the childlessness of the deceased there could be any other heirs and who were they.

I take judicial notice of the fact that some of the issues relevant to this case have been decided or are pending decisions by this court or / and the Court of Appeal , including High Court Probate Cause No. 46/2006, Civil Appeal No. 51 of 2007, and Civil Case No. 1 of 2011. Let me refer to the background facts in as far as they are relevant to the present case.

The deceased Diana Ranger had three blood brothers known as; Napoleon Anagnostou, Christos Anagnostous and Anastasiosis Anagnostou to whom I shall hence forth refer as Napoleon, Christos and Anastasiosis respectively. Napoleon and Christos died before Diana Ranger's death so that at the time of her death in 2006 the only surviving brother was Anastasiosis, who was living in Greece.

Napoleon and Christos were survived by children. Napoleon had one son known as Georgio Anagnostous while Christos had a daughter known as Ourania Anagnostous and a son also known as Georgio Anagnostou. The children of Christos, that is, Ourania Anaghostos and Georgio Anagnostou are the first and second plaintiffs respectively.

The plaintiffs are suing one Emmanuel Marangakis, according to them, a stranger to the family and not a beneficiary of Diana Ranger's estate, and the Administrator General for bequeathing Diana Ranger's asset, a house, to this stranger. Emmanuel Marangakis is the first defendant, and the Administrator General is the 3rd defendant. The Commissioner for Lands, the second defendant, is sued for registering the house in the first defendant's name. It is alleged that upon that

challenged registration, the first defendant sold the house to Joseph Anthony Gonsalves, the fourth defendant.

It is alleged by the plaintiffs and not disputed by the defendants that when Diana Ranger died, the defendant turned up at the High Court of Tanzania, Dar es Salaam Registry and petitioned for Letters of Administration of her estate claiming to act on behalf of Anastasios, Diana Ranger's surviving brother. Georgio Anagnostou, son of Napoleon and the plaintiffs raised a caveat to challenge the first defendant's petition. This Court, in one of the decisions referred to earlier, granted letters of Administration to Georgio Anagnostou, son of Christos the first plaintiff.

The first defendant, still claiming to be acting on behalf of Anastasios, challenged this Court's decision by an appeal to the Court of Appeal. The appeal was successful in that the Court of Appeal appointed the Administrator General (3rd defendant) to administer the estate in the place of the first plaintiff.

All these are matters not in dispute, in my view, as neither in the pleadings nor in the testimonies of Emmanuel Marangakis (DW1), Juliana Linus Ngonyani (DW2) and Joseph Jackson Mwakatobe (DW3), the only witnesses for the defence, were the facts challenged. There is also no dispute that when administration of Diana Ranger's estate was still in progress Civil Case No. 1 of 2011 was filed by the first defendant in this court and that he was doing so under the instructions of Anastasios once again.

In that case it was alleged that a settlement had been reached between the plaintiffs on the one hand and Anastasiosis on the other, to the effect that the latter should take the disputed house at Upanga in Dar es Salaam as his share to the deceased's estate. At this juncture let it be noted that Diana Ranger left behind some assets in Greece her mother land, and in Tanzania. She had two house in Dar es Salaam, a motor vehicle and some money lying in her Bank Account. One of the house was at Masaki area and I shall be referring to it as the Masaki house, where necessary. The other house was on Plot No 648, Upanga area in Dar es Salaam, and this is the house the subject of these proceedings.

It is common ground that the deceased Diana Ranger had left a will but that is was only in respect of assets in Greece and the money in her Bank Account in Tanzania. This is the reason she is taken to have died intestate as far as the disputed house is concerned.

There are two versions as regards the house at Upanga and the alleged settlement. For the plaintiffs the story is told by Pw1 and one Steven Daly(Pw2) the second plaintiff's husband. The second plaintiff did not testify because she was unwell and also for the reason that her husband (Pw2) who had already testified had first - hand information of all material facts.

The version of Pw1 and Pw2 is that there were proposals for settlement initiated by the Administrator General's office in their discharge of their duty of administering the deceased estate. The proposal by the Administrator General was that Anastasiosis should have

the Upanga house, the money in the bank and the car. The plaintiffs' counter proposal was that the money in the Bank Account could not be discussed because it was an item in Diana Ranger's will. As regards the house, the plaintiffs agreed with the Administrator General's proposal subject to the said house being valuated and its market value being known. The written correspondences were tendered as Exhibit P3.

The plaintiffs' position is that the valuation of the Upanga house was never done and or communicated to them, therefore the discussions were not conclusive. Thus, according to them, judgment in Civil case No. 1 of 2011 based on the alleged non existent settlement was obtained through misrepresentation or fraud, committed by the first defendant.

In another dimension Pw1 stated that civil case No. 1 of 2011 was a case stated that had meant to seek the court's guidance on the issue whether or not Anastasios, a foreigner, could inherit his sister's property in Tanzania. Pw1's testimony was that the court answered the issue in the affirmative but that did not mean it decided the right or share of Anastasios to the Upanga house.

Even then, according to Pw1 Anastasios died on 30th January 2012, so that immediately thereafter the Power of Attorney that he had earlier granted to the first defendant became ineffectual. The order of the court that the Upanga house should be bequeathed to Anastasios or his duly constituted Attorney could not, therefore, be executed in favour of the first defendant.

The second version is that of the defendants as expressed by DW1 and DW3 in their testimonies. DW1 who testified with the aid of an interpreter, narrated how he knew her husband and upon death of the husband, he, DW1 took to helping her in her errands. He stated that he also got introduced to Anastasios, Diana Ranger's brother. DW1 narrated how he took care of Diana Ranger during her illness that subsequently led to her death, and that thereafter Anastasios authorized him to take care of everything concerning the assets of the deceased. Initially he hired security guards (ultimate Security Company) to guard Diana Ranger's houses at Masaki and Upanga.

Later by order of the High Court the house at Masaki was bequeathed to three people that is the plaintiff and Georgio Anagnostou son of Napoleon. There are two people in the family who share the name of Georgio Anagnostou, and in reference to them, DW1 stated that one of the Georgios sold the house at Masaki and made away with the proceeds. From the account of PW1 it must be him because he stated that at the time he was still holding letters of administration of Diana Ranger's estate he sold the house and kept the proceeds in a Bank Account so as to distribute it to the beneficiaries.

DW1 further stated that as regards the house at Upanga, Anastasios who was the only surviving blood relative of Diana Ranger authorized that it be transferred to him. Thereafter the Administrator General obtained a Court order to effect the transfer of the house to him (DW1) and that at the time when the court order was made, Anastasios was still alive. During cross – examinations by counsel for

counsel for the plaintiffs, DW1 stated that the order passing over the disputed house to him was made by the court three years before the death of Anastasios, but the actual transfer was effected after his death.

DW2 a Senior Legal officer in the Ministry of Lands testified on the history of occupation of the suit house. She stated that from 2007 after the death of Diana Ranger, George Anagnostous as her personal legal representative was registered as the owner. In 2012 the registration changed after the Administrator General successfully applied to be registered. In 2013 the Land office received an application from the Administrator of the estate assenting to the house being registered in the name of Emmanuel Marangakis as a constituted Attorney of Anastasios Anagnostous, as per court order in Civil Case No.1 of 2012. DW2 must have been referring to Civil Case No. 1 of 2011, judicial notice of which has already been taken in the preceeding pages.

The plaintiff's case is that when they learnt about the transfer of the house to the first defendant they filed a caveat with the Land Registry and published a notice in a daily newspaper dated 9/11/2013 collectively admitted as Exhibit P9. They also filed this case. On the other hand DW1 testified that he was not aware of this case until a friend of his saw a copy of service by publication on a newspaper.

DW1 stated, and there is no dispute that he sold the house to the fourth defendant. The plaintiffs maintain that the third defendant transferred the house to the first defendant while aware that

away. Pw1 testified that immediately after the death of his uncle Anastasiosis, he informed the Administrator General by e – mail (admitted as Exhibit P6©) who requested that a death certificate be produced to them and it was indeed produced (Exhibit P6(a) Further to that Mrs Nakazael Tenga learned advocate for the plaintiffs issued a Notice of Revocation of Power of Attorney (Exhibit P6 (b)) under section 96 of the Land Registration Act, Cap 334.

On this turn of events, the Administrator General filed in court an application seeking directions of the court on how to execute the earlier court order that had directed that the property at Upanga be bequeathed to Anastasiosis or his Attorney. A copy of that chamber summons was tendered as Exhibit P7. This application was, however, not determined for the reason that the Administrator General withdrew it citing death of the first defendant as evidenced by Exhibit P8. According to the plaintiffs, this was a misrepresentation on the part of the 3rd defendant because the first defendant, was and is not dead.

The first defendant is blamed for selling the house to the fourth defendant, ignoring the caveat and the notice to the general public that had cautioned anyone from buying that said house.

The first and third defendants testified to talk themselves out of the blame. DW1 stated that at the time of selling the house to the fourth defendant he was not aware of this case being pending. It was much later that a friend of his saw a Notice in a Newspaper and told him about it. DW3 stated that the application filed by the Administrator General sought directions of the court as to how to resolve some issues

that had been raised by family members of the deceased. Admitting that the application was withdrawn at the instance of the Administrator General, DW3 could not answer Mrs Tenga's question as to how the issues raised by members of the family were resolved without directions from the court. He conceded that Mr. Marangakis the first defendant is alive. DW3's position was that the transfer of the house to the first defendant was based on the order of the court.

Apparently it is clear from the evidence of DW1 and that of DW2 that the house is still registered in the name of Mr Marangakis because an injunction issued by this court earlier in this case restrained the move to register it in the fourth defendant's name.

This suit challenges the action of the third defendant to bequeath the Upanga House to the first defendant who is neither a relative of the deceased nor was he holding a valid power of Attorney at the time of receiving that house. It also challenges the first defendant's action of selling the house to the fourth defendant faulting the action on the ground that he had no title to it and that there existed, at that time, a caveat and a public notice against sale of the said house.

These facts attracted the following issues, framed at the beginning of the trial;

1. Whether the first defendant Emmanuel Marangakis, had a valid Power of Attorney at the time Administrator General bequeathed the house on Plot No. 648 Upanga Ilala District in Dar es Salaam, to him.

2. Whether the transfer of the property on Plot No. 648 Upanga area in Dar es Salaam to the first defendant was unlawful.
3. Whether the first defendant had any legal basis to sell the property on Plot No. 648 Upanga area in Dar es Salaam to Joseph Anthony Gransalves, the 4th defendant.
4. Who are the rightful heirs of the estate of the late Diana Ranger.
5. Whether there was a concluded agreement between the beneficiaries of the estate of the late Diana Ranger that the house on Plot No. 648 Upanga area in Dar es Salaam be distributed to Anastasios Anagnostou.
6. Whether judgment in Civil Case No 1 of 2011 was obtained fraudulently.
7. To what reliefs are the parties entitled.

The plaintiffs were represented by Mrs Nakazael Tenga whereas the first and fourth defendants were represented by Mr James Kabakama, learned advocate. Ms Janeth Makondo, learned Senior State Attorney stood for the second defendant, the Commissioner for Lands. The third defendant's appearance was by in-house Attorney known as Samwel Cosmas Mutabazi and Ms Edna Kamara. The learned counsel addressed the issues in their final written submissions.

It seems from both the recorded evidence and the final submissions, the following facts are uncontroverted. That the Administrator General the third defendant was appointed by the court of Appeal on 9th October 2009 to be administrator of the estate of Diana Ranger to replace Georgio Anagnostou whose letters of

Diana Ranger to replace Georgio Anagnostou whose letters of administration were revoked. That when the 3rd defendant took over the administration Anastasiosis Anagnostou was the only surviving brother of the late Diana Ranger and he was living in Greece. During the time relevant to the administration of the estate, the said Anastasiosis granted the first defendant special power of Attorney to deal with the estate of the deceased. That acting under that power of Attorney the first defendant filed Civil Case No. 1 of 2011 to seek directions of this court on whether or not a foreigner could inherit landed property under the laws of Tanzania.

It is also not in dispute that in Civil Case No. 1 of 2011 this court not only answered the issues in the affirmative, that is that a foreigner could inherit land, but went a step further by ordering the third defendant to bequeath the house on Plot No. 648, Upanga to Anastasiosis or his constituted Attorney. The first defendant turned out to be that constituted Attorney. That, around the same period, the third defendant initiated negotiations with Anastasiosis and other heirs as to how Diana Ranger's assets in Dar es Salaam could be distributed suggesting that the Upanga house be given to the first defendant.

Another undisputed turn of events is that on 30th January 2012 Anastasiosis passed away and that at this time distribution of the assets or at least the house had not been done. On 16th October 2012 the 3rd defendant filed in Court an application seeking directions as to how the assets could be distributed. That the 3rd defendant

transferred the Upanga house to the first defendant in September, 2013.

The first issue, which I propose to deal with first, is whether the first defendant had a valid Power of Attorney at the time when the Administrator General bequeathed to him the house on Plot No.648 Upanga. In the learned submissions counsel for the first and fourth defendants stated that since the first defendant has a right to be bequeathed the house, the answer to issue No.1 is of no consequence. He submitted that the first defendant's right to inherit the house came from the Court order in Civil Case No. 1 of 2011 recognizing his Power of Attorney.

On her part, Mrs Tenga submitted that the first defendant had no valid Power of Attorney because of Power of Attorney ceases to hold any effect upon death of the giver. She referred to the dates of the death of Anastasiosis and the date when notice of that death reached the 3rd defendant. The learned counsel further submitted that the first and third defendants were aware of the death of Anastasiosis. She referred the court of Black's Law Dictionary 6th Edition for the legal position that a power of attorney ceases to exist upon death of the giver.

With respect there seems to be no dispute as regards the position of the law on this issue. Even the definition of the term "***Power of Attorney***" as found in the Black's Law Dictionary found at page 1290(of the 9th Edition) is clear that it is revocable and **automatically terminates upon the death or incapacity of the principal**. This

position has been clearly settled in a number of decisions including **Imerimaleva and others Vs Diana Nhorongo** [1991] TLR 1 (CA). My answer to the first issue would, therefore, be that after the death of Anastasios Anagnostou on 30th January 2012, the power of attorney he had granted to the first defendant automatically terminated.

I would ordinarily, and for good sequence, move on to issue No. 2 but for the fact that the answer to that issue, namely whether or not the transfer of the house to the first defendant was lawful, depends, to a great deal, on the discussion of issues No. 5 and 6.

For the foregoing reason I shall discuss issue No.5, whether there was a concluded discussion among the hers on whether the Upanga house should be given to Anastasios. Both in the pleadings and testimonies by the two opposing sides, it is one's word against the other's. Since the said discussion was by written communication and since copies of those e-mails were tendered collectively as Exhibit P3, the decision on the issue shall largely depend on these exhibits.

There are three letters by PW1 to the 3rd defendant and one letter by one Annuciter Ngilo of the 3rd defendant's office. To appreciate the gist of these communications I shall reproduce them.

The first is dated 4th May, 2010 by PW1. It reads.

"Dear Madam or Sir

Thank you for informing my lawyer Mrs. Tenga about the proposal from my uncle Anastasios Anagnostou, Concerning

the distribution of the estate of my late aunt, Diana Ranger, in Tanzania.

I have spoken with the other heirs and we agree in principle to the proposal, whereby

- 1. I distribute the assets from the sale of the house in Masaki and other minor value assets already in my hands, together with the bank balance in Tanzania to all the heirs except Anastasios*
- 2. Anastosios gets the house in Upanga and the Car and Emmanuel Maranyakis is relieved from having to pay rent for the use of the house and the car over the past for years.*

Please let me know. If we can proceed with this arrangement Prof Dr. G. Anagnostous"

After acknowledging receipt of PW1'S letter, Annuciater Ngailo wrote back on 7th May, 2010 and the relevant part reads;

"...This is our suggestion, leave the house at Upanga Car and amount at the bank which will remain after taking our fees to be taken by your uncle Anagnostout, so as we can do fair and justice to him who is a legal heir according to our laws here in Tanzania. Upon thinking on

this our office will do valuation on Upanga property and vehicle so as we can get real amount early next week."

"Hopeful you will consider this.

Annuciater Ngailo"

The third is a letter dated 20th May 2011 by PW1 addressed to the third defendant.

"Dear Sir

Thank you for your letter at 15th February. I apologies for the delay In replying but I have only just received it after being away for some months. I have some questions because I am not sure whether I understand your instructions correctly.

According to your letter of 15.02.2011 the position for the proposal for distribution is as it was agreed last spring. In last spring, I informed you're with my letter of 04.05.10 that me, my sister and my cousin agree with the proposal by Anastasios Anagnostou that he receives the Upanga house and the car, while we get the assets from the sale of the house in Masaki and other minor value assets already in my hands, together with the bank balance in Tanzania.

Do I understand correctly that after distributing the assets in my hands to my sister Qurania Anaganostou, my cousin Georgies

Anagnostou and myself the Administration of the Tanzania estate has been completed from my perspective; that you will transfer to us via to us via my lawyer Mrs. Tenga the balance from Diana's bank accounts; and that the remaining assets in Tanzani will be proceed by yourselves for distribution to my uncle Anastasious Anagnostous as his share of the estate in Tanzania?

I look forward to hearing from you as soon as possible because we wish as everybody wishes 5 years since Diana passed away to finalize this matter.

Prof. Dr. Georgious Anagnostou".

It appears that there was no response to PW1'S letter dated 20th May 2011 because he wrote again on 29th June 2011 asking for that response which according to him (PW1) never came. On the basis of the fact that the third defendant did not respond to his last letter that had raised some questions, PW1 stated that the negotiations were not conclude. Mrs. Tenga submitted that the negotiations were not concluded because the Upanga house was not valued. She cited section 2 of the Law of contract Act Cap 345 for her argument that for a proposal to be a promise the acceptance must be absolute and unqualified. The learned counsel submitted that the proposals and counter proposals in the case did not form a concluded agreement.

On the other hand, Mr. Kabakama for the first and fourth defendants submitted that the discussions were concluded as evidenced by Exhibit P3.

What comes out from the letters in Exhibit P3 and the evidence of PW1 and PW2 is that there was a strong indication to have the Upanga house given to Anastasious. However as correctly submitted by Mrs. Tenga this proposal was accepted subject to having the value of the house determined in order to avoid the possibility of one heir taking more than what other heirs may have taken. There was also the suggestion in Pw1's last letter that the balance in the bank account would also pass over to the plaintiff's and the other Gergios Anagnostou. As already shown. PW1's last letter proposing some conditions was not responded to, which plainly means the discussions were unconcluded.

Therefore, without necessarily testing these discussions on the basis of the contractual offer and acceptance as submitted by Mrs. Tenga, the evidential conclusion that can be drawn from the letters is that the discussions were unconcluded. If I must cite a law, I would seek the principle in **Hotel Travertine Limited and Two Others Vs National Bank of Commerce Limited** [2006] T.L.R. 133. In this case it was held inter alia, that an acceptance of an offer by a letter which mode had not been prescribed in the offer, was ineffectual. In the instant case there could not be any discussions other than those in Exhibit. P3.

My answer to issue No. 5 is in the negative.

I now turn to issue No. 6 whether judgment in Civil Case No. 1 of 2011 was obtained fraudulently. This issue is very relevant in my view because, according to the defendants it is the judgment in that case which

ordered that the Upanga house be bequeathed to Anastasios or his duly constituted Attorney.

On this issue, for the first and fourth defendants it has been submitted that the law requires that fraud must be strictly proved especially when it involves court documents. Mr. Kabakama referred to Exhibits P6 and P15 as being documents that were executed in 2014 so that even if fraud is being suggested in relation to them, they could not have influenced the decision of the court made in June, 2011 in Civil Case No. 1 of 2011.

For the third defendant it was submitted that there was nothing wrong with the decision in Civil Case No. 1 of 2011 that is why the plaintiffs did not challenge it.

It is common ground that the decision in Civil Case No. 1 of 2011 was not challenged. PW1 stated in his shown evidence that there was no point in challenging that decision because ownership of the Upanga house was not one of the issues, the case having been meant for and limited to interpretation of the law. In her learned submissions Mrs. Tenga referred to instances which she suggested to be proof of fraud, centrally the fact that at the time of transferring the house to the first defendant the third defendant and the said first defendant were aware that Anastasios had died. She also submitted that the 1st defendant lied in telling the court that there was an agreement.

With respect I agree with Mr. Kabakama on the standard of proof of Fraud in Civil Cases. Fraud being on allegation of criminality needs to be proved on a decree higher, than that expected in Civil Cases, and this is a

long settled position of the law. See the case **of Omary Yusuph Vs Rukia Ahmed Abdulkads**. [1987].L.R 169 cited with approval in **Mwajabu Ally Swakali Ve Mwazani Ally Swakali**, Land Case No. 162 of 202, High Court, Dar es Salaam District Registry (unreported). In another Case, that is, **Tanzania Forestry Research Institute Versus National Microfinance Bank Public Limited Company**, Civil Case No. 45 of 2010, High Court, Dar es Salaam District Registry (unreported), my brother Mwandambo, J took the same position citing the case of **Ratilas Gordhanbhai Patel Vs Lalji Makanji** [1957] EA 314 at Page 218

In this case the plaintiffs have cited the alleged fraud or misrepresentation as being the first defendant's intimation to the court that the heirs had agreed that the Upanga house be given to Anastasios.

The question, however, is whether the decision by the court in that case was informed by the said first defendant's misrepresentation. With respect, it was not, as my reading of the judgment (Exhibit P4) shows that the decision was based on provisions of the Land Registration Act Cap 334. My conclusion in issue No.6 therefore is that while the first defendant's assertion that the heirs had reached a settlement as regards the Upanga house was untrue the Court's decision in Civil Case No.1 of 2011 was not based on that fact. My final decision on issue No. 6 is in the negative.

Next for consideration is issue No. 2 whether the transfer of the Upanga house to the first defendant was lawful. In their testimonies and submissions made by their learned counsel the plaintiffs have

maintained that the transfer was unlawful for two reasons. The first reason is that the first defendant was not an heir to Diana Ranger's estate a fact that is unchallenged. It is the second reason that is a hard nut to crack.

The second ground for holding the transfer of the house as unlawful is the fact that at the time of the transfer, Anastasios Anagnostou had passed away, and both the first defendant and the third defendant were aware of that fact. On this aspect it has been submitted that the third defendant was notified by email and the death certificate forwarded to the effect that Anastasios had died. It is further submitted that the transfer of the property to an attorney when the principal is dead was invalid.

The first defendant's take on this is that the decision of the court to order the house transferred to Anastasios or him was made three years before the former's death. He conceded to the fact that the actual transfer was executed when Anastasios was dead. Still on this point, DW3 stated under cross-examinations that when the third defendant learnt about the death of Anastasios, it filed an application to get court's direction as to how to deal with the estate. Mrs Tenga submitted that the filling of this application by the third defendant was an acknowledgment by them that the judgment in Civil Case No. 1 of 2011 could not be executed. It is now common ground that the transfer was done in September 2013 when the said application was still pending, though subsequently it was withdrawn.

I agree with Mrs Tenga that by filing the application for directions, the third defendant was appreciating the fact that the order of the court in Civil Case No.1 of 2011 could not be implemented following the death of Anastasios. At this stage neither the judgment in Civil Case No. 1 of 2011 nor the negotiations amongst the heirs could be validly relied upon by the Administrator to transfer the house to the first defendant. I find the third defendant to have acted inconsistently and unlawfully in transferring the Upanga house to the first defendant. That disposes of the second issue.

The third issue is whether the first defendant had any legal basis for selling the Upanga house to the fourth defendant. For the first and fourth defendants, Mr. Kabakama submitted that the first defendant acquired title to the house by being bequeathed by the third defendant on the basis of the judgment in Civil Case No. 1 of 2011 and his power of Attorney. The same line of reasoning has been taken by the 3rd defendant who submitted that they were executing the order of the court in Civil Case No. 1 of 2011, which was not challenged.

On the other hand, Mrs. Tenga submitted that the first defendant had no title to the house which he could pass over to the fourth defendant. She cited the case **Salima Hussein V. Hussein Ibrahim Sadiki & Sons**, Civil Appeal No. 55 of 2000, CAT (unreported).

Based on the position I have taken in the proceeding issues, that is, the first and second issues, it is clear that the first defendant had no legal

basis for selling the house to the fourth defendant. I agree with Mrs. Tenga on the fact that the first defendant had no title to pass over to the fourth defendant as stated by the Court of Appeal in **Salima Hussein** (supra).

The fourth issue is; who are the rightful heirs of Diana Ranger's estate. Although this issue arose out of the pleadings and the plaintiffs testified in support of the fact that they are the rightful heirs, I refrain from pronouncing myself on it this is because, as I have stated earlier in this judgment, there is or there was a Probate Cause filed at this court in relation to the estate of Diana Ranger. I hold the view that it is the court in that cause which is mandated to determine that issue raised in the present case.

I am aware of the principle that it is the duty of the court to determine each issue framed as it was decided by the Court of Appeal in **Shaikh Ahmed Said V. The Registered Trustees of Manyema Masjid** [2005] T.L.R. 61. However, having taken judicial notice of a pending Probate Cause involving the same estate I cannot risk the possibility of making a conclusion that might conflict another reached in that Probate Cause.

Counsel for the first and 4th defendants raised an issue during closing submissions that this suit ought not to have been preferred for the reason that there was that Probate Cause. This approach took me aback and placed me in a dilemma for if counsel had wanted to argue this point he

was not only duty bound to notify the other side but also to raise it as early as possible. I think this is a household practice and settled law. My brother Mwambegele J (Now a Justice of the Court of Appeal) in **Gauff Ingenieure Gonbtt & Co. – JBG V. The Director, Kinondoni Municipal Council**, Commercial Case No. 164 of 2014. (unreported, cited with approval the case of **Registered Trustees of Catholic Archdiocese of Nyeri & Another Vs Standard Ltd and others** [2003] EA 257 as thus;

"Preliminary points are to be raised at the beginning of the hearing and not at the end of the hearing. Secondly, the issue of Capacity to sue goes to the very root of the case and must be pleaded".

Accordingly, I find the point raised by Mr. Kabakama to have been irregularly raised at the end and it denies the other parties the opportunity to address it. I shall not give any weight to it.

I now turn to the reliefs, which is the seventh issue. In dealing with reliefs I take note of the fact that on the evidence of DW2, the Upanga house has not been registered in the name of the fourth defendant. Therefore, I need not make an order for withdrawal of the consent of the second defendant because none has been made.

Having found the transfer of the Upanga house to the first defendant to have been illegal and having found that the sale of that house to the

fourth defendant was equally illegal, I grant the first and second prayers only to the extent of declaring that the transfer of the house to the first defendant was illegal and so was the sale to the fourth defendant. I also grant the fourth prayer for vacant possession but that it be to the third defendant who, as far as these proceedings are concerned, he is the administrator of the estate. There has been no proof of the alleged loss of rent, therefore there is no basis for me to grant it.

Since I have not made any order for monetary relief, the fifth prayer for interest on the decretal amount has no legs on which to stand. It is not granted.

Judgment is entered for the plaintiffs with costs against the first defendant as prayed.



I.P. KITUSI
JUDGE
1/2/2018