

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

LAND CASE NO. 319 OF 2015

**MWALIMU SULEIMAN MZENGA (Suing under Power of Attorney of
Mbwana Ali Mzenga).....PLAINTIFF**

VERSUS

**ZAINABU MOHAMED KIBASILA.....1ST DEFENDANT
MWANAHAMIS SEMENI RASHID MWINYIMKUU
KILALA.....2ND DEFENDANT
JAMILA SEMENI RASHID MWINYIMKUU
KILALA.....3RD DEFENDANT
LATIFA SEMENI RASHID MWINYIMKUU
KILALA.....4TH DEFENDANT
HAMZA SEMENI RASHID MWINYIMKUU
KILALA.....5TH DEFENDANT
IDRISA SEMENI RASHID MWINYIMKUU
KILALA.....6TH DEFENDANT
SALUM SAID NYASIBU.....7TH DEFENDANT**

JUDGMENT

Date of Last Order: 08/03/2018

Date of Judgment: 20/04/2018

S.A.N. WAMBURA, J:

**MWALIMU SULEIMAN MZENGA (Suing under Power of Attorney of
Mbwana Ali Mzenga) instituted this suit against the defendants (1st-
7th defendants) for the following reliefs:-**

- (a) An order of eviction from the disputed house by the
defendants, their agents, assignees, workmen and any other
person whomsoever acting on their behalf or on the behalf of
any other person or any other person.*

- (b) Court's Declaration that the Plaintiff is a lawful owner of the disputed premises and that the 1st to 6th Defendants are trespassers.*
- (c) The Defendants be ordered to pay general damages.*
- (d) Costs be paid by the Defendants.*
- (e) Together with any other relief(s) as this Hon. Court may deem fit and just to grant.*

The 1st-6th defendants in their written statement of defence denied the entire allegations in the plaint and alleged that the sale was tainted with fraud as Rehema Rashid Mwinyimkuu Kilala was not the only heir of the estate of the late Rashid Mwinyimkuu Kilala. They therefore prayed for dismissal of the suit with costs.

On the other hand the 7th defendant consented for Judgment and decree prayed by the plaintiff.

At the hearing of this case the plaintiff was represented by Mr. Boaz Moses Advocate while the 1st-6th defendants were represented by Mr. M. Sanze Advocate and the 7th defendant was represented by Mr. M. Kiobya Advocate.

The brief facts of this case are that the plaintiff bought the suit premises on 12/11/2014 from one **Salum Said Nyasibu** (7th defendant) who was the administrator of the estate of the late Rashid Mwinyimkuu Kilala. That after the said sale, the plaintiff through his lawyer wrote a letter to the 7th defendant seeking handing over physically the said suit premise. That the 1st -6th defendants refused to vacate from the suit premises and they are still dwelling in the same despite several verbal and written demands to vacate the premise from the plaintiff. Thus he filed this suit to claim over the ownership against the 1st – 6th defendants.

The 1st – 6th defendants disputed the plaintiff's allegations by stating in their joint written statement of defence that the suit premise was fraudulent sold to the plaintiff hence he cannot claim over the ownership of the said suit premise.

Before the commencement of the hearing of the suit, three issues were framed to be determined by the Court being:-

(1) Whether the plaintiff is the lawful owner of the suit premises.

(2) Whether the sale of the suit premises between the plaintiff and the 7th defendant was lawful.

(3) To what reliefs are the parties entitled to?

In supporting his case, the plaintiff **Mwalimu Suleiman Mzenga** (Pw1) testified himself to support his case.

On the defence side the 1st-6th defendants invited two witnesses namely Haidary Suleiman (Dw 1) and Adam Ali Kilala (Dw 2) while the 7th defendant testified himself.

I will now move to determine the issues which were raised in this case in seriatim.

(1) Is the plaintiff the lawful owner of the suit premises?

It is a common principle of law that the one who alleges has to prove the same. This has been so provided under the provisions of Sections 110 and 111 of the Evidence Act which provide inter alia that whoever desires any Court to give judgment as to any legal right which he asserts must prove these facts exist. **Section**

110 of the Evidence Act, 1967, Cap 6 R.E. 2002 which places the burden of proof on he who alleges by stating *inter-alia*:

"110. (1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In the case of **ABDUL KARIM HAJI VS RAYMOND NCHIMBI ALOIS AND ANOTHER Civil Appeal No. 99 of 2004** (unreported) where the Court of Appeal held that:

".....it is an elementary principle that he who alleges is the one responsible to prove his allegations".

Thus the burden of proof of the same at the required standard which is on a balance of probabilities is laid upon the plaintiff being the one who alleges.

What this Court is to decide upon is whether the burden of proof has been discharged by the plaintiff.

According to Dw3 Salim Saidi Nasibu who was the Administrator of the Estates of the late Rashid Mwinyimkuu Kilala that there were two heirs namely; **Semeni Rashid Mwinyimkuu Kilala and Rehema Rashid Mwinyimkuu Kilala** who had agreed to sell the suit property. However, before the sale of the suit premises was effected, Semeni Rashid Mwinyimkuu Kilala passed away. He thus involved his children who were the heirs of the estate of their late father.

He contended that Rehema Rashid Mwinyimkuu Kilala (Dw 4) and the children of the late Semeni Rashid Mwinyimkuu also agreed to sale the suit premises. That the children of Semeni (1st-6th defendants) volunteered to look for a customer who would pay them well. But as time went by, they could not find one. It was when their aunty Rehema Rashid Mwinyimkuu also decided to assist in looking for a customer. She was able to find the plaintiff who offered to purchase the suit premises at the sum of Tshs. 60,000,000/= and they all agreed.

The plaintiff (Pw1) testified that he was authorized to sue on behalf of his son by way of a Power of Attorney which was admitted in Court as Exhibit P1. He averred that he is the lawful owner of the suit premise having purchased the same on 12th November, 2014 at the sum of Tshs. 60,000,000/= from Dw3 who was the administrator of the estate of the late Rashid Mwinyimkuu Kilala. He tendered the sale agreement and the letter of offer which were admitted in Court as Exhibit P 2 and P3 respectively. Pw 1 further stated that the said sale was blessed with the consent of the beneficiary one Rehema Rashid Mwinyimkuu Kilala (Dw 4) as evidenced by Exhibit P 4.

He contended that when he went to be handed over the suit premises the 1st-6th defendants refused to issue vacant possession. He issued a notice through his advocate to the defendants but they still refused to vacate. To support his testimony he tendered a notice which was admitted as Exhibit P5. He thus filed this suit.

On the other hand Dw 2 Adam Ali Kilala (the Administrator of the Estate of the late Semen Rashid Mwinyimkuu Kilala) admitted that the heirs of the late Semen Rashid Mwinyimkuu were called before the Ukonga Primary Court to collect their shares but they refused to do so as the amount was on the lower side. He refused to have been involved in the decision and process of selling the disputed house. However Dw4 said they were involved and all the processes were reported at the Ukonga Primary Court.

From the above evidence, there is no dispute that both the heirs of the late Rashid Mwinyimkuu Kilala consented to the sale of the suit premises and they authorized the Dw3 (7th defendant) the Administrator of the Estate to enter into a sale agreement with the plaintiff.

What is in dispute here is that the heirs of the late Semen Mwinyimkuu Kilala were not satisfied with the amount given to them as their shares on the ground that the amount was small compared to that which was given to their aunty Rehema (Dw4).

Unfortunately this court has no jurisdiction to determine on whether the said distribution of the estate of the late Rashid Mwinyimkuu Kilala was fair or not. The competent Court to determine on the same is the Ukonga Primary Court which heard the Probate and Administration matter of the deceased estate. Parties are thus asked to challenge the distribution of the proceeds at that Court.

It suffices to state here that in as far as ownership of the suit premises is concerned it is the findings of this Court that in so long as the heirs thereto agreed to the sale of the suit premises which was then sold to the plaintiff then the plaintiff is the lawful owner of the suit premises.

(3) Whether the sale of the suit premises between the plaintiff and the 7th defendant was lawful.

Having found that that the plaintiff is the lawful owner of the suit premises I believe I do not need to labour much on this issue. There is no dispute that the 7th defendant was a legally appointed administrator of the deceased estate who was dully

authorized to sell the suit premises under the provisions of Sections 33, 44, 70 95 and 97 of the Probate and Administration Act, Cap 352 R.E. 2002. Hence the sale was a legal and valid one. Had there been any dispute on his appointment then this too ought to have been resolved by the trial court. But there is no such dispute on record.

In Halsbury's Laws of England Vol. 17 (2) 4 Edition Reissue paragraph 446, Butterworth it is stated and I quote:-

"All conveyances of any interest in real and personal estate made to a purchaser by a person to whom probate or letters of administration have been granted are valid notwithstanding any subsequent revocation, or variation of the probate or letters of administration.

In the case of **MIRE ARTAN ISMAIL AND ANOTHER VS SOFIA NJATI Civil Appeal No. 75 of 2008** (unreported) the Court of Appeal of Tanzania held as herein quoted:-

"We are of the settled mind that under succession, the property devolved to Yusuf Mzee, and upon his death, the said property devolved to his heirs. The 4 heirs of

Yusuf Mzee, per page 18 of the record of appeal, consented to the sale of house No. 29 on Plot No. 4 Block 61 Livingstone Street, Kariakoo, Dar es 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 proceeds of sale were distributed to the beneficiaries of the late Yusuf Mzee as shown on Pages 99 to 102 of the record of appeal. The property was properly transferred to the purchaser as shown on Page 103 of the record of appeal."

(Emphasis is mine).

Therefore it is my belief that the suit premises was lawfully sold by the 7th defendant to the plaintiff.

(4) What reliefs are the parties entitled to?

Since the plaintiff has successfully proved his case on balance of probabilities as required by the law, this Court orders as follows;

- (a) *The Plaintiff is declared the lawful owner of the disputed premises*
- (b) *The 1st-6th defendants, their agents, assignees, workmen and any other person whom so ever acting on their behalf or on*

the behalf of any other person or any other person are given two months from the date of this judgment, to vacate from the suit premises.

- (c) The 1st – 6th Defendants to jointly pay Tshs. 10,000,000/= as general damages for inconveniences and loss of use of the suit premises to the plaintiff.*
- (d) Costs of this suit to be paid by all the Defendants.*


S.A.N. WAMBURA
JUDGE
20.4.2018