

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 107 OF 2016
(Originating from Civil Revision No. 49 of 1998)

STEPHEN MAFIMBO MADWARY..... APPLICANT

VERSUS

UDUGU HAMIDU MGENI.....1st RESPONDENT

SIMON HAMIS SANGA.....2nd RESPONDENT

RULING

18th December 2020 & 5th March 2021

Rwizile. J

By Chamber summons that supports his affidavit, the applicant, Stephen Mafimbo Madwary, under Section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019], O.XXI r. 98,99 and Section 95 of the Civil Procedure Code, [Cap 33 R.E 2019].

Facts leading to this application are expedient to narrate. It was in 1993 when the applicant and his late wife Sekii Kyoko bought a suit land from the administrator of the estate of the late Hamidu Mgeni, one Mwinyihamisi Hamidu Mgeni. They successfully obtained a title deed (certificate of a right of occupancy) upon transfer in the year 1996. It is on record that the sale of the said property was challenged by the 1st respondent in several cases which he instituted way back in 1992.

It was in 2003 when this court ordered the suit property to be sold by public auction, following the decision of the trial court and the same was done in 2008, where the ownership passed to the 2nd respondent herein.

It is in record that, the applicant being aggrieved by that decision, lodged Civil Application No. 186 of 2008 before the Court of Appeal seeking revision of the ruling of Ihema, J (as he then was) in Civil Revision No. 49 of 1998. The court observed as hereunder;

However, we have noted some irregularities in the sale, in that the property in question was sold twice. Initially it was sold to and registered in the name of the applicant and his late wife. Subsequent thereto it was sold to the second respondent in an auction ordered by the District Court of Kisumu. However, it would be inappropriate for the Court to interfere at the state reached.

In the circumstances, we direct that the file be remitted to the High Court to investigate into the matter and make appropriate orders. [emphasis added]

Following that ruling, the applicant filed this application in 2016 seeking for the following orders **one**, extension of time to file a complaint for disposition of his land, **two**, to be declared bonafide purchaser over the suit land and **three**, to be placed back as owners of the suit land. This court Mkasimongwa, J granted the application. The same aggrieved the 2nd respondent who lodged an application for revision before the Court of Appeal, Civil Application No. 402/01 of 2017. The Court of appeal reiterated what was held before in Civil Application No. 186 of 2008, in the following observation;

In line with our previous stance as aforesaid above, we find merit in the application by the applicant that, the decision of the High Court, dated the 14th July, 2017 which condemned the applicant unheard, was illegal and cannot be left to stand. Invoking the powers vested on us by the provision of section 4 (3) of the AJA, we nullify the proceedings and ruling of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (Mkasimwonga, J), in Miscellaneous Civil Application No. 107 of 2016, with direction that the order of this court, contained in the ruling of the Court dated the 22nd December, 2015 to investigate into the sale of the suit property to both the first respondent and the applicant, and thereafter give appropriate orders, be complied with. [Emphasis added]

For the foregoing this court is now called upon to investigate into the sale of the suit land to the applicant and the 2nd respondent.

Supporting the application, Mr.Mlaponi learned advocate for the applicant apart from adopting the applicant's affidavit, he argued that, it was an error for first respondent (Udugu Hamidu Mgeni) to be appointed as an administrator of the estate of his father without revoking the letters of administration which was first granted to Mwinyihamisi Hamidu Mgeni as per section 29 of the Probate and Administration of Estate Act, [Cap 352 R.E 2002]. According to him, that appointment empowered the 1st respondent to resale the suit property to the 2nd respondent.

It was his submission further that, it is undisputed that foreigners cannot own land in Tanzania, as stated by the Land Act No. 4 of 1999. He stated as well, that, the applicant bought before change in the law, which came in force thereafter. The learned advocate held, that since suit property was bought in 1996, and the law that came thereafter has no retrospective effect. According to him, not until the certificate title to land is revoked by the President of the United Republic of Tanzania, he remains to be the lawful owner of the property.

Mr Mlaponi submitted further that, the applicant and his wife are bonafide purchasers who lawfully bought the property from the administrator who was legally appointed. The advocate added that, interest of the applicant in that property has to be protected. To support his argument, he cited the cases of **Mire Artan Ismail and Another vs Sofia Njati**, Civil Appeal No. 75 of 2008 at page 8-9 and **John Bosco Mahongoli vs Imelda Zakaria Nkwira and others**, Land Appeal No. 101 of 2016 at page 5-9. He therefore prayed for this application to be granted, the applicant to be declared a lawful owner of the suit land and costs of the suit on the respondents.

Opposing the application, Mr. Mbamba for the 2nd respondent, submitted that, the applicant and his late wife were not bonafide purchasers. He argued that they did not buy the suit land on public auction as per decision of Ihema, J (as he then was) they never qualified to be bonafide purchasers. It was argued that, no good title was passed to the applicant, according to him the principle of buyer beware can be applied against him. He cited the case of **Melchiades John Mwenda vs Gizele Mbaga(Administrator of the estate of John Japhet Mbaga)** Civil Appeal No. 57 of 2018 (unreported).

He asserted that, all the cases cited by the applicant are distinguished from this matter at hand, since he said, the sale in this case was unlawful. The 2nd respondent stated that, he was the rightful owner of the suit land since he bought the same at the public auction, according to him he should be protected by the law. He cited the cases of **Peter Adam Mboweto vs Abdallah Kulala and Another** [1981] TLR 335 and **Ahmed Ally Salum vs Ritha Baswali Kitenge Furahisha**, Civil Application No. 21 of 1999 (unreported).

It was Mr Kariwa's submission that, foreigners cannot own land in Tanzania. He asserted that, the applicant and his late wife were foreigners and never proved that they were residents in Tanzania. He said, for that reason they could not own land in the country. He asked this court to make reference to section 20(3) of the Land Act, [Cap 113 RE 2019].

It was the submission of the counsel that, the first respondent was appointed an administrator of the estate of the late Hamidu Mgeni after the first appointed administrator's failure to abide by orders of this court by Ihema J. He asserted further that, he did not sell the suit land through public auction instead, he had privately sold the house to the applicant. He added that, the same deprived the beneficiaries their right to bid over the property. It was the prayer of the first and second respondents that this application be dismissed with costs.

In re-joining the applicant reiterated what was submitted in his submission in chief.

Having considered the rival submission of the parties and gone through the records of this application, the issue to be determined is who is the rightful purchaser/buyer of the suit property.

It was argued by the counsel for the applicant that, the applicant was the rightful buyer since he bought the same from the appointed administrator. The same was disputed by respondents who argued that the applicant did not buy the property at public auction instead from the administrator in his personal capacity as the owner of the property which was illegal. It has to be noted that, the 1st respondent disputed the sale of the property which led to the order of Rubama, J in Civil Appeal No. 7 of 1992 when the 1st respondent appealed against the decision of the District Court of Kisumu in Probate No. 6 of 1989. Rubama, J (as he then was) ordered among other things, the sale of the suit property be by public auction and distribution of the proceeds of sale be in accordance with Islamic law.

It is in record that, in 1993 the said property was sold to the applicant and his late wife Sekii Kyoko. However, Counsel for 1st respondent argued that the said sale was not through public auction, the question would be, did the 1st respondent ever complained about it. I am compelled to answer this point in affirmative, since it is in record that, the 1st respondent filed an application for revision before this court, Civil Revision No. 49 of 1998 where he made two prayers, for clarity it is hereunder restated;

This honourable court be pleased to order that the respondent comply with the order of the High court in the Civil Appeal No. 7/1992 which requires the respondent to sell the house in public auction

Despite what was stated in chamber summons, the same was not proved/averred in his affidavit. It was also unfortunate that this application was struck out by Hon. Mackanja, J (as he then was) and the parties had no chance to adduce evidence for the same.

The 1st respondent never rested, he filed another application for revision (Civil Revision No.49 of 1998) for this court to revise proceeding and ruling of the District court in Probate Cause No. 6 of 1989, Ihema, J (as he then was) dismissed the application since he did not find merit in the same. He then ordered as hereunder reproduced;

I accordingly order that the administrator of the estate proceeds to sell the house by public auction and then divide what is obtained in accordance with the dictates of the Holy Quran. Any of the inheritors of the estate proceeds could take part in the bidding should he so find himself in that position.

From the foregoing it is upon the applicant to confirm whether this court's direction/order of 2nd July 1992 had been complied with. If not, the applicant can lodge an application for compliance as ordered.

From the ruling of this court, it is my considered view that the order of sell as per Ihema J depended on the confirmation by the 1st respondent that, the administrator failed to sell the property as directed by the court. Basically, what I understand from Ihema J, was not a direct order that the house has to be sold, but was to be sold upon confirmation that the same was not done by the administrator as instructed. It is therefore in the record that, the 1st respondent filed another application in relation with what was instructed by Ihema, J. and the first prayer in a chamber summons was as hereunder reproduced;

This honourable Court be pleased to compel the respondent to comply with this honourable court order issued on 2nd July 1992

(Rubama J) to divide the estate under his administration in accordance with the dictates of the Holy Quran.

In his affidavit it was averred in paragraph 6 that;

The respondent has, however, sold the said house but defied the said court order by proceeding to appropriate the proceeds accruing from the sale all for himself.

It is from this chamber summons and affidavit of the first respondent which were filed in court on 5th December 2001, that the respondent confirmed that, the house was sold by the administrator but the proceeds of the sale were not divided to the beneficiaries according to the law and court orders. Nothing in those documents suggests that the house was not sold by public auction, otherwise it could have been explicitly stated in the affidavit. When going by Ihema J, the orders followed the sale. It was for the administrator to divide the proceed to beneficiaries in accordance with the Holy Quran. Hence it is my considered view that, the 1st respondent's claim was the appropriation of the sale proceeds by the administrator and not the manner in which the house was sold.

It is after the filing of the chamber summons, this court on 6th August, 2003, Ihema, J ordered that;

In the event I grant the prayers of the applicant and direct that the District Court of Ilala at Kisutu supervise the implementation of the order of this court.

As to what was ordered by this court, the District Court was to supervise the implementation of the order. I can say, the 1st respondent misdirected himself when he filed an application (Misc Civil Application No. 209 of

2003) to be appointed administrator and resell the house. As noted earlier on, it was a misconception on part of 1st respondent because, the order of this court was not only to sell the house but also to divide the proceeds of the sale as per the holy Quran. It is my view that what Ihema,J was after was an implementation of the order for division of the proceeds of the sale to beneficiaries as instructed. It was confirmed by the 1st respondent that the said house was sold by the administrator. The 1st respondent never proved in his affidavit that the sale was not by public auction. Since it is settled that, he who alleges must prove as per section 110 of the Evidence Act [Cap 6, R.E 2019].

It is my considered view that the second sale of the house on Plot 39 Block 73 Mchikichi Street Kariakoo was unlawful. It is therefore, the applicant who rightfully purchased suit property.

On my part, so far, so good, since my duty was ***to investigate into the sale of the suit property to both the first respondent and the applicant***, but not rule on whether foreigners can own land in Tanzania. But although by passing, I feel compelled to comment on the fact. Before the Land Act [Cap. 113 R. E 2019] came by in 1999, there were no restriction on foreigners to be allocated land in Tanzania. This however, is an invention of the Land Act. Section 20 (1) (2) and (3) are clear on how to deal with this issue. For easy reference the law states;

20.-(1) For avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act.

(2) Land to be designated for investment purposes under subsection (1), shall be identified, gazetted and allocated to

the Tanzania Investment Centre which shall create derivative rights to investors.

(3) For the purposes of compensation made pursuant to this Act or any other written law, all lands acquired by non-citizens prior to the enactment of this Act, shall be deemed to have no value, except for unexhausted improvements for which compensation may be paid under this Act or any other law.

It is my considered view, that since the law provides how to deal with land owned by foreigners before the enactment of the land Act, that should be left for a proper forum. This court, at this juncture, if I may be pardoned for saying so, is not an appropriate forum.

Having said so, I grant this application, costs to follow the event.

AK. Rwizile

JUDGE

05.03.2021

the presence of Irene Kiseko for the applicant, the 1st and 2nd respondents are present in person.



Recoverable Signature

X



Signed by: A.K.RWIZILE

