

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

LAND CASE NO. 26 OF 2017

PETER OLOITAI.....PLAINTIFF

VERSUS

REBECA TOAN LAIZER.....1ST DEFENDANT

NESERIAN TOAN LAIZER.....2ND DEFENDANT

MARTHA TOAN LAIZER.....3RD DEFENDANT

JOYCE TOAN LAIZER.....4TH DEFENDANT

TOAN S. LAIZER.....5TH DEFENDANT

FIRST WORLD INVESTMENT COURT

BROKER.....6TH DEFENDANT

HARPREET BRAR.....7TH DEFENDANT

JUDGMENT

23.03 & 03.07.2020

MZUNA, J.:

Peter Oloitai (hereafter the plaintiff) claims against the defendants jointly and severally for ownership of a parcel of land measuring 1000 acres, commonly known as Farm No. 745 held under Certificate of Title Number 15011, located at Loiboserat Village in Simanjiro District within Manyara Region (hereafter referred to as suit land).

The background story of case is that it was instituted after the plaintiff was ordered by court order compelling the 6th defendant to give vacant possession of the suit land within fifteen (15) days. This came about after the first to fourth defendant obtained a consent decree vides the Land Case No. 9 of 2012 which was against the 5th defendant (their husband). Other co-defendants including the 7th defendant were not parties thereto.

During the hearing, the plaintiff paraded two (2) witnesses being PW1 Peter Oloitai and PW2 Langai Silia whereas the defendants (save for the 6th defendant who did not show up) had no other witnesses apart from themselves. Mr. Deogratius Urassa, learned counsel, appeared for the plaintiff while Ms. Edna Mndeme, learned counsel, entered appearance for the 1st to 6th defendants. The 7th defendant had the services of Mr. Nerius Rugakingira, also learned counsel. The plaintiff filed his submission unlike the defence as Mr. Rugakingira opted not to file his while Ms. Mndeme failed to comply with the agreed schedule of filing same.

The facts in brief being that the plaintiff bought the suit land from the 7th defendant on the 15th day of December, 2015 as evidenced by *exhibit P2* (sale agreement between them). He further transferred the suit land to his name on 11th January, 2016 (see *exhibit P1*). The 7th defendant also bought the suit land

from one, Agro seed Co. Ltd (now defunct). The sale agreement between the 7th defendant and the said Agro seed Co. Ltd was tendered and admitted in evidence as *exhibit P3*. As per the evidence; it appears that, the farm was previously co-owned by the 5th defendant herein who happened to sale his shares to the said Agro Seed Co. Ltd.

On the other hand, the defence case is that there was a lease agreement between the 5th defendant (DW1) and John Faul, now deceased, between 2002 and 2007 for a rent of Tshs 50,000/= plus 5 bags of maize per month. It is also averred that the said John Faul and Agro seed Company Limited was declared bankrupt. All defence witnesses, save for the seventh defendant, refuted the sale between the plaintiff and the 7th defendant as well as the sale from the said Agro seed Company to the 7th defendant. The defence case is that the 1st to 4th defendants who are wives of the 5th defendant, were not aware that their husband had formed a company with John Faul, which is the defunct Agro Seed Co. Limited. The sale is disputed because there was in existence the lease agreement between the defendants (except No. 6 and 7) with John Faul to supply them with some food and Tshs 50,000/-.

In his evidence, the 7th defendant (Harpreet Brar DW6) admitted to have sold and transferred the suit land to the plaintiff. That he purchased it from

Agro seed Company Limited on **13/05/2011** and then sold it to the plaintiff in **2015**. He tendered the Certificate of Incorporation with Articles of Association as exhibits D2 collectively. He said that after purchasing that shamba he was told that the Company was liquidated. He also averred that he has never been involved in the said Land Case Number 9 of 2012, which is relied upon by the 1st, 2nd, 3rd, and 4th defendants to have vested the interests in the suit land onto them. He admitted however that he is aware of the land case filed in 2012 by Taon lazier, the 5th defendant that he was not paid by John Faul, the Managing Director of Agro seed company Ltd who had by then shifted to Nairobi. This however was refuted by the information that indeed the 5th defendant was paid Tshs 4,000,000/- on 30th June 2011, vides exhibit D4.

Five issues were framed namely: **One**, who is the lawful owner of the suit land; **Two**, whether the sale of the suit property by the 7th defendant to the plaintiff and transfer was lawful; **Three**, whether there was demolition of 19 houses and if so to what extent; **Four**, whether the registration of the land in dispute in the name of Agro Seed Co. Ltd was lawful under the law; And **five**, what relief (s) to which the parties are entitled thereto.

Let me start with the first issue. The question to ask is, *who as between the plaintiff and defendants, is the lawful owner of the suit land.*

As a matter of fact, the plaintiff's claim is rooted from the sale and transfer agreement between him and Harpreet Brar, the 7th defendant, whereas the 1st to 4th defendants say the suit land reverted back to them through a court order in the Land Case No. 9 of 2012.

The question to ask was there transfer and sale from Agro seed Company Limited? It is worth noting that the said Company as well as John Faull were joined in the suit but were then withdrawn for being bankrupt. Again, the sale agreement between Agroseed Company Ltd in favour of Harpreet Brar (Exhibit P3) was signed by John W. Faull and Gaynor Anna Faull who are all foreigners. That was 13th May 2011. The question is, was there disposition in law?

There has been an argument that the owners of the said Agroseed Company Limited being foreigners could not have owned and sold the suit plot. The law which prohibits ownership of land by non citizens is section 20 (1) of the Land Act, Cap 113 RE 2002. It came into force on 1st May, 2001 vides G.N No. 485 of 2001. Mr. Urassa, the learned counsel has argued that such law cannot apply because they came into ownership since year 2000. *Exhibit P1* shows that the suit land was granted to Agro Seed Company Limited on the **2nd day of January, 2000**. However, by then it was jointly owned with a local, the 5th defendant. I have revisited the Memorandum and Articles of Association,

there is a provision which provided for disposition by way of sale and or transfer of business under paragraph 3.11 and 3.31 of the Memorandum of Association (exhibit D2).

I dare say that this case was instituted prematurely. The 7th defendant ought to have challenged the attachment of the suit plot instead of selling it. The plaintiff cannot claim against other defendants apart from the one who sold the suit plot to him. One would have expected any objection against the attachment was by filing objecting proceedings under section 38 (1) of the CPC, Cap 33 RE 2002. This no doubt, ought to have been done by the 6th defendant. Paragraph 6 of the exhibit D1 says:-

"That, although I was not informed of the said Land case No. 9 of 2012, the same was brought to my attention on or about 10th day of November, 2013 i.e after the issuance of the Court Order ...the said chairman informed me that there was a dispute in court in respect of my property and that the same has been declared to be transferred to the 1st, 2nd, 3rd, and 4th respondents..."

When DW6 was cross examined by Ms. Mndeme, the learned counsel, he admitted that he knew the farm had problems in 2012. That being the case, at the time of the alleged sale in 2015 to the plaintiff, no transfer or disposition could be valid. Sale was void ab initial as it was based on "fundamental flaw". No disposition and subsequent transfer could be said to be valid, See the case

of **Chandrakant Vinubhai Patel v. Frank Lionel Marealle and Another**
[1984] TLR 231, 235 (CA).

I understand under Order XX1 Rule 101 of the CPC any other party not being a judgment debtor, like the plaintiff in our case, can file a suit. No doubt he applied that provision. In his evidence PW1 said bought the suit land for Tshs 150,000,000/- and was given the sale agreement between the 7th defendant and Agroseed Company Limited (exhibit P3). He admitted did receive the eviction order from the court broker on 7/4/2017. He even admitted knew the said decree in settlement and court order (exhibit P5 and P6 respectively). He insisted that he was not a party in that case and that there was no caveat which was filed before he bought the suit land.

The defence on the other hand say the purported sale was without the Board Resolution granting mandate to Agro Seed Company to sell the suit plot to the 7th defendant. This fact was admitted by DW6. Further, the said DW6 admitted he filed Misc. Land Application No.183 of 2013 objecting the attachment (exhibit D1). This case was filed on 15/11/2013. However, while aware of that fact and even without blessing of the court where he had taken his matter, proceeded to sell the suit land on 15th December, 2013 to the

plaintiff. This, no doubt is a total disrespect of the court. If such conducts are condoned no doubt courts will be rendered toothless.

The argument that in Land Case Number 9 of 2012 the plaintiff was never involved nor was there any judgment or decree against him must be challenged by those who had interest by then in 2012-2013 not him whose interest arose in 2015. Even the argument that there was collusion between the 1st -4th defendants with the 5th defendant by registering settlement in the absence of other defendants are matters which must be dealt with in the same case file by setting aside the settlement deed.

I am aware the defendants have raised issue of fraud. It was held in the cases of **Hidaya Ilanga v. Manyama Manyoka** [1961] EA 705 and **Omary Yusufu v. Rahma Ahmed Abdulkadr** [1987] TLR 169 that in all cases where there is allegation of fraud, proof must be more than mere balance of probabilities.

One would pose and ask, if there was dubious deal done by the 7th defendant, could there be clean deal with the plaintiff. I would say no because even if there was not filed the caveat, still the 7th defendant knew that there was a suit and the remedy was not to bypass the legal machinery by sale.

Another anomaly which was brought to the attention of this court is the fact that although the 5th defendant had resigned from Directorship of Agro seed Company since 30/6/2011 as per exhibit D4, however according to DW6 Mr. Harpreet Brar says the Briella search in 2013 still revealed that the Directors were Taon Laizer and John Faul. He never tendered it.

The last point is that the sale and transfer of the suit land to the plaintiff from the 7th defendant would not have been effected since there was a consent order in favour of the defendants. This point has been strongly disputed by the plaintiff and his counsel in that it was ex parte against the 6th defendant. One would pose and ask, if the 6th defendant was aware, what measures did he take. This court has taken a note that the same advocate Mr. Deogratias Urassa, who appeared for the seller, the 6th defendant, had this time appeared for the purchaser, the plaintiff. In other words, he knew all what was supposed to be done, that is ensuring that the fate of the 6th defendant was solved first.

The learned counsel for the plaintiff brought to the attention of this court the case of **Leopold Mutembei v. Principal Assistant Registrar of Titles and Others**, Civil Appeal Number 57 of 2017 Court of Appeal at Mwanza and **Jafari Hussein Sinai & Another v. Silver General Distributors Ltd & Others**, Civil Appeal Number 271 of 2017 Court of Appeal at Tanga (both

unreported) to buttress his submissions. The cited case of **Leopold Mutembei** (supra) dealt with a situation where there was a lease agreement to occupy a commercial room. It dealt with situations where a party lodged his grievances. The Court of Appeal found remedy was to seek damages under the powers stated under section 100 (1) of the Land Registration Act, Cap 334 RE 2002 which deals with right to indemnity. The court held at page 17 of the judgment that:-

*"...the registration under a land titles system is more than the mere entry in a public register; **it is authentication of 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.**"* [Emphasis supplied]

However, that case has material facts different to this case where there was a decree in favour of the defendnats No.1-4. There was official search which was tendered unlike in our case. If the plaintiff was smart enough, ought to have joined the Commissioner for Lands and the Solicitor General. He did not bother even to call the Commissioner as his witness.

I have considered the testimony of the defence witnesses especially that of Toan Laizer (DW1), Alais Koina (DW2), Martha Toan (DW3), Rebeca Toan (DW4) and Nesian Toan (DW5). There is no clear cut evidence to show that

the land they rented to John Faul was with the alleged terms or there was such lease. The fifth defendant (DW1) said when he was examined by the court that the payment agreement before 2017 with John Faul was in writing while DW3 said it was verbally.

The plaintiff's advocate based on the fact that the land in dispute is a registered land which under *exhibit P1*, it was registered in the name of the plaintiff on 11th January, 2016. That he is the "owner" in relation to interest or estate in land which under section 2 of the Land Registration Act, (Cap 334) it means:-

"the person for the time being in whose name that estate or interest is registered."

Mr. Urassa, the learned counsel further referred to the Black's Law Dictionary (9th Ed) at page 1214, owner to mean **"one who has the right to possess, use and convey something...."**

It is true, *prima facie*, since the title deed is in the plaintiff's name he is presumed to be the owner unless otherwise proved to the contrary. Under section 119 of the Law of Evidence Act, Cap 6 of the Laws of Tanzania, (Cap 6) the defendants have *"the burden of proving that he is not the owner."*

As above shown, though the plaintiff is in possession of the suit land however the transfer and subsequent sale to him is tainted with fraud. Fraud was raised under paragraph 2 of the amended WSD that:-

"...the purported transfer of the ownership of the land in dispute was done aiming at avoiding the execution of the decree in Land case No. 9/2012 the act which is unlawful..."

That said, there is no disposition and transfer as well stated under section 41 (1) and (2) of the Land Registration Act, Cap 334 because there is an information which was not made known to the relevant authorities. The mere fact that there was no caveat, in my view is not a ground to find that the transaction was done with bona fide purchaser and seller. Consequently, I hold that the sale and transfer of the suit land from the 7th defendant to the plaintiff was unlawful. The purported lease of the suit land to Silvarsands Investment Limited cannot pass the litmus test based on the above reasons. Nobody who can pass title which he does not have. The plaintiff was duty bound to clear any doubt by the caveat emptor principle i.e buyer beware.

The fourth issue is *whether the sale and transfer of the suit land from the 7th defendant to the plaintiff were lawful?*

I have demonstrated this issue at length in the preceding paragraphs. Reading from the cross examination and paragraph 4 of the amended written

statement of defence by the 1st to 5th defendants jointly, it is averred that the 7th defendant could not own and transfer title to the plaintiff since he is a foreigner. In reply, and even in his submissions, the plaintiff's counsel averred that the said defendant is a Tanzanian National with copy of Tanzanian passport. He even submitted that even assuming this point is sailable, still if the first transfer was lawful i.e from Agroseed Company Limited to the 7th defendant, then the second transfer from the latter to the plaintiff cannot be unlawful. He insisted that it was almost a year after the registration in the name of Agro Seed Company Limited. That there was no court order or caveat filed against the certificate of title thereto and therefore the defence must fail. The learned counsel referred to sections 36 to 40 and 61 of the Land Act, Cap 113 (Cap 113) and section 35 of Cap 334 to fortify his assertions. The defence never adduced proof that indeed the 7th defendant is a foreigner.

Issue of a foreigner, I must say touched on the sellers of the suit plot to him not otherwise. This takes me to another point as to *whether the registration of the suit land in the name of Agro seed Company Limited was lawful?*

The evidence shows that the land was previous owned by Toan Laizer (5th defendant). It is further stated that the 5th defendant transferred the suit land to Agro Seed Company Limited. This is evidenced by the letter dated 30th

June, 1994 in which he requested the Land Office to issue certificate of title in the name of the said company. According to the evidence on the record, the procedures were followed. In *exhibit P1*, the title to the company was registered on 8th February, 2000. There is an argument by the 1st to 4th defendants that they were not aware if their husband (5th defendant) formed the Agro Seed Company in partnership with John Faull. I hasten to say that this argument is shallow and must be rejected. I say so because at the time of registering the settlement deed, the 5th defendant was quite aware that the land belonged to Agroseed Company. It is also on the record that during cross examination, the 5th defendant admitted to have sold the suit land to John Faul in which the sale agreement was made at the Village Office. Under section 5 of Cap 334, it is provided that the signature of the Registrar to be judicially noticed. In view of *exhibit P1*, there is an endorsement with the seal of the Moshi Land Registry and signature of the Assistant Registrar of Titles stating that the title to the suit land was registered in the name of the said Agro seed Company. Mr. Urasa is of the view that *exhibit P1* does not only prove the state of ownership of the suit land but also confirms the underlying transactions that conferred or terminated respective titles to the persons named therein.

That, the Commissioner for Lands, no doubt, would have denied approval and the Registrar of Titles as well as refusal for registration if there were

anomalies in the process including the allegation that the company was owned by the foreigners. That by the time the suit land was first registered there was no limitation on land ownership by foreigners unless it is for "investment purposes under the Tanzania Investment Act, Cap 38" citing section 20 (1) of the Land Act Cap 113 RE 2002.

This court has this to say, at time of the registration of the suit land in the name of Agroseed Company, it was lawful. However, at the time the 6th defendant purchased the suit plot its status has changed as the sellers were not Taon Laizer and John Faul as per the search, a fact he admitted. The term purchaser under section 39 (4) of the Companies Act, Act No 12/2002 is defined as:-

"Purchaser means a purchaser in good faith for a valuable consideration...acquires interest in property."

The 6th defendant did not purchase in good faith. He never acquired interest or title over same just like the plaintiff.

Now, on the point as whether there was demolition of 19 houses. This question was raised by the 1st to 4th defendants in their counter claim. They claimed the total value of the houses demolished to be 190,000,000=.

However, the said defendants have not been able to prove their claim to the

required standard for the following reasons, first even the 5th defendant admitted that they were built by John Faul. None of the defendants above listed, could say its actual construction costs let alone the value of each hut. DW3 (Martha Toan) says she saw the plaintiff demolishing the houses. DW2 (Alaisi Koina) testified that he did not know the number of the houses whereas DW1 (Toan Laizer) testified that he was not sure if the plaintiff demolished houses. In summary there is no coherency in the testimony of the defendants regarding the counter claim about the houses alleged to have been demolished. Suffice to say that they never owned same. I agree with the plaintiff's evidence that actually there are four buildings which are not the properties of the defendants No.1-4. The counter claim is bound to fail.

The last issue is on the reliefs. After finding no liability on the part of the plaintiff regarding the counter claim, I proceed to hold that nothing to award the defendants. Similarly, the plaintiff claimed for unspecified sum of general damages. It is bound to fail. I am aware court can grant general damages, however, in view of the decision of the Court of Appeal in the case of **Masolele General Agencies v. African Inland Church Tanzania** [1994] TLR 192 (CA),

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one..."

Such claim for damages which had not been proved is equally dismissed. I award none.

In conclusion therefore, neither the plaintiff nor the defendants are declared as the lawful owners of Farm Number 745 held under Certificate of Title No. 15011 located at Loiboserat Village Simanjiro District Manyara. It is a trite law that he who alleges must prove. In **Abdul Karim Haji v. Raymond Nchimbi Aloyce & Another**, Civil Appeal No.99 of 2003 (unreported) the Court of Appeal stated that:

"...It is an elementary principle that he who alleges is the one responsible to prove his allegations."

The 5th defendant signed acknowledging receipt of money Tshs 4,000,000/- In law, he is estopped to claim it again. According to **Halsbury's Laws of England**, 4th edition, Vol 9 paragraph 284 at page 162 it provides that:-

"Now the principle is that a man is estopped by his signature thereon from denying his consent to be bound by the provisions contained in that deed or other agreement..."(exception to this rule is on plea of non est factum).

Having found, neither the plaintiff nor the defendant has title over the suit plot, what then can this court do? This court has powers under section 99 (1) (d) of the Land Registration Act, Cap 334, RE 2004 for rectification of the land register if there is proof that Registration over the title was obtained by fraud. The defendants have successfully shown that there was fraud because at the time when John Faull and his wife owned that suit plot without the indigenous Tanzanian the law which did not allow foreigners to own land was in force under section 20 (4) and (5) of the Land Act, Cap 133 RE 2002. The said provision reads:-

"(4) For the purposes of this Act, any body corporate of whose majority shareholders or owners are non-citizens shall be deemed to be non-citizens or foreign company's.

(5) At the expiry, termination or extinction of the right of occupancy or derivative right granted to a non-citizen or a foreign company, reversion of interests or rights in and over the land shall vest in the Tanzania Investment Centre or any other authority as the Minister may prescribe in the "Gazette".

I say so because Taon Laizer (5th defendant) resigned as a Director on 30th June, 2011 while the said law came inforce on 1st day of May, 2001 vides GN No. 485 of 2001. This is a matter of policy. The remedy is revocation under section 45 of the Land Act, Cap 113. It reads:-

"45. (1) Upon any breach arising from any condition subject to which any right of occupancy has been granted, the right of occupancy shall become liable to be revoked by the President.

(2) The President shall not revoke a right of occupancy save for the good cause. In this subsection "good cause" shall include the following—

(i) ***there has been an attempted disposition of a right of occupancy to a non-citizen contrary to this Act and any other law governing dispositions of a right of occupancy to a non-citizen...*** (Emphasis mine)

I order that Land described above reverts back to the Village council. The plaintiff and the defendants are hereby restrained not to deal with such land be it in their personal capacity or as a leader(s). The mandate is vested to the Village council of Loiboserat Village until such time as the Minister responsible for Land may direct. No doubt, even the Loiboserat Villagers will benefit from the 1000 acres either through the investment or otherwise instead of the plaintiff who wants to make use of his position in the Village to benefit from something not owned legally. If he has any claim he should claim against the 7th defendant. The suit and counter claim are dismissed with no order for costs.




M. G. MZUNA,
JUDGE.
03.07.2020