IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LAND APPEAL NO. 47 OF 2021

(Originating from the Decision of Land Application No. 53 of 2019 of the District Land and Housing Tribunal for Iramba at Kiomboi)

SALUM HASSANI ..... APPELLANT

VERSUS

JUMA SELEMANI LEMBELI ..... 1ST RESPONDENT

MAKIA SAIDI LEMBELI ..... 2ND RESPONDENT

JUDGMENT

5th April & 28th June 2023

KHALFAN, J.

The Appellant, herein, dissatisfied with the whole decision of the District Land and Housing Tribunal for Iramba at Kiomboi, appealed to this Honourable Court in order for this Court to allow this Appeal with costs, to quash and set aside the proceedings, judgment, decree and orders of the trial District Land and Housing Tribunal.

On 28th November, 2022, this Court ordered this matter to be disposed of by way of filing written submissions. The Appellant, in his submission, stated that during the hearing at the trial Tribunal, the 1st Respondent neither tendered any proof to show that he was granted letters of Administration by any court of law concerning the estate of the

deceased, the late Said Lembeli Makia, nor showed an inventory containing full and true estimate of all the properties of the late Said Lembeli Makia including the land in dispute.

The Appellant cited the case of **East African Road Services Ltd v J.S Davis & Co Ltd** [1965] EA 676 and Section 110 (1) of the Evidence Act [CAP. 6 R.E 2019] which states that; *'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'*

The Appellant insisted that since the 1st Respondent failed to prove his administratorship then, he has no locus to institute a case against the disputed land since he is neither a legal owner of the suit land nor the administrator of the estate. Also, the 1st Respondent failed to prove that the disputed land forms part of the estate of the late Said Lembeli Makia while the Appellant succeeded to show how he purchased the disputed land from the 2nd Respondent.

The Appellant attested that during the sale agreement, both Respondents were present and witnessed the exchange of the dispute land and 9 cows. Pages 37 – 42 of the Trial Tribunal proceedings state that the Appellant and 2nd Respondent consented to the said sale agreement. Although they did not attest the same into writing, they both

agreed. During the hearing at the trial Tribunal, the 1st Respondent failed to object the same. This shows that the disputed land does not belong to the deceased and the sale between the Appellant and the 2nd Respondent was legal and valid.

On his fourth ground, the Appellant submitted that the Honourable Chairman of the trial Tribunal framed issues for smooth determination. The first issue portrayed by the trial Tribunal states that: *'whether or not the suit land belongs to the estate of the late Said Lembeli Makia'* instead of it being; '*who is the legal owner of the suit land.'* The Appellant stated that, Order 11 Rule 1 of the Civil Procedure Code, [CAP. 33 R.E 2019], provides that: *'every suit shall, as far as practicable, be framed so as to afford grounds for final decision upon the subjects in dispute and to prevent further litigation concerning them.'* In that way, the trial Tribunal should not pinch itself to only determining as to whether the suit land belonged to the deceased or not rather to give itself a wider avenue to discuss who the suit land belongs to.

Lastly, the Appellant discussed the issue of assessors. It is required by the law that the Chairman, while reaching its decision to take into account the opinion of assessors as it is provided under Section 24 of the Land Disputes Court Act [CAP. 216 R.E 2019]. The relevant provision states that: *'In reaching decisions, the chairman shall take into account*

the opinion of the assessors but shall not be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion.'

The Appellant insisted that at page 8 of the Judgment, the trial Chairman considered the so-called opinion of one assessor in reaching at his decision, and opted to differ with the opinion of the other assessors. But unfortunately, the trial Chairman failed to give reasons for such departure.

Basing on that position, the Appellant prays this Honourable Court to allow this appeal by quashing and setting aside the proceedings, judgment, decree and orders of the trial District Land and Housing tribunal with costs.

The Respondents joint reply to the Appellant submission is as follows: That it is true there was no inventory tendered in order to prove that the suit land formed part of the estate of the late Said Lembeli Makia. This is because, an inventory is filed in probate proceedings and not in land disputes. They cited a case of **Joseph Shumbusho v Mary Grace Tigerwa and 2 others**, (CAT) at Dar es Salaam, Civil Appeal No. 13 of 2016 (unreported) wherein it was explicated that: '... *the rationale of exhibiting the inventory and accounts is to keep the beneficiaries informed*

and to have transparency in the execution/administration of the deceased's estate...'

In that way, the trial Tribunal was not sitting as a probate court for the 1st Respondent to exhibit an inventory of the deceased's assets; and in any event, an inventory filed by an administrator is not a conclusive proof that the suit land belongs to the deceased and thus forming part of his estate. It is the property that the administrator believes forms part of the deceased's estate.

Concerning the case of **East African Road Services Ltd v J.S Davis & Co Ltd** (supra) and Section 110 (1) of the Evidence Act [CAP. 6 R.E 2019], the Respondents in their submission stated that all that was stated by the Appellant is irrelevant. The 1st Respondent and his witnesses at the trial Tribunal, proved that the suit land formed part of the estate of the late Said Lembeli Makia and the sale between the Appellant and the 2nd Respondent was vitiated and nullified because the evidence on record proved that the Appellant by his conduct and actions, showed that he was not a *bona fide* purchaser.

The Respondents insisted that the 1st Respondent was duly appointed as the Administrator of the deceased's estate and a copy of the letters of Administration was in fact annexed to the application and

tendered and received in evidence. Therefore, the 1st Respondent had a *locus standi* to sue and prosecute the matter in the trial District Land and Housing Tribunal.

On the third ground, the Respondents submitted that, the issue was not about sale agreement but rather on the legality/validity of the purported sale between the parties bearing in mind that the land belonged to the late Said Lembeli Makia and sold by 2nd Respondent who had not been allocated the land, and thus, a person who had no title to pass. The Respondents insisted that the purported sale agreement between the Appellant and the 2nd Respondent was not nullified simply because it was an oral agreement, but rather the sale was nullified because the suit land had not been distributed to any heirs of the late Said Lembeli Makia. Therefore, the 2nd Respondent had nothing to pass to the Appellant as he could not sell the land that did not belong to him. He quoted a principle of *'nemo dat quod non habet.'*

The Respondents continued to submit that; the trial Tribunal found the sale to be invalid on the ground that the Appellant was not a *bona fide* purchaser for value, as his conduct clearly showed that the purported sale was tainted with fraud and he lied to the late Said Lembeli Makia's family and administrator that the suit land had been leased to him by the 2nd Respondent for five years. After the lapse of five years, that is when

knew that the 2nd Respondent had no title to pass to him over the suit land and that is why he dilly dallied for five years without telling the truth.

The Respondents cited a case of **Halima Simba Salum v Zaria Ramadhan Yakubu** (As the Administratrix of the Estate of the Late Ramadhani Ali Yakubu) and 3 Others, HCT (Land Division) at Dar es Salaam, Land Appeal No. 115/2020, where it defines a bona fide purchaser for value as one that acquires property with an honest belief that it was legally sold to them and had no notice of any outstanding rights of others.

On the issue basing on wrongly framed issues, the Respondents answered it as follows: That, it is trite law that the issues are framed based on the pleadings of the parties. The 1st Respondent alleged that the suit land belonged to the estate of the late Said Lembeli Makia which had been undistributed and the Appellant alleged the land to belong to him after he purchased the same from the 2nd Respondent as his personal property after it was distributed to him. Therefore, it was imperative to first determine whether the suit land formed part of the estate of the late Said Lembeli Makia in order to see if the subsequent sale by the 2nd Respondent to the Appellant was legal and valid.

The Respondents continued to submit that even if the trial Tribunal framed the issue as to who was the legal owner of the suit land, the Tribunal would still trace the 2nd Respondent's ownership of the suit land in order to see whether there was a valid sale between the 2nd Respondent and the Appellant. The rights of both parties were determined and the Appellant's purchase was found to be illegal because he fell short of a *bona fide* purchaser for value and because the seller had no title in law to pass to the purchaser.

Lastly, the Respondents contended on the issue of opinion of the assessors and he stated that the Trial Chairman summed up the opinions of both assessors and stated as to why he agreed/differed with each of the assessor's opinion based on the evidence tendered before the trial Tribunal and the Appellant's conduct. At the end, they prayed that the whole appeal be dismissed with costs and the judgment of the trial Tribunal be upheld.

On rejoinder, the Appellant insisted on the principle established under the case of **East African Road Services Ltd v J.S Davis & Co. Ltd** (supra), which this Court must consider in reaching its decision. And went further to submitted that it is crystal clear that the 1st Respondent failed to prove his administratorship on balance of probabilities as required by the law. He argued that the records are very clear that he has never

tendered any evidence to prove it. The Appellant insisted that the disputed land belonged to the 2nd Respondent since he purchased the same from the 2nd Respondent since the year 2009 in the presence of the 1st Respondent. The Appellant further submitted that the trial Chairman failed to give reason as to why he departed from the opinion of the other assessors. Therefore, the Appellant humbly prays this Court to allow this Appeal by nullifying the proceedings, judgment and the decree of the trial tribunal with costs.

I have duly considered the parties' submissions. This Court finds that, the 2nd Respondent, in his evidence at the trial Tribunal (see pages 53 – 55), declared to the trial Tribunal that he sold his father's land, measuring 10 acres to the Appellant without permission from his family members while it had not yet been divided and told his family members that he leased the land to the Appellant for five years.

According to the 2nd Respondent's evidence, this Court was clear that the 2nd Respondent was not the owner of the said land. He knew that the said land belonged to his fathers and was quite aware that the said land had not yet been distributed to any heir even to himself. Thus, he was not supposed to sell it to the Appellant, simply because *one cannot give that which he does not have, (nemo dat quod non habet rule*), as it was observed in **Magambazi Mines Company Ltd & Others v Kidee**

Mining (T) Limited(CAT) Civil Appeal No. 238 of 2019 Arusha Registry (unreported) [2022] TZCA 814 ; **Mathias Erasto Manga v Simon Group (T) Ltd** [2014] T.L.R. 518 and **Abdulatif Mohamed Hamis v Mehboob Yusuf Othman & Another**, (CAT) Civil Revision No. 6 of 2017, Dar es Salaam Registry (unreported).

This Court finds that it is irregular when the Appellant insists that the said land belonged to the 2nd Respondent and not his family, while the 2nd Respondent in his evidence stated clearly that the said land belonged to his family. This misperception proves that, the Appellant did not do official search before buying the said land.

The Appellant was thus bound by the principle of buyer beware which assumes that buyers will inspect and otherwise ensure that they are confident with the integrity of the product or land before completing a transaction. In fact, a buyer of landed property is supposed to make a search, make on-site inspections of the property, and make inquiries if there are any existing disputes over the property, boundaries, right of way, maintenance of roads and the like.

It was therefore the duty of the Appellant to make such enquiries and search before proceeding with the sale between himself and the 2nd Respondent to satisfy himself of the transaction. If the Appellant had gone

into the trouble to know what he was buying, he would have known that the 2nd Respondent was not the owner of the said land. See the case of **Joha Hassan Mohamed and Another v Jalia Amiri Gufu and Others** (HC) Land Case No. 83 of 2021, Land Division at Dar es Salaam (unreported).

Similarly, Section 97 (1) and (2) of The Land Registration Act, [CAP 334 R.E 2019], states that:

> *'(1) Any person may inspect the land register, any filed documents, the index map or any plan filed in the land registry, during the hours of business.*
> *(2) Any person may require an official search in respect of any parcel and shall be entitled to receive particulars of the subsisting memorials appearing in the land register relating thereto'.*

Consequently, in the case of **ACER Petroleum (T.) Limited v BP (Tanzania) Limited** (CAT) Civil Application No. 60 of 2020, Dar es Salaam Registry (unreported) [2022] TZCA 393 (28 June 2022); it was stated that: *'... it did not take sufficient precautions, including to conduct an official search with a view to ascertaining that the TRADECO was the lawful owner of the suit land before purchasing it.'*

So, in order for the Appellant to know who is the real owner of the said land as between the 2nd Respondent and his family, then he was supposed to do an official search and submit the evidence before this Court showing that the said land belonged to the 2nd Respondent and not just mere words, that the owner was the 2nd Respondent while the 2nd Respondent himself denied that the suit land belonged to him.

The Appellant was very concerned about the Administratorship of 1st Respondent, that he had no locus stand to sue and prosecute this matter in the trial District Land and Housing Tribunal as he never tendered any proof showing exactly when he was granted letters of Administration in any court of law. Surprisingly, in the file of the District Land and Housing Tribunal, there is the said letter of Administration of the 1st Respondent. The said Letter of Administration of the 1st Respondent was received by the Trial Tribunal on 31st December 2019, the date when the Applicant (now the 1st Respondent), lodged his application and paid for Tribunal fees.

The said letter of Administration was Form No. IV from Ndago Primary Court at Kiomboi/Iramba, and the 1st Respondent was appointed on 26th June 2019 under the Probate and Administration Cause No. 6 of 2019 to be an Administrator of the late Said Lembeli Makia Estates. This information is found in the file of the Trial Tribunal, and this Court believes

that, even the Trial Chairman knew that the Applicant was legally appointed by the Court to administer the estate of the late Said Lembeli Makia so he can sue and be sued.

The law itself states that, an administrator of the estate of a deceased, in terms of Sections 99 and 100 of the Probate and Administration of Estates Act, [CAP. 352 R.E 2019], in case of a District Court and High Court and Paragraphs 5 and 6 of Part II of the Fifth Schedule to the Magistrates' Court Act, [CAP 11 R.E 2019] for Primary Courts, states that *'is a legal representative of the deceased with capacity to sue and be sued.'* No doubt, that the power includes the power to lodge and defend applications and also preferring and defending an appeal, revision and review and any matter pending in Court to which the deceased is a party. See the case of **Saidi Omari Mohamedi (as Administrator of the Estate of the Late Tarimu Mohamed) v Abdallah Mselem** (CAT) Civil Application No. 144 of 2023 Tanga Registry (unreported).

Therefore, for the 1st Respondent to submit Form No. IV from Ndago Primary Court at Kiomboi/Iramba, under the Probate and Administration Cause No. 6 of 2019 which appointed him on 26th June 2019 before the Tribunal, verifies that he is an Administrator of the late Said Lembeli Makia Estates.

The Appellant in his submission claimed that the trial Chairman did not give the reason(s) as to why he opted for the opinion of one assessor and departed from the other, while the Respondents stated that the trial Chairman did discuss at length as to why he differed with one of the assessors' opinions based on the evidence. This Court also wondered that, if the trial Chairman indeed failed to discuss the opinion of the assessors, then how would the Appellant know that the trial Chairman departed from one of his assessors' opinions?

However, according to page 8 and 9 of the Trial Tribunal Judgment, the Trial Chairman wrote that:

> *'... one of the assessors was of the view that the land belongs to the 1st Respondent after having purchased the same from 2nd Respondent. The other assessors were of the opinion that the 1st Respondent should be given back his 9 cows as he has also benefited from the suit land. I hold the same view as the second assessors, that the 1st Respondent should be given back his 9 cows.* ***I say so not because they are related, but because*** *the purported sale between the 2nd and 1st Respondent is invalid, as the 2nd Respondent had no title to pass to the 1st Respondent ...' (Emphasis is mine).*

This Court finds that for the trial Chairman giving his reasons as to why he had the same view with the second Assessor is a clear indication as to why he departed from the other assessor as provided under Section 24 of the Land Disputes Court Act [CAP. 216 R.E 2019]. The relevant provision reads that:

> *'In reaching decisions, the chairman shall take into account the opinion of the assessors* ***but shall not be bound by it,*** *except that the chairman shall in the judgment* ***give reasons for differing with such opinion****.' (Emphasis is mine).*

At the end, this Court agrees with the Appellant that he bought the suit land by paying nine (9) cows. This is because, even the seller himself, admitted that he received the nine (9) cows from the Appellant for the land sale agreement. Thus, the Appellant bought and paid the nine (9) cows to a wrong person, that is one who was not the owner of the said land.

As the Trial Chairman expounded in his judgment, that since the land had not been distributed to the 2nd Respondent, in effect, he had no title to pass over to the Appellant. In law, a person may not pass title to something which he does not own. A deceased's property only changes

ownership to the heirs and beneficiaries after the estate is distributed and each party given its share.

With the above finding, this Court upholds the decision of Trial Chairman, that the suit land forms part of the estate of the late Said Lembeli Makia. The purported sale between the Appellant and 2nd Respondent was null and void as the purchaser failed to conduct the official search to know who was the real owner of the suit land. As a result, he bought the suit land from the wrong person who had no title that he could pass to the Appellant.

In conclusion, the Appeal is therefore devoid of merit. Thus, it is hereby dismissed. Each party shall bear his own costs.

It is so ordered.

Dated at **Dodoma** this 28th day of June, 2023

F. R. KHALFAN

JUDGE