

IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LAND APPEAL NO. 68 OF 2018

[Appeal from the act of the Assistant Registrar of Titles refusing to rectify the Land Register in respect of a Right of Occupancy with Certificate of Title No. 4876, Plot No. 61 Block 23, Bahi Road Majengo Dodoma dated 13th November 2018]

MOHAMED SALMINI APPELLANT

VERSUS

THE ASSISTANT REGISTRAR OF TITLES 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUMANNE OMARI MAPESA INTERESTED PARTY

JUDGMENT

21st April, 2020 & 4th August 2020

M.M. SIYANI, J.

The appellant herein one Mohamed Salmini, was the owner of a property located at No. 4876 - DLR Plot No. 61 Block 23, Bahi, Majengo Dodoma. On 21st August, 1991, he mortgaged the said property to National Bank of Commerce (NBC). In 1997 the debt was assigned to the Loans and Advances Realisation Trust Fund (LART). On 11th November, 2002, LART applied to be registered owners of the said title under transmission by

operation of the law before selling the same to one Jumanne Omari Mapesa for a consideration of the sum of Tshs 15,000,000/=. Ownership of the property was therefore transferred to Jumanne Omari Mapesa as the Purchaser.

On 23rd March, 2018, Dr. Lucas Charles Kamanija, the learned advocate, acting under the instructions of the appellant, applied to the Assistant Registrar of Titles, Dodoma Land Registry, for rectification of the title in respect of a right of occupancy with certificate of title No. 4876-DLR Plot No. 61 Block 23, Bahi, Majengo Dodoma with a view that, the name of Mohamed Salmini be restored in the register for the reason that the transfer of the property to LART and then to the purchaser, was illegal.

On 28th August, 2018, Dr. Kamanija wrote another letter to the Assistant Registrar of Titles insisting that the Land Register be rectified to restore his name. By a letter dated 13th November, 2018 with reference No. LR/DOM/T/4876-DLR/38, the Assistant Registrar of Titles informed the appellant that the property in issue was a subject of a pending court

proceedings and advised him to pursue his right in courts of law. As such the application to have the register rectified was turned down.

Dissatisfied, Mohamed Salmini is now in this temple of justice to challenge the said refusal to rectify the Land Register by the Assistant Registrar of Titles. The appeal was initially preferred against the Assistant Registrar of Titles and the Attorney General. However, having considered the nature of the appeal and the orders sought in the petition, a notice in terms of section 102 (5) of the Land Registration Act Cap 334 RE 2019, was issued to one Jumanne Omari Mapesa who as indicated above is allegedly, a purchaser of the property in dispute and so an interested party. The petition of appeal presented, contains three grounds as follows:

- 1. That the Assistant Registrar of Titles erred in law in refusing to rectify the Land Register while knowing or ought to know that the transfer and the registration of title of the mortgaged property from the appellant to the Loans and Advances Realisation Trust Fund (LART), were illegal.*

2. That the Assistant Registrar of Titles erred in law in refusing to rectify the Land Register while knowing or ought to know that the transfer and registration of title of the mortgaged property from LART to Jumanne Omari Mapesa, were illegal and fraudulently.

3. That the Assistant Registrar of Titles erred in law in refusing to rectify the Land Register while knowing or ought to know that it was illegal for LART who was only an assignee of the mortgage, to apply to be registered as owner of the mortgaged property and then sell it to Jumanne Omari Mapesa, under the guise of transmission by operation of law under section 71 of the Land Registration Act.

While Dr. Kamanija represented the appellant during the hearing of the instant appeal, Ms Mariam Matovola, learned State Attorney and Mr Francis Kesanta, learned counsel appeared for the respondents and interested party respectively. Submitting in support of the 1st and 3rd grounds of appeal, Dr. Kamanija argued that the procedure adopted by the Assistant Registrar of Titles when transferring the appellant's mortgaged

property to LART on 11th November 2002 and then at the same date, transfer it to Jumanne Omari Mapesa, was illegal and fraudulent. It was contended that the law as far as mortgages are concerns is that, a mortgaged property will always remain as a security and cannot therefore be transferred to the mortgagee. The learned counsel referred section 57 of the Land Registration Act and section 116 (1) of the Land Act Cap 113 RE 2019 to support his arguments. As such, Dr. Kamanija submitted that the Assistant Registrar of Titles ought to know that LART being a mere assignee of the mortgage from NBC, was not entitled to have the right of occupancy registered in their favour and so he should have not endorsed the transfer. In view of the learned counsel, by endorsing the transfer without even notifying the appellant, the Assistant Registrar of Title, acted illegally.

To support his argument, the learned counsel invited the court to borrow a leaf from the Court of Appeal of Tanzania decisions in: **Ahmed Mabrouk and another Vs Rafiki Hawa Mohamed Sadik**, Civil Reference No. 20 of 2005; **TANELEC Ltd Vs The Commissioner General TRA**, Civil Appeal No. 20 of 2018; **Kamardini Vs Kahwa** [1996] TLR 100, **Samson**

Ng'ualida Vs Tanzania Revenue Authority, Civil appeal No.86 of 2008, and **Judge in charge of Arusha & Another Vs N.I.N Munuo Nguni** [2004] TLR 44.

Dr. Kamanija went on to contend that the Assistant Registrar of Titles ought to know that section 71 of the Land Registration Act relied by LART when applying for transfer of ownership, does not allow LART to be registered as owners by operation of the law casually. According to the learned counsel, for section 71 of the Land Registration Act to apply, there must be either a written law, judgment, decree, ruling or drawn order authorising such transfer and support his stance with the Court of Appeal of Tanzania decisions in the case of **Rift Valley Corporation Union and another Vs Registered Trustees of Diocese of Mbulu**, Civil Appeal No. 12 of 2007 and **Pius Kipengele Vs The Registrar of Titles and 3 Others**, Land Appeal No. 10 of 2018.

Dr. Kamanija maintained that in the matter which is a subject of the present appeal, there was no compliance to section 71 because LART sold the mortgaged property to Jumanne Omary Mapesa on 5th November, 2002

before being registered as owners on 11th November, 2002. In his opinion therefore, the purported transfer was illegal and fraudulent because one; in terms of section 41 (2) of the Land Registration Act, no disposition can be effectual as to create transfer, vary or extinguish any estate in any registered land, two; that LART and Jumanne Mapesa were registered as owners of a Right of Occupancy with certificate of title No. 4976-DLR on the same date and three; that LART and Jumanne Mapesa acted together in effecting the transaction which was blessed by the Assistant Registrar of Titles through documents prepared by R.K. Rweyongeza and Co. Advocates.

The learned counsel for the appellant argued further that Jumanne Omari Mapesa was not a bonafide purchaser and so he cannot be protected when the sale was done fraudulently. He submitted that where a mortgaged property has not been legally sold, no title passes to the purchaser and consequently the property remains with the mortgagor. Dr. Kamanija invited the court to follow similar position in the cases of **Peter Adamu Mboweto Vs Abdallah and Mohamed Mweke** (1981) TLR 335 and **NBC Vs Walter Czurn** (1998) TLR 380.

In his conclusion, the learned counsel prayed for a declaratory order that the transfer and registration of title to the mortgage property from the appellant to LART were illegal and fraudulent; a declaration that the transfer from LART to Jumanne Mapesa was illegal and fraudulent; an order that LART who was only assignee could not apply to be registered as owner of the mortgage property and then sell it to Jumanne Mapesa through the transmission of operation of the law under the Land Registration Act and; an order directing the Assistant Registrar to rectify the land register in respect of the mortgage by removing the name of Jumanne Mapesa and re-entering the name of Mohamed Salmini therein.

In her reply submissions Ms Mariam Matovolwa submitted that, refusal to incorporate the name of Mohamed Salmini by the Assistant Registrar of Titles was proper because the appellant did not indicate justifiable reasons as required by section 99 (1) of Land Registration Act Cap 334. The learned State Attorney, argued that the complained transactions are subject of a pending court proceedings and therefore the Assistant Registrar of Titles, could not therefore have rectified the register unless directed so by the court.

With regard to the issue of fraud, Ms Mariam argued that, there was neither illegality nor any form of fraud to warrant rectification and that the transfer was done in compliance with the law governing disposition of assets of NBC which were under trusteeship of LART. According to the learned State Attorney, Rule 5 of the LART Rules, deemed asserts under the trust to have been transferred to it with effect from 30th June, 1991 and Rule 7 (c) of the LART Rules (supra) vested powers to the trust to sale the assets.

Ms Mariam contended that the law placed non-performing assets to the trust and that's why such assets were transferred by operation of the law under section 71 of the Land Registration Act and Rule 13 of the LART Rules, declared such transfer valid and binding to the parties. She argued that the appellant was notified of the intention to sale his asset and had he been aggrieved, he could have challenged the transfer or sale to the tribunal which was in place at that time under Rule 19 (1) of LART Rules. As the law didn't prohibit transfer of asserts, the learned State Attorney believed that it was neither illegal nor was there fraud for such for transfer of the assets within a single day.

Mr Kesanta made his submission on behalf of Jumanne Omari Mapesa (interested party). He contended that the appellant's complaint before the Assistant Registrar of Titles, is on the sale and transfer of the house in dispute basing on fraud and illegality. According to the learned counsel, that was the reason why the appellant applied to have the register rectified. Mr. Kesanta argued that the question of fraud and illegality of the transfer of the said land, was already decided by the District Court in Civil Case No. 27 of 2003 which declared the sale between LART and Jumanne Omari Mapesa as proper and legal. According to Mr. Kesanta the said decision of the District Court, is still valid today despite the same being a subject of a pending appeal at the Court of Appeal of Tanzania. In view of the learned counsel, since there is a pending appeal challenging the said sale and transfer, the present appeal is an abuse of the court process as it amounts to taking legal recourse in two different avenues at the same time and in respect of the same matter. He accordingly invited the court to subscribe itself to a decision in **Harish Amberson Jina (By his Attorney Ajal Patel) Vs Abdul Razak Jussa Selemani** (2004) TLR 342, where similar conclusion was reached.

The learned counsel went on to submit that, the Assistant Registrar of Titles, was correct to decline rectification because of the court decision which must always be complied with. In his view, no changes to the register can be effected as far as the disputed property is concerned, unless a court decision which declared Jumanne Omari Mapesa as the owner is set aside. Mr. Kesanta believed that Jumanne Omari Mapesa, is a bonafide purchaser who must be protected by law as stipulated under section 51 of the Land Registration Act.

Through his rejoinder, Dr. Kamanija submitted that, the application for rectification was done under section 99 (1) (d) and (f) and section 99 (2) (a) (b) and (c) of Land Registration Act which vests power to the Registrar to rectify register where there is proof of fraud, mistake or omission. Dr. Kamanija believed that Ms. Mariam Matovolwa and Mr. Kesanta, failed to appreciate the issue in this court which was not on ownership of the mortgaged property, rather it was whether the transfer of the property from appellant to LART and then to Jumanne Omari Mapesa was lawful and legal.

The appellant's counsel was firm that the whole process of transfer from Mohamed Salmini to LART and then to Jumanne Omari Mapesa, was done without the appellant being given chance to be heard contrary to section 51 (1) of the Land Registration Act. There was therefore fraud and illegality by LART and the purchaser when registering the title. As according to the law what was vested to the mortgagee was the mortgage and not its ownership and since when the title was registered in 2002 there was no foreclosure neither was there a case in any court of law, LART could not therefore have a right to transfer the mortgage to itself.

Dr. Kamanija argued that the question of registration is therefore not an issue in a matter pending before the Court of Appeal of Tanzania. He submitted that the duty of the Registrar of Titles is to investigate the application before it in an attempt to find whether the same can be rectified but not to determine on issues of ownership of the land and he invited the court to follow a decision in **Nizar Shell Ladaway Mchana Vs Registrar of Titles and another** (1995) TLR 217.

Responding on a claim that Jumanne Omari Mapesa is a bonafide purchaser who should be protected by the law, Dr. Kamanija submitted that, a bonafide purchaser can only be protected in the circumstances of this case, had the mortgagor (appellant) been notified of the transfer. He therefore advised the purchaser to seek for reimbursement under section 100 of the Land Registration Act.

Having revisited the submission by the learned counsels as above, I will consolidate my reasoning in respect of the presented grounds of appeal. As prior stated, I find it worth noting that the instant appeal originates from a decision of the Assistant Registrar of Titles which declined to rectify the register by deleting the names of Jumanne Mapesa and re-entering the names of Mohamed Salmini (appellant) who was the previous owner of a landed property with certificate of Right of Occupancy No. 4876-DLR, located on Plot No. 61 Block 23, Bahi, Majengo Dodoma. That property was later transferred to LART then sold to Jumanne Omari Mapesa.

Following such transfer and sale, Jumanne Mapesa and Mohamed Salmini were involved in court litigations; first at the District Court Dodoma through

Civil case No. 27 of 2003 and then to this Court through Civil Appeal No. 6 of 2008. Currently, the dispute is at the Court of Appeal of Tanzania. The record shows, the District Court Dodoma found the sale of the property to Jumanne Omari Mapesa was legal and proper as it was published in the Gurdian News Paper (Exhibit P1).

Admittedly, the transfer of the property to LART and then to the purchaser was done before the above decision which was delivered on 4th April 2005. Dr. Kamanija contended that the transfer was illegal because no any written law, Judgment, decree, Ruling or Drawn order authorising such transfer when the same was effected as required under section 71 of the Land Registration Act. With due respect, I find Dr. Kamanija's arguments misplaced because section 13 of the Loans and Advances Realization Trust Act No. 6 of 1991, vested LART with power to direct any bank of financial institution to transfer non-performing assets to itself. For reference purposes, I have reproduced the contents of the said provision as hereunder:

13: (1) Notwithstanding any law or agreement to the contrary, the Trust may direct in writing any bank or financial institution, and that bank or financial institution shall, upon such direction, transfer to the Trust such of its non-performing assets:

(a) as are in existence at the commencement of this Act; [Underlined Emphasis supplied]

In my considered view, presence of a court decision was not the only pre condition for the Registrar to record changes by operation of law under section 71 of the Land Registration Act. The above provision allowed LART to have the non-performing assets transferred to it and therefore justifying the Registrar's change to the register.

Indeed even if there would be no written law authorising change of register as claimed by Dr. Kamanija, the decision of the District Court in Civil Case No. 23 of 2003 which later in 2005 blessed the transfer of the property to LART and its subsequent sale to Jumanne Omari Mapesa and which is still a subject of an appeal to the Court of Appeal of Tanzania,

barred the Registrar from rectifying the register because doing that would amount to disobeying such an order.

I therefore agree with Mr. Kesanta that, although the instant appeal is an attempt to challenge the Assistant Registrar's decision that declined to rectify the register, but since the property ins issue is also a subject of a pending court proceedings at the Court of Appeal of Tanzania; then the present appeal amounts to taking legal recourse in two different avenues at the same time and in respect of the same matter. The proper way in the circumstance, would be to pursue one course at a time.

In the fine, I hold that the Assistant Registrar of Title was justified in refusing to rectify the register pending court proceedings because as Dr. R.W. Tenga and Dr. S.J. Mramba stated in their book titled **Conveyancing and Disposition of Land in Tanzania: Law and Procedure**, Law Africa, Dar es Salaam, 2017, registration under a land titles system is more than the mere entry in a public register. Rectification of the register according to them is:

".....authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transactions that confer, affect or terminate that ownership or interest. Once the registration process is completed; no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title."

Having adumbrated as above, I find the three grounds of appeal presented to have no merits. The appeal is consequently dismissed with costs. It is so ordered.

Dated at DODOMA this day of 4th day of August, 2020



M.M. SIYANI

JUDGE