IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO.313 OF 2002

MIRE ARTAN ISMAIL.....PLAINTIFF

VERSUS

SOFIA YASIN NJATI.....1ST DEFENDANT

ZAINABU MZEE.....2ND DEFENDANT

Date of Hearing: 16th June & 15th July 2003; 21st September & 19th December 2011, and 6th November 2012

Date of last order: 06/11/2012

Date of Closing Submissions: 20/11/2012

Date of Judgment: 08/02/2013

JUDGMENT

MAKARAMBA, J.:

Mr. **MIRE ARTAN ISMAIL**, the Plaintiff, lodged this suit in this Court on the 31st day of December, 2002. It is against **SOFIA YASIN NJATI**, the 1st Defendant and **ZAINABU MZEE**, the 2nd Defendant. **SOFIA YASIN NJATI** is wife, and **ZAINABU MZEE** is sister, to **YUSUF MZEE** respectively, who died on 06th day of March, 1996. He was the owner of a residential house on Plot No.4 Block 61 House No.29, Livingstone Street, Kariakoo, the suit property. The court record shows that **ZAINABU MZEE**, the 2nd Defendant and the sister of the deceased, YUSUFU MZEE, applied for and obtained letters of administration of the estate of YUSUFU MZEE, by virtue of which all the property of YUSUFU MZEE vested in her with powers to sell. Accordingly, the 2nd Defendant applied to be registered as the legal personal representative of YUSUFU

MZEE, the deceased. The disposition was approved by the appropriate authorities. The record also shows that by an agreement in writing dated 10th day of November 2002, and a deed of transfer dated 11th day of November, 2002, between the Plaintiff and the 2nd Defendant, the 2nd Defendant agreed to sell and transfer, and the Plaintiff agreed to buy the suit property at a price of **TZS 85,000,000/-** (say eighty five million Tanzanian shillings). The Plaintiff claims that on the instructions of the 2nd Defendant, the Plaintiff paid the purchase price by issuing cheques in the names of all the beneficiaries of the deceased's estate. The Plaintiff claims further that all the beneficiaries, save the 1st Defendant and her two children, **SHUKURU** and **TATU,** have received their cheques and have already been paid. The Plaintiff claims further that the agreement for sale provided among other things that a balance of **TZS 11,000,000/-** (Say eleven million Tanzania shillings) shall be paid to the beneficiaries when the 2nd Defendant surrenders vacant possession of the suit property to the Plaintiff. The Plaintiff claims further that, in breach of the said agreement, and notwithstanding requests made by the Plaintiff and his advocates, the Defendants have wrongfully failed and continue to neglect and refuse to surrender vacant possession to the Plaintiff, which is why the Plaintiff brought the present suit against the Defendants jointly and severally. In this suit the Plaintiff is seeking from this Court the following reliefs:

(i) *A declaration that the sale of the property by the second defendant to the plaintiff was lawful and proper and the Plaintiff has thereby acquired good title over the same.*

(ii) *An order of specific performance by the surrender of vacant possession by the Defendants and all those claiming under them.*

(iii) *A declaration that the first Defendant has no further claim over the property and that her right and that of her children is now limited to receiving the money as her share of the estate.*

(iv) *Costs and any further or other relief.*

The 1st Defendant has vehemently disputed the Plaintiff's suit while the 2nd Defendant partly admitted and partly disputed the Plaintiff's claim. The 1st Defendant

also filed a chamber application praying for revocation of the grant of letters of administration and to set aside the sale.

Central to the present dispute before this Court is a residential house on Plot No.4 Block 61 House No.29, Livingstone Street, Kariakoo, the suit property whose owner was YUSUFU MZEE, the decujus, but which has since vested in the 2nd Defendant by virtue of grant to her of letters of administration. The Plaintiff claims that the suit property was lawfully sold to him by the administratrix, the 2nd Defendant in this suit. According to the court record, this matter has gone through many learned hands. The suit was instituted by **ZAINABU MZEE**, the 2nd Defendant in this Court on the 31st day of December, 2002 and styled as Commercial Case No.313/2003 seeking vacant possession from **SOFIA YASIN NJATI**, the 1st Defendant.

The court record shows that **ZAINABU MZEE**, the 2nd Defendant, the sister of YUSUFU MZEE, had applied for letters of administration at the Kinondoni District Court in **Probate and Administration Cause No. 57 of 1996** and she was granted on **09.09.2002**. She then sold the suit property to the Plaintiff on **10.12.2002.** When Mr. **MIRE ARTAN ISMAIL**, the Plaintiff, lodged this suit in this Court on the 31st day of December, 2002, the 1st Defendant, **SOFIA YASIN NJATI**, raised an objection against it that, the suit was erroneously lodged in this Court in existence of another suit before the Kisutu RM's Court in **Probate and Administration Cause No.57 of 1996** in which prayers made therein were almost identical to those made in this suit. Kalegeya, J., as he then was, on **03.11.2011** ruled in favour of the 1st Defendant and struck out the Plaintiff's suit in Commercial Case 313/2002 on the ground that it was incompetent. The Plaintiff was aggrieved by that decision and appealed to the Court of Appeal in **Civil Appeal No. 108 of 2003,** wherein the Court of Appeal (Msoffe, JA.) held in favour of the Plaintiff and **restored the Plaintiff's suit. The Court also ordered that the suit should proceed before another judge**. In its ruling in **Civil Appeal No. 108 of 2003,** the Court of Appeal observed that, **the trial judge ought to have stayed the proceedings instead of striking out the suit.** Following the order of the Court of Appeal that the Plaintiff's suit should be placed before another Judge, the

case file was accordingly reassigned to Massati, J., as he then was, who in his ruling on an application for temporary injunction on **12/05/2006**, ordered the 1st Respondent/1st Defendant, **SOFIA YASIN NJATI, to deposit all of the monthly rent in Court until final determination of the case.** However, before the case could proceed to hearing, **SOFIA YASIN NJATI,** the 1st Defendant, filed Civil Revision No.82/2003 in the High Court of Tanzania at the Dar es Salaam Registry. Massati, J., accordingly stayed the Plaintiff's suit pending the outcome of the application for revision that the 1st Defendant, had lodged. The revision came before Mandia, J., as he then was, who nullified the sale of the suit property. The court record shows that the revision originated from an application **SOFIA YASIN NJATI**, the 1st Defendant, had lodged at the Kisutu RM's Court against the Plaintiff seeking for an order of revocation of grant of Letters of Administration of the estate of the late Yusufu Mzee to Zainabu Mzee, the 2nd Defendant. In the same application the 1st Defendant had also invited the RM's Court to nullify the purported sale of the suit premises situated at Plot No.4 Block 61 House No. 29 Living Stone/Udowe Streets Kariakoo, Dar es Salaam. The RM's Court however, dismissed the application by the 1st Defendant. Aggrieved by this decision, the 1st Defendant then filed **Civil Revision No. 82 of 2003** in the High Court of Tanzania, Main Registry at Dar es Salaam, which came before Mandia, J., and which was determined in favour of the 1st Defendant. Mr. **MIRE ARTAN ISMAIL**, the Plaintiff herein, was aggrieved by the decision and appealed against it in the Court of Appeal in Civil Appeal No. 75/2008. In its decision in Civil Appeal No.75/2008 (Munuo, JA), the Court of Appeal **reversed the decision of Mandia J., in Civil Revision No. 82/2003, which had nullified the sale of the suit property**. The 1st Defendant was aggrieved by the decision and filed an application for review in the same Court through **Civil Application No. 17 of 2009**. The Court of Appeal dismissed it with costs. I found it critical to revisit the above historical background so as to situate the resumption of the business of this Court to continue the hearing of this matter.

I should point out here and as Mr. Marando rightly submitted that the main issue which was framed by this Court when the matter came for first hearing before

Kalegeya, J., having already been determined by the Court of Appeal in **Civil Appeal No. 75 of 2008**, that is why this Court on the 20th May, 2011, directed that:

1. *The matter to proceed by the Plaintiff recalling PW1 on the reason that the case file has been remitted to this Court to continue.*
2. *The 2nd Defendant has not filed defence therefore cannot be heard but orders will be issued against her.*
3. *The issue of rent is to be determined by evidence*
4. *Final orders will be made on the issue of vacant of possession.*

As the court record will show, this resumed hearing of this suit on 21/09/2011. On that date **Mr. Marando**, learned Counsel appeared for the Plaintiff, and **Mr. Masaka,** learned Counsel appeared for the 1st Defendant. The 2nd Defendant has not filed any defence and did not appear in Court. However, since she had admitted part of the claim, final orders will be binding on her. At the close of the Defendant's case the learned Counsel for the parties prayed to file their closing submissions, which prayer this Court dully granted.

The court record shows that when this matter came for first day of hearing before Kalegeya, J., as he then was, on 01/04/2003, the following issues were framed and recorded by this Court for the determination of this suit, namely:

(1) Whether the Plaintiff obtained good title on purchase of the property on Plot No. 4 Block 61 House No.29 Livingstone Street Kariakoo.

(2) To what rights are the parties entitled.

As I pointed out earlier the first issue has already been conclusively determined by the Court of Appeal in **Civil Appeal No.75 of 2008, which PW1 tendered in this**

Court for easy of reference. In the course of his closing submissions Mr. Marando quoted from the typed judgment of the Court of Appeal in Civil Appeal No.75 of 2008 at page 15, in which it was stated as follows:

> *"The issue before us is whether the High Court had cause to invalidate the sale of House No.29 on Plot No.4 Block 61 Livingstone Street, Kariakoo Dar es Salaam.* ***There is no dispute that, Zainab Mzee was duly appointed the administrator of the estate of her late brother Yusuf Mzee****. The 4 heirs of Yusuf Mzee....consented to the sale of house No.29 on plot No. 4 Block 64 Livingstone Street, Kariakoo, Dare s Salaam. Under the circumstances, the administratrix lawfully, sold the house in dispute to the 1st Appellant, Mire Artan Ismail. The latter was a bona fide purchaser for value without encumbrances..The property was property transferred to the purchaser..."*

The Plaintiff has called one witness, **Mr. Mire Artan Ismail,** the Plaintiff himself. He testified as **PW1**. The 1st Defendant on her side has called two witnesses, M/s **Sofia Yasin Njati**, the 1st Defendant herself who testified as **DW1,** and **Haji Rajabu Ambari,** who testified as **DW2**. However, before I traverse the evidence on record I find it proper to address two points of preliminary objection, which Mr. Massaka, learned Counsel for the 1st Defendant raised in his written closing submissions, namely:

(i) Whether the reason advanced at paragraph 11 of the plaint may confer or create jurisdiction to this Court to entertain and determine the dispute?

(ii) Whether the 1st Defendant was a party to the agreement between the Plaintiff and 2nd Defendant?

The first point of preliminary objection essentially touches on the jurisdiction of this Court. In his closing submissions and in his letter to this Court which is dated 30th November, 2012 (filed in this Court on the same day), Mr. Masaka has raised a point of

preliminary objection that this **Court does not have jurisdiction to entertain this matter**. In buttressing this point, in a letter dated 30th November, 2012 addressed to the Registrar of this Court and copied to Mr. Marando, Mr. Masaka attached the decision of the Court of Appeal in **SEBASTIAN RUKIZA KINYONDO VERSUS DR. MEDARD MUTALEMWA MUTUNGI (1999) T.L.R. 479.** However, rather unfortunately Mr. Masaka attached only a part of the decision. In that decision, the Court of Appeal insisted that it was an appellate court, which essentially deals with appeals, and that it was a creature of statute in which its jurisdiction and powers are prescribed and the procedure for the processing of appeals is well provided for under the Rules of the Court. This pertinent observation by the Court of Appeal in that decision came as a response to one of the points of preliminary objection that were raised relating to ground one in the Memorandum of Appeal, the subject matter of which was the issue of jurisdiction and limitation. Mr. Magafu, learned Counsel for the Respondent, forcefully argued in that case that the question of limitation and jurisdiction of the High Court cannot be entertained at the appeal stage because it was not raised at the trial and the court of first instance did not address or make a decision on it. Mr. Rweyongeza, learned Counsel for the Appellant, vigorously opposed the preliminary objection and submitted that the Court has powers, which enables it to step into the shoes of the High Court so as to deal even with issues which were not dealt with by the High Court. The Court of appeal saw merit in the submissions of Mr. Magafu that the issue of jurisdiction and limitation, the subject matter of ground one of the Memorandum of Appeal cannot be raised at the appeal stage because it was not addressed and decided by the High Court as the court of first instance. The Court insisted that since the filing of a Memorandum of Appeal is one of the essential steps to be taken towards institution of an appeal, it should comply with the requirement of the Rules of the Court, particularly Rule 86(1), in that first, the matter should pertain to the decision of the court against which the appeal is preferred, and secondly, the Memorandum of Appeal should also specify the points which are alleged to have been wrongly decided. The Court of Appeal (Lubuva, J.A) gave the rationale for the need for

complying with the Court's Rules in regulating appeals at page 487 of the reported decision thus:

> *"...If appeals are not dealt with strictly in accordance with the rules, we apprehend the danger of turning the appeal court into a court of first instance where issues are to be tried subject to the rigour of cross examination by affected parties before a decision is arrived at. Furthermore, non-compliance with the rules would, in our view, tempt some of the parties to raise issues at the appeal stage which for some reason were not raised at the trial. We think for an effective appeal system geared towards a proper system of administering justice tendencies of this nature shou;ld be deprecated."*

The Court allowed the preliminary objection and struck out ground one of the Memorandum of Appeal. We can deduce the ratio decidendi in ***Sebastian Rukiza Kinyondo Case*** (above) to be that the issue touching on jurisdiction can only be raised at the appeal stage if it was addressed and decided by the court of first instance and has been brought according to the Rules of the Court. Clearly, the Court of Appeal in ***Sebastian Rukiza Kinyondo Case*** (above) declined to entertain a ground in the appeal which had not been raised and considered by the High Court as a court of first instance during trial. The decision in ***Sebastian Rukiza Kinyondo Case*** (above) does not therefore lend itself to the proposition and invitation by Mr. Masaka that the issue of jurisdiction can be raised at any stage even at appeal.

Let me state from the outset that the objection raised by Mr. Masaka in his closing submissions that this court has no jurisdiction to entertain this suit must fail. The reason for holding so is that the issue of jurisdiction was raised and determined by this Court on the 31st day of July, 2009 by Werema, J. as he then was. On that date Mr. Masaka also raised the same point of preliminary objection and submitted on it upon which Werema, J., as he then was, ruled as follows:

> *"I think at the point of entry, there was no Land Court and this Court assumed jurisdiction on that basis.* ***This Court has jurisdiction*** *and I also take into*

account the time and space that this case has been pending here...." (emphasis supplied by this Court).

The argument by Mr. Masaka that the issue of jurisdiction can be raised at any stage of the suit, even on appeal, is quite tempting. However, this does not find support in the authority in ***Sebastian Rukiza Kinyondo Case*** (above) cited to this Court by Mr. Masaka. Even if for arguments sake we were to agree with Massaka on this point, which I do not, still that argument will crumble for the very simple reason that this is not an appellate court but a court of first instance. This Court is continuing with the hearing and determination of this suit which is properly before it. As I intimated to earlier, since the issue of jurisdiction has ready been decided by my learned brother Judge Werema, to invite this Court again to re-litigate and determine on that very issue would in my considered view, amount to be asking this Court to sit on appeal over it's own decision that it has jurisdiction to entertain the matter. If that were the case, litigation would not come to an end and it would lend the justice system into total disrepute with the attendant risk of losing the trust and confidence of the populace it is intended to diligently, confidently and competently serve. I have carefully perused the court record and could not unearth any decision by a higher court invalidating the decision and order of my learned brother Judge Werema that this Court has jurisdiction in this suit. This suit is therefore still properly before this Court. Any attempt at reviving the ground of jurisdiction and invite this Court to rule itself out of jurisdiction is tantamount to turning this Court into an appellate court. I am highly enthused by the wise words of Mwesiumo, J., as he then was, in **JOSEPH KIVUYO AND OTHERS VERSUS REGIONAL POLICE COMMANDER ARUSHA AND ANOTHER, High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 22 of 1978** (Unreported), that much as a court is *"a temple of justice"* and that *"nobody should fear to enter into it to battle his legal redress as provided by the law of the land"*, those who are minded to enter this temple of justice should do so according to the rules of the legal battle. The first point of preliminary objection raised by Mr. Massaka in his

closing submissions that this Court does not have jurisdiction fails and it stands dismissed.

I shall now turn to consider the second point of the preliminary objection, which is *whether the 1st Defendant was a party to the agreement between the Plaintiff and 2nd Defendant.*

This particular point of objection, with due respect to Mr. Masaka, amounts to framing a completely new issue, which is highly un-procedural. In any event, this issue calls for adduction of evidence thus disqualifying it from capable of being fronted as a preliminary point of objection. In the absence of any evidence, clearly this Court cannot make any finding on this issue either way. The argument by Mr. Masaka that the contract of sale was between the Plaintiff and the 2nd Defendant, and that the 1st Defendant was not privy to the contract, and therefore she is not bound by the terms of that contract, are submissions from the bar unsupported by any tested evidence. Suffice to point out here that since the 2nd Defendant, **ZAINABU MZEE**, was acting on behalf of the beneficiaries of the late **YUSUF MZEE**, and since all the beneficiaries had consented to the sale of the suit property, and that the 1st Defendant is among those beneficiaries, an order against **ZAINABU MZEE** automatically binds all of the beneficiaries. In 4th paragraph of her Written Statement of Defence, the 2nd Defendant, has stated that it is not the 2nd Defendant who neglected and refused to surrender vacant possession to the Plaintiff, but the 1st Defendant and her two children who are still living in the disputed house. These very facts are not disputed by the 1st Defendant. It is therefore my considered view that, the prayer for vacant possession by the Plaintiff is valid and enforceable as against both the 1st Defendant and 2nd Defendant and *all those claiming under them*. The second point of preliminary objection must also fail. It is accordingly hereby dismissed.

Let me now turn to consider the only issue left for determination in this suit, which is, ***what rights the parties are entitled to***. In his closing submissions, Mr. Marando learned Counsel for the Plaintiff submitted that, the main issue that this Court framed and recorded on **01/04/2002** at the commencement of the trial, that is, ***whether***

the Plaintiff obtained good title on purchase of the property on Plot No. 4 Block 61 House No.29 Livingstone Street Kariakoo, has already been answered by the Court of Appeal in its decision in Civil Appeal No.75/2008. That decision therefore becomes a judgment ***in rem,*** and operates against everybody. It can only be assailed by a new suit based on fraud, which has never been fronted by the 1st Defendant. According to Mr. Marando, this case has been remitted to this Court for continuation because the Court of Appeal ordered that the suit ought to have been stayed instead of being struck out, and on the **3rd day of March 2006** it was ordered that, the suit should proceed before another Judge of this Court. PW1 has tendered in this Court the decision of the Court of Appeal in **Civil Appeal No.75 of 2008** for easy reference. Mr. Marando quoted from the wording of the Court of Appeal in Civil Appeal No.75 of 2008 at page 15 thus:

> *"The issue before us is whether the High Court had cause to invalidate the sale of House No.29 on Plot No.4 Block 61 Livingstone Street, Kariakoo Dar es Salaam. There is no dispute that, Zainab Mzee was duly appointed the administrator of the estate of her late brother Yusuf Mzee. The 4 heirs of Yusuf Mzee....consented to the sale of house No.29 on plot No. 4 Block 64 Livingstone Street, Kariakoo, Dare s Salaam. Under the circumstances, the administratrix lawfully, sold the house in dispute to the 1st Appellant, Mire Artan Ismail. The latter was a bona fide purchaser for value without encumbrances..The property was property transferred to the purchaser..."*

Unfortunately Mr. Masaka did not bother to make any submissions on the four points of directions this Court gave on 20th May, 2011. Instead Mr. Masaka seems to have beleaboured only on the two points of preliminary objection he raised, which this Court has already dismissed. That being the case therefore this Court is left with only the submissions of Mr. Marando and witness testimonies to consider in this judgment.

As Mr. Marando correctly submitted only two issues have been framed by this Court for the determination of this suit on merits, namely:

(1) Whether the Plaintiff obtained good title on purchase of the property on Plot No. 4 Block 61 House No.29 Livingstone Street Kariakoo.

(2) To what reliefs are the parties entitled

Pursuant to the Judgment of the Court of Appeal in Civil Appeal No. 108 of 2003, it was argued at page 6 that Kalegeya, J. of this Court had no other option except to stay the suit in line with the provision of section 8 of the Civil Procedure Code. In view of the appeal which had been preferred to the Court of Appeal, this Court had other choice but to stay the suit pending determination of **Civil Appeal No.75 of 2008**, whose decision the Court of Appeal has handed down a copy of which PW1 has tendered in this Court to take judicial notice of.

When this matter came for continuation of hearing of the Plaintiff's case, Mr. Marando told this Court that, there is no need for continuation of the Plaintiff's case since the main issue has already been answered by the Court of Appeal in Civil Appeal No.75 of 2008, wherein at page 16 the Court held to the effect that:

> *"....the administratrix (the 2nd Defendant in this suit) lawfully sold the house in dispute to the 1st Appellant, Mire Artan Ismail (the Plaintiff in this suit). The latter (Plaintiff) was a bona fide purchaser for value without encumbrances." (emphasis of this Court)*

I have taken judicial notice of the decision of the Court of Appeal in **Civil Appeal No.75 of 2008.** I am satisfied that the main issue in this case, which is "*whether the Plaintiff obtained good title on purchase of the property on Plot No. 4 Block 61 House No.29 Livingstone Street Kariakoo,"* has conclusively been determined by the Court of Appeal in its decision in **Civil Appeal No.75 of 2008.** According to that decision, **ZAINABU MZEE** was duly appointed the administrator of the estate of her late brother **YUSUFU MZEE**. Furthermore, the 4 heirs of Yusuf Mzee consented to the sale of House No.29 on plot No. 4 Block 64 Livingstone Street, Kariakoo, Dare s Salaam, the suit property. **Under the circumstances, the administratrix therefore lawfully, sold the house in dispute to the 1st Appellant, MIRE ARTAN ISMAIL, the Plaintiff herein, who was a bona fide purchaser for value without encumbrances. The suit property was property was therefore transferred to**

the purchaser. That being the case therefore there is absolutely no good and strong reason for this Court to reopen this issue and hear the parties on it. In my considered view, doing so, will not only amount to questioning the wise decision of the highest court in the land but will be a total waste of time not only of the Court but of the parties. In any event litigation must come to an end so as to allow the disputants to engage in other meaningful economical and business endeavours. Furthermore, since this Court is bound by the decisions of the Court of Appeal, it is incompetent to make findings on a matter which has been conclusively determined by the Court of Appeal, which is binding on all subordinate courts even if it is was wrong until the Court of Appeal determines so and overrule its own decision. This is a trite practice principle which is the hallmark of the doctrine of precedent which ensures uniformity, certainty and predictability of court decisions. This Court is therefore left with only one issue to determine, which is **what rights the parties are entitled to** which I now turn to consider. This particular issue was not determined by the Court of Appeal in Civil Appeal No.75 of 2008.

In paragraph 9(b) of the Plaint, the Plaintiff stated that, the 2nd Defendant has not surrendered vacant possession to the Plaintiff. In paragraph 3 and 4 of the Written Statement of Defence, the 2nd Defendant avers that, it is not the 2nd Defendant who neglects and refuses to surrender vacant possession to the Plaintiff but the 1st Defendant and her two children who live in the disputed house. On her side the 1st Defendant stated that, she did not vacate the premise on the pretext that she was the administratrix of the deceased estate and that the sale was illegal. However, considering the decision of the Court of Appeal in **Civil Appeal No.75 of 2008**, the Defendants have no other option except to vacate the Plaintiff's house. In his closing submissions, Mr. Masaka has tried to convince this Court that the Letters of Administration were illegally granted to the 2nd Defendant and therefore this renders the sale nullity. With due respect to Mr. Massaka, this Court at this stage is not being called upon to determine the legality or otherwise of the sale of the disputed house. The Court of Appeal in its decision in Civil Appeal No.75 of 2008 has already declared

the sale of the disputed house to be valid and that the **suit property was property transferred to the Plaintiff who was a bona fide purchaser for value without encumbrances.** This Court is bound by the decisions of the Court of Appeal. It cannot therefore clothe itself with jurisdiction and determine an issue which has already been decided by the Court of Appeal. Furthermore, it is worth taking note that this Court does not have jurisdiction at this stage to deal with issues arising from matters of probate and administration of estate.

It is for the above reasons, that an order of vacant possession against the Defendants all those claiming under them, is quite appropriate in the circumstances.

Let me now turn to consider the issue of rent. The court record shows that the issue of rent was determined on evidence and Massati, J. in a ruling in this case dated **3rd October, 2006** specifically at page 3, held that, **the burden was placed on the Plaintiff to prove the amount of rent collected by the Defendant that was supposed to have been deposited in Court.** Pursuant to the order of this Court, the only evidence the Plaintiff produced in this Court is the **ruling by Massati, J. dated 12/05/2006** and a **Statement of Account of Expenditure,** which was filed in this Court on the 19th day of September, 2006. The pertinent question for this Court is therefore this: *did the Plaintiff offer any better evidence for this Court to award* ***TZS 24,000,000/=*** *as rent collected from the disputed house?* The ruling of Massati, J., of 12/05/2006 as tendered by the Plaintiff contains the following order:

> *"The 1st Defendant to collect all monthly rent from the sitting tenants and henceforth deposit all of it in Court until the final determination of this suit."*

Although the order by Massati, J. seems to be fairly straight forward, it does not state as from which date the 1st Defendant should commence to deposit the rent in Court or the amount to be deposited. There is also a problem with respect to the Statement of Account of Expenditure, which in considered view is not conclusive evidence as to the amount of rent the 1st Defendant was required to deposit in this

Court. In the first place, the Statement of Account shows the amount which ought to be deposited in 2006, but has nothing to prove any rent collected or to be collected in the years 2007, 2008, 2009, 2010, 2011 or 2012. On the other hand, Massati, J. in his ruling of 3rd October, 2006 regarded the statement of account as not being conclusive evidence which is why even though it was established that the 1st Defendant had collected **TZS 3,000,000/=** per year, still his Lordship did not make orders against the 1st Defendant as to deposit in Court that amount. Instead, his Lordship having considered other issues including payment of the debts of the deceased and school fees for Shukuru Njati and and Tatu Njati who by then were pursuing studies in Russia (Lumumba University) and Tanzania (University of Dar es Salaam) respectively, finally ordered the 1st Defendant, to deposit in Court only **TZS 500,000/=.** There is no evidence however, that the 1st Defendant ever deposited in Court that amount of money as ordered. Furthermore, aside from the statement from the bar by Mr. Marando, which he made before Werema, J. on 31st July, 2009, that the 1st Defendant had accounted for rent for the years 2006 and 2007, there is nothing on record to establish if the 1st Defendant ever accounted for rent for the years 2008 and 2009 and/or the subsequent years.

The Plaintiff is also claiming for the rent the 1st Defendant purportedly collected for the years previous to the order by Massati, J. that is, for 2003, 2004 and 2005. In my considered opinion the order by Massati, J. that the 1st Defendant deposit in Court TZS 500,000/- affected the rent she collected as from 2006 onwards and not for the previous years. The ruling of Massati J. however, is conspicuously silent on the deposit in Court of rent the 1st Defendant collected prior to 2006. This finding finds support in the statement by Mr. Marando before Werema, J., on the 31st July, 2009, in response to the question whether this Court should order the 1st Defendant to account for the rent collected together with its expenditure for the year 2006 and 2007, whereupon he responded that the 1st Defendant had accounted only for the rent for the years 2008 and 2009. In my considered view and basing on what is in the court record, the rent the 1st Defendant was required to deposit in Court was that for the years beginning

from May, 2006 until the date of determination of this suit. This would amount in total to **TZS 3,374,946/-** being rent for 81 months (6 years and 9 months) reckoning from May 2006 to February 2013 at the rate of **TZS 41,666/-** per month having divided TZS 500,000 by 12 months in a year. In my considered the scanty evidence the Plaintiff has offered in this Court is insufficient for this Court to order the 1st Defendant to deposit in Court **TZS 24,000,000/=** being the rent purportedly she collected from the disputed house. I therefore find and order the 1st Defendant to pay the Plaintiff **TZS 3,374,946/-** being the amount of rent she ought to have deposited in this Court as per the order of this Court.

On the 16th day of June, 2003, Mr. Mnyele learned Counsel for the Plaintiff prayed before this Court (Kalegeya, J.) for Judgment on admission against the 2nd Defendant. At that time F. A. Jundu (now the honourable Judge Kiongozi) who was the Learned Counsel for the 2nd Defendant conceded to the prayer. However, having regard to the nature of the controversy, Kalegeya, J. did not grant the prayer but ordered the matter to go to full trial.

It is on record that **SOFIA YASSIN NJATI**, the wife of Yusufu Mzee, the deceased, had contested the grant of Letters of Administration to ZAINABU MZEE and therefore she and her two children, **Shukuru Yusufu Mzee** and **Tatu Yusufu Mzee** had refused to take the cheques that had been drawn in their favour containing the amount of money they were entitled to as their share being proceeds from the purchase price the disputed house had fetched. In terms of **Exhibit P3**, titled "***Malipo ya Awali (Down Payment) ya Mauzo ya Nyumba Na.29 Livingstone Street***", which Zainabu Mzee, the 2nd Defendant herself signed, three cheques were drawn in her favour and her two children, herself was to get **TZS 8,500,000/-,** and Shukuru Yusufu Mzee and Tatu Yusufu Mzee were each to get **TZS 9.916,666/-,** thus making the total amount the three would have received to be **TZS 28,332,000/-** In my considered opinion this is the amount of money Sofia Yassin Njati and her two children, Shukuru and Tatu are now entitled to being part of their share in the estate of YUSUFU MZEE arising from the proceeds of the sale of the disputed house.

In the whole and for the above reasons judgment and decree is hereby entered as follows:

As Against the Defendants:

(i) *It is hereby declared that the sale of the suit property House on Plot No.4 Block 61 House No.29, Livingstone Street, Kariakoo, by the 2nd Defendant to the Plaintiff was lawful and proper and the Plaintiff has thereby acquired good title over the same.*

(ii) *The Defendants and all those claiming under them shall surrender vacant possession of House on Plot No.4 Block 61 House No.29, Livingstone Street, Kariakoo, the suit property.*

(iii) *It is hereby declared that the 1st Defendant has no further claim over the suit property and that her right and that of her two children is now limited to receiving the* ***TZS 28,332,000/-*** *in item (vi) below, as her share of the estate of YUSUFU MZEE, deceased.*

(iv) *The 1st Defendant shall pay the Plaintiff* ***TZS 3,374,946/-*** *being the amount of rent she collected from the suit property at the rate of TZS 500,000/- per year from May 2006 to February, 2013.*

As Against the Plaintiff:

(v) *The Plaintiff shall pay the 2nd Defendant* ***TZS 11,000,000/=*** *being the outstanding balance of the purchase price of the suit property.*

(vi) *The Plaintiff shall pay the 1st Defendant,* ***TZS 28,332,000/=*** *as part of her inheritance together with her two children Shukuru Yusufu Mzee and Tatu Yusufu Mzee.*

(vii) *Each party shall bear own costs in this suit.*

It is accordingly so ordered.

.....

R.V. MAKARAMBA

JUDGE

08/02/2013

Judgment delivered this 08th day of February, 2013 in the presence of Mr. Marando, Advocate for the Plaintiff and Mr. Masaka, Advocate for the 1st Defendant and in the absence of the 2nd Defendant.

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R.V. MAKARAMBA

JUDGE

08/02/2013

Word count: 6,230