

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

LAND CASE 20 OF 2017

CHRISTINA JALISON MWAMLIMA &

ROBERT JALISON MWAMLIMA (Administrators

of the Estate of the late **JALISON MWAMLIMA**).....**PLAINTIFFS**

VERSUS

HENRY JALISON MWAMLIMA.....**1ST DEFENDANT**

NBC BANK PLC.....**2ND DEFENDANT**

VITUS MGAYA.....**3RD DEFENDANT**

JUDGEMENT

Date of Hearing : 02/07/2021
Date of Judgement: 19/08/2021

MONGELLA, J.

Following grant of letters of administration for the estate of the late Jalison Hayola Mwamlima, their biological father, the plaintiffs instituted this suit against the defendants. The suit concerns a landed property situated at Plot No. 25 Block "H" Tunduma area within the district of Momba in Songwe region.

In their plaint as well as testimonies, the plaintiffs claimed that the suit premises belonged to their late father, Jalison Hayola Mwamlima, who

died intestate on 25th December 1977. After his death, his estate was put under the trust and care of his brothers named Brackson Hayola Mwamlima and Godfrey Hayola Mwamlima, as the deceased's children were still infants. In 1997, the deceased's brothers handed over the title deed of the suit premise to the deceased's children. The 1st defendant, who is the brother of the plaintiffs, took the title deed for safe custody on behalf of the rest of the beneficiaries of the deceased's estate.

Sometime in 2014, the rest of the beneficiaries were surprised to learn that in 2005 the title to the suit premise was transferred in the name of the 1st defendant. They claimed that the said transfer was fraudulently done. The 1st defendant also obtained a loan from the 2nd defendant by mortgaging the suit premise. The suit premise is a business complex harbouring a number of shop rooms. The 3rd defendant rented one of the shop rooms through the 1st defendant. The plaintiffs claim arrears of rent from him and that is the basis of suing the 3rd defendant.

The 1st defendant denied the claims. He claimed to be the lawful owner of the suit premise having obtained the same from his late father's 3rd wife. He claimed that the property is registered in his names thus legally his property.

The second defendant denied the plaintiffs' claims on the ground that the mortgage transaction entered between him and the 1st defendant is legal having been duly registered under the law. He claimed that at the time of registration there was no encumbrance or caveat on the title of



the mortgaged property showing that the plaintiffs have interest on the said property.

The 3rd defendant claimed to have fully paid the rent as per the contract he entered with the 1st defendant who he had privity of contract with. He disputed the plaintiffs' claims that he was to pay the rent to them as administrators of the deceased's estate.

On the final pre-trial conference five issues were framed in consensus with all the parties for smooth determination of this matter. The issues are:

- (i) *Whether the suit premise formally formed part of the estate of the late Jalison Mwamlima.*
- (ii) *Whether the 1st defendant is the lawful owner of the suit premise.*
- (iii) *Whether the mortgage transaction between the 1st defendant and the 2nd defendant is valid*
- (iv) *Whether the contractual arrangement between the 1st defendant and the 3rd defendant is valid.*
- (v) *To what reliefs are the parties entitled to.*

Both parties had legal representation. The plaintiffs were represented by Mr. James Bedron Kyando; the 1st and 3rd defendants were represented

by Mr. Bak Mwabukusi and Ms. Caroline Luhungu; the 2nd defendant was represented by Ms. Rashida Jamaldin Hussein, all learned advocates.

During the hearing the plaintiffs mounted five witnesses to prove their case, the 1st and 3rd defendants mounted three witnesses, and the 2nd defendant mounted one witness. I shall deal with their testimonies while deliberating on the issues framed.

The dispute on the first issue is on whether the suit premise formed part of the estate of the late Jalison Mwamlima. As per the testimony of PW1, PW2, PW3, PW4, DW1, and DW2 the suit premise used to be commercial cum residential whereby the late Jalison Mwamlima, the father to the plaintiffs and the 1st defendant, used to live with his 3rd wife, one Bertha Shitindi (PW4).

PW1, Christina Mwamlima, who is the daughter of the late Jalison Mwamlima, specifically testified that the house in dispute belonged to the deceased. She said that after the demise of his father, her uncles one Brackson Mwamlima and Godfrey Mwamlima cared for the house in dispute and other deceased's properties for about 20 years and paid for their education. Their uncle then handed over the house to them before a clan meeting. This followed her and her siblings requesting for the said house to be handed over to them.

PW2 testified almost similar to what PW1 testified. He added that the house was handed to them in 1997 and by that time the title deed was in the name of their deceased father. PW3, Brackson Mwamlima, who is the

younger brother of the deceased also said that the house was handed to him and his brother Godfrey Mwamlima to care for after the demise of their brother, Jalison Mwamlima. He said that his deceased brother owned the house and he used to live in the said house with his 3rd wife whereby they used to live at the back and at the front there was a shop. He said further that when her deceased brother's children grew up, they asked them to hand over the house to them so that they can do business with it. Given the request, a clan meeting was conducted and the documents/titles and keys to the house were handed before clan members. To be specific, he said that he handed the documents and keys to the deceased's mother for her to hand it over to the deceased's children. He said that the house was in the name of Jalison Mwamlima when he handed it back.

PW4 was the deceased's third wife named Bertha Shitindi. She testified that the house in dispute belonged to her late husband and she used to live at the said house with her late husband. She added that the house was handed to the children when they grew up, however the 1st defendant changed the names in the title deed to his name.

PW5 one Boniface Novati Shayo, an officer from the land department, testified that the records in their office show that the property in dispute had no previous owner. That, the record shows Henry Mwamlima (the 1st defendant) is the first owner. He said that Henry Mwamlima was allocated the land after he presented a letter showing that one named Godfrey Mwamlima, who used to supervise the property, asked the Mbozi Municipality to transfer the property to his nephew, Henry Mwamlima. The

said letter also stated that the land belonged to his late brother named Jalison Mwamlima. He said that the 1st offer was issued in 2003 and was for a short term of one year. The 2nd offer was issued in 2005 and was a long term offer. The title deed was issued in 2011.

The 1st defendant (DW1) on his part, maintained that the house does not fall under the estate of his late father, Jalison Mwamlima. Just like the prosecution witnesses, he reiterated that his late father had three wives whereby the 3rd wife used to live at the house in dispute. However, on those bases, he said that the house in dispute was given to the 3rd wife by his late father, thus never belonged to his late father, but to the 3rd wife. He was of the stance that his late father distributed his properties inter-vivos when he was still alive.

DW2, the 2nd wife of the deceased Jalison Mwamlima and biological mother to the 2nd plaintiff and the 1st defendant, claimed that the house in dispute was hers having acquired the same from her brother who used to live in Zambia. She said that she allowed the house in dispute to be used by the 3rd wife, Bertha Shitindi because Bertha had nowhere to go. She added that she is the one who gave the house in dispute to the 1st defendant, his own son. On cross examination she said that the 1st defendant also knew that the house in dispute belonged to her brother.

I have considered the testimonies of the witnesses as presented above. Though PW1, PW2, PW3 and PW4 stated that the title deed to the house in dispute was in the name of the deceased Jalison Mwamlima at the time the house was handed over to the deceased's children, no documentary

proof to that effect was tendered in court. PW5 also proved that there was no such document as the record at the land office shows that there was no previous owner prior to Henry Mwamlima.

On the other hand however, PW1, PW2, PW3, PW4 and DW1 testified that the house used to be occupied by the deceased, Jalison Mwamlima and his 3rd wife, Bertha Shitindi (PW4). The testimonies of all these witnesses, in my view, prove that the premises had an owner prior to being registered in the 1st defendant's name, though no documentary proof was presented to that effect.

DW1's defence is that the said house was given inter-vivos to PW4 by the deceased, Jalison Mwamlima. The law under **section 110 (1) and (2) of the Evidence Act, Cap 6 R.E. 2019** requires a person asserting the existence of facts to prove that those facts really exist. In consideration of this position of the law, I find the allegation by DW1 to this fact unfounded. This is because DW1 just uttered mere statement with no proof that the house was given to PW4 inter-vivos by the deceased. He could not state as to when the said house was exactly given inter-vivos to PW4 and who the witnesses to that event were. PW4 herself, who is claimed by DW1 to have been given the house by the late Jalison Mwamlima, did not testify to this fact. She specifically stated that the house belonged to her deceased husband. If she was really given the house to own she should have known that fact.

It is not disputed that the late Jalison Mwamlima had three wives and each wife stayed at a different house. However, in my view, placing each

wife at her own house does not make the property solely belonging to the said wife. The deceased had three houses whereby he placed each of his wives at one of the houses. By doing that he did not lose his rights in ownership of the said houses. He must have had a share to the properties he shared with his wives. The said share falls under his estate and thus subject to administration.

In addition, the 1st defendant's witness (DW2) gave a contradictory testimony saying that the house was hers having obtained the same from her brother who lives in Zambia. She said that she is the one who gave the house in dispute to the 1st defendant. With all due respect, I find the contradictions between the testimony of DW1 and DW2 being material and going to the root of the matter. This is because they contradicted themselves as to who exactly owned the property before the demise of Jalison Mwamlima, which is core in determination of this first issue. The law is trite to the effect that material contradictions between the witnesses' testimonies put the credibility of their testimony into question. The contradictions between the DW1 and DW2 diminish the credibility of their testimony. See: **Ernest Sebastian Mbele v. Sebastian Sebastian Mbele & 3 Others**, Civil Appeal No. 66 of 2019 (CAT at Iringa, unreported).

Further, if the house in dispute really belonged to DW2, it does not make sense that the same was placed in the hands of the deceased's young brothers to care for. DW2 stated that she had to let PW4 live in the house as she had nowhere to go. I do not subscribe to her testimony simply because there was no any other piece of evidence to collaborate her story. In addition, in my view, if that was true, then the house should have

been placed in the hands of PW4 and not the deceased's brothers. Further, if that was true, DW1, her biological son, who she claimed to have given the said house, should have known the said fact and testified in court as such. DW1 maintained all the time that the house belonged to PW4. PW4 on the other hand, maintained that the house belonged to her late husband, Jalison Mwamlima.

In consideration of the observation I have made above, it is my finding that the house in dispute belonged to the late Jalison Mwamlima, thus forming part of the estate of the late Jalison Mwamlima.

The second issue is on whether the 1st defendant is the lawful owner of the suit premise. While the plaintiffs claim that the 1st defendant illegally changed the ownership of the house in dispute to himself, the 1st defendant claims to be the rightful owner. The 1st defendant claims as such basing on two main grounds. One, that, the title to the house in dispute is registered under his name and that no title in the name of Jalison Mwamlima or other name was tendered in evidence.

Two, that, he got the house from his late father's 3rd wife (PW4), on an agreement that he builds her a house to live in. As pointed out while deliberating on the first issue, he claims that the house in dispute belonged to his late father's 3rd wife (PW4) who was given the said house inter vivos while his father was still alive. To this point, he testified that he fulfilled the agreement he had with PW4 by building her a house in her father's compound. He added that PW4 was not satisfied with the said house as it was in her father's compound and thus he bought her another

house. He said that both houses are in possession of PW4 whereby she lives in one house and has rented out the other house.

On her part, PW4 testified further that she agreed to vacate the house and handle it to the family on an agreement that she be given an alternative accommodation and that she be given five (5) rooms for business at the house in dispute upon the same being renovated.

As much as no title in the name of Jalison Mwamlima was tendered in court, it was not disputed that the late Jalison Mwamlima lived in the house in dispute with PW4. Having ruled on the first issue that the house in dispute or rather part of it, which formed part of his share forms part of deceased's estate, I move to deliberate on whether the title deed issued in the name of Henry Mwamlima, the 1st defendant, was lawful.

In allocating land /issuing title deeds, the land office does not act on mere words from the applicant on how he/she came to possess the land he seeks to be issued title deed. If the person says he purchased the same from someone there has to be a sale agreement to that effect. If someone exchanged his/her land for something else, like the 1st defendant claims in the case at hand, there has to be an agreement to that effect.

In the matter at hand, the 1st defendant claims that there was no any written agreement but oral agreement with PW4 to the effect that she gives him the property in exchange of him building her a house somewhere else. DW1 did not state which document he presented at the

Land Office to move it to allocate the land to him and issue the title deed thereof. PW5 on the other hand, testified that the document acted upon by the land office to issue the title deed in the 1st defendant's name was a letter presented to them by the 1st defendant which came from one Godfrey Mwamlima. The said letter stated that the house belonged to his late brother Jalison Mwamlima and he wanted it to be in the name of Henry Mwamlima. To this point, I am inclined to believe in the testimony of PW5, that the document that moved the Land Office to issue the certificate of title in the name of the 1st defendant was the letter from Godfrey Mwamlima.

The testimony of PW5 provides further proof that the property in dispute belonged to the late Jalison Mwamlima. In my settled view however, the land office acted wrongly on the said letter. The author of the said letter, that is, the said Godfrey Mwamlima, was not the owner or administrator of the deceased's estate. The house being under his supervision did not confer him the powers of an administrator of the deceased's estate to distribute the properties. A person acquires powers to administer the estate of the deceased upon being granted letters of administration by a court of competent jurisdiction. Godfrey Mwamlima therefore did not have powers to pass the title to the 1st defendant as he possessed none. See: **Paschal Maganga v. Kitinga Mbarika**, Civil Appeal No. 240 of 2017 (CAT at Mwanza, unreported); **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205. Under the circumstances, the land office illegally issued the title deed on Plot No. 25H to the 1st defendant without the same being properly bequeathed/distributed to him under administration of his deceased's father's estate. The said title deed is thus a nullity.

With regard to the third issue, it is the plaintiffs' contention that the mortgage transaction between the 1st defendant and the 2nd defendant is illegal for having being transacted over a family property without involving family members. DW4, one Harold Dalton Ngogolo, an official from the 2nd defendant bank, testified on behalf of the 2nd defendant in proof of this issue. He testified that the 1st defendant is a client of the 2nd defendant whereby he obtained an overdraft loan of T.shs. 50,000,000/- from their Tunduma branch.

DW4 continued to testify that the 2nd defendant conducted all due diligence before issuing the loan, including confirming on the ownership of the security property from the land department. He said that the 1st defendant fulfilled all the requirements to the satisfaction of the bank and that is why the loan was issued to him. The same was followed by signing the mortgage deed. The loan was issued for additional capital on hardware, guest house, bar and restaurant business for the 1st defendant. It was for one year, but renewable in one year interval. This is evidenced in the credit facility letter admitted in evidence as "exhibit D2." The mortgage deed was also admitted in evidence as "exhibit D1." The deed was executed on 25th May 2012 and charged as security property with CT No. 18620 MB-MBYLR Plot No. 25 Block H-Tunduma urban area, the property in dispute.

I have already ruled out that the certificate of title to Plot No. 25 Block H, the property in dispute, was illegally issued to the 1st defendant as the property formed part of the estate of the late Jalison Mwamlima and was issued to the 1st defendant without the same passing through

administration of the estate. The said certificate of title to the land in dispute is a nullity. In the circumstances, whatever transaction conducted by or on behalf of the 1st defendant in connection with property in dispute becomes a nullity as well.

However, on the other hand, in consideration of the fact that the 2nd defendant acted in good faith and diligently in issuing the loan to the 1st defendant, a loan issued to boost the 1st defendant's own private business, as per exhibit D1, the 2nd defendant is entitled to go after the 1st defendant's private properties to recover the outstanding loan balance with the 1st defendant.

The fourth issue concerns the lease contract entered between the 1st defendant and the 3rd defendant on the property in dispute. The plaintiffs claim against the 3rd defendant for vacant possession of the room rented to him and for a sum of T.shs. 1,800,000/- being arrears of rent from January 2017. They claim that the 3rd defendant refused to pay the rent despite being aware of the outcome of the case instituted in the primary court against the 1st defendant and the warnings by the local government leaders on dealing with the 1st defendant over the property in dispute.

The 3rd defendant testified as DW3 defending against the plaintiffs' claim. In his testimony he conceded being a tenant in the house in dispute. He said that he usually pays rent to the tune of T.shs. 1,800,000/- per annum and pays the same to the 1st defendant who is his landlord. He said that he has never been in any arrears as he usually paid his rent on time to the

1st defendant. On cross examination, he said that he never knew if the plaintiffs were appointed administrators of the late Jalison Mwamlima's estate. He denied the two demanding any rental money from him.

Considering the testimony of the witnesses with regard to the liability of the 3rd defendant, I find that it is not disputed that the 3rd defendant rented a room at the house in dispute for T.shs, 1,800,000/- per annum. The dispute therefore is on whether the 3rd defendant was obliged to pay the rent to the plaintiffs as administrators of the estate of the late Jalison Mwamlima or to the 1st defendant. In my considered view, the 3rd defendant entered into a lease contract with the 1st defendant in 2000 whereby he has been paying the rent to him annually. He believed that the 1st defendant was the legal landlord. The privity of the lease contract was thus between the two. The plaintiffs on their part did not tender in evidence any demand letter formally informing the 3rd defendant that the property is under their administration and thus the rent should be paid to them and not to the 1st defendant. Under the circumstances, it becomes difficult to refute DW3's claim that no rent was demanded from him by the plaintiffs and that he had no idea if the plaintiffs were administering the deceased's estate.

The plaintiffs claimed that the 3rd defendant refused to pay the rent to them despite being aware of the court decision in Criminal Case No. 30 of 2015 in the District court of Mbozi that convicted and sentenced the 1st defendant over the plot in dispute. The plaintiffs however provided no proof as to whether the said decision was communicated to the 3rd defendant. Further, I have read the said judgment and found that the 1st

defendant was not convicted and sentenced with respect to plot no. 25 H. He was charged with two counts on the offence of forgery and one count on the offence of false swearing. The court acquitted him on the two counts of forgery. It convicted and sentenced him on the offence of false swearing. However, as seen at page 28 of the said judgment, the offence concerned plot no. 4 Block "C" with CT No. 14061 L.O. No. 19732, which is not the property in dispute in the case at hand. The said judgment therefore has no bearing on the claims against the 3rd defendant.

In my settled view therefore, the 3rd defendant bonafidely paid his rent to the 1st defendant whom he believed to have been the legal landlord. In my considered view, the person responsible to remit the rental dues to the plaintiffs, as administrators of the deceased's estate, is the 1st defendant.

To this juncture I move to the fifth issue concerning reliefs entitled to the parties. Among the reliefs claimed in the plaint are general damages upon assessment by the court. It is settled under the law that general damages are payable upon proof of the loss or injury suffered. See: **National Bank of Commerce Limited v. Lake Oil Limited**, Commercial Appeal No. 5 of 2014 (HC Commercial Div. at DSM, unreported); **MS FishCorp Limited v. Ilala Municipal Council**, Commercial Case No. 16 of 2012 (HC Commercial Div. at DSM, unreported); **Dr. Abraham Israel Shuma Maro v. National Institute for Medical Research (NIMR) and the Attorney General** [2015] LCCD 161; **Marine Services Company Ltd. v. Willbard R. Kilenzi** [2015] LCCD 133; and **Tanzania Breweries Limited v. Nancy Morenje** [2015] LCCD 17 just to mention a few.

It is however, unfortunate that in their testimony, both plaintiffs never demonstrated the loss suffered entitling them to be awarded the general damages. Having failed to demonstrate any injury or loss suffered as a result of the defendants' actions I shall not award any general damages. The following reliefs are therefore awarded to the parties:

1. The property in dispute situated at Plot No. 25 Block H Tunduma is declared to form part of the estate of the late Jalison Hayola Mwamlima, thus subject to administration by the plaintiffs who are the legally appointed administrators of the deceased's estate.
2. The certificate of occupancy on Plot. No. 25 Block H Tunduma issued in the names of the 1st defendant, Henry Hayola Mwamlima was illegally issued, thus hereby nullified.
3. The responsible Land Office shall issue a new certificate of occupancy in the names of all the persons whom the property in dispute, that is, Plot No. 25 Block H Tunduma, shall be distributed to by the administrators of the deceased's estate.
4. The mortgage transaction between the 1st defendant and the 2nd defendant is declared a nullity following nullification of the certificate of occupancy on the plot in dispute, that is, Plot No. 25 Block H Tunduma, issued in the names of the 1st defendant. The 2nd defendant is permanently restrained from interfering with the property in dispute in connection with the mortgage transaction.

5. Should the 2nd defendant wish to recover the loan advanced to the 1st defendant through mortgage of the property in dispute, he is entitled to go after the 1st defendant's private properties in accordance with the relevant legal procedures.
6. The 3rd defendant is not liable to pay the arrears of rent to the plaintiffs. However, he should vacate the suit premise after his rent is over unless another arrangement is entered with the rightful owners or administrators of the deceased's estate if the property shall still be in their hands.
7. The 1st defendant is liable to pay to the plaintiffs the arrears of rent he collected from the 3rd defendant from January 2017 to the last date the said rent was paid to the tune of T.shs. 1,800,000/- per annum.
8. Costs of the suit to be borne by the 1st defendant to the plaintiffs. The 2nd and 3rd defendants to bear their own costs of the suit.

Dated at Mbeya on this 19th day of August 2021.




L. M. MONGELLA
JUDGE

Court: Judgement delivered in Mbeya in chambers on this 19th day of August 2021 in the presence of the plaintiffs, the 1st and 3rd defendants, and Ms. Edna Mwamlima, learned advocate, holding brief for the plaintiffs' advocate, Mr. James Kyando.


L. M. MONGELLA
JUDGE