

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND APPEAL No. 57 OF 2019

**(Arising from the decision of the Registrar of Titles given on 24th
September, 2019)**

CHARLES NDESSI MBUSIRO.....APPELLANTS

VERSUS

1. THE ASSISTANT REGISTRAR OF TITLES.....1ST RESPONDENT

2. ROBERT CHACHA MABOTO.....2nd RESPONDENT

JUDGMENT

26th July & 09th August, 2021

TIGANGA, J.

This is an appeal against the decision of the Registrar of Titles of issuing 30 days notice to the appellant with the intention of removing the caveat lodged by the appellant in respect of the land located on plot No. 65 Block T in Mwanza City. The Notice was informing the appellant of the intention of the registrar to remove the caveat, to transfer the right of occupancy to the 2nd respondent after accepting the application for change of ownership lodged by the 2nd respondent whose ownership has been revoked by the District Court of Nyamagana in Civil Revision No. 04 of 2018.

The land subject of these proceedings is on Plot No. 65 Block "T" in Mwanza City and the grounds of appeal are as follows;

1. That the Registrar of Titles erred in law and facts by issuing 30 days notice to the appellant with the intention of removing the caveat and register the transfer of the right of occupancy to the second respondent,
2. That the assistant Registrar of Titles erred in law and facts by accepting the application for changing ownership to the second respondent whose ownership has been revoked by the District Court of Nyamagana in Civil Revision No. 04 of 2018.

The orders sought are for this court to quash and nullify the decision of the Assistant Registrar of Titles and declare the transfer of title to the 2nd respondent to be *void ab initio* and grant the costs of the appeal.

The appellant was represented by Mr. Elias Hezron, learned counsel, the 1st respondent was represented by Ms. Subira Mwandambo, and learned State Attorney from the office of Solicitor General and the 2nd respondent was represented by Mr. Malick Khatib Hamza, learned counsel.

With the leave of this court, the appeal was argued by way of written submissions and counsel filed their respective submissions as scheduled by the court.

The background of the matter as can be deciphered from the record and submissions filed in support and against the appeal is as follows. The house in question was listed as one of the properties forming the estate of the late Ahmad Makusudi in Probate Cause No. 55 of 2004 in which one Karume J. Makusudi was an Administrator of the Estate. It is alleged that the appellant bonafidely purchased the said house from the Administrator in that case. However, the same house seems to be and forms a list of the estate in another Probate Cause No. 176 of 2016, under which the second respondent also purchased the said house. It was after the second respondent had purchased the said house when he applied to the Registrar of Titles to transfer the ownership of the said plot in his names.

As the appellant had already lodged caveat in respect of the same plot following his purchase of the same, the Registrar of Titles had to serve him a notice of intention to remove the caveat and register the transfer of the right of occupancy to t it. Believing

that he still possesses interest in the property, the appellant appealed to this court asking for the orders listed herein above.

In his submission in chief the counsel for the appellant submitted that the applicant has demonstrated good ground upon which the caveat could be entered in terms of section 78(1) of the Land Registration Act, [Cap 334 R.E 2019] therefore the first respondents intention to cancel the said caveat and proceed to transfer the title to the second respondent was unlawful. He therefore prayed for the first ground to be allowed.

Regarding the second ground, he submitted that the appellant bought the said land on 14/12/2015 as indicated in the caveat registered on 20/02/2019. He submitted that the second respondent's interest emanates from probate No. 176 of 2016 which was filed one year after the appellant had purchased the said plot in question. He informed the court that, the question of the legality of both probates that is Probate No 55 of 2004 and Probate No. 176 of 2016 was tested in the case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 Others vs Charles Ndessi Mbusiro**, PC. Probate Appeal No. 11 of 2019 in which it was observed that the appellant was a bonafide purchaser of the property in question vide Probate No. 55 of 2004 the

decision which has never been reversed by the court competent to do so. He submitted further that, the High Court removed the said property that is Plot. No. 65 Block "T" from Probate No. 176 of 2016 on the reasons that, as the same property had already formed part of the list of the estate in the Probate Cause No. 55 of 2004. He submitted that as the decision in the case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, PC. Probate Appeal No. 11 of 2019 has never been reversed by the competent court, then the Registrar of Titles is bound by the decision.

The submission in reply filed by the learned State Attorney was straight forward that the appellant had not proved that he actually purchased the same plot from Karume J. Makusudi being the Administrator of the estate of the late Ahmad Makusudi in Probate 55 of 2004.

He also submitted that ownership was not an issue in the case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, PC. Probate Appeal No. 11 of 2019, the court dealt with probate matters, and the court did not in any way deal with the matter of ownership, there was no way for the court to conclude that the appellant was a bonafide purchaser of the plot.

He said the appellant has never produced any evidence of disposition of the said plots. She referred this court to section 68(1) of the Land Registration Act, Cap. 334 which provides that;

"No assent to the vesting of any devise or bequest of any registered estate or interest, or disposition by a legal personal representative, shall be registered unless such estate or interest is registered in the name of such legal personal representative."

It was her submission further that, the appellant did not prove to have complied with the provision quoted above, or to submit any proof that the appellant was a bonafide purchaser of the plot. She in the end submitted that, the appeal has no leg to stand on, and asked the same to be dismissed with costs.

In his reply the counsel for the 2nd respondent submitted that, the allegations that the appellant is a bonafide purchaser is not supported by any evidence, he said the judgment in **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, (supra) did not settle the issue of legality of the alleged purchase because that was not a key issue in the appeal. He also submitted that the said plot was owned in common by three deceased brothers involved in Probate Causes No. 55 of 2004 and 176 of 2016 all

before the same Primary Court administered by the three Administrators. Therefore any alleged disposition was under section 159(4)(a) of the Land Act, [Cap. 113 of R.E 2019] supposed to involve them all and be made jointly by all joint occupiers or occupiers in common or their respective legal representatives also acting jointly. He reminded the court that, the appellant never proved the disposition jointly made by the occupier in common or their legal representatives of all three deceased who were occupiers in common. He submitted that when the appellant filed his appeal did not attach any document proving his interest, but came to attach the proof in the submission filed in support of the appeal is has no effect of proving the said interest in the land, as the submission are not evidence nor are the authorities annexed, he referred me to the case of **Bruno Wenslaus Nyalifa vs The Permanent Secretary Ministry of Home Affairs and the honourable Attorney General**, Civil Appeal No. 82 of 2017, CAT Arusha (unreported).

He also relied on section 67 and 68 of the Land Registration Act, that the same were not complied with therefore the 1st respondent was justified to issue such notice as there was no proof of the appellant's interest.

Regarding the second ground of appeal, he submitted that the decision in the case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, (supra) was dealing with probate matter not interest on land, he submitted that the appeal be struck out for lack of merits.

In rejoinder submissions the appellant reiterated what he submitted in chief but he insisted that he was declared the bonafide purchaser in the case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, (supra). Therefore he prayed that his appeal be allowed because he managed to establish sufficient interest in the case.

That being a summary of the submission made by the counsel for the parties, in dealing with this appeal I will straight away start with pointing out that by virtue of section 101 and 102 of the Land Registration Act, [Cap 334 R.E 2019] this Court is mandated to hear the appeal arising from the decision or act of the Registrar of Titles.

In this the act of the Registrar of Titles which triggered this appeal is the act of issuing a notice to remove the caveat lodged by the appellant against the disposition of land or interest in the property located on plot No. 65 Block "T". The caveat was lodged on the ground

that the appellant purchased the said land from Karume J. Makusudi who was the Administrator of the estate of the late Ahmad Makusudi in Probate Cause No. 55 of 2004 which was filed in Mwanza Urban Primary Court of Nyamagana District. The caveat was entered under section 78 of the Land Registration Act, (supra) which provided as follows;

(1) Any person who claims an interest in any registered land, or any person who has presented a bankruptcy petition against the owner of any estate or interest, may present a caveat in the prescribed form,

(2) Every such caveat shall be supported by a statutory declaration stating the facts upon which the claim is based,

(3) Upon receipt of any such caveat, the Registrar shall enter the same in the land register as an incumbrance and shall notify the same to the owner of the estate or interest thereby affected,

(4) The High Court, on the application of the owner of the estate or interest affected, may summon the caveator to attend and show cause why such caveat should not be removed and thereupon the High Court may make such order, either ex parte or otherwise as it thinks fit,

(5) Any person who has presented a caveat may at any time withdraw the same by a notice in the prescribed form executed and attested in the manner required for deeds by sections 92 and 93,

(6) If a deed is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar shall give notice thereof to the caveator and shall suspend registration of such deed for one month from the date of such notice. At the expiration of such period, the caveat shall lapse and the deed shall be registered as at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs,

(7) The interest protected by a caveat may not be made the subject of a second caveat so as to defeat the provisions of subsection (6).

From the provision above, it goes without saying that in the first place the appellant acted under subsection (1) and (2) by lodging the caveat while the Registrar of Titles acted under subsection (3) to register the same. However after receiving the application by the 2nd respondent the Registrar of Titles acted under subsection 6 by issuing the appellant the notice of his intention to vacate or remove the caveat and register the transfer of the said plot in the name of the 2nd respondent and the appellant basing under the same subsection 6 and section 101 and 102 of the same Act, lodged this appeal.

It should be noted that this is not a land dispute case where parties are to prove their ownership; it is an appeal against the decision

or act of the Registrar of Titles intending to remove the caveat lodged by the appellant. The registrar may receive and act upon any caveat entered into by the caveator only when the said caveator has demonstrated his interest in the Title for which the caveat is entered.

This means in the case at hand, in the first place the Registrar was satisfied that the appellant demonstrated to have interest in the land that is why he registered the said caveat. This means the registrar may only remove the said caveat after being satisfied that the interest upon which the caveat was based has either ceased to exist or for any reasons diminished.

I entirely agree with the counsel for the respondent that in case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, (supra) which has been referred throughout these proceedings, the issue of ownership of the land was not a subject matter and what was decided was probate cases. However, in that probate case it was established that the appellant purchased the said land from the Administrator of the estate who so acted under the authority given to him in Probate Cause No. 55 of 2004, the facts which throughout the submissions by the counsel for the respondents has not been disputed. There is no evidence that the

appellant interest for which he lodged the caveat has already been cleared, therefore the Assistant Registrar was not justified in his intention to remove the caveat lodged by the appellant and register the said plot in the name of the second respondent.

From the submissions filed by the respondents, the learned counsel are seemingly suggesting that for the appeal to be allowed, the appellant needs to establish the ownership of the said plot. Further to that, they are treating this matter as it is the land dispute in which this court is required to declare the owner. On these two points, I should straight away reiterate by saying that, this is not a land dispute where this court is required to decide on the right of the parties, what the appellant needs to establish is just an interest in terms of section 78(1) of the Land Registration Act, [Cap. 334 R.E 2019], which in my considered view, the appellant has managed through his submissions and the evidence attached as contained in the decision in the case of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, (supra), where the appellant was declared the bonafide purchaser.

Regarding who is the bonafide purchaser in law, the Court of Appeal of Tanzania in the case of **Suzana S. Waryoba vs Shija Ndalawa**,

Civil Appeal No. 44 of 2017, CAT – Mwanza the court adopted the dictionary definition of the term *bonafide* purchaser to mean;

"A bonafide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property."

Further to that, in the case of **Nala Textile and Others vs Tax Recovery Officer and another**, Civil Appeal No.6536 of 2003 it was also held that, the stranger who becomes a **bonafide** purchaser must have his interest be protected.

The decision of **Juma Issa (Administrator of the Estate of Issa Feruzi) and 3 others vs Charles Ndessi Mbusiro**, (supra) was referred and attached to the submission, in as far as I agree that submission are not evidence, I do not agree that the court should not make reference to the authority attached to the submission especially in the circumstances like this one where the said authority dealt with the same matter. It should be noted that the court being the fountain of

justice, its focus is to make sure that justice is done, therefore this court is justified to make reference to the case cited as I have just done.


From the above exposition and basing on what have been submitted by the counsel, it goes without saying that, both the appellant and the 2nd respondent have interest in the land. The said conflicting interests should be resolved by involving the parties who sold them the land. That can be done by the parties going to the proper court which will, after hearing them, declare as between the two, who is the lawful owner of the said plot. During the pendency of this process of ascertaining who is the lawful owner the caveat should remain intact.

That said, the appeal is found to have merit, the Registrar of Titles is hereby restrained from removing the caveat lodged by the appellant in respect of the house on Plot No. 65 Block "T" in Mwanza City.

It is accordingly ordered.

DATED at MWANZA, this 09th day of August 2021




J. C. TIGANGA
JUDGE
09/08/2021