

IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 226 OF 2015

OMARY ALLY FUKU.....PLAINTIFF

VERSUS

THE NATIONAL MICROFINANCE BANK .....DEFENDANT

THE ATTORNEY GENERAL.....FIRST 3<sup>rd</sup> PARTY

MOROGORO MUNICIPAL COUNCIL.....SECOND 3<sup>rd</sup> PARTY

JUDGMENT

Date of Last Order: 25/10/2010

Date of Judgment 30/10/2019

A. Mohamed, J:

Omary Ally Fuku, (henceforth "Omary"), the administrator of the estate of his father, the late Ally Rajabu (also known as Ali Rajabu), brought this action against the National Microfinance Bank (henceforth "the bank") praying for judgment and decree with the following orders:-

1. The defendant to yield vacant possession of Plot No. 41 Block "C" Uhuru Street in Morogoro Municipality.
2. General damages of 400,000,000/= shillings.
3. Costs of this suit.
4. Any other reliefs this Court may deem fit and just to grant.

This is a dispute over ownership of a parcel of land described as Plot No. 41 Block "C" Uhuru Street within Morogoro Municipality. Omary, claims his late father Ally Rajabu, was granted a Certificate of Title No. 18221 ("CT) having a 99 year lease running from 1/7/1969 that was to lapse on 30/6/2068. He alleges the bank has trespassed onto it and has built a building therein.

On its part, the bank denies the claim. It insists to be the lawful owner of the suit land by virtue of the **National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, 1998 (Cap. 404 R.E. 2002)**. It further avers that the Government published Government Notice No. 594 of 1998 that vested all assets and liabilities of the National Bank of Commerce to a number of entities including the bank in respect of the suit plot. Following the move, in 2007 the Morogoro Municipal Council (henceforth "the Council") issued a letter of offer to the bank over the suit plot.

It is apparent, Omary and the bank have locked horns in litigation over ownership of the property at various Courts including this one over a course of several years that I need not mention as they are not useful in determination of the action at hand.

At the hearing, Omary was represented by Mr. Egidi Mkoba, learned counsel whilst the bank had the services of Professor C. Binamungu, and Mr. Jackson Liwawa, both learned counsels. Ms. Lillian Machage, learned State attorney, appeared for the Attorney General and Mr. Elikarim Samwel represented the Council.

The Court framed the following issues for determination.

1. Who is the lawful owner of Plot No. 41 Block "C" Morogoro Municipality?
2. Whether the defendant was lawfully allocated the property in dispute.
3. To what reliefs are the parties entitled to.

I will commence to determine the 1<sup>st</sup> issue that is; **who is the lawful owner of Plot No. 41 Block "C" Uhuru Street within Morogoro Municipality?**

Omary is the administrator of Ali Rajabu's estate vide letters of administration dated 2/9/2014 (**exhibit P2**). According to **exhibit P1**, the said Ali Rajabu died on 2/12/2006. After his demise, Omary found a letter from the Council addressed to the bank dated 20/12/2005 informing the bank's manager that Ali Rajabu is the lawful owner of the suit plot that was admitted in evidence as **exhibit P3**. A Certificate of Title No. 18221 over the plot in Ali Rajabu's name for a 99 year term was admitted as **exhibit P4**. A search result over the suit land, dated 8/1/2006 confirmed Ali Rajabu's title over the same was admitted as **exhibit P5**, as well as a rent assessment sheet of the plot and a payment receipt were collectively admitted as **exhibit P6**. The witness confirmed a building owned by the bank stands on the plot wherein the bank runs a banking business. A letter from the bank to Mkoba & Company informed the latter that the Government granted the suit plot to the bank and it has been owning it for 25 years. On 13/10/2015



he made inquiries at the Ministry of Lands and human Settlements on the rent status and he paid the said rent arrears.

Omary assailed the defendant's letter of offer issued on 1/4/2017 having a term of 33 years by arguing it was invalid as it was issued during the subsistence of his father's Certificate of Title with a 99 year term issued on 1/7/1969 and would lapse on 30/6/2068.

During cross examination, he told the Court he found a letter from the bank requesting his father for "talks" on the plot. In response to questions put by Prof. Binamungu, Omary insisted Ali Rajabu's title to the suit plot has never been revoked. He further asserted he has been pursuing his claim for over ten years in Courts.

For the defence, Mr. Dismas Prosper Batiri (DW1), the bank's Morogoro branch Manager, averred the National Microfinance Bank Ltd was founded in 1997 by the National Microfinance Bank Incorporation Act of 1997. Mr. Batiri further averred the NMB Wami Branch was created through a law passed by the Ministry of Finance named the (Re- Organization and Vesting of Assets and Liabilities) Act (Cap 404 of 2002). He averred that Item No. 61 in the second Column at page 20 of the schedule to the Act shows Plot No. 41 Block "C" and Plot No. 43 Block "C", both located at Uhuru Road within Morogoro Municipality were owned by the bank. The Court took judicial notice of the provision cited by the witness. The witness pointed that at page 20 of the said law, it is shown item 61 plot No. 41 Block "C" and Plot No. 43 Block "C" in Morogoro Municipality belong to the Wami Branch of the bank. In addition, Mr. Batiri tendered **exhibit D1**, a certified

copy of a letter of offer dated 10/6/2007 issued to the plaintiff by the 2<sup>nd</sup> defendant.

A letter from C&B Law Chambers addressed to the Council was admitted as **exhibit D2** urging it to settle the dispute with Omary and cautioning it that in case of failure, it would be joined as a defendant in the suit. Another letter to the Permanent Secretary Ministry of Finance was admitted as **exhibit P3**. It urged him to intervene and settle the matter but there was no response.

Lastly he prayed this Court to dismiss the suit with costs as Omary is not the owner and is not therefore not entitled to the 400,000,000/= shilling general damages he seeks as a relief. When cross examined, he admitted the bank failed to attach receipts for various payments in respect of the letter of offer (**exhibit D1**). When cross examined by Mr. Elikarim Samuel for the Council, Mr. Batiri replied he could not trace the building permit for construction of the bank's building.

Mr. Robinson Kidede (**DW2**), a treasury officer from the Treasury Registrar's office testifying for the Attorney General, essentially corroborated Mr. Bariki's (**DW1**) version of how the bank acquired the suit property resulting from enactment of **the National Bank of Commerce (Reorganization and Vesting of Assets and liabilities), Act (Cap 404 RE 2002)**. He explained that the said law divided assets of the erstwhile National Bank of Commerce among three entities; NBC 1997 and the NMB acquired commercial buildings as operating branches whilst NBC Holding Corporation acquired residential buildings. Mr. Kidede averred that in Morogoro, the NMB acquired

the building located at Plot No. 41 Block "C" and Plot No. 43 Block "C" Uhuru Street.

He could not recall NMB's ownership documents over the suit land. During cross examination he stated the two plots were acquired in 1976 but he did not know how. He admitted the NMB did not follow the legal procedures for acquiring land.

Mr. Constantine Salvatory, (DW3) a land officer from the Council stated the suit plot is owned by Ali Rajabu vide a Certificate of Title for a 99 year term that has not been revoked. And that since 1982, the Government intended to acquire plot 41 and 43 for public purposes under section 3(g) of **the Land Acquisition Act of 1967** but the process was not completed. He said plot no 41 and 43 Block "C" were first granted in 1969 to Ali Rajabu and Saidi Ali Ganzel respectively whilst the Council granted the two plots to the bank on 1/7/2007. The witness told the Court when the bank requested to be granted the two plots, the Council informed the bank the plots were already owned by two different occupiers. The Council then suggested the two plots' titles be revoked in order for re-grant to the bank.

Mr. Salvatory averred the **Land Act No. 4 of 1999** governs grant of land to registered occupiers. He stated **the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act** cannot grant land. He confirmed the 2007 letter of offer (**exhibit D1**) issued to the bank by the Council was invalid.

When cross examined by Prof. Binamungu for the bank, Mr. Salvatory pointed out that **exhibit D1**, the offer of a right of occupancy



of the bank was in respect of plots 41, 42 and 43 Block "C" in Morogoro. He further pointed out that the original document tendered in Court as an exhibit differs from that annexed to the banks' defence **marked NMB "B"** which only refers to plots No. 41 and 43 Block "C". The Court ruled there was an alteration in exhibit "D1", and although it was already admitted in evidence as an exhibit, it would not be accorded any weight.

After a review of the evidence on record, it is uncontroverted by all parties that Ali Rajabu was lawfully granted the suit land in 1969 by then Regional Land Officer. Thereafter, on 3/8/1970 he was issued with a Certificate of Title No. 18221 for a 99 year term (**exhibit P4**). This fact was averred by Omary and confirmed by Salvatory, the Council's witness, who also established that Ali Rajabu's Certificate of Title has not been revoked to date. In addition, the Council wrote a letter dated 20/12/2005 to the bank's Morogoro branch Manager notifying him the plot is owned by Ali Fuku and advised him to have discussion with the owner in order to compensate him for the plot (**exhibit P3**). A search made on 8/11/2006 also confirmed the plot was owned by Ally Rajabu who held a Certificate of Occupancy with a 99 year term commencing from 1/7/1969 (**exhibit P5**). According to **exhibit P1**, Ali Fuku demised on 2/12/2006 and Omary was appointed as the administrator of his estate on 2/9/2014 as depicted in **exhibit P2**.

On the other hand, the bank's claim to ownership of the suit land is based on two documents. The first, is indicated as Item No.61 on page 20 of the list of assets vested to the bank vide **the National Bank**

**of Commerce (Reorganization and Vesting of Assets and Liabilities) Act** namely, **GN. No. No. 594 of 1998** that the Court took judicial notice of. The other is a letter of offer of a right of occupancy over plot numbers 41, 42, and 43 Block "C" Uhuru Street, Morogoro Municipality issued to the bank by the Council on 11/6/2007 comprised as **exhibit D1**.

According to Salvatory, Ali Rajabu's Certificate of Title over the suit land issued on 3/8/1970 for a 99 year term has never been revoked and still subsists. This was uncontroverted by Mr. Batiri and Mr. Kidede as well as Mr. Salvatory. In fact the bank joined the Council as a third party to indemnify it in the event it loses the suit. In addition Mr. Salvatory, a land officer from the Council, stated categorically the bank's letter of offer (**exhibit D1**) was invalid as it was subsequently issued in 2007 when the suit land had already been granted to Ali Rajabu in 1969.

I would also like to emphasize, the evidential value of **exhibit D1** was blown away by the discovery that the exhibit tendered in evidence differed materially from that annexed to the bank's defence. The Court found the one filed in the written statement of defence as **annexure NMB "B"** referred to plots 41 and 43 Block "C", whilst **exhibit D1**, admitted in evidence, was altered and refers to plots 41, 42 and 43 Block "C".

The position is that once a title to land has been granted to an occupier, it cannot be granted to another occupier. It was restated in **Frank Safari Mchuma v. Shaibu Ally Shemdolwa [1998] TLR 278**, that;





***“A grant of a right of occupancy over a piece of land when a prior right of occupancy over the same land still subsists is irregular and the prior grantee is entitled to the land”.***

See also; **Colonel Kashmiri v. Naginder Singh Matharu [1988] TLR 16**

According to the defendant, and in Mr. Batiri's testimony, the bank was given ownership of **plots 41 and 43 Block “C” Uhuru Street** in Morogoro vide **the National Bank of Commerce (vesting of Assets and Liabilities), Act (Cap 404 RE 2002)**, as listed in **GN. No. No. 594 of 1998**.

Omary, Mr. Kedebe and Salvatory reasoned otherwise. With respect, the **Land Act (Cap. 113 R.E. 2002)** and the **Village Land Act (Cap 114 R.E. 2002)** are the chief pieces of legislation that can lawfully grant land to fresh occupiers. In this case, section 29 of **the Land Act** provides for powers of allocating authorities to grant rights of occupancy to occupiers. The **National Bank of Commerce (Reorganization and Vesting of Assets and liabilities), Act** (supra), only transferred land that had already been lawfully owned by the erstwhile NBC before that law was enacted. It did not, and could not, therefore, transfer the suit land to the bank as it was already lawfully owned by Ali Rajabu since 1969.

After the foregoing, I find that the lawful owner of the parcel of land **known as Plot No. 41 Block “C” Uhuru Street within Morogoro Municipality** is the plaintiff, Omary, being the administrator

of the late Ali Rajabu's estate since his CT has never been revoked to date. This leads to the 2<sup>nd</sup> question;

**2. Whether the defendant was lawfully allocated the property in dispute?**

From the above discussion, I am satisfied the Council's 2007 grant of the suit land to the bank was unlawful and invalid since the suit land had already been granted to Ali Rajabu in 1969. In other words, the first grant to Ali Rajabu in 1969 vide a 99 year term CT subsisted when the 2<sup>nd</sup> defendant purportedly granted the latter grant to the 1<sup>st</sup> defendant in 2007.

The last issue is on **the reliefs the parties are entitled to** having found the lawful owner of the suit land.

I am satisfied the bank has denied use of the suit land to its owner since 1976. I am also content, heirs of the plot's owner have been litigating with the bank for over 10 years causing psychological and affiliated hardship. They are thus entitled to general damages. In regard to this question, Lord Blackburn in **Livingstone v Rawyards Coal Co. (1850) 5App. Case.25** at page 39, defined damages generally as;

**"That sum of money which will put the party who has been injured or who has suffered in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation."**

Similarly, the Court of Appeal in **Tanzania Saruji Corporation v. African Marble Co. Ltd (2004) TLR 155**, at page 157 held that;

***"The position is that general damage are such as the law will presume will be the direct, natural or probable consequence of the act complained of. The defendant's wrong doing must therefore have a cause, if not the sole or particularly significant, cause of damage"***

I am alive to the principle that a lawful occupier is one who holds the title to a parcel of land. I am also aware of the principle of ***Quicquid plantatur solo, solo cedit***, a Latin maxim related to fixtures which means that something that is or becomes affixed to the land becomes part of the land; therefore, title to the fixture is a part of the land and passes with title to the land. Consequently, any unexhausted developments by a trespasser on a lawful occupier's land belong to the lawful owner.

In terms of section 176 of the **Evidence Act (Cap 6 RE 2002)**, on 19/8/2019, I ordered the Chief Government Valuer to make a valuation of the current market value of bare land in respect of the suit plot. On 24/9/2019, Mr. Pastory Kimaro, a land valuer from the Chief Government Valuer's office testified as a Court witness (**CW1**) and tendered a valuation report of the suit land that was admitted as **exhibit C1**. The witness was of the opinion that the current market value of bare land in respect of the property on Plot No. 41 Block "C"

was Tanzanian **shillings one hundred and fourteen shillings only (114,000/=)**. He averred to have employed the Market approach/Comparison method and relied on a 320,000/= shilling per square metre rate for the Morogoro Central Business District according to official rates issued by the Chief Government Valuer in 2016. After examination of the exhibit, parties were allowed to cross examine him on his exhibit and his testimony.

I am of the firm view, in equity, it would not be in the interests of justice to order the bank to yield vacant possession of the suit land as prayed for by the plaintiff. The bank has been in uninterrupted occupation and use of the suit land since 1976. Again, it is clear, the bank has built a large one storied building in the centre of plots 41 Block "C" and Plot 43 Block "C" that would have to be completely demolished in case this Court makes an adverse order against the bank.

In view of these extenuating circumstances, I enter judgment and decree for the plaintiff and make the following orders;

- 1. The defendant is to pay the plaintiff the sum of 114,000,000/= million shillings being the current market price of bare land as compensation in lieu of yielding vacant possession of all that land comprised as Plot 41 Block "C" Uhuru Street in Morogoro Municipality.**
- 2. The defendant to pay general damages of 100,000,000/= to the plaintiff.**

**3. Costs of this suit be borne by the defendant.**

It is so ordered.



**A. MOHAMED,  
JUDGE,  
30/10/2019.**

The right of appeal to the Court of Appeal duly explained.



**A. MOHAMED,  
JUDGE,  
30/10/2019.**



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In view of these extenuating circumstances, I enter judgment and decree for the plaintiff and make the following orders;

- 1. The defendant is to pay the plaintiff the sum of 114,000,000/= million shillings being the current market price of bare land as compensation in lieu of yielding vacant possession of all that land comprised as Plot 41 Block "C" Uhuru Street in Morogoro Municipality.**
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