IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

LAND CASE NO. 49 OF 2017

ZEPHANIA SAMWEL ***(suing as administrator of Estate of the late SOLOMON ABRAHAM)*** **.....PLAINTIFF**

VERSUS

BRAEBURN INTERNATIONAL SCHOOL..... DEFENDANT

JUDGMENT

23/11 &19/02/2021

MZUNA, J.:

In this suit, parties are disputing on a claim for a suit land measuring about 6.5 acres worth Tshs 780,000,000/- located at Kisongo village, within Arusha. **Zephania Samwel**, the plaintiff herein, says inherited it from his father the late Solomon Abraham who in turn inherited it from his father the late Abraham Nailugisha. On the other hand, **Braeburn International School,** the defendant herein, says bought it from Amanda Lobulu in 2009 who in turn bought it from Olod Katamboi sometimes on 30th August, 2004.

During hearing, the plaintiff was represented by Mr. Edward Lekaita, Mr. Jeremiah Mjema, Mr. Ombeni Kimaro and Ms. Miriam Nitume, learned advocates whereas the defendant was represented by Mr. Innocent Mwanga

and Ms. Teresia Mutajuka, also learned advocates. Essentially, there are five issues for determination.

I propose to start with the first issue, whether the plaintiff has the *locus standi* to sue the defendants? This will be followed by the subject matter of the suit, whether it is the same?

The submission by the defendant is that though the plaintiff tendered the letters of administration purporting to show that he was appointed as the administrator of the estate of the late Solomon Abraham as evidenced by exhibit P1, still the said letters have some discrepancies like:- It purports that he was appointed on 6th day of April 2016 before the death of Solomon Abraham who passed away on 6th day of June, 2016 which is also opposed to the pleadings at paragraph 5 where it is alleged he passed away on 6th day of June 2015. That the plaintiff did not give cogent explanation in his reply to the written statement of defence though such anomalies were raised.

On his part, the plaintiff says, the deference on the dates are mere typographic errors which does not have any effect and the court was asked to rely on the death certificate not otherwise. The same argument was also raised on the allegation that he was appointed before the date of death of

the deceased, a defect which is based on the Form No.4 (exhibit P1) which he says was filled by the court clerk.

This court finds that the appointment of the plaintiff as the administrator was primarily based on the death certificate and therefore, it is unimaginable to say he was appointed before the death of the deceased. Exhibit P1 reads that the plaintiff was appointed on 6-4-2017. It was signed on 11-4-2017 though at the bottom where the administrator signed it reads 6-4-2016 in actual fact it ought to have tallied with the other date to read year 2017. The raised point is on mere trivialities and therefore lacks any merit. One would have expected the defendant to have challenged such appointment at the court which appointed him not at this court. I would agree with the plaintiff that the variance on the year of death of the deceased 2015 vis a vis 2016 and the date of signing to read 2016 instead of 2017 are mere typographic errors which have nothing to do with the substantive part or root of the main case, which is on ownership of the land. When PW1 was asked the question as to why did he sign the Probate letters before death of Solomon he said that:-

"The Clerk inserted a date mistakenly. I just signed. I learnt about that mistake today. My Advocate mistakenly wrote date of death as 6/6/2015 instead of 2016."

Based on the above answer, the wrong of the advocate or court clerk cannot be used to punish the innocent litigant. The plaintiff is right when he said that where there is variance on the date of death of the said Solomon, the court should rely on the death certificate (exhibit P2) which was admitted without any objection. The raised point of objection on the first issue that the plaintiff was appointed before the death of the deceased is bound to fail. The plaintiff has a mandate to sue.

This takes me to the raised issue as whether the plot claimed by the plaintiff is one and same as that which was sold to the defendant?

PW1 averred that the purported first sale agreement between Amanda to Braeburn Schools alleges the shamba is at Mateves Village and the second sale alleges it is at Ngorbob Village which is not their shamba as their shamba is at Mateves Village. According to him that is a manoeuvre. The defence through the evidence of DW5 Juma Abdallah Makona, the Land Surveyor at Arusha District Council said that the court has to act based on the location shown in the title deed as the correct one that is at Ngorbob Village not

Mateves. That, it is within Arusha District council. On his part, DW2 then the street leader said that the suit Plot is at Mateves Ward. Administratively the Plot is at Ngorbob Village. However during the sale it (plot) was at Mateves. The Plot cannot be shifted/transferred. It is the same plot now in dispute.

I should make it clear, based on the above evidence, that the disputed plot is one and same plot not as alleged that they are distinct plots. As par the plaint, the plot is located at Mateves as contended by the plaintiff and as per the first sale agreement. Merely saying it is at Ngorbob Village in the second sale agreement cannot change the fact that it is the same plot. This is given support by the evidence of DW5 Juma Abdallah Makona, the Land Surveyor at Arusha District Council, who said that the difference between sale agreement and the title to read the Plot is at Mateves and Ngorbob Village respectively is due to the fact that those who supervised the demarcations are the concerned District Authority (in our case Arusha District Council). They are the one who observed that the Plot is at Ngorbob and not Mateves. That, the Court has to act based on the location shown in the title deed as the correct one (in our case Ngorbob Village).

I revert to the second issue on *whether the suit was filed within time?* The defence says the suit was instituted on 27th July, 2017 almost after 13

years from the first sale agreement (30th day of August 2004) and then 2009 when it was sold to the defendant by Stella Lobulu and then in occupation of the defendant without any interruption. The court was asked to disregard the date of appointment of the administrator in computing the time limit based on the decision in the case of **Yusuph Same and Another vs. Hadija Yusuf** [1996] TLR 347.

On his part, the plaintiff says, from the alleged date of purchase of the suit land by the defendant 24th January, 2009 to 27th July, 2017 when the suit was instituted, it is only 8 years which had lapsed and therefore below the prescribed 12 years period to claim for land. More so, that even the sale agreement is questionable because the said Olod Katamboi never owned the land in dispute. Further that the right of action should start to be counted from the date of death of the deceased based on section 9 (1) of the Law of Limitation Act, Cap 89 RE 2019. The court was also asked to take note that the plaintiff's evidence shows the late Solomon Abraham had been in occupation of the suit land until 06th June 2016.

Section 9 (1) of the Law of Limitation Act, cited by the plaintiff's counsel reads:-

"(1) Where a person institutes a suit to recover land of a deceased person... the right of action shall be deemed to have accrued on the date of death."

This provision insists, time starts to run from the date of death of the deceased then "*in possession of the land and was the last person entitled to the land*".

The time limit therefore according to the plaintiffs is 6th June, 2016 which is well within time as per the decision in the cited case of **Yusuph Same and Another vs. Hadija Yusuf** (supra) at page 350 which held that "*right of action accrued from when the deceased died*" not as alleged by the defence that it is on the date of sale agreement. I say so because the alleged sale agreements are disputed. Mr. Mwanga, the learned counsel asked PW1 the question that the first sale agreement was since 2004, why is it that the case was instituted in 2017 after more than 12 years? His answer was that: "That is not true. There is fraud '*umetumika ujanja*'". In other words, issue of fraud has been raised. PW1 said that they learnt about the trespass in 2017. That any sale in 2004, ought to have been by Solomoni, then in occupation of the suit land. He was also articulate when he said that:-

"If someone prepares a document of ownership of my Plot without involving the owner, the document becomes a

forged document. And the sale agreement must be also illegal 'batili'"

I would find that the alleged 12 years' time limit cannot apply in view of the fact that fraud had been raised. Time would start to run from the date of the discovery of the alleged fraud in view of the decision in the case of **Calico Textile Industries Ltd and Another vs Tanzania Development Finance Co. Ltd** [1996] TLR 257 (CA) where the court held that:-

"The period of limitation for the bringing of legal proceedings in the Law of Limitation Act does not begin to run until the victim of fraud has discovered the fraud."

The discovery of fraud was in 2017, the same year during which this suit was filed. The suit is not therefore time barred as alleged.

This takes me to issue No. 4 *whether the sale agreement giving title to the defendant is valid in law* followed by issue No.3, that *is, who is the lawful owner of the disputed suit plot.*

On the issue of validity of the sale agreement, the plaintiff says, the defendant could not own the suit plot in 2004 while the plaintiff was in occupation of the suit plot up to 2016 when Solomon Abraham passed away. That the alleged sale is tainted with fraud. Second that sale is illegal because the Directors of Braeburn are not citizens of Tanzania above all that majority

shareholders are non citizens which under the provisions of section 20 (1) and (4) of the Land Act, Cap 113 RE 2002, prohibits the foreigner from owning land in Tanzania except for investment purpose through Tanzania Investment Act and Tanzania Investment Centre. According to the learned counsel the contract or agreement giving title to the defendant is legally invalid. The learned counsel capitalized as well on the provisions of section 19 (2) of the Land Act in supporting the above point.

Further that even the advocate Mr. Ezra Joshua Mwaluko (DW3) who witnessed the sale agreement of 30/8/2004 (exhibit D1) between Olodi Katamboi and Amanda Lobulu did not visit the suit plot.

On the defence side it is argued first that the suit is unmaintainable in law for non joinder of the necessary party the seller(s) Olod Katamboi and Amanda Lobulu. That the plaintiff being stranger or not privy to a contract cannot challenge those agreements citing the case of **Tweddle vs. Atkinson** (1861), 1B & S.393.

Second that if the plaintiff is alleging issue of fraud on the sale and transfer documents (Exhibit D1, D2 and D4 which gave title Exhibit D3) based on the case of **Omary Yusufu vs Rahma Ahmed Abdulkadr**

[1987] TLR 169, must prove beyond the standard required in a normal civil case.

This court has the following to say, first reading from the plaintiff's case they allege that they had been in occupation of the suit premise even before the alleged sale which they say is tainted with fraud. For the defence, they argue that the defendant owned it from when Olodi Katamboi was in its occupation and then sold it to Amanda Lobulu followed by the second sale to Braeburn Secondary School.

The issue of validity of sale agreement I would say cannot be well answered in the absence of the sellers being joined in the suit. It was held in the case of **Juma B. Kadala v. Laurent Mnkande** [1983] TLR 103, 106 (HC) the position which I fully subscribe to, that:-

> *"This present occupant of the disputed piece of land ought to have been sued jointly with the respondent for recovery of the piece of land in dispute. Failure to do so was fatal to the proceeding because...it is impossible to make any orders in this matter without affecting the rights of Omari Kuziwa who has not had any chance of being heard in this matter at all. Every person must be heard on matters that concern and/or affect his rights. This is a fundamental principle of justice in any democratic*

country such as ours and the same must be guarded, particularly by courts of law worth the title, with utmost jealousy."

Surely if this court will find that the sale agreements are tainted with fraud or void, that will be unfair to Olod Katamboi (first seller) and Amanda Lobulu, (the second seller) who will be condemned unheard. I understand that Stella w/o Lobulu testified as DW1 on behalf of the said Amanda Lobulu, her daughter, but this cannot overrule the necessity of summoning her as party to the suit. The court record of 24/3/2020 reads:-

Mr. Lekaita Adv:- *I have noted new development on the sale transactions which may necessitate the need to join the sellers to the defendant. Before I do that, I need to consult my co-advocate. We pray for two weeks' time to see if we can amend pleadings."*

There was no objection from Mr. Mwanga Advocate. Then on 2/4/2020, **Mr. Lekaita Adv** said that:-

"We have decided to proceed with the matter without amending the plaint. We say so because the sale agreement has been disputed."

The above transcript suggests that joining the sellers is a matter of one's wish which I would say that it is absolutely wrong. The suit is therefore bad in law for non joinder of the said sellers as necessary parties, defendants.

Second, the plaintiff purport to raise issue of fraud. It was held in the case of **Omary Yusufu vs Rahma Ahmed Abdulkadr** (supra) at page 175 that;

> *"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."*

It is too early to say that fraud was indeed committed until such time when the sellers have been heard. The argument that there was need for DW3 to visit the suit plot was not supported with any law and therefore is a mere presupposition.

This takes me to *issue of ownership.* The plaintiff says they own it through customary rights. PW2 Wilfred Solomon Abraham, son of Solomon Ibrahim, deceased, said that they knew that it was their shamba because their Mother inherited it from their grandmother, mother of their late father. According to PW1 Zephania Samwel Mollel, who is the appointed administrator of the estate of the late Solomon Abraham vides letters of appointment in Probate Case No. 3/2017 (exhibit P1), said that the late Solomon Abraham passed away on 6/6/2016 as evidenced by the death certificate Exhibit P.2. They

learnt that the disputed plot had been trespassed into by the defendant on 20/05/2017.

They met with the Director of Braeburn School one Mr. Ngungi within 3 days and then met with Amanda Lobulu who sold the farm to them. DW1 denied to know PW1 and or the deceased Solomon Abraham let alone to have any transaction with them. It was agreed that they should meet so as to settle the matter, however, the defence side never turned up which prompted the institution of the suit. He insisted that the plot belongs to Solomon Abraham, the defendant is a mere trespasser. He denied to know Olodi Katamboi.

The defence says bought the plot from Amanda Lobulu daughter of Stella Lobulu (DW1) who in turn bought it from Olodi Katamboi as per the sale agreement tendered as exhibits D2 and D1 respectively. The first sale agreement (exhibit D1) was witnessed by DW2 Robert Laban Onina then as a Street leader, at Ngaramtoni ya chini, Mateves Village in the presence of the Village Executive Officer Yusuph Swaleh. He denied to know both Zephania Samwel and Solomon Abraham whom he says never resided within his hamlet. He described the demarcations for that plot which measures 6.7 acres as follows:- West – Road, Lawrence Peter and Braeburn School; South

– Road leading to the Bible School; North – Road and Loshooki Abraham; East – Road heading to Lazeri School and where the seller resides. The same description was given by DW1 who said that:- West: Lawrence Peter; North – Loishooki; East – Road; South – Road.

The Head of Braeburn Schools one Anne Lous Bishop (DW4) insisted that they have the documents from Amanda and therefore owns the land legally. She tendered the sale agreement (exhibit D2), certificate of occupancy (certified copy as exhibit D3), the transfer of right of occupancy (exhibit D4). The witnesses to the sale agreement were the Directors:- Mr Charles and Colman Ngallo. The latter is the Board Chairman since 2005.

On the issue of ownership there has been a challenge on the current owners, the Braeburn schools that its Board of Directors has many foreigners than local Directors. That it is therefore a foreign company. PW2 said that before 2017 they did not till the shamba (i.e. 2015 – 2017) because their father was sick and were nursing him. That, the beacons were installed by the defendant after instituting the case.

On the part of the defence, they said that the suit land was purchased from Olodi Katamboi (now deceased) on 30th August, 2004, then Braeburn purchased it in 2009. The latter was in possession of the suit plot up to the

date of the institution of the suit. According to DW1 she fenced it after purchasing it.

As above intimated, this court cannot determine issue of ownership unless the legality of the sale are determined. That would also cover the propriety of the current owner, who on the face of it owns the plot in contravention of Section 20 (1) of the Land Act. Under that law, a foreigner may own land only for investment purposes. However, the same must be owned through a derivative right from the Tanzania Investment Centre, which is not the case here. Above all, the alleged sale to the defendant did not get the blessing of the Village Council. It was held in the case of **Bakari Mhando Swaga v. Mzee Mohamedi Bakari Shelukindo** and 3 Others, Civil Appeal No. 389 of 2019, CAT at Tanga (unreported) that failure to do so shows the purchaser never exercised "due diligence". The court further emphasized the powers of the Village council under section 142 (1) of the Local Government (District Authorities) Act, Cap 287 RE 2002 that it is *"the organ in which is vested all executive power in respect of all the affairs and business of a village."*

The above point gets support because if the land was unregistered in 2004 when it was purportedly sold for the first time, then registration of the suit land for the first time in 2006 as per exhibit DE4 must have involved the

Village council authority. In view of the above anomalies therefore, the transfer of the suit land from Amanda Lobulu to the defendant was without following strict procedures under the land law regime in Tanzania, including blessing of the Village Council and above all, it was sold to a foreign company against the dictates of the law.

That said, in resolving the last issue of reliefs, I find that this suit stands dismissed for want of joining the sellers. The plaintiff should file a proper (fresh suit) by joining them. That should be done within 90 days from today. In between, there should be no further transfer of the title deed, until the current one is determined on its legality. No order for costs because the plaintiff never made use of that chance during hearing, the option which was availed to him.

M. G. MZUNA,

JUDGE,

19/02/2021.