

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

MISC LAND APPLICATION NO. 373 OF 2021

(Arising from Land Case No. 131 of 2019, Execution No. 58 of 2020,
and Misc. Land Application No. 99 of 2021)

UNYANGA RABIKIRA MASAWE 1ST APPLICANT

JEAN MOYO MILLIKEN 2ND APPLICANT

VERSUS

CHRISTINE SKYTTE MKWAYA 1ST RESPONDENT

CRUCIAL INVESTMENT LIMITED 2ND RESPONDENT

MBOGO ALLY MASUDI t/a

NZIGE AUCTION MART 3RD RESPONDENT

ARAFI HAMIDU 4TH RESPONDENT

RULING

Date of Last Order: 28/9/2021

Date of Ruling: 22/10/2021

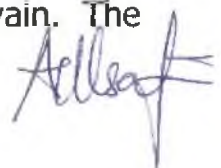
A. MSAFIRI, J

The applicants Unyanga Rabikira Masawe and Jean Moyo Milliken under certificate of urgency, moved this Court by way of chamber summons pursuant to Section 51(1) of the Land Disputes Court Act, Order XX1 Rule 57 (1) and (2) and Section 59 and 95 of the Civil Procedure code Cap 33, R.E. 2002 and any there enabling provisions of the law.

The applicants seek for herein below Orders:

- a) That this Honourable Court be pleased to make investigation and order that the 1st and 2nd applicants are lawful and absolute owner (sic) of all lands plus all unexhausted improvements on former farm number 999/LO No. 118694 with title No. 37846 now known as Plot number P21133 with title number DSMT1006578 and Plot number P21134 with title number DSM T1009517, situated at Kawe Area, Kinondoni District, Dar es Salaam and area not liable for attachment and sale.
- b) That this Honourable Court be pleased to allow the 1st and 2nd applicants to pay the 1st respondent a total sum of TZS 235,000,000/- as unpaid balance which was supposed to be paid to her by the 2nd respondent and the 2nd respondent refused to honour a deed of settlement filed in this Honourable Court in Land Case No.131 of 2019.
- c) That this Honourable Court be pleased to order that the 2nd respondent is liable to refund a total sum of TZS 235,000,000/- to the 1st and 2nd applicant plus costs of this application.
- d) That this Hon. Court be pleased to allow the applicants to secure an irrevocable Bank Guarantee in the sum of TZS 235,000,000 in favour of the 1st respondent pending determination of this application.
- e) Costs of this application be paid by the 2nd respondent.
- f) Any other order/relief as the Hon. Court may deem just to issue given the circumstances of the matter.

The hearing of the application was on 26/8/2021 and went orally and both sides were represented. The applicants were represented by Advocate James Evarist, and the 1st defendant was represented by Advocate Benjamin Kalume. The hearing was ex-parte against the 2nd and 3rd respondents after all the efforts to serve and re-service was in vain. The



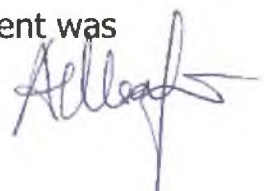
two respondents did not respond to the Court summons. They never entered an appearance in Court so the hearing proceed in their absence.

In his submission, Mr. Evarist started by adopting the joint affidavit sworn by the applicants. He submitted that, this application emanates from Land Case No. 131 of 2019 where the 1st respondent was suing the 4th respondent claiming among others the refund of her money from 4th respondent.

That, in the said case No. 131 of 2019, the parties filed a Deed of Settlement which was adopted as Decree of the court.(A photocopy of the same was attached to the affidavit and titled "Amended Deed of Settlement"). In that Amended Deed of Settlement, the 2nd respondent Crucial Investment Limited was to pay the 1st respondent a total of TZS. 325,000,000/= as a full settlement of the 1st respondent's claim against the 4th respondent.

Mr. Evarist stated further that, basing on the Amended Deed of Settlement, the 2nd and 3rd respondents conducted a survey on a Farm No. 999 and divided the said farm into 3 (three) independent plots namely Plot No. P 21133, Plot No. P 21134 and Plot No. P 21135. Two of these Plots were sold to the applicants, i.e. Plots No. P. 21133 and P. 21134. That the applicant processed and were issued with the Certificate of Titles for the said Plots.

Mr. Evarist avers that, the 2nd and 4th respondents never disclosed any third party interest over the Plots. That the applicants later discovered that there was Execution No. 58 of 2020 whereby the 3rd respondent was



given a Court Order to sell by auction the former farm No. 999. He submitted further that, to protect their interest, the applicants filed Misc. Land application No. 99 of 2021 objecting the intended sale. The said Application was dismissed.

He pointed out that the applicants decided to file this Application No.373 of 2021, not to deny the 1st respondent her right but to ask this court to allow the applicants to pay the 1st respondent, a total of TZS. 235,000,000/= and thereafter, task the 2nd respondent to refund that money to the applicants.

He stated further that, in order to make the payments to the 1st respondent at the earliest possible time, the applicants secured an interested buyer who is willing to purchase Plot No. P 21135 and they have offered TZS. 50,000,000/= but the buyer is ready to pay after determination of this Application. Concluding his submissions, the counsel for the applicants prayed for the following Orders:-

- i) This court to allow Plot No. P 21135 to be sold at the proposed offer of 50,000,000/=.
- ii) This Court to allow the applicants to pay the 1st respondent balance of TZS. 235,000,000/- in two equal instalments.
- iii) This Court to Order the 2nd respondent to refund to the applicants a total of TZS. 185,000,000/=.
- iv) This Court to lift the order in Execution No. 58 of 2020 which intends to sell former farm No. 999 because the 1st respondent will have no claims whatsoever against any party in this Application.



v) Costs of this Application to be borne by the 2nd respondent.

On reply, Mr. Kalume advocate of the 1st respondent, prayed to adopt the contents of the counter affidavit deponed by the 1st respondent. He agrees with the submission by the counsel for the applicants that this Application emanates from Land Case No. 131 of 2019. However, he pointed that this is the second application made by the applicants with the aim of objecting the decree of Land Case No. 131 of 2019.

He stated that, the applicants have already filed Misc. Land application No. 99 of 2020 which reflects this present application, and hence this application is additional and unnecessary and it is shopping forum and abuse of Court process.

He stated further that, there is no dispute that the 1st respondent need to be paid back their money from the 2nd and 4th respondents, and the intention of the applicants to pay to the 1st respondent the claimed sum could have been executed from the date the applicants filed an objection proceedings and the same was ruled out by this Court. He pointed out that, the only proper remedy for the applicants is to file a fresh suit against the 2nd and 4th respondents and not to file another unnecessary application.

Regarding the applicants' prayers, the counsel for 1st respondent objected the prayer of payment in two instalments because the sum that the 1st respondent was supposed to be paid was not subject to interest and has taken too long. He concluded by noting that the Application was filed under the law which does not exist, i.e. Civil Procedure Code Cap 33 R.E.



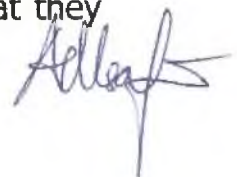
2002 while there is now R.E. 2019, therefore the whole Application has no leg to stand on. He prayed for this application to be dismissed with costs.

The 4th respondent had brief submission where she conceded with the submissions by the counsel for the applicants. She prayed for this court to assist them so as the 1st respondent could be paid.

In rejoinder, Mr. Evarist reiterated his submissions and prayers and added that Misc. Land Application No. 99 of 2021 and this Land Application No. 373 of 2021 have different prayers and different parties. On the issue of citing proper law, he pointed that the provisions are the same save that instead of writing R.E. 2019, it is written R.E. 2002 and this is just a slip of the pen.

Having heard the submission of both parties the major issue for determination is whether this application has merit. However before determination of the Application and delivery of the Ruling, on 28/9/2021, the parties to this matter approached the court and inform the same that they have entered an arrangement which they prayed that the court should take into consideration when giving its Ruling. Mr James Evarist for the applicants told the court that the applicants together with the 1st and 4th respondents wish to file a Deed of Settlement for the court to consider when giving its Ruling.

Mr Kalume for the 1st respondent and the 4th respondent appearing in person, agreed with the submission by Mr. Evarist and added that they



wish to settle this matter. Mr. Kalume abandoned his former opposition of the Application and now agreed to the settlement arrangements.

Basing on the fact that the parties has mutual concession, the court granted the prayer and ordered the parties to file their settlement arrangement as prayed.

The parties entered a deed of settlement and filed it in the court on 29/9/2021. In the settlement, the parties among other things has agreed that;

1. That the applicants will pay the 1st respondent her claim of TZS. 235,000,000/= and out of that sum, a total of TZS. 117,000,000/= has already been paid by the applicants/=
2. That the 1st respondent through his advocate acknowledge receipt of the sum of TZS. 117,500,000/= as part payment of her claim in execution No. 58 of 2020.
3. That the second payment of TZS. 117,500,000/= shall be paid to the 1st respondent by the applicants within a period of three (3) months from the date of first payment, that is from 16th September 2021.

In determination of this matter, the court has appreciated the settlement entered by the parties. The spirit of the court is to encourage the parties to the suit to set the matters amicably hence making an end to endless litigations as long as the parties have reached consensus and the settlement does not cause miscarriage of justice to any party to the dispute.

The present application originates from Land Case No.131 of 2019. On 13th March 2020, the 1st respondent and the 4th respondent who were



parties to the said land case, (1st respondent as the plaintiff and 4th respondent as the 1st defendant) entered a settlement which was filed and registered before this court as a decree. In the settlement dated 13/3/2020, the 4th respondent has sold the suit property to one Crucial Investment limited (who is the 2nd respondent in this application) whereby the same accepted to pay TZS.325, 000,000/= to the plaintiff (1st respondent). This is reflected in the Amended Deed of Settlement filed before the court and registered as decree as hereinabove stated. In the said settlement, Crucial Investment Limited was party to the settlement and was represented by one Godson Kimanga.

However, as put in the current application and the current deed of settlement between the applicants and the 1st and 4th respondents, the 2nd respondent Crucial Investment failed to honour the decree of the court. Hence, among their prayers, the applicants claiming to be bonafide purchasers for the suit property and hence affected by the any ongoing procedures which threaten to dispose of the same, they are willing to pay the 1st respondent the sum which the 2nd respondent has failed to pay as per the amended settlement dated and filed in court on 13th March 2020. However, in addition, the applicants seek for the order of the court to compel the 2nd respondent, who is ex-parte, to refund the applicants with that amount plus other costs which are related to this Application.

The issue here is whether the court can grant the prayers sought considering that the applicants were not party to the amended deed of settlement and were also not party to Land Case No.131/ 2019 but they



filed Application No.99 of 2019 in an attempt to object the execution in the said case. The application was dismissed.

Regarding the circumstance of this matter, the raised issue is answered in affirmative. This is because first and most important, the applicants and the 1st and 4th respondents, on their own volition, has agreed to settle this matter for the interest of each party for which this court agrees basing on the policy of amicable dispute settlement. Second, the applicants being the bonafide purchasers of the suit property, has interest to protect on the same so they have agreed to pay the required sum to the 1st respondent so as to settle the matter and therefore end amicably the Execution No. 58/2020 pending before this court which arise from Land Case No. 2019 hence bringing an end to endless litigations. Third, since the Amended Deed of Settlement which was registered as decree before this court binds the parties, they are compelled to honour the terms of the same. Therefore, Crucial Investment Limited is bound to honour the terms of the said deed of settlement and pay a sum of TZS 235,000,000/= to the 1st respondent. And since the applicants has agreed to pay the said sum and they have actually already paid TZS 117,000,000/=, then Crucial Investment Limited have to refund the whole sum to the applicants.

For the above reasons, I find the application has merit and I allow it. I hereby orders that;

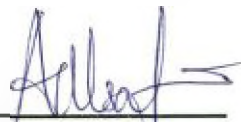
- a) The 1st and 2nd applicants are declared the lawful owners of former Farm Number 999/LO NO. 118694 with title No. 37846 now known as **Plot number P21133 with title number DSMT1006578** and



Plot number P21134 with title number DSM T1009517,
situated at Kawe Area, Kinondoni District,

- b) The 1st and 2nd applicants shall pay the 1st respondent her claim of TZS. 235,000,000/= as unpaid balance which was supposed to be paid to her by the 2nd respondent. The court has noted that out of that sum, a total of TZS. 117,000,000/= has already been paid by the applicants/= to the 1st respondent.
- c) That the respondent through his advocate acknowledge receipt of the sum of TZS. 117,500,000/= as part payment of her claim in Execution No. 58 of 2020.
- d) The second payment of remaining balance of TZS. 117,500,000/= shall be paid to the 1st respondent by the applicants within a period of three (3) months from the date of first payment, that is from 16th September 2021.
- e) The 2nd respondent is liable to pay and shall refund a total sum of TZS. 235,000,000/= to the 1st and 2nd applicants being the amount which the same was required to pay the 1st respondent as per Amended Deed of Settlement which was registered in the court as a decree in Land Case No. 131 of 2019.
- f) The parties herein are bound by the terms of the Deed of Settlement entered and registered in the Court on 29th September 2021.
- g) Costs of this Application shall be borne by the 2nd respondent.

It is hereby ordered.



A. MSAFIRI.

JUDGE

22/10/2021

