

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
LAND CASE No. 19 OF 2016

ASHA RAJABU KIUNGE.....PLAINTIFF

Versus

ABDALLAH MKUMBA.....1st DEFFENDANT

KASANDA MCHOMVU.....2nd DEFENDANT

PRIDE TANZANIA LIMITED.....3rd DEFFENDANT

TULVIN INVESTMENT COMPANY

LIMITED.....4th DEFENDANT

SULEIMAN H. ZANANGWA.....5th DEFENDANT

JUDGEMENT

24th December 2019 – 11th February, 2020.

J. A. DE- MELLO J;

The Plaintiff, herein the Administratrix of the Estate of the late **Rajabu Ally Kiunge** filed this suit against the **five (5) Defendants** herein jointly and, severally, claiming for the following;

- (1) Declaratory Order that the sale of the said house with Residential License No. TMK/MBGK/MKK 13/278 was illegal hence null and void *ab initio***
- (2) Immediate rebuilt of the destroyed and, demolished; or in the alternative, payment of TShs. 150,000,000/= (Tanzanian Shilling One Hundred Fifty Millions only) being the actual value of the of the destroyed or demolished property (house).**
- (3) Immediate hand over of the Residential License no. TMK/MBGK/MKK 13/278 to the plaintiff.**
- (4) Compensation as Specific Damages to the tune of Tshs 20,971,000/= of the lost and, damaged utensils and, home appliances belonging to the plaintiff and the entire deceased's family at the time of demolishing and evicting them from the house in dispute.**
- (5) General Damages**
- (6) Interest of the amount claimed at Commercial Rate from the date of filling this suit to the date of judgement.**
- (7) Costs of the suit.**

Following continuous and, persistent abscondment of all the Defendants and, their respective Counsel's, despite of being duly served, the matter was heard Ex-Parte. The Plaintiff was represented by the **Counsel Castor Rweikiza**, lining up four witnesses, namely: **Asha Rajabu Ally (PW1)**, **Mariam Hussein Said (PW2)**, **Iddi Mzee Matengwa (PW3)** and **Rashidi Athumani Mbata (PW4)** and, ~~Ally~~ **Rajabu Kiunge (PW5)**.

Asha Rajabu Ally (PWI) also the sole complainant in this matter, testified that, she and, her other relatives used to reside in the disputed suit premise as their home before its destruction and, demolition. She testified further that, the said house was the property of his late father one **Rajab Ally Kiunge** who had passed away in **Dar es Salaam** on the **14/2/2007**, as she was appointed the Administrator of his Estates on the **27/11/2018** at **Mbagala Primary Court**. With this, she firmly states to be the legal representative, lawful owner and beneficiary in the said Estate, of the deceased, **Rajabu Ally Kiunge**. That, among the properties left by the deceased, is this disputed house, of which she maintains all the documents to prove the ownership. The same was tendered in Court the **Residential Permit Na. TMK/MBGK/MKK 13/278 which** bears the name of their late father one **Rajabu Ally Kiunge**, admitted as **Exh. P2. PW1** furthermore testified that, the **1st Defendant** the said **Abdallah Mkumba** was a mere **Tenant** at the same disputed suit premise who somehow stole their father's Residence License and illegally, handed it over to the **2nd Defendant**, who inturn submitted it as collateral, following a loan that, he secured from the **3rd Defendant**, to the tune of **TShs. 10,000,000/=** It is alleged and apparent that, the **2nd Defendant** then failed to repay the said loan, which forced the lender to sell the suit premise to the **5th Defendant** through **4th Defendant** who acted as a Broker, she stated. That and, without their knowledge the disputed house was demolished by the alleged buyer, the **5th Defendant** leaving the family in total surprise and, distress. It then all unfold that if not for the **1st Defendant**, all this would have not happened. She pointed out that infact the **1st Defendant** had access through **PWI's**

brother bedroom, before handing it over to the **2nd Defendant. PW2**, and PW5, had nothing much to add other than corroborating **PW1's** evidence, stressing the family in Court to be the beneficiaries of the Estate of the late Rajabu Ally Kinge of which, the disputed house belonged to. It is said that, the said document was in the custodian of this **PW5 Ally Rajabu Kinge**, PW1's added, being custodian of the said Residential License which somehow vanished and ended up abused by the **Abdallah Mkumba** the first Defendant, who other than a long time tenant, used to be a close friend to their late father. **PW4 Rashidi Athumani Mbata** a neighbor had little to echo by confirming the house to belong to the late **Rajabu Ally Kiunge** whom he lead as **Ten Cell Leader** during his life time. Another testimony was drawn from **PW3 Iddi Mzee Matengwa**, a relative having known the family for long, but '**mjumbe wa shina**' the time demolition was executed. The practice and procedure used for eviction and demolition let alone sale was unknown to him as neither Notice nor Court orders to that effect was issued, he informed. **PW5 Ally Rajabu Kiunge** explained how the Residential licence ended up into his possession entrusted to him by the family as custodian. Some time passed when he noted it to be missing from his bedroom drawer and reported to Police and secured **RB No. MBL/RB/5103/11** dated the **9th May 2011 Mbagala Kizuiani**.

The following issues were framed, upon which, this Court is called to consider and, be determine.;

- 1. Whether the late Rajabu Ally had the son who bears same name?**
- 2. Whether the house under license No. TMK/MBGK/MKK13/278 belonged to the late Rajabu Ally Kiunge and, therefore formed part of his estate.**
- 3. Whether the late Rajabu Ally Kinge lawfully mortgaged his house in favor of the 2nd Defendant for the amount of TShs. 10,000,000/=**
- 4. Whether the sale of the disputed house by the 3rd Defendant to the 5th Defendant was lawful.**
- 5. To what Relief(s) are the Parties entitled.**

The above-mentioned issues are collectively analyzed as follows;

It is undisputed that the deceased is named **Rajabu Ally Kiunge** with two sons named; **Saidi Rajabu Kiunge** and **Ally Rajabu kiunge**. It is **Ally Rajabu Kiunge** who appeared as **PW5** and, one who claimed to be in custody of the stolen Residential Licence whose name somehow resembles that of his late father. **Paragraph 7, exhibits P13** all alludes to his names as stated that, of National Identity Card and, Passport. This therefore settles for the first issue and, in the negative that no son of the deceased is named by his late father same name.

There is even no rocket science in confirming that all the exhibits, with regard to the deceased, bears his name of the late **Rajabu Ally Kiunge**, more so the Residential Licence and, thus forming part of his Estate. This then simply answers the second issue in affirmative. The late Rajabu and on record, died

on **14th, February, 2007**, in as far as his death certificate reveals and, admitted as **exhibit P1**. According to section **117** of the **Evidence Act Cap, 6 R.E 2002** the burden of proving that sale was effected by the late **Rajabu Ally Kiunge** in 2010, with a view of proving the said transaction, as observed. The Defendants are at large and, the one whose burden of proof lies upon.

Section 117 of the Evidence Act (supra) reads as follows, as I quote;

"When the question is whether a man is alive or dead and it is proved that he has not been heard of within the proceeding of five years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive lies on the person who assert it.

The Plaintiffs have done their part by tendering the deceased's Death Certificate, portraying his the to have occurred on **14th February 2007**. Failure on their part to appear, deliberate or else, forces this Court to conclude that, all the transactions of mortgaging the house of the late Rajabu Ally Kiunge was tainted with fraud and hence illegal, if at all. This Court has no mandate to ascertain on that, it being a Civil suit whose standards are different. **PW3 & PW4** both leaders of the Street by then, were not aware and, which condense the uncertainty as to its legality. The fourth issue is answered in the negative.

Regarding the **5th issue**, as to whether the sale of the disputed house by the **3rd Defendant** to the **5th Defendant** was lawful and, based on the illegality observed above, it goes without say that, the sale is illegal. Neither

the 1st Defendant nor the 2nd & 3rd Defendants had Good Title to offer to the 5th Defendant. Several and, many cases have dealt with the issue of good title and, I would wish to draw parties to the case of **Justine Pual Mukabi & 50 Others vs. Nyaso Enterprises Ltd & Another, Land Case No. 128/2012 H/ COURT OF TZ. At Page 20**, and, I quote;

“This makes the Court to come to the finding that, even if it is true that PW3 purchased the land from the mentioned vendor but there is no evidence to establish the vendor was the lawful owner of the land sold to PW3. It is the view of this court that, it might be possible the said vendor was one of the trespassers to the land”.

Disposing the last issue, this Court and, based on the foregoing. I am of a firm finding that, the case has been proved in accordance with the law that guides Civil suit, the Balance of Probabilities, it is. The house belonged to the Plaintiff by virtue of the Estate as the Administrator from their late father **Rajabu Ally Kiunge, PW1**. None of them, the family, was part of the dirty game for mortgaging and disposing the suit premise. Demolition and, illegal as it seems, lead to not only anxiety and tragedy and distress, as the family while still in occupation, were thrown out with items lost and, or stolen, to include 21 beds, 18 mattresses, 7 refrigerators, 8 cupboards, 4 TV sets, 2 DVD deck, 4 VHC deck, 5 CD Radio (Music Systems), 3 phone Handsets, 5 Iron, 5 Sofa sets, Chairs, Coffee tables, Clothes and cash money of TShs. 546,000/= all with the ~~total~~ value of TShs. 20,971,000/=. This is notwithstanding Tenants.

The Reliefs sought in the Plaint are with merits and, granted as prayed. Costs to follow the event.

It is so ordered.



J. A. De-Mello
J. A DE-MELLO

JUDGE

11/02/2020