

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
LAND CASE NO 12 OF 2020
STANSLAUS LAWRENCE KALOKOLA PLAINTIFF**

VERSUS

1. TANZANIA BUILDINGS AGENCY 2. MWANZA CITY COUNCIL 3. HON. ATTORNEY GENERAL	DEFENDANTS
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JUDGMENT

21st April & 22nd July 2022

ITEMBA, J

Mr. Stanlaus Lawrence Kalokola, the plaintiff herein, has filed a suit against the Tanzania Building Agency (TBA), Mwanza City Council (MCC) and the Attorney General the 1st, 2nd and 3rd defendants respectively. His claim against the defendants is for a judgment and decree jointly and severally for:-

- (a) A declaratory order that the plaintiff is a lawful registered owner of the suit house being and situate at Plot No. 94 Block 'D' Isamilo Mwanza City.
- (b) An order that taking possession and continued occupation of the said house by the Second Defendant in unlawful.

- (c) An order allowing the plaintiff to recover the said house from the Second Defendant and order the Second Defendant to give vacant possession thereof. In the alternative an order compelling the Second and Third Defendants to refund the Plaintiff the sum of **Tshs. 9,668,000/=** paid by the Plaintiff towards the purchase of the said house and a further **Tshs. 102,277,000/=** which the Plaintiff expended on renovating the same.
- (d) Costs of this suit
- (e) Any further and other reliefs that this Honourable Court deems just to award.

According to the plaint filed before the court, the plaintiff claim is that on 14th of February, 2004 the 1st Defendant sold to the Plaintiff the suit house being and situate at Plot No. 94 Block 'D' Isamilo Mwanza, herein the suit house, for the sum of TZS. 9,668,000/= and that the Plaintiff was supposed to pay the purchase price of the said house within 10 years of execution of the said agreement or within the remaining period prior to the Plaintiff's retirement. That, on 11th of April 2005 the 1st Defendant wrote to the Plaintiff congratulating him for paying up the

purchase price in respect of the suit house and that the Plaintiff leased the suit house to a tenant who was evicted by the Second Defendant who claimed ownership thereof. The plaint discloses further that, thereafter, the District Land and Housing Tribunal of Mwanza declared the Plaintiff to be a lawful owner of the suit house but the relevant judgment was quashed on appeal before the High Court on ground that a necessary party had not been joined; the said High Court decision was later affirmed by the Court of Appeal. The plaint discloses that after the delivery of the Court of Appeal Judgment the Second defendant took possession of the suit house, evicted the Plaintiff's tenant and allocated the house to its employee to date.

The Plaintiff avers that the suit house belongs to him by virtue of agreement of sale and the defendant took possession unlawfully.

The 1st and 3rd defendants filed a joint written statement of defence while the 2nd defendant filed a separate written statement of defence and a counter claim. The 2nd defendant contested the plaint and stated that she is the registered owner of the suit property and she had never transferred the same neither to the plaintiff nor to the 1st defendant. The 1st, 2nd and 3rd defendants jointly stated further that the plaintiff maliciously represented the fact of ownership of the suit property and the therefore he

contributed to the existence of dispute. That, on 20th July, 2010 the plaintiff was offered by the 1st defendant a refund of TZS 9,668,000/= which was the purchase price of the suit property, but he neglected.

The 1st and 3rd defendants jointly explain that the sale agreement of the suit property was terminated and the title has never passed to the plaintiff despite several official communications which have been made between the plaintiff and the 1st defendant on the process of executing the agreement with the 1st defendant to purchase the suit property. The 2nd defendant adds that she notified the plaintiff who vacated willfully and paid for her accommodation.

The 1st and 3rd defendants stated further that the occupier was the trespasser considering that the government employees are entitled to enjoy accommodation from their employer and had a duty to return the rights over the suit property to the owner when their service comes to an end. And; that the second defendant who is the rightful owner of the suit house issued a letter which also served as a notice of seven (7) days requiring a tenant of the plaintiff to vacate the suit house.

The 1st and 3rd stated further that the proper authority to declare a registered owner of the suit property, is the Commissioner for Lands and it

is only the office which makes approval for disposition of land which can witness whether the transfer for the same has been made or not.

In respect of the counter claim the 2nd defendant states that she is the registered legal owner of the suit property known as plot No. 94 Block "D" Isamilo within the jurisdiction of the 2nd Defendant vide CT No. 033006/43. She attached a copy of Certificate of Title. The 2nd defendant stated that, she is and was at all material times a lawful owner of the suit property therefore, the alleged sale was thus illegal and irregular. She attached a copy of the Official search to that effect.

The second defendant added that government directives require that council Heads of Department to be provided with accommodation or in the alternative to be paid TZS 600,000/=per month as accommodation. That the plaintiff being the 2nd defendants' Heads of Department who was working as a treasurer, as a matter of right was allocated the suit property as a dwelling house being a tenant of the 2nd defendant, that sometime in 2005 the plaintiff was transferred to Babati Town Council. That, since then the plaintiff refused to vacate the disputed premises and decided to lease it knowing that he is not a lawful owner of the disputed premises and he misrepresented the fact of ownership.

The 2nd defendant stated that, by using deprived occupation of the disputed premise the 2nd defendant suffered loss, and the plaintiff by leasing the disputed premises and receiving rent therefrom, received profit out of illegal acts.

She adds that, because the 2nd defendant was deprived his right to use the disputed premises since 2005. She had to incur extra costs to pay for accommodation to the tune of Tsh. 600,000/= per month for treasures/ employees, for that matter the 2nd defendant incurred loss of Tshs. 86,400,000/= between 2005 and 2017. The 2nd defendant avers that she incurred cost to the tune of TZS 1,751,600/= for paying for an alternative accommodation for the plaintiff's tenant who vacated willfully after being notified to do so.

I should mention that, I took over this suit from my brother Hon. Ismail J, who had been transferred to a different station.

I am grateful to all the parties for preparing useful final submissions which were considered in reaching the decision in this judgment.

At hearing, the plaintiff had the service of Mr. Anton Nasimire, Advocate, the 1st and 3rd defendants were represented by Ms. Subira

Mwandambo Senior State Attorney and the 2nd defendant was represented by Mr. Joseph Vungwa State Attorney.

Issues which were agreed by both parties were:

- i. Whether the sale of the suit house on Plot No. 94 Block 'D' Isamilo by the 1st defendant to the plaintiff was lawful.*
- ii. If the issue no. 1 is answered in affirmative, whether the plaintiff is the lawful owner of the suit house.*
- iii. Whether the renovation, allegedly done by plaintiff was consented to by the relevant authority.*
- iv. If issue no. 3 is in the affirmative, whether the plaintiff incurred and expenses in rehabilitating the suit house.*
- v. Whether, in the circumstances of this case, the 2nd defendants act of taking possession of the suit from the plaintiff and occupying the same was justified.*
- vi. Whether, in relation to the counter claim the 2nd defendant suffered any loss as a result of the plaintiff possession of the suit house.*
- vii. What reliefs are the parties entitled to?*

The plaintiff had 2 witnesses and 7 exhibits while the defendants paraded a total of 5 witnesses, 2 exhibits and 1 exhibit which was admitted for identification purposes.

The Plaintiff **Mr. Stansalus Kalokola** testified as **PW1**. He expounded the contents of the plaint by stating that he is currently a retired civil servant and during his service he occupied the suit property. The house was allocated to him as he was working as City Treasurer. An evaluation was done by the government regarding houses eligible for sale to the occupants. In 2004 the Municipal houses were sold to the occupants and he was one of the occupants who bought the houses. He produced a sale agreement (**Exhibit P1**). PW1 added that he managed to pay the purchase price 2 years after signing the contract and he was issued with a letter congratulating him for effecting full payment. He applied to the Mwanza Municipal Council for a rehabilitation permit and he was granted through a later dated 3rd of August 2005. (**Exhibit P 2**). PW1 also produced the architectural drawings which were issued under his name in relation to Renovation and Extension of the suit property. (**Exhibit P3**). PW1 testified that the renovation had costed him an amount of TZS 102,277,000/= as he added a master bedroom, replaced the roof, replaced ceramic tiles to the one from South Africa, reinstall electrical wiring, plumbing system, toilets, changed the verandah and parking, build the new water tower and new water tank, did landscaping, fencing and installing a gate.

PW1 explained that in 2007 his tenant was evicted from the suit property and upon inquiry he was informed by the Director of the 2nd respondent that they have decided to repossess their house. PW1 testified that in 2009, he instituted proceedings against the 1st and the 2nd respondents before the District Land and Housing Tribunal (DLHT) which decided in favour of the plaintiff and ordered the 1st and 2nd respondents to return the suit property to the plaintiff. The judgment and decree of the DLHT were admitted as **Exhibits P4 and P5** respectively. PW1 added that on grounds that the DLHT did not have jurisdiction to entertain a suit without joining a necessary party which was the Attorney General, the DLHT proceedings were quashed and the judgement thereof was set aside by the High Court. The Court of Appeal also approved the High Court decision. The High Court and Court of Appeal judgements were admitted as **Exhibits P6 and P7** respectively. PW1 finalised his testimony by admitting that he was offered a refund by the 1st respondent but he declined as the house was sold to him legally. He prayed that the 1st respondent should either let him enjoy the suit property or refund the cost of the suit property with interest. PW1 had explained in cross examination by the 3rd respondent that it was the then City Director who informed him that the suit property belongs to the Government through the Ministry of

Works and that cross checking was done by the 1st and 2nd respondent but sale was done by the Ministry of Works.

P2 Isaya William's evidence was that he is the mason who did the renovation of the suit property in 2005. He corroborated PW1 on the extent of renovation.

In defence, **DW1 Getruda Mwilubi**, who is the Planning Officer of the 1st defendant testified that the 1st defendant was in the process of selling houses on behalf of the Central Government and that in 2014 they received a letter authored by the plaintiff stating that the suit property belonged to the central Government and not Local Government which includes the 2nd respondent. That; the said letter allowed the 1st defendant to sell the suit property. She explained that in 2010 the 2nd defendant learnt that the suit property belongs to the 1st defendant. She also explained in cross examination that the house subject to sale were the one belonging to Central Government and not local government.

DW2 is the engineer named **David Balyagati**. He referred exhibit P2 which is a permit to renovate a suit property issued to the plaintiff and explain that the plaintiff was supposed to go to the city council for inspection but he did not. And that Exhibit P3 does not make any reference

to any specific house. And that to get a permit one does not need to have a certificate of occupancy. **DW3** is **Clement Kalonga** an accountant of the 2nd defendant. His testimony is to the effect that on 21st April 2017, the 2nd defendant had to pay for accommodation at a hotel for a tenant who was evicted from the suit property as the house was for the city treasurer. The other witness **DW4** was **Ayoub Kasuka** the 2nd defendant's land officer whose testimony was to the effect that among his duties are to inspect ownership of land. He stated that the suit property is under the ownership of the 2nd defendant. That they were built by the colonialist and were acquired by the 2nd defendant thereafter. That it was the 2nd defendant's director who instructed him to inspect the file in respect of the suit property.

The last defence witness was **Melkiori Buberwa (DW5)** from the office of Registrar of Tittles Mwanza. He stated that the suit property belongs to the 2nd defendant since 1958 as it was inherited in 1958, it has a registration Certificate of Tittle no. 033066/45 for the term of 99 years. The suit property is located at Isamilo and it has plot No. 94 and 95. He produced a photocopy of the said certificate of tittle of the suit property for identification purpose because the original is in Dar es salaam. The said document was admitted as **Exhibit ID1**. DW5 explained further that the

said Title shows that the owner is Mwanza Town Council because that was the former name of the 2nd defendant. DW5 also produced the official search of the suit property which was done on 8th March 2021 and shows that the suit property is owned by the 2nd defendant. DW5 also tendered a letter (**Exhibit D2**) written by the plaintiff on stating that Plot **no. 94D, 95D, 96D, 97D, 102D** Isamilo Mwanza which includes the suit property were not built by the 2nd defendant but the 2nd defendant acquired them after colonial era. That the plaintiff wrote the said letter as the City Treasurer who was the Head of Finance Department. That marked the end of defence case.

In respect of the counter claim, further to what has been testified by the defendant's witnesses, in support of the loss which the 2nd defendant had incurred as mentioned above, DW3 who is the accountant of the 2nd defendant testified that he paid costs of accommodation at Ryans's Bay Hotel for the plaintiff's tenant who had occupied the suit property amounting to TZS. 1,751,600/=.

Having grasped the evidence produced by the parties, subsequent is responding to the issues raised.

The first issue is whether the sale of the suit house on Plot No. 94 Block 'D' Isamilo by the 1st defendant to the plaintiff was lawful. This issue will be answered together with part of the issues in the counter claim as the two are related. The plaintiff has testified that he had bought the government house paid a sum of TZS. 9,668,000/= the payments which is undisputed by the defendants, and the 2nd defendant even congratulate the plaintiff for finishing the payment which was done by instalments. (exhibit P3), the 1st and 2nd defendant gave the plaintiff a permit to renovate the house of which he did. The plaintiff claims that the sale was lawful because it was done based on a valid contract. The respondents are disputing that the sale was not valid because it was done following a misrepresentation by the plaintiff on the status of the suit property that it belonged to the central government while it actually belonged to the 2nd defendant. In respect of the first issue, principally, as far as the rights of the parties are under scrutiny, courts are guided with the clean hands doctrine expounded in an old case of *The Highwayman (Everet v William, ex 1725,9 L.Q. Rev 197)*. The doctrine is based on the maxim of equity that 'one who comes to equity must come with clean hands. Therefore, I agree with the submission by the defendants that the plaintiff was supposed to give a true and correct report of ownership status of the

suit property. The plaintiff was a public servant was supposed to work with excellence and achieve highest standard of performance (see item V) of the Code of Conduct for Public Servants made under Regulation 65 and 66 of Public Service Regulation GN 168/2003) he was supposed to make sure that the feedback he is giving is true and correct.

Exploring the factual version of our case at hand; here are my observations:

One; on the issue of misrepresentation, the 2nd defendant states that there has been misrepresentation on the ownership of the suit property by the plaintiff, which renders the sale contract unlawful. Section 19 of the Law of Contract Act, is to the effect that:

'19. -(1) Where consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused:

*Provided that, if such consent was caused by misrepresentation or by silence, or fraud within the meaning of section 17, the contract nevertheless is not voidable, **if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. (emphasis supplied)***

In other words, if the party claims to be misrepresented but the said party had a means of discovering the truth the contract cannot be voidable. In this case, the 1st, 2nd and 3rd defendants being government entities who under ordinary diligence had the means of discovering the truth of ownership of the suit house by doing the official search and find the title deed by themselves before sale but they did not do so. This denies the respondent the option of revoking the contract for being voidable.

Two; according to the 2nd defendant, misrepresentation by the plaintiff is based on the letter issued by the plaintiff to the 1st defendant (Exhibit P2) explaining that the suit property and other 4 houses belong to the central government. I have gone through the said letter and there are several issues which raise concern. I will put them in two branches. First, the letter (exhibit P2) was written on 17th August 2004 while the contract which the plaintiff bought the suit house (exhibit P1) was entered on 14th February 2004 which is about 6 months before the said letter was written. From the evidence, it is not clear why would the letter regarding ownership, be written after the contract for sale was entered by the parties. Either way, I construe that, the seller, the government, had already made a decision to sell the suit property with or without the

opinion of the plaintiff. Under these circumstances, the defendants cannot claim to have sold the house following a misrepresentation by the plaintiff.

Secondly, the letter (Exhibit P2) is referring to 5 houses with plots numbers **94D, 95D, 96D, 97D, 102D** in Isamilo Mwanza, the suit property being **94D**. However, the plaintiff has explained in their submission that it was only the suit property which was alleged to be sold by mistake, as it belonged to central government. Nothing is explained about the rest of the houses do they fall under the central government or the 2nd respondent? Were they sold or not? Ayoub Rashid (DW4) who is land officer of the 2nd defendant had explained that among his duties is to prepare for land tittles and go through files to ascertain ownership of land. In cross examination by the plaintiff's counsel DW4 was asked about the status of the houses no 95D, 96D, 98D and 102D and he simply stated that he does not know the status of the house as he is overseeing more than 21,000 plots and the 2nd defendant is just one of his clients. And that he is not informed if some of the 2nd defendant's houses were sold. The plaintiff states in his submission that all these other four houses were sold and the buyers have never been asked to return the same to the 2nd respondent. This situation raises more questions than answers. I find that the 2nd defendant picking only the suit house and claiming that it belongs to the

government and leaving the rest of the houses mentioned in Exhibit P1 is either because the 2nd defendant is not sure about the ownership of these other four houses whether they belonged to the 2nd defendant and the central government or the 2nd defendant is being is discriminatory against the plaintiff.

Three; In respect of the counter claim, the 2nd defendant is alleging that the suit house does not belong to the government, and it was only the central government houses which were sold to the public servants and that is why the plaintiff was evicted from the suit property and that; there is actually a tittle deed to that effect.

There was no tittle deed produced before the Court. The defendant had produced the official search (Exhibit D1) which shows that the suit belongs to the 2nd respondent. Nevertheless, an official search report is not proof of ownership of land. Even reading from the official search itself it says and I quote:

'the records shown on the official search does not guarantee as to the genuineness of the Certificate of Tittle, if you intend to do any transaction you are advised to submit the Certificate of Tittle before the office of the Registrar of Tittles for authenticity.'

However, there is evidence from DW5 the Registrar of Tittles to the effect that the suit house belongs to the Town Council which is the former name of the 2nd respondent, therefore the rightful owner of the suit property is the 2nd respondent. It is my belief that the evidence by DW5 is

reliable evidence as DW5 is the right person with authority to declare ownership of land. It goes therefore, if the suit property belongs the 2nd defendant and if there was no misrepresentation on the part of the plaintiff then the sellers, the 1st defendant (through Ministry of Work) decided to sell the house which was not theirs. The seller had a duty to conduct due diligence before selling but they did not. That was negligence in the part. Significant to note, the sellers had no right to sell a house which is not theirs and this act makes the sale was unlawful. The '*emo dat quod non habet*' rule is to the effect that no one can give what they do not have. This rule is explained in the case of **Farah Mohamed v Fatuma Abdak** [1992] TLR 205 where it was held that he who does not have good title to the land cannot pass the same to another. See also **Melchiades John Mwenda v Giselle Mbaga (administratrix of the Estate of the Late John Japhet Mbaga and two others)** Civil appeal no. 57 of 2018 CAT (Unreported). The plaintiff likewise, took the risk of buying a property from a party who does not own it, likewise under the doctrine of which means 'buyer beware' the plaintiff was required to reasonably examine the property before purchasing the suit property. That being said, the 1st issue is answered in the negative.

The 1st issue being answered in the negative, the second issue have no legs to stand. The plaintiff is not the lawful owner of the suit house.

The third issue is '*whether the renovation, allegedly done by plaintiff was consented to by the relevant authority*'. Here there is no dispute that renovations were made but whether there was consent to renovate or not. The plaintiff had produced a permit to renovate the house which was issued by the 2nd respondent (Exhibit P2). A part of that letter states and I quote '*kibali kimetolewa kwa ajili ya ukarabati huo*' meaning a permit has been issued for such renovation. I do not see if there is any problem with the renovations done. In respect of the plaintiffs claim that the renovation did not follow procedures or were below the required standards, the defendant should invoke the existing laws and remedy available against the plaintiff in the proper forum. The 3rd issue is answered in affirmative.

The 4th issue is whether the plaintiff incurred and expenses in rehabilitating the suit house. It has been stated by PW1 and PW2 that the plaintiff rehabilitated the house at the cost of TZS 102,277,000/=. There is an architectural drawing in respect of renovation of the suit property (Exhibit P3) and as mentioned hereinabove, the plaintiff had mentioned that he added a master bedroom, replaced the roof, replaced ceramic tiles

to the one from South Africa, reinstall electrical wiring, plumbing system, toilets, changed the verandah and parking, build the new water tower and new water tank, did landscaping, fencing and installing a gate. PW2 who was the mason involved with the said renovation had corroborated the plaintiff's evidence. The plaintiff had testified that he did the renovation, although the defendants had objected to visit *the locus in quo* but they do not dispute those major renovations were made. The evidence that the suit house was renovated has not been successfully challenged by the defendants and I see no reason to doubt that. Apart from the extent of renovation of the suit house made by the plaintiff, I have also considered the duration of time which the house has been under the control of the 2nd defendant since 2007, which is about 15 years counting from when the plaintiff's tenant was evicted. I find it just to award the amount of TZS 102,277,000/= as general damages. As well the amount of the purchase price has been established and not contested. Therefore, this issue is answered in affirmative to the extent that what the plaintiff has established is general damage which he has suffered.

The 5th issue is whether, in the circumstances of this case, the 2nd defendants act of taking possession of the suit from the plaintiff and occupying the same was justified. As already expounded above the sale of

suit property was unlawful however, as the negligence was done in the part of the seller. Still, the defendants were not justified in taking possession of the suit from the plaintiff and occupying it. The 2nd defendant needed to sort out with the sellers on the best way to evacuate the plaintiff having known that the sale was unlawful as a result of the negligence of the seller. The 5th issue is also answered in the negative.

The 6th issue relates to counter claim and whether, the 2nd defendant suffered any loss as a result of the plaintiff possession of the suit house. DW3 had testified that the 2nd defendant incurred costs to pay for an alternative accommodation for the government employee who could not occupy the suit property (TZS 86,400,000/=) and for the plaintiff's tenant who was evicted at the suit property (TZS 1,751,600). However, both payments were not supported by any tangible evidence whatsoever. As a result, this issue is answered in the negative.

The last issue is on the reliefs which the parties are entitled to. Based on the deliberation above this court is satisfied that:

- i. The 2nd defendant is the lawful owner of the suit house.
- ii. The sale of Plot No. 94 Block 'D' Isamilo Mwanza City by the 1st defendant and Ministry of Work to the plaintiff was unlawful as

the property was under the ownership of the 2nd defendant. The 1st defendant and Ministry of Work had no good title to pass to the plaintiff.

- iii. The 1st defendant and the Ministry of Work was not diligent in selling the suit property and therefore caused loss to the plaintiff who bought and renovate the suit property.
- iv. The 2nd and 3rd Defendants to refund the Plaintiff the sum of **Tshs. 9,668,000/=** paid by the Plaintiff towards the purchase of the said house and a further **TZS 102,277,000** as general damages.
- v. Costs of this suit to be on each party.

It is so ordered.

DATED at **MWANZA** this 22nd day of July, 2022

