

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPEAL NO. 92 OF 2015

(Arising from decision of Registrar of Tittles delived on 16/8/2010)

OMAR ALI OMAR..... APPELLANT

Versus

REGISTRAROF TITTLES.....1ST RESPONDENT

SULEIMAN ATHUMAN SWAI.....2ND RESPONDENT

Date of the Last order: 23/05/2018

Date of the Judgment: 24/8/2018

J U D G M E N T

MGONYA, J.

This Appeal originates from the decision of Registrar of Title delivered on 16th day of August, 2010 in which the Registrar of Title rectified the Land Register by canceling the name of the Appellant **(OMAR ALI OMAR)** and restoring the name of **SULEIMAN ATHUMAN SWAI** as the registered owner.

The Appellant herein being aggrieved and dissatisfied with the decision, appealed to this Honourable Court on the following grounds:-

- a) That the Registrar of Titles erred in law and in fact for failure to observe the principal of natural justice by denying the Applicant his right to be heard before registering the rectification hence condemned him unheard.***
- b) That the Registrar of Titles erred in law and in fact by rectifying the land registers by deleting the name of the Appellant as owner without any justifiable reason;***
- c) That the Registrar of Title erred in law and in fact by entertaining and determining probate matter which has no jurisdiction;***
- d) That the Registrar of Titles erred in law and in fact by rectifying the Land Registry without satisfied as to how the Appellant was involved in the purported error before registered the said rectification;***
- e) That the Registrar of Titles erred in law and in fact by registering the rectification by removing the name of the Applicant as owner before indemnifying the Appellant for loss of value.***

The Appellant was represented by MRINDOKO learned Counsel while the 2nd Respondent was under the services of MR. EDWARD LISSO and 1st Respondent was represented by HOSEA, State Attorney.

With the leave of this Court the Appeal was disposed by way of Written Submissions.

In support of the grounds of Appeal; The Appellant decided to blend the 2nd and 4th grounds of Appeal and argued them together; while the rest of grounds remain separately.

Regarding to 1st ground of Appeal, Appellant submitted that it was the duty of the 1st Respondent to give right of being heard before exercising its power under **Section 99 of the Land Registration Act** as that right of hearing was basic and granted by **Article 13 (6) b of the Constitution of the United Republic of Tanzania (1977)** as amended time to time. The Appellant cemented his argument with the Court of Appeal Decision in a case of ***JUDGE INCHARGE ARUSHA & AG VS. N. I. N. MUNUO NGUNI (2004) TRL 44***; Hence the Appellant prayed the Court to nullify the rectification made and order the name of the Appellant to be restored.

Going to the 2nd and 4th grounds of Appeal, the Appellant contended that from the wording of provision of **Section 99 (2) of the Land Registration Act** that the Appellant's name was removed without justification. The Appellant further submitted that, there was nowhere in the 1st Respondent's decision mentioned the Appellant to have been party/priory or contributed

to the commission of the purported fraud, or error; then the fraud was committed by **BAKARI SELEMAN** (as legal personal representative of the deceased) and error was committed by 1st Respondent. The Appellant asked as to why the decision affect the Appellant as bona fide purchaser who was not involved in any crime. Hence the 1st Respondent was not justified to cancel the name of the Appellant and replace with that of the deceased without establishing the pre-condition set out under **Sub Section 2 of Section 99 (Supra)**.

On the 3rd ground of Appeal, the Appellant submitted that the 1st Respondent erred by removing the Appellant name on the account of matter that had no jurisdiction and without investigation, they proceeded and decided to denounce the death of SULEIMAN ATHUMAN SWAI (deceased). The Appellant went further to submit that as per **Section 67 of the Land Registration Act**, the said Bakari in his Application attached copy of letter of Administration of the Estate of the owner (deceased) hence the 1st Respondent had duty to inquire to the Court that issued the probate to BAKARI ATHUMAN so that the Court could have denounce the death after thorough investigation was conducted. Further, that the 1st Respondent was in a position to advice the person purported to be deceased to report the purported fraud to the police who would investigated and prove

that the deceased was alive by evidence. In that event, it is the Appellant's view that the 1st Respondent determined the matter related to probate without jurisdiction.

On the last/5th ground of Appeal, Appellant submitted that, as per the decision of the 1st Respondent, the name was removed followed with an error purported to have been committed by the 1st Respondent, and for the reason under the provision of **Section 100 of the Land Registration Act**, the Appellant was entitled to be indemnified by the Government in the sense that valuation of the property by the Government could have been done before rectification, but contrary to the law the 1st Respondent failed to identify the Appellant.

Responding on the Appellant submissions in regard of his Petition of Appeal, the 1st Respondent submitted that, the Appellant was dully notified through Notice with **Ref. No. LR/T/34022/71** dated 1st September, 2010 which was sent to the Appellant on **7th September, 2010** in which he did not take any necessary step in responding to the said notice. It is the 1st Respondent's stand that, the non-activeness of the Appellant does not bar the 1st Respondent to proceed with rectification; and that the Respondent was not in violation of **Article 13 (6) of the Constitution of the United Republic of Tanzania** but rather had full mandate

and in the event had fully complied with requirement of **Section 99 (1) Land Registration Act, Cap. 334 [R. E. 2002]**.

For the 2nd and 4th grounds of Appeal, the 1st Respondent submitted that the Application under **Section 67 (Supra)** was deceitful made and the 1st Respondent wrongly register it with the effect of transmitting **Plot No. 1 Block 72 at Kariakoo** to BAKARI ATHUMANI (as legal representative of SULEIMAN ATHUMAN SWAI) who was alleged to be dead. However, being discovered that the later was still alive, then the 1st Respondent had to rectify the Registration as per **Section 99 (1) (f) of Cap. 334 [R. E. 2002]** as the said SULEIMAN ATHUMAN SWAI (deceased) appeared in person at the office of the 1st Respondent and produced his passport.

The 1st Respondent contended that the provision of **Section 99 (2) (b) of the Land Registration Act Cap. 334 [R. E. 2002]** gives power The Registrar of Titles to rectify Land Registry disposition to any person through whom claims for value was void. From the same, the 1st Respondent averred that therefore the disposition of Plot No. 1 Block 72 Kariakoo from BAKARI ATHUMAN to the Appellant was void since the said BAKARI ATHUMAN obtained the plot in dispute by false misrepresentation **as such had no good title to pass to the Appellant.** That the 1st

Respondent also acted on the facts believing to be true and registered Plot No. 1 Block 72 Kariakoo in the name of Bakari ATHUMAN.

Regarding the 3rd ground of Appeal, the 1st Respondent submitted that upon discovered that SULEIMAN SWAI was still alive, the 1st Respondent rectified the Land Register by cancelling the name of OMAR ALI OMAR and restore the name of SULEIMAN ATHUMAN SWAI and that the 1st Respondent did not denounce the death rather was exercising his powers under **Section 99 (1) of the Land Registration Act, Cap. 334 [R. E. 2002]**.

On the last ground, the 1st Respondent submitted that the Appellant was not entitled to be identified by the 1st Respondent since there was no proof of any development on the disputed plot hence it was the duty of Appellant to prove that he had made some development therein as he was in a good/better provision to know the value of the development thereon. The 1st Respondent cited **Section 100 (6) of the Land Registration Act Cap. 33 [R. E. 2002]** which requires the interested part to make an Application to the Registrar of Tittle so as can determine whether a person was entitled to be identified or not. Therefore, provisions above shows that, the right to be identified was not automatic and the Appellant had to move the 1st Respondent by an Application as such the

Appellant did not make any Application as required by law. Under the circumstances, and reason adduced above, hence the 1st Respondent prayed this Appeal be dismissed with costs.

On the second Respondent's side, he contended that the 1st Respondent acted within the preview of its power as provide under the provisions of **Section 99 (1) (f) (Supra)** and qualified under **Sub Section (2) (b) of the Registration Act, Cap. 334 [R. E. 2002]**. Also the Appellant was dully served with notice of rectification as per record of the Court. Thus, cannot at this time allege that he was condemned unheard; hence **Article 13 (6) of the Constitution of the United Republic of Tanzania (1977)** as well as the case of **JUDGE INCHARGE ARUSHA AND AG (Supra)** were totally inapplicable herein as it does not support the Appellant's appeal. It is the 2nd Respondent's view that the instant ground be dismissed in that there was an error in the Register as well as sufficient cause which prompted and justified the 1st Respondent to rectify it.

On for the 2nd and 4th grounds of Appeal, 2nd Respondent submitted that, at all material time he had been in possession of the original certificate of tittle and in full occupation of the property in issue, as such, the transaction was fraudulent, which was without legal significance that one cannot claim to be a bona fide

purchaser for value from a *mala fide* vendor. It follows therefore the transaction was null and void as no valid tittle could pass from the said BAKARI ATHUMAN to the Appellant.

Regarding to 3rd ground, the 2nd Respondent submitted that, by the discovery of omission of provisions of **Section 69 (2) of the Land Registration Act Cap. 334 [R. E. 2002]**, the 2nd Respondents was of the view that the action taken by the 1st Respondent did not in any way determine the probate matter.

On the 5th ground, the 2nd Respondent submitted that transfer transaction was void *ad initio* being tainted with fraud and *mala fide*, as such no any valid tittle passed from the fraudsters led by BARAKA ATHUMANI to the Appellant. 2nd Respondent cited provisions of **Section 100 (4) of Cap. 334 [R. E. 2002]** that no identity shall be payable to any person who has himself caused or contributed to the loss. Hence, from the above position the Appellant was not entitle identity.

In the Appellant's rejoinder to the 2nd Respondent, the Appellant submitted on 1st ground of Appeal by denied to have been notified about the rectification, and that the 2nd Respondent has not established as to how the Appellant was notified.

On the 2nd and 4th grounds, the Appellant emphasized that, there was no evidence on record that the 2nd Respondent was in possession of the disputed premises and Tittle Deed.

The Appellant further, made a rejoinder to the submission in chief by 1st Respondent; that there was no evidence if the notice was sent and delivered to the Appellant. Further, the letter purported to be served to the Appellant 1/9/2010 does not amount to show cause notice; hence the Appellant was not given opportunity to be heard; and thus was in violation of Principal of Natural Justice under the provision of **Article 13 (6) (e) of the Constitution of the United Republic of Tanzania (1977)**.

From the above argument, Appellant prayed to this court to quash or set aside the 1st Respondent's decision with costs and direct the 1st Respondent to restore Appellant in the land register book.

Having gone through the grounds of Appeal as well as the court records and the submission of both parties, this Court observes that, the main issues to be considered/determined is whether the Appellant had been notified on the rectification concerning **Plot No. 1 Block 72 Kariakoo**. (Whether the Notice of rectification was sent to the Appellant).

On the 1st ground of Appeal, this Court finds that according to the evidence on record, **the Notice with Ref. No. LR/T/34022/71** dated **1st day of September, 2010** written by Victor Robert (Asst: Registrar of Tittles) was sent to OMAR ALI OMAR/Appellant whereby BAKARI ATHUMAN and SULEIMAN ATHUMAN SWAI, were copied. That being the case, the Appellant himself denied the right to be heard by not acting/responding to with the Notice given. It is the trite law under the case of ***R. B. POLICIES AT LLOYDS VS. BUTLER (1950) I KB 76 AT 81 or (1949) 2 ALL ER 226 at page No. 229 – 230*** that:

"Those who go to sleep on their rights must not be assisted in the court".

I therefore believe that there is no violation of **Article 13 (6) of the Constitution of the United Republic of Tanzania (1977)** as the Appellant denied himself the right to be heard as the notice was sent to him as it was seen in the court records hence this **ground has no merits.**

In determining the 2nd and 4th grounds of Appeal, this Court records provides that the Appellant purchased the disputed plot from one BAKARI ATHUMAN who was registered as legal representative of SULEIMAN ATHUMAN SWAI. After the sale, Appellant sought for consent of Commissioner for lands to

disposition which was granted. Later the Appellant submitted the transfer to the Register of Title for registration and the same was granted on **24th day of March, 2010**. Further the record reveals that, on **16th day of August, 2010** the 1st Respondent rectified the Land Register by cancelling the name of the Appellant as the registered owner and restored the name of the deceased.

Thus being the case, this Court is of the view that the disposition from BAKARI ATHUMAN (as legal representative of SULEIMAN ATHUMAN SWAI) of Plot No. 1 Block 72 Kariakoo to the Appellant was **null and void** as per records of Court since one Bakari Athuman **had no good tittle to pass**, as it was held in case *of FARAH MOHAMED VS. FATUMA ABDALLAHY (1983) TLR 205*.

Therefore it goes without saying that the procedure used by the 1st Respondent under **Section 99 (1) (f) of the Land Registration Act Cap. 334 [R. E. 2002]** is proper as the 1st Respondent acted within the powers conferred by the law.

As I have stated earlier, that the Appellant was dully served with notice of rectification, hence the removal of his name as the owner of the disputed land and restoring the name of the former owner was done according to law and I quote:-

"Section 99 (1) (f) (supra): "subject to any express provision of this Act, the land register may be rectified pursuant to an order of the High Court or by Registrar subject to an appeal to the High Court, in any of the following cases:-

(f) In any case, where by reason of any error or omission in the land register, or by reason of any memorial made under a mistake, or for other sufficient cause it made be denied just to rectify the land register."

It is from this legal position that these two grounds of Appeal are meritless.

As for the 3rd ground of Appeal, this Court believe that the act done by the 1st Respondent was not to denounce the death but to things as it was before the subsequent transfer. Then the argument of the Appellant that the office of the 1st Respondent having document of probate of SULEIMAN ATHUMAN SWAI (deceased) does not hold water as the court records did not show it anywhere. Therefore this ground is hopeless and therefore fails.

Going with the allegation of the Appellant on the 5th ground, it is on the court records that in providing entitlement, one must prove the development on the disputed area. In our case, the

Appellant failed to prove any progress done on the suit land as to be entitled award or to be indemnified. The law provides, under the provision of **Section 100 (6) of the Land Registrar Act, Cap. 334 [R. E. 2002]** that:-

"The Registrar may, on the Application of any interest party, and subject to an Appeal to the High Court, determine whether a right to indemnity has arisen under this Section, and if so, award indemnity."

Since the record does not reveal that the Appellant moved the court by way of Application so that the court could determine whether a right to indemnity has arisen, then no indemnity will be payable.

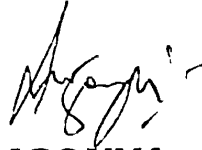
The position is also cemented by **Section 100 Sub Section (4) (Supra)** that:

"100(4) No indemnity shall be payable under this Act to any person who has himself caused or substantially contributed to the loss by his fraud or negligence or drives title (otherwise than under registered) disposition for value from a person who so caused or substantially contributed to the loss."

Therefore it is from the wording of the **Section 100 (4) (supra)** that I find no reason of allowing the Appeal.

Accordingly, this Appeal is dismissed in it's totally with costs for being meritless.

Right of Appeal Explained.

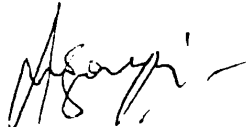


L. E. MGONYA

JUDGE

24/8/2018

COURT: Judgment delivered in the presence of Advocate Mswenya holds brief for Advocate Mrindoko for Appellant, Ms. Caroline Matemu for 1st Defendant, Advocate Lisso for 2nd Defendant and Ms. Monica RMA on 24th day of August, 2018 in chamber No. 18.



L. E. MGONYA

JUDGE

24/8/2018