

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 83 OF 2013

LUMEME RAJABU MABIRA.....PLAINTIFF

VERSUS

RASHID SALUM MINTANGA.....1ST DEFENDANT

REMINA AUCTION MART.....2ND DEFENDANT

DIRECTOR ILALA MUNICIPAL COUNCIL.....3RD DEFENDANT

KARIM DEWJI @ DEWLO.....4TH DEFENDANT

BAHADUR DEWJI@DEWLO.....5TH DEFENDANT

J U D G M E N T

P.M. KENTE, J:

The plaintiff filed this suit against the defendants both jointly and severally claiming for judgment and decree on the following reliefs:-

- a. The plaintiffs be declared the lawful owner of the suit property.*
- b. The 1st defendant be declared as a trespasser to the plaintiff's ownership of the suit property.*
- c. The 1st and 2nd defendant be declared trespassers into the plaintiff's house located on Plot No. 24 Block "M" Ilala Municipal Dar es salaam.*
- d. The 1st and 2nd defendant be ordered to return all the robbed properties and in alternative the destroyed properties (as listed in the annexure B collectively) be valued and the 1st and 2nd defendants be ordered to pay the valued amount*

- e. *The 2nd defendant be ordered to pay to the plaintiff the sum of money Tshs. 50,000/= being the money they took on the date of trespass to the plaintiff's property.*
- f. *The 4th and 5th defendant be ordered to return the Title deed of the suit property belonging to the plaintiff unconditionally.*
- g. *The defendants be ordered to pay the plaintiff General damages amounting to Tshs 150,000,000/=.*
- h. *Cost of the suit.*
- i. *Any other relief(s) that this honourable court may deem fit and just to grant.*

In their respective written statements of defence, the defendants denied the allegations made by the plaintiff and prayed for the court to dismiss the suit with costs.

At the hearing the plaintiff was represented by Mr. Mtiginjola learned Advocate while the 1st 4th and 5th defendants were represented by Mr. Kambo, learned counsel. The, 2nd defendant was represented by Mr. Morris, learned counsel and the 3rd defendant was represented by Mr. Tafisa, Municipal Solicitor. Immediately before the commencement of hearing the following issues were identified from the pleadings.

1. *Who is the rightful owner of the suit property*

2. *Whether the transfer of the right of occupancy by the 3rd defendant was properly done*
3. *Whether there was any eviction of the plaintiff by the second defendant*
4. *If issue No.3 is answered in affirmative, whether there was any loss suffered by the plaintiff*
5. *To what reliefs are the parties entitled.*

The plaintiff called six witnesses, namely, Lumeme Rajabu Mabira (PW1), Said Mussa Bhanji (PW2) Haji Warid Kaborou (PW3), Juliana Ngonyani (PW4), Husna John Mwakibete (PW5) and Suna Juma (PW6) in a bid to prove his case. On the other hand the defendant called five witnesses including themselves. Those who testified in support of the defence case were Rashid Salum Mwintanga (DW1), Rose Joseph Masuka (DW2), Samson Mkamba (DW3), Bahadur Dewji (DW4), and Alkharim Dewji (DW5). After closure of both cases, both sides filed their final written submissions to assist the court to arrive at a fair and just decision.

The first issue seeks to establish the identity of the lawful owner of the suit property. This issue is prompted by the 1st defendant's contention

that the suit property was sold to him by the plaintiff who is however strongly opposed to the said contention. PW1 Lumeme Rajabu Mabira testified that, he is the owner of the suit property. He said that on 10th August, 2009 he was granted a loan (Tshs 40,000,000/=) from the 5th defendant upon agreement that the same would be paid back with interest (sh. 4,000,000/=) and was payable within six months. He said that the house in dispute was put on as security for the said loan. According to the plaintiff the loan was paid, except for the interest which was sh. 4,000,000/= which he could not pay due to the fact that he was facing problems in his business and within the same period, he lost his two parents. He told the court that he contacted the 5th defendant and notified him about the difficult situation which he was facing. However he said, the 5th defendant insisted that he could not release his title deed unless he paid the said balance. He went on narrating that he managed to raise the said sh. 4,000,000/= but he could not find the 4th and 5th defendant as he was told that they had gone abroad.

According to the plaintiff, his house was seemingly sold to the 1st defendant by the 4th and 5th defendants. Even though the plaintiff denied in the strongest possible terms to have sold the suit property to

the 1st defendant. He contended that he owned the suit property since 1992 and he had never sold it to either the 1st defendant or the 5th defendant. To support his testimony, he produced a copy of a certificate of title as exhibit P2. He also produced a caveat as exhibit P3.

The above testimony was supported by the testimony of PW3 and PW5 who witnessed the loan agreement in which the plaintiff received Tsh.40,000,000/= from the 5th defendant. They also told this court that the plaintiff was granted the said loan by the 5th defendant and the house in dispute was put on as a security. They insisted that the debt was discharged except for the interest which was to be paid had the plaintiff not lost his parents.

The first defendant Rashid Salum Mintanga (DW1) told this court that he is the owner of the suit property having bought the same from the plaintiff at the price of Tshs, 20,000,000/=. He said that transfer was duly effected and the property is now registered in his name. He tendered a sale agreement and the transfer deed collectively as exhibit D1. He went on saying that after the execution of the sale agreement, the plaintiff requested him to be given a three, month's

extension of time so that he could give vacant possession but thereafter, the plaintiff allegedly kept on requesting for further extensions until when he (1st defendant) sought assistance from the 2nd defendant who however, failed to evict him.

The fourth defendant Bhadur Dewji testified to the effect that he never entered into any sale agreement with the plaintiff but what he knows is that the plaintiff used his house as a security for the loan which he secured from the 5th defendant. He added that the loan did not attract any interest. According to this witness, after payment of the loan, the 5th defendant returned the title deed to the plaintiff who later on sold his house to the 1st defendant. He added that the sale transaction was done in the 5th defendant's office because the 1st defendant namely Rashid Mintanga was once his employee and that the 4th defendant was the one who witnessed the sale agreement between the plaintiff and the 1st defendant.

This testimony was also supported by the evidence given by DW5 Alkarim Dewji who told this court that he only knew the plaintiff for the first time when he requested to be given a loan from his brother. According to DW5 there was no sale agreement between the plaintiff and the 4th defendant. He added that the plaintiff sold his house to

the 1st defendant and the sale agreement was executed in their office.

For purposes of convenience, I intend to consider and finally determine the 1st and 2nd issues together as they are closely related if not completely interwoven.

Now, under section 2 of the **Land Registration Act, [Cap. 334 R.E. 2002]**, owner of Land or a person with interest to land is defined in the following terms.

“Owner means in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered.”

The Plaintiff in support of his case produced exhibit P2 which is a copy of a Certificate of title on Plot No. 12 Block “M” Ilala Area, Dar es salaam with title No. 101031 issued in 2006. The 1st defendant for his part produced a sale agreement which was allegedly executed between the plaintiff Lumeme Rajabu Mabira (vendor) and the 1st defendant Rashid Salum Mintanga (purchaser) together with the transfer deed. And as can be gleaned from the submissions made by Moriss learned counsel for the 2nd defendant, the most obvious argument in favour of the proposition that the house in dispute was

sold to the 1st defendant is the fact that, it is now registered in his name. This argument is certainly based on the definition of the term "owner" as quoted herein before. But with due respect to Mr. Moriss, it is hard to argue that even where registration is fraudulently procured as it is in this case, the person in whose name the property is registered shall be the owner. It does not require any emphasis to say that, where the registration of an estate or interest in land is procured by fraud, that registration is null and void. And, this I will hereinafter demonstrate.

From the evidence on record, it is apparent that there is no dispute between the parties that before the occurrence of the facts leading to the present suit, the house in dispute belonged to and was registered in the name of the plaintiff. Moreover, it is common ground that, a lien was created on that property after the plaintiff was granted a loan by the fifth defendant. Going forward, it is as well not in controversy that the plaintiff managed to discharge the said debt though belatedly. For the avoidance of doubt, the loan transfer between the plaintiff and 5th the defendant is said to have taken place in 2009. On the other hand the same property is said to have been sold by the plaintiff to the 1st defendant on 26th November, 2010

and subsequently transferred to the 1st defendant on 18th May, 2011 (vide exhibit D1). Again, for the avoidance of doubts and for the sake of clarity, both the sale Agreement and the Transfer Deed were attested by an advocate known as Mwalali. According to advocate Mwalali, both the plaintiff and the 1st defendant were introduced to him by a person known as Idd Mohamed. However, the first defendant could not bring Mwalali, or Idd Mohamed to support his claims that he bought the disputed house. This, to my mind, clearly shows that, except for the 5th defendant whose evidence, as I will hereinafter demonstrate, is to be taken cautiously, the alleged sale and transfer transaction was not proved by any other independent evidence.

As I have already intimated, the evidence of the 5th defendant is not without flaws. He himself conceded and this is not disputed that the 1st defendant was his employee at the time which was material to the occurrence of this dispute. It is in these circumstances that the plaintiff accuses them and probably so of conspiracy to defraud and finally deprive him of his property. Undoubtedly, the fifth defendant is bound to disagree that he connived with the 1st defendant to have the plaintiff's house purported to have been sold to the 1st defendant.

But the question is, how truthful was the 5th defendant? I had the opportunity to hear him as he testified. I have gone through his testimony. He claims to have witnessed the sale agreement between the plaintiff and the 1st defendant but this evidence is diametrically opposed to what is actually contained in the alleged sale agreement (exh. D1). Being a witness to a written sale agreement does not only mean being physically present when it is executed but it also includes the witnessing of the document being signed and signing it too to say that one saw it being signed. While the fifth defendant claims to have witnessed the alleged sale agreement, the said agreement supports the contrary view that he was not a witness. In the absence of an independent witness I think, the 1st defendant was saddled with a duty to show that he has more reliable and independent evidence to support his claims that he bought the plaintiff's house.

But then I am digressing as this was not done. It follows that the plaintiff did not execute any of the statutory forms and instruments for the sale and transfer of his house to the 1st defendant. The said house belongs to him and it has never been the property of the 1st defendant.

When all is said and done, the first and second issues are resolved in the plaintiff's favour. He is the lawful owner of the suit premises and its transfer to the first defendant was nothing but fraudulent.

The third issue is relatively easy and straightforward to determine. The plaintiff's evidence is that on 6th March, 2013 his residence was invaded by a group of people together with some Police officers who broke into his compound and forced him to leave his house on the grounds that he had sold it to the 1st defendant. The Plaintiff's properties such as furniture and others were loaded in motor vehicles and rushed off down the streets. To date efforts to recover his properties have proved futile. While in panic and confusion the Plaintiff hurriedly went to the nearby Police Post to seek assistance but he was told to vacate the house on the grounds that he had already sold it. He went back home but only to find that his properties were being taken away. As if that was not enough, the second defendant admits in his WSD (paragraph 4) that the eviction was done calmly and professionally. If the principle that the parties and the court are bound by the pleadings (**See Juma Jaffer Juma V. Manager PBZ Ltd & 2 Others Civ. Appeal No. 7 of 2002, CAT at Zanzibar** (unreported)) is

anything to go by, the second defendant is estopped from denying the fact that the plaintiff was evicted. In fact the plaintiff together with his family members were returned back into their residence upon intervention by the Inspector General of Police but after they were physically expelled from the same.

Mr. Morris learned counsel appearing for the 2nd defendant has strenuously submitted that the plaintiff was not evicted. But with due respect to Mr. Morris, with the above kind of evidence, no reasonable court would find that there was no eviction in this case. Unless one is immersed in his own thoughts, he cannot fail to see this plain fact. So the 1st and 2nd defendants' position that the plaintiff was not evicted from his house is found to have no evidential basis and is hereby rejected. To that end, the third issue is resolved in the affirmative.

The fourth issue is consequential to the third issue. It is whether there was any loss suffered by the plaintiff as a result of unlawful eviction. In the present situation, there are two categories of evidence that is relevant to the loss issue. The first category is the oral evidence from the testimony of the plaintiff together with his witnesses. The second category is that one which can be inferred from the circumstances contemporaneous with the eviction.

Starting with the first category of evidence, I find it difficult to disagree with the plaintiff. It is, I think evident from the evidence on record that the plaintiff's properties were forcefully seized by the second defendant who was acting under the instructions of the first defendant. The evidence given by the plaintiff shows, albeit on a balance of probabilities that, in the course of the unlawful eviction, he lost his cash (50,000,000/=) which he had received from PW2 one Saidi Bhanji in the course of their business. In all probability, it seems to me that the plaintiff suffered a big loss both materially and financially.

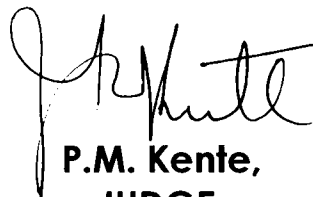
The second category of evidence proving loss is inferable from the circumstances of the case when considered as a whole. The Plaintiff had just been granted a loan by the 5th defendant which loan he eventually paid back. But to his dismay, he ended up being unlawfully evicted from his residence and severely humiliated on the pretext that he had sold his house to the 1st defendant who was a total stranger to the loan transaction. It seems to me that this was the most traumatic experience in the plaintiff's life. I would say and hold that, it must have occasioned him a great loss.

Next to be considered is the reliefs to which parties are entitled. Taking into account the fact that the plot to deprive the plaintiff of his

house was essentially hatched and perpetrated by the first and fifth defendants, they are ordered, each, to pay the plaintiff sh. 25,000,000/= being the amount of cash which he lost in the course of the unlawful eviction. Moreover, the first and fifth defendants are to pay the plaintiff sh. 25,000,000/= being general damages for the loss, humiliation, and anguish which he suffered as a result of (unlawful) eviction. The second defendant is ordered to pay the plaintiff sh. 10,000,000/= being compensation for his seized and retained properties. This punitive order is made while taking into account the fact that the 2nd defendant blatantly refused or neglected to return and hand over to the plaintiff the said properties even after a court order to that effect was made. The transfer and registration of the suit property in the 1st defendants' name is hereby declared null and void. The third defendant is ordered to see to it that the said property is re-registered in the plaintiff's name. Needless to say, the above mentioned monetary awards shall attract interest at the bank rate from the date when this suit was filed to the date of this judgment and, at the court rate, from the date of judgment to the date of payment in full.

To the above extent, judgment is entered in favour of the plaintiff
with costs.

Dated at Dar es salaam this **25th** day of **May, 2018**.



**P.M. Kente,
JUDGE.**