

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 26 OF 2008**

YUSUFU JUMA SADIKI.....1ST PLAINTIFF

MOHAMED JUMA SADIKI.....2ND PLAINTIFF

VERSUS

NURU MOHAMED KIHIO.....1ST DEFENDANT

MARIAM MOHAMED KIHIO.....2ND DEFENDANT

ASHRAF KIHIO.....3RD DEFENDANT

J U D G M E N T

Date of last order: 2/3/2018

Date of Judgment: 27/4/2018

MGONYA, J.

The Plaintiffs **YUSUFU JUMA SADIKI AND MOHAMED JUMA SADIKI** referred as 1st and 2nd Plaintiffs have come to this Hon. Court by way of Amended Plaint seeking Judgment and Decree against Defendants, **NURU MOHAMED KIHIO, MARIAM MOHAMED KIHIO** and **IDD ASHRAF** (The Administrator of the Estate of the late Ashraf Kihio).

The relief sought are as follows:

- 1. The Defendants deliver vacant possession;***
- 2. The 3rd Defendant be ordered to pay rent to the Plaintiffs at the rate of Tshs. 500,000/= per month from 1st March, 2001 to the date of availing vacant possession;***
- 3. General damages for hindering the development of the property;***
- 4. Costs; and***
- 5. Any other relief (s) that this Honourable court may deem just to grant.***

The Plaintiffs are represented by Mr. Azizi Learned Advocate, and Victor Ntatula Learned Advocate. Mr. Mwesiga learned Advocate represents the 1st and 2nd Defendants while the 3rd Defendant was represented by Mr. Mussa Learned Advocate.

On the other hand, the 1st and 2nd Defendant's grievances can be appreciated by looking at the wording of paragraph 18 of the Counter Claim and which is as follows:-

"18. That the Plaintiffs act of processing and obtaining transfer fraudulently has seriously interfered with the

1st and 2nd Defendants right of possession and enjoyment of the disputed premises."

On that ground, they pray for Judgment and Decree as follow:-

"(a) Declaration that the purported transfer Deed is a nullify for being fraudulently obtained;

(b) Declaration that the 1st and 2nd Defendants are the legal owners in common of the disputed property;

(c) Order that in the event that 1st Plaintiff is still interested should purchase the same at the current prevailing market price;

(d) General damages of Tshs. 34,000,000/= for denial of right of enjoyment and quite possession to the 1st and 2nd Defendants by the 1st Plaintiff;

(e) Costs of the suit; and

(f) Any other relief (s) as this Honourable Court may deem fit and just to grant.

The Plaintiff, **YUSUPH JUMA SADIKI** tendered four documentary Exhibits (**Exhibit P1 – 4**) and testified before the court as PW1. He also called two witnesses, **SELEMANI SAIDI SINGANO (PW2)** and **LIZ KABADA (PW3)**.

2nd Defendant, Mariam Mohamed was the sole witness on their part. The 3rd Defendant called 2 witnesses **FATUMA MOHAMED (DW 2) AND RAYMOND RUBEN KIMARO (DW3)**. She did not tender any document.

In his testimony, PW1 **YUSUPH JUMA SADIKI** testified that he is claiming to be handled a **House No. 42 Plot 4 Block "J" Msimbazi, Kariakoo**, since he bought the said suit premise from 1st and 2nd Defendants who the Administrators of the estate of Mohamed Amir Kihyo. PW1 proceeded to testify that, he bought the premises for the tune of **Tshs. 15 Millions**.

PW1 elaborated further that, after they have completed sale they went to the stage of transferring the property. In the Ministry of Land they were told that they cannot transfer the property until the name of the deceased is changed into the name of his Estate Administrators. **Exhibit P1** is the letter dated 19th June, 2001 in which the 1st and 2nd Defendants applied for an Application by legal personal representative of the late Mohamed Kihyo. The legal personal representative wrote to the Commissioner of Land to state that the property have been sold to the Plaintiffs. They requested Commissioner to remove their names and replace the same with

the Buyers' names. The Commissioner granted the payer and the Plaintiffs names were placed in the title.

PW1 proceeded to testify that after the transfer, they obtained a title deed which was admitted **Exhibit P2**. Exhibit P3 collectively are receipts of payment of land rent and property tax by Plaintiffs.

PW1 insisted that, they are in court since they are yet to be handled over the house. The witness told the court that the 3rd Defendant came up and claimed that the house was sold to him by the deceased. PW1 maintained that the 1st and 2nd Defendants were the rightful persons to sell the disputed house to Plaintiffs since they were the Administrators of the estate of late Mohamed Kihyo as per **Probate Case No. 4 of 1995**.

The witness proceeded to testify that the 3rd Defendant is not lawful owner as per the **Civil Case No. 21 of 2000** in the District Court of Ilala at Samora and the Ruling in **Civil Appeal No. 45 of 2003** in the High Court of Tanzania. The same were tendered and admitted as Judicial Notice. The witness went on saying that he had a plan of building and eight storey house worth **Tshs. 300,000,000/=**. However, by now he said is about **2 Billion Tshs**; and still the house is yet to be handled to them. He

successfully tendered a building permit which was admitted as **Exhibit P4**.

PW2 **SELEMANI SAID SINGANO** testified that there was a disposition of house by the 1st and 2nd Defendants to the Plaintiff over the property which was owned by Late Mohamed Kihyo. He further clarified that the ownership was shifted from Defendants to the Plaintiffs. The witness further testified that, he was told by 1st Plaintiff that they are yet to be handled the house.

PW3 **LIZ KIBADA** Legal Officer to the Office of Registrar of Titles testified that as per **Exhibit P2**, Title the current owner of the land in disputed are 1st and 2nd Plaintiffs. The ownership started on **21st March, 2002**. Confidently PW3 averred that, the person who has been registered by the Commissioner of Land is the owner.

PW3 narrated the procedure on how a person can obtain title from deceased. She said, the client has to come with the form **[Application for legal personal representative]** prepared by an advocate together with the letter of Administration from the court and current rent receipts. If the person has bought the land, PW3 told the court that the same has to come with other documents such as transfer deeds, notification of disposition,

approval for disposition, Sale Agreement, Original Certificate of Title and current land rent receipt and the said person has to state if he has paid Capital gain.

PW3 admitted that on **20/2/2003** they received injunction from Ashraf Kihyo (3rd Defendant) who they were told is a late Mohamed Amir Kihyo's brother. Through the injunction the 3rd Defendant was claiming that he is an owner of the Land in dispute. The injunction was registered on **20/2/2003**.

PW3 clarified at length that the Administrator of estate can sell the land and change title if he comes with the earlier stated documents and short of that there could be no any transfer.

On Defence DW1, **MARIAM MOHAMED KIHIO** the 2nd Defendant testified that she is sued as the Administratrix of the estate of her late husband Mohamed Amir Kihyo. She has confessed that the **House No. 42 Plot No. 4 Block "J" Msimbazi, Kariakoo** belonged to his late husband Mohamed Amir. DW1 admitted that they agreed to sell the house to the Plaintiffs for the tune of **Tshs. 90 Millions**, but Plaintiffs gave the **34 Million**. The said consideration she said was paid in presence of Mr. Hashim Mtanga learned Advocate, Selemani Saidi Singano and Mzee Samora. On the outstanding balance DW1 testified that,

the same was to be offered upon the determination of the case which was instituted by the 3rd Defendant. DW1 proceeded to testify that when they approached Plaintiff and showed the Judgment of the Ilala District Court, they asked them to return the money to them since they couldn't engage further sale of the said property. However, Plaintiffs refused.

DW1 disputed that they did not sign any document serve for the petty cash register where they received money. DW1 is shocked to find the Plaintiff has a title over the disputed property. She thus prayed for the court to declare the transfer by Plaintiffs nullity since herself and her co administrator to the property were not involved. She also prayed before the court that the property belonged to the late Mohamed Amir Kihyo be handled to his children.

DW2, **FATUMA MOHAMED** led by Mr. Mussa learned Counsel testified that the 3rd Defendant was her uncle and that the property in dispute was the property of her later father Mohamed Amir Kihyo who is deceased. Further, after the death of her father, they agreed that if the house is sold then the 3rd Defendant was to get a share since he was always there. DW2 admitted that they were not notified that the house was to be sold. The witness explained further that if the house was to be sold they were the

ones to sell the same as owner's children. The witnesses confessed **further** she knows nothing about the sale.

DW3 **RAYMOND RUBEN KIMARO** on his part testified that he recognized Amri Kihyo and Mariam Kihyo as the owners of the disputed plot since they were his Landlords. DW3 further testified that the Plaintiffs are invaders, since they sent Remina Auction Mart to destroy some properties in the suit land. He reported the matter to the Police and later, instituted a **Case No. 144 of 2015** which is before Hon. Dyansobera, J.

During the final pre-trial and scheduling conference issues framed were:-

- 1. Whether the first and second Defendants Lawful, sold the suit property to the Plaintiffs;***
- 2. Whether the first and second Defendants had legal capacity if any to sell the suit property to the Plaintiffs;***
- 3. Whether the third Defendant purchased the suit property from the late Mohamed Kihyo; and***
- 4. What reliefs are the parties entitled to.***

At this juncture, I have with intense attention sensibly and substantially considered the evidence adduced by both parties, the view and or advice of the Gentlemen Assessors and to a great extent the reasoned final submissions of the learned Advocates from both parties.

If I may quote partly the following are the written advice submitted by Gentlemen Assessors.

".....kwa ushahidi uliotolewa kwa pande zote mbili hakuna mauzo yaliyofanyika kwa hiyo wamiliki halali ni wadaiwa. Maombi ya mdai yatupwe kwa gharama....." (By Philip Kimaro).

"Kwa kuangalia mwenendo wa shauri hilo mbele yako na ushahidi wote uliotolewa; Wadaiwa waiishindwa kukidhi matakwa ya kisheria kuthibitisha madai yao....."

Walalamikaji wanao uhuru wa kukutana na walalamikiwa na kujadiliana namna ya kurejeshewa Tsh. 34 Milioni walizochukua Walalamikiwa bila ya zengwe. Mlalamikaji afutiwe hati miliki batili aiiyopata kwa njia zisizoeleweka kwa mujibu wa sheria....." (By Alex Kimatare).

As stated earlier in this judgment, I categorically itemized four issues for determination. Of course within the spirit of **Order XX Rule 5 of the Civil Procedure Code Cap. 33 [R. E. 2002]** reading together with the decision of the court of Appeal of Kenya in the case of ***KUKAL PROPERTIES DEVELOPMENT LTD VS. MALOO AND OTHERS [1990-1994] EA 281***, the court has a duty to determine an issues before it one way or the other. The more I scan the four issues in this case, I have found it necessary to start with the second issues. The reason for the same is that, before to venture in determining as to whether 1st and 2nd Defendants lawful sold the suit property, the court has to satisfy on the capacity of 1st and 2nd Defendants to enter into a contract of Sale with the Plaintiffs. It follows therefore the second issues has tasked my brain a great deal that before to determine the first issue, let me first start with second issues which touch the legal capacity of 1st and 2nd Defendants over the Sale of property to the Plaintiffs.

For ease of reference and clarity the 2nd issue reads:-

"Whether the 1st and 2nd Defendants had legal capacity if any to sell the suit property to the Plaintiffs."

It is imperative to restate portions of the evidence presented to court portions which are not disputed.

First, the suit property formerly was owned by one Mohamed Amir Kihyo who now is the deceased who passed way **15th October, 1989.**

Second, the Plot in dispute is **House No. 42 Plot 4 Block "J" Msimbazi, Street Kariakoo Area, Dar es Salaam.**

Third, the 1st and 2nd Defendants were appointed as Administratrix and Administrator of the late of Mohamed Amir Kihyo in **Probate Case No. 5 of 1995.**

Fourth, the Plaintiffs purchases the suit Plot on **4th May, 2001** from 1st and 2nd Defendants.

Fifth, the 1st and 2nd Defendants applied for legal personal representative of the late Mohamed Amir Kihyo on **19th June, 2001.**

The law is well settled that an Executor or Administrator has in respect of the property vested in him, power to sale immovable property conferred by written law upon Trustees of a trust for Sale.

Section 101 of the Probate and Administration of Estates Act, Cap 352 [R. E. 2002]. He has such power since the same he is a legal representative of the deceased person. See **Section 99 (Supra).**

As per Exhibit P1, the 1st and 2nd Defendants complied with the mandatory requirement of **Section 67 of the Land Registration Act Cap. 334 [R. E. 2002]** where they applied to the Registrar of Titles so that they can be registered as owner in the place of Mohamed Amir Kihyo (deceased). They applied on **19th June, 2001** and paid fees on **14th August, 2001** as per Exchequer **Receipt No. 15456702**. Since the payment was made on **14th August, 2001**, 1st and 2nd Defendants became registered as owner in the place of the deceased one Mohamed Amir Kihyo, on this particular date.

I understand that parties are bound by their own pleadings as it has been clearly stated in the case of ***SCAN TAN TOUR LIMITED VS. THE CATHOLIC DIOCESE OF MBULU, Civil Appeal No 78 of 2012;*** and in the case of ***PETER NG'HOMANGE VS. THE ATTORNEY GENERAL; Civil Appeal No. 114 of 2011*** Court of Appeal of Tanzania (both Unreported).

Now looking on paragraph 4 of the Plaint the Plaintiffs alleged that they purchase a suit property from 1st and 2nd Defendants on **4th May, 2001**. By these findings under paragraph 4 of their own Plaint, it is not hard to find that, the purchase was on **4th May, 2001** while as per Exhibit **P1** the 1st and 2nd Defendants became registered owner in the place of Mohamed Amir Kihyo deceased on **14th August, 2001** three months after the sale has been executed. Since the provision of **Section 68 (1) Cap. 334** provides that:

"No disposition by a legal personal representative shall be registered unless such estate or interest is registered in the name of such legal personal representative."

It follows therefore the 1st and 2nd Defendants had no legal capacity to sell the suit property to the Plaintiffs since they disposed the property in dispute before they became **registered legal personal representatives of Mohamed Kihyo**. I proceed to find that since they were not yet registered as legal personal representatives, they had no legal capacity to dispose the property to the Plaintiffs; since they were yet to be registered as owner in the place of the deceased.

During cross examination by Mr. Mussa - LC PW1 admitted that one cannot sell the property which is not his and if so the sell will be void. He further confessed that he bought the property in dispute on **4/5/2001** from the 1st and 2nd Defendants had a power or mandate to sell the said property on **14th August, 2001**. Three month from the date of Sale.

Furthermore, PW1 during re-examination admitted by his own words that when they went to the Ministry of Land, they were told that the ownership cannot be effected until deceased's ownership goes first into the Administrator's name before the same passes to them. He further confessed that there was an interval of 3 months from the date of Sale to the date where the 1st and 2nd Defendants were allowed to be in the shoes of the late Kihyo's estate. In the same series, PW3 when cross examined by Mr. Mussa Learned Counsel, the witness clarified to the court that one cannot sell the land with title before he goes to the Ministry of Land to change ownership. She further confessed that, the Administrator of the estate cannot proceed with the sale before he/she become a legal personal representative of deceased's estate. PW3 further elaborate that the Administrator cannot sell the property in dispute since he was not the owner of that property.

During cross examination by Mr. Mussa learned Counsel, PW3 upon being reminded the provision of **Section 67 and 68 of Cap. 334**, the witness admitted that, no transfer or sell to the estate which one is yet to be registered as a legal representative as the transfer is illegal.

In re-examination, PW3 explained to the court clearly that the person with the letter of Administration cannot sale the property neither transfer the deceased's property.

Answering the question imposed by Mr. Alex Kimatare (Assessor) PW3 proceeded to confess that the Administrator who is yet to become a legal representative cannot sell the land of the estate of the deceased.

On her part, DW1 Mariam Mohamed Kihyo when she was cross examined by Mr. Mussa learned Counsel; confessed that they had no right to sell the suit property since by then the house was still in the name of the late Mohamed Kihyo. Being cross examined by Mr. Ntalula DW1 admitted that they had no any authority to sell the suit property to the Plaintiffs.

Now in view of the confession and the evidence reading together with the provisions of **Section 67 and 68 of Cap. 334**, I am satisfied that indeed the 1st and 2nd Defendants had no legal capacity to sell the suit property to the Plaintiffs since they were not registered as Legal Representatives of the late Mohamed Amir Kihyo by the time of the Sale.

From the above, it is my firm view that the 1st and 2nd Defendants herein conducted sell to the Plaintiffs before they became registered as owners in the place of the deceased. The disposition of the house was executed before they were registered as legal Personal Representatives hence 1st and 2nd Defendants had no legal capacity to sell the suit property to the Plaintiffs. He who does not have legal title to land cannot pass good to title over the same to another. It is the principal of law that no one can give a better title than he himself possesses. In the case of ***FARAH MOHAMED VS, FATUMA ABDALLAH (1992) TLR 205*** it was held that:-

"He who has no legal title to the land can not pass good title over the same to another."

It goes without say therefore that, a person without good title to the property cannot pass a title to the transferee than his own.

Having considered all the above in totality, I have formed a decision that, the 1st and 2nd Defendants **had no legal capacity to sell the suit property to the Plaintiffs by the time of the Sale of property in issue; and that the 2nd issues is answered negatively.**

The 1st issue is whether the 1st and 2nd Defendants lawfully sold the suit property to the Plaintiffs.

In view that the findings observed in the second issue above, I find the issue cannot detain much time of the court. Since it has been found that the 1st and 2nd Defendants had no legal capacity to sell the suit property to the Plaintiffs.

It follows therefore this issues is answered easily that 1st and 2nd Defendants did not lawfully sold the suit property to the Plaintiffs since they had no legal capacity to sell the suit property due to the fact the they sold the suit property before they were registered as owner of the deceased property i.e as Legal personal representatives.

The sale of the house by 1st and 2nd Defendants to the Plaintiffs was void and ineffectual as it took place before they were registered as owners in the place of the deceased. Upon being

appointed as Administrator and Administratrix of the late Mohamed Kihyo, 1st and 2nd Defendants they were required to apply to the Registrar pursuant to **Section 67 of Cap. 334** so that they be registered as legal personal representatives. In the instant matter, the 1st and 2nd Defendants disposed the property in dispute before they were registered as Legal Personal Representatives hence the same violated the mandatory provision of **Section 68 (1) of Cap. 334.**

In view of the above, the 1st issue is negatively answered that **the 1st and 2nd Defendants did not lawfully sold the suit property to the Plaintiffs.**

Turn to the 3rd issue, whether the 3rd Defendant purchased the suit property from the late Mohamed Amir Kihyo.

The thrust of this issue is whether or not there is an evidence on the record to warrant the court finding that there was an agreement/disposition of the suit property between the 3rd Defendant and the Late Mohamed Amir Kihyo.

Of course, the law is very clear that a contract of disposition of a right of occupancy is only enforceable on if the contract is in writing or there is a written Memorandum of its terms. The

provision of **Section 100 of the Evidence Act Cap. 6 [R. E. 2002]** the proof of disposition of the property is on the document itself with exclusion of other evidence. It is unfortunately the document which prescribed for purchase was not produced and admitted in evidence. The document showing the Sale Agreement between the 3rd Defendant and Mohamed Amir Kihyo could be essential to the ground and without it this court cannot arrive at the decision that the 3rd Defendant purchased the suit property from the late Mohamed Kihyo. Now, in absence of the said document produced and admitted in evidence, I proceed to find that **the issue is answered negatively that the 3rd Defendant did not purchase the suit property from the late Mohamed Kihyo.**

Finally but not least, what reliefs are the parties entitled to. Substances of this judgment are enough testimony to that the Plaintiffs deserves nothing among the entire reliefs sought from this court at page 3 of the Amended Plaint. They have miserably failed to prove the case to the standard required in Civil Litigations that on the balance of probabilities. The Plaintiffs are at liberty to institute a matter to a court of competent jurisdiction to claim for **Tshs. 34 Million** they paid to the 1st and 2nd Defendants.

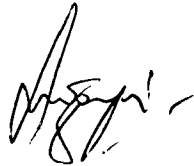
But in all fours, the 1st and 2nd Defendants in their Counter Claim deserves and are hereby granted the following reliefs:-

- i. The title Deed No. 52254 issued to **YUSUFU JUMA SADIKI AND MOHAMED JUMA SADIKI** is declared nullity.
- ii. The 1st and 2nd Defendants are declared as legal personal representative of the late Mohamed Kihyo, hence registered as owner of **House No. 42 Plot No. 4 Block "J" Msimbazi Street Kariakoo Area Dar es Salaam** in the place of the Late Mohamed Kihyo (deceased).
- (iii) The cost of the suit to be borne by Plaintiffs to the 1st and 2nd Defendants.

The 1st Plaintiff is at liberty to purchase the House No. 42, Plot No. 4 Block "J" Msimbazi Street from the 1st and 2nd Defendants as they are legal personal representatives of the Estate of Mohamed Amir Kihyo.

Consequently, **the suit is dismissed** and the **Counter Claim** is granted in the manner stated above.

Right of Appeal Explained.



L. E. MGONYA

JUDGE

27/4/2018

COURT: Judgment delivered in the presence of Advocate Sauda Thabit for Plaintiff, Advocate Aristrida Kagashe for 1st and 2nd Defendants, Advocate Mussa for 3rd Defendant and Ms. Emmy B/C in my chamber today 27th April, 2018.



L. E. MGONYA

JUDGE

27/4/2018