

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

LAND CASE NO. 70 OF 2016

ABDUL MALIKI K. IBRAHIM.....PLAINTIFF

VERSUS

THE DIRECTOR, MOROGORO

MUNICIPAL COUNCIL.....1ST DEFENDANT

THE REGISTERED TRUSTEES OF

TANGANYIKA AHMADIYA

MUSLIM MISSION

.....2ND DEFENDANT

JUDGEMENT

Date of Last Order: 22/2/2021

Date of Judgment: 9/3/2021

MASABO, J.:

The parties contend over ownership of a unit title (condominium) comprising the one sixteenths (1/16) part of a building situated on Plot No. 33 Block J, Zone III Madaraka road in Morogoro Municipality (The sixteenths (for convenience, the 1/16) part of a building is here after referred to as **suit unit** whereas the building is referred to as **premise**). The plaintiff prays for a declaratory order that he is the rightful owner of the **suit unit** and for a permanent injunction restraining the defendants and their agents from interfering with his lawful ownership and occupation of the suit premise.

Three issues were framed at the commencement of hearing, namely:

1. Whether there was a sale or purchase of the suit property prescribed as 1/16 part of the building on plot No. 33 Block J Zone 3 situated at Morogoro;
2. If the answer in the above issue is in the affirmative, whether the plaintiff is the lawful owner of the suit property
3. To what reliefs are the parties entitled to.

The plaintiff's case was supported by two witnesses, the plaintiff who testified as PW1 and Eitteen Edmund Wamunza as PW2. Further to the oral account of these two witnesses, 5 documentary evidence comprising of a sale agreement for the suit premise (Exhibit P1); a notice of vacant possession from the 1st defendant (Exhibit p2); a letter from the 2nd Defendant (Exhibit P3), Capital Gains Clearance Certificate (Exhibit P4) and a deed of transfer of the suit premise (Exhibit p5). For the defendants, there were two witness Gizbert Charles Msemwa, a Land Officer from Morogoro Municipality who testified as DW1 and Abdulhaman Mohammed Amme, an officer of the 2nd defendant testified as DW2.

During the testimony of DW1 a crucial issue regarding ownership of the premise surfaced. DW1 testified that it has come to the attention of his office that the premise belongs to the government as it was acquired by the President of the United Republic of Tanzania under The Acquisition of Buildings Act, 1971 sometimes in 1971. In support, he rendered a copy of an

Whereas it is true that the contract between the parties being for disposition of land is governed by section 37 to 40 of the Land Act, Cap 113 which among other things, require a mandatory approval of the Commissioner for Land and although we note the such approval has so far not been obtained, that in itself does not vitiate the contract between the parties as per the principle articulated in (**Mohamed Idrissa Mohamed v Hashim Ayoub Jaku** (supra) and **George Shambwe v National Printing Company Limited** (supra) which squarely apply in protecting the sanctity of the contract between the plaintiff as purchaser and the 2nd defendant as vendor.

In the second issue, I have been invited to investigate whether the agreement has vested the lawful ownership of the suit unit into the plaintiff. This question takes me back to the issue of approval. The law regulating disposition of land recognises sale as a lawful means of land disposition. Such disposition is contingent to certain conditions, the requirement for notification and approval of the Commissioner for Land in particular. The requirement for notification and approval, where relevant, are not cosmetic. They are mandatory requirements to be complied with for the disposition to be operative as per section 38 of the Land Act, Cap 113 RE 2019. Under the premise, since all parties are in common that, no formal transfer has been affected, the argument that ownership of the suit unit has vested in the plaintiff seems to be misconceived.

Indeed, this is the position of law as it currently stands. It is a trite law of pleadings that the parties are bound by their respective pleadings and new facts not pleaded should not be entertained as that would prejudice the opponent party by taking them by surprise.

In the foregoing, since in the facts pertaining to the acquisition of the premise were not pleaded by the parties but was introduced in the course of hearing, such evidence would, under the normal circumstances, be entertained as that would contravene the principle above. The circumstances of the present case are however of a peculiar nature warranting departure from the general rule above. The facts introduced by the defendant is revolves around a legal issue which is not tied up to pleading.

The schedule of acquisition is issued under section 9 (1) of the Building Acquisition of Building Act, No. 13 of 1971 and published in the Government Notice (GN 98 of 1971) hence falls under the list of documents to which courts are mandated to take judicial notice pursuant to section 59(1) (a) of the Evidence Act [Cap 6 RE 2019]. The invitation for this court to ignore this public notice, is therefore, a lucid misdirection. This court being a court of law is enjoined to interpret and apply the law as opposed the wishes of the parties.

I have had a glance at the schedule of acquisition.. The premise under dispute, located at Plot 33/J Madaraka Road, appears in the 2nd item of the Buildings acquired under section 9(1) of the Acquisition of Buildings Act,

produce any rule or notice to the contrary, I deem the Notice published in GN No. 98 of 1971 to have remain enforce which entails that, as of 11th May 1990 when the plaintiff and the 2nd Defendant concluded the disposition agreement, the suit property and the entire building was no longer under the ownership of the 2nd Defendant.

In the foregoing, I answer the second issues in the negative because not only was there no proof of formal transfer but at the time the parties concluded the agreement, the 2nd defendant, whether knowing or not, had ceased to be the owner of the premise by operation of law. Having lost his ownership to the Registrar of the Buildings he had no good title to pass to the plaintiff as one who does not have a legal title to the land cannot pass good title over the same to another (*nemo dat quod non habet*).

As argued by the 2nd defendant's counsel, the contract between the parties is impossible of performance and the plaintiff has liberty to invoke the remedy provided under section 56(2) of the Law of Contract Act, if he so wishes.

The third issue is on remedies. The plaintiff has two main prayers namely, a declaratory order that he is the rightful owner of the 1/16 unit share of the disputed building and an injunction restraining the defendant and their agents from interfering with his lawful ownership and occupation of the suit premise and genera damages. More or less similar prayers were advanced