

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

LAND CASE NO. 137 OF 2019

BOCK JUMA RUNGWE.....PLAINTIFF

VERSUS

THE GRAND LODGE COMPANY LIMITED.....1ST DEFENDANT

THE REGIDTRAT OF TITLES2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

22nd October, & 5th November, 2021

MKWIZU, J:

Plaintiff, Bock Juma Rungwe a natural person has brought a suit against the respondent, Limited Company, the Registrar of Titles and the Attorney General as necessary parties claiming to be a lawful owner of a suit property described under paragraph 6 of the amended Plaint as PLOT NO. 376 BLOC 45C Kinondoni Municipality registered under a certificate of Title No. 48721 through a deed of Gift by his brother Hashimu Rungwe dated 20th October 2006.

1st defendant on the other hand seems to have contracted the suit premises through execution proceedings in respect of the decree in Civil Case No 55 of 1997 between Naftal Mero and Bahari Motors Co Limited and Hashimu

ungwe (the original owner) issued by Tabora Resident Magistrate's Court but finalized by Kinondoni Resident Magistrate Court in 8th July, 2012, in a public Auction in which she happened to be the highest bidder hence buying the suit property at a purchase price of 50,000,000/= . It is apparent from the record that, the said sale remained intact even after several attempts by Hashimu Rungwe to contest the same through appeal process.

In the process of transfer of the certificate of title, 1st defendant learnt of the disposition by Hashimu Rungwe which necessitated an application for transfer through transmission by operation of the law under section 71 of the Land Registration Act, (Cap 334 RE 2019]. It is after service on him of the notice by the Registrar of Title regarding 1st defendant's application, Plaintiff came with the present suit pleading to be declared a lawful owner of the suit property and claiming; that 1st defendant has no right over the suit property and therefore her application for a transfer by transmission by operation of the law is unjustified, a perpetual injunction against the 1st defendant prohibiting her from claiming any right over the suit property, prohibition order against the 2nd defendant from registering the suit property in the name of the 1st defendant, specific and general damages plus the costs of the case.

Two issues were framed and agreed upon by the parties, namely; Who is the lawful owner of the suit property and to what reliefs are the parties entitled to.

All parties had legal representation during trial. Mr. Josephat Mabula, advocate represented the plaintiff during trial, Mr. Armando Swenya also learned counsel represented the 1st defendant and Mr. Charles Mtae, learned State Attorney appeared for the 2nd and 3rd defendants. The plaintiff marched four witnesses, 1st defendant called three witnesses while 2nd and 3rd defendant had only one witness.

Plaintiffs (PW1) claim in both the plaint as well as his own evidence before the court, is that, the suit property was donated to him by his brother Hashim Rungwe through a deed of gift executed in the year 2006. He initiated transfer of the certificate of title from Hashim Rungwe to his own name in 2008. Unfortunately, he got health complications and therefore he could not finalize the process until 2015. After recovery from sickness and before the completion of the process, on 9/01/2015 the house in which the transfer document was kept was smashed by fire which damaged documents including the transfer deed. He was then required by the land officers to submit to the Land commissioner other documents reflecting the deed of transfer Forms executed in the year 2008 for indorsement. Because of the destruction led by the fire he had to sign new transfer for which was later on approved and he was issued with a certificate of title in his name on 17/2/2015. The Gift Deed dated 20th October, 2006, transfer Forms (No 35), approval of the transfer and variation of conditions of the Right of Occupancy (Form No 28 and 33) as well as the certificate of title No 48721 in the plaintiff's name issued on 17/2/2015 were tendered in court as exhibits P1, P2, P3 and P5 respectively.

According to the plaintiff, he was later served with a notice dated 24th September, 2019 (exhibit P6) requiring him to submit to the Registrar of Titles original certificate with Title No. 48721 for a transfer of ownership through transmission by operation of the law to the 1st defendant. Hence this suit claiming that, 1st defendant has no any right over the suit property thus her application for transfer under transmission by operation of the law is unjustified. He implored the court to declare him a lawful owner of the suit property, and other orders indicated in his plaint.

PW2 is one Hashim Rungwe, a brother and transferor of the suit premises to the plaintiff. His evidence is clear and straight forward. He testified that, he had in the year 2006 donated his house on plot No 376 Block 45 C Kijitonyama to his brother Bock Juma Rungwe out of love and affection. To give effect to that donation, he executed a deed of Gift and transfer of the right of occupancy. The transfer processes were made complete in the year 2015 where he was required to submit another Transfer deed to the Commissioner for lands after the previous one was destroyed by fire in a house situated on Plot No 43 Block 45C Kijitonyama.

Referring the court to exhibit P4, PW2 said, the transfer was approved after payments of all required fees and new certificate of title was issued in the name of the plaintiff on 17/2/2015. He identified all the exhibit tendered by PW1.

Adelfrida Camelius Lekule (PW3) is an officer from the office of the Commissioner for lands working as a legal officer. Her testimony was to the

effect that, according to the records of the Commissioner for lands, Plot No 376 Block 45 C Kijitonyama was in 1999 registered/ issued to Hashimu Rungwe . This was by issuance of the letter of offers dated 5/1/1999 followed by a duly signed certificate of Title No. 48721 registered on 5/8/1999.

PW3 explained further that, in the year 2006, the office of the Commissioner for Land received an application for disposition from Hashim Rungwe (exhibit P2). In that application Hashimu Rungwe was disposing the suit plot to Bock Juma Rungwe . According to PW3, that application was accompanied by a Deed of gift, Land Forms No. 29, 30, 35, valuation report and the original certificate of Title. The application was processed after the approval of the change of use of the suit land from residential purposes to commercial/ residential. The disposition of the right of occupancy, stated PW3, was approved by the commissioner on 3rd April 2008 by issuing to the plaintiff a Certificate of approval of disposition -Land Form No 33 (- exhibit P3).

In 2015, stated PW3, the Commissioner for lands received an application from Bock Juma Rungwe requesting for some documents for disposition claiming that some of his documents were destroyed by fire and therefore he needed them to complete the transfer of Title processes. The application was accompanied by the report of Fire and a burnt copy of the certificate of Title. And thereafter, Bock Juma Rungwe was issued with a new certificate of title. Clarifying on the said approval, PW3 said, the approval of disposition of the right of occupancy is an indication that there were no impediments that frozen the process. When asked to explain situations that would have halted the transfer process, PW3 mentioned diverse use of the land apart

from the approved use, mortgage, registered caveat or bond registration, and where the transferor is not the lawful owner.

The 2nd and 3rd defendant opened the defence case by marching their one and only witness Mr. Waziri Masoud Mganga who featured as DW1. Mr. Mganga informed the court that, he is an officer from the office of the Registrar of Titles dealing with registration of Titles and other transaction connected to the registration of titles. Testifying on the ownership of the plot in dispute, Maganga said, currently the plot is owned by Bock Juma Rungwe pursuant to a registration approval of 17th February, 2015. He stated further that, Plaintiff made an application for the transfer of the Right of Occupancy from Hashimu Rungwe to Bock Juma Rungwe to the Registrar of Titles which resulted into the registration of the Right of occupancy relating to Plot no 376 Block 45 C Kijitonyama in his name. According to DW1, Bock Juma Rungwe was issued with a new certificate of Title No 48721 dated 17/2/2015. He identified exhibit P5 as a new certificate issued by his office to the plaintiff.

Mr. Masoud (DW1) also disclosed that, 1st defendant applied for a transfer of the suit plot by way of transmission by operation of the law. Plaintiff was thereafter served with a notice under section 71 of the Land Registration Act, [Cap 334 R E 2019] indicating the Registrar's intention to affect the application by the 1st defendant. On being asked as to whether there was compliance by the plaintiff of such a notice, DW1 said, processing of the application was stayed by the Registrar of Titles pending the outcome of this

case. He tendered in court Form No LR 25 which was admitted as exhibit D1.

Speaking on the status of the Title deed in question before its transfer to the plaintiff, DW1 said, it had different caveats registered. The first one was registered by Naftali Mero on 11.11.2003 as a result of an attachment order by the court in Civil case No 55 of 1997. He said, this caveat was deemed withdrawn after failure by Naftali Mero to respond to a 30 Days' notice served upon him by the Registrar of titles on 5/9/2005. The second caveat was by Tunu Hashimu Rungwe. This was, according to DW1 registered on 10.09.2012 after the attachment order of the court in view of selling the suit plot in an auction. And that there was an Application No 9 of 2010 which was still pending in court. The third caveat was again by Tunu Hashimu Rungwe registered on 30/6/2014 in which disposition of the suit plot by Hashimu Rungwe was being protested. This caveat was however withdrawn on 21/1/2015 by the caveator.

DW2, Naftali Mero was brought before the court by the 1st defendant. He is a decree holder in Civil Case no 55 of 1997. His evidence was essentially a story on how he obtained the decree in the Civil Case No 55 of 1997 at the RMS Court Tabora which ended into selling the suit plot belonging at that particular time, to Hashimu Rungwe.

DW2 said, he on 11th November 2003 entered a caveat on Title in respect to plot No 376 Block 45C Kijitonyama and later sought for court orders to halt any kind of disposition of the suit Plot by Hashim Rungwe after learning

through the commissioner for lands that Hashimu Rungwe was mortgaging his certificate of Title to Standard chartered Bank. The application was determined after all parties were afforded an opportunity to be heard and at the end the court gave an injunction restraining Hashimu Rungwe from disposing of Plot No 376 Block 45 C Kijitonyama with Title No. 48721 by any means whatsoever pending final determination of the execution proceedings. He tendered in court the drawn Order of the court dated 28th September, 2005 which was admitted as exhibit D4.

DW2 explained further that, the execution proceedings were concluded in the year 2012 where the suit premises on Plot No 376 Block 45 C Kijitonyama was sold in a public auction to the 1st defendant.

Ntwa Ambukile Salati gave evidence as DW3. He is a Court Broker trading as Nasm Auction Mart and Court Broker and Processes Server Limited, and a Court broker who conducted the auction. He told the Court that, the auction duly complied with the law. Before the auction, he made a publication for sale. Explaining on the procedure taken on that process, Dw3 said he was first issued with a proclamation of sale by the Kinondoni Resident Magistrate court- exhibit D5, he made the requisite publications for sale before the auction which culminated into selling the suit plot, that is Plot No 376 Block 45 C – Kijitonyama to the 1st defendant in a consideration of 50,000,000/=. On conclusion of the sale and payment of the full purchase price DW3 said, the purchaser was issued with the certificate of sale, exhibit D 6.

On his party, DW4, Jonas Meshaki Matende an employee of the 1st defendant informed the court of his participation on behalf of The Grand lodge Co Limited on the public auction conducted by DW3. He said, they heard of the announcement relating to the said auction. And from there, they developed interest to participate due to the fact that 1st defendant was in a need to expand her hotels business in Dar es salaam and that the suit plot, that is Plot No. 376 Block 45C Kijitonyama was in their neighborhood in Kijitonyama few meters from where the 1st defendant's offices are located. Before engaging into that transaction however, stated DW4, he made due diligence by consulting the director of Nasm Auction Mart and Court Broker for clarification on the validity of the intended auction. He was on that move, availed with a proclamation for sale (exhibit D5) issued by Kinondoni RMs court and which assured them of the legitimacy of the auction. Having bought the suit premises, clarified DW4, they paid the purchase price followed by issuance of the sale certificate (exhibit D6). They also conducted an official search with Land authorities in 2012 which revealed to them that the suit premises belong to Hashim Rungwe. However, stated DW4, in 2016 they were informed by the Registrar of Titles that the suit property is no longer the property of Hashimu Rungwe. It belongs to Bock Juma Rungwe. He supported his evidence by a letter by the Commissioner for Lands dated 10/5/2016 admitted as exhibit D7.

After the closure of the defence case, parties were ordered to file their final submission. As the record would show all parties did comply with the court order. While plaintiff's counsel submissions are in support of the claim by the plaintiff, submissions by Mr. Swenya and Charles Mtae, the learned state

attorney are in a way discrediting the plaintiff's case. The details of their submissions will be considered while determining the issues raised before commencement of the suit namely;

- 1. Who is the lawful owner of the suit property?*
- 2. To what relief are the parties entitled to?*

I have enthusiastically evaluated the pleadings, evidence by both sides, and the final submissions filed. The following facts are indubitable **one**, that, the suit property that is, Plot No 376 Block 45C Kijitonyama was formally the property of Hashimu Rungwe (exhibit P5). **Two**, that, the suit property with C.T. No.48721 is now registered in the name of the Plaintiff one **BOCK JUMA RUGWE** effective from 17.02.2015, upon obtaining the same by way of Gift Deed from PW2 one Hashimu Rungwe as per **Exhibit P1** whose transfer stemmed far back in 2006 (**exhibit P2**). **Three**, that, the process of transfer of the Title to Bock Juma Rungwe was consented to by the Commissioner on 3rd April, 2008. **Four**, the transfer from Hashimu Rungwe to the plaintiff was finally complete on 17th February, 2017 and **five**, that, the suit property was sold to 1st defendant, The Grand Lodge Co Limited by way of public auction on 08.07.2012 pursuant to the court order in Misc. Land Application No.9 of 2010 Exhibit **D6**, originated from a decree in Civil Application No. 55 of 1997, **Exhibit D2, D5 and D6**.

The competing argument is however on who obtained good title between the 1st defendant and the plaintiff. The testimonies of PW2, PW3, DW1, DW3, DW3 and DW4 give a detailed information on the steps taken in disposition of the suit plot by donation and the execution process. I will analyze these

issues without necessarily reproducing the above-named witness's evidence as well as the final submissions filed by the counsels for the respective parties.

Analysing the events in this matter sequentially, it is safe to conclude at early stage of this judgment that disposition of the suit property by Gift was ineffectual on the following reasons. **First**, Hashimu Rungwe's Title was first affected by the court's order dated 28th September 2005 (Exhibit D4) where the suit property was subjected to attachment by the competent court. I would like to quote the wording of the said drawn order; -

*"It is hereby accordingly ordered that the said house on plot No.376 Block 45 C Kijitonyama area in Dar es salaam City, the land having title Number 48721 **should not be disposed of by way of sale, transfer, mortgage, gift or otherwise, and also that should not be dealt with in any other manner whatsoever which will or is likely to affect its attachment by an order of the court until when the execution proceedings filed to this court by the decree holder have been concluded or otherwise directed by this court"** (emphasize is mine).*

The disposition of the suit land was by the above order, restricted pending the execution proceedings before Kinondoni Resident Magistrates court. As the records would reveal, the execution proceedings were concluded on 08.07.2012 pursuant to the order of the same court that resulted into auctioning of the suit property in a public auction. So, by simple analysis,

the restrictions of disposition of the suit property given in the court's order dated 28th September, 2005 ended at the conclusion of the execution, that is on 8th July 2012 when 1st defendant bought the suit property in a public auction.

It appears, the suit property was transferred to the plaintiff by way of Gift on 20.10.2006 (Exhibit **P1**). The Transfer deeds were submitted to the Commission for Lands on 20th October, 2006 followed by the issuance of certificate of Approval of disposition issued two years later, that is, 3rd April, 2008 Land Form No 33 (- exhibit **P3**). The approval by the commissioner, according to PW3, meant that the title has passed to Bock Juma Rungwe from the date of the certificate that is 3rd April 2008.

It should be remembered here that, the Gift deed and the approval of disposition were given after the court order that restricted disposition of the suit property pending final determination of the execution of the decree between Naftal Mero, Bahari Motors and Hashimu Rungwe. I have perused the entire records, I have failed to find any court order that varied the position held by the Kinondoni Resident Magistrates Court on 28th September, 2005 in Civil case No. 55 of 1997. Hashimu Rungwe being one of the parties to Civil Case No 55 of 1997 was bound by that order. This is the laws. Speaking on compliance to court's orders, Manento J (As he then was) had this to say in Criminal Revision No 8 of 2000, between **John Mwansasu and The Republic**,

" A court order is lawful unless it is invalidated by another superior order, and therefore it must be obeyed. A contrary view will have the undesired effect of creating an impasse in the conduct of the trials."

See also the case of **Kinvanvite V. Hassan & Another**, Civil Appeal No. 57 of 2003, High Court at Dar es Salaam (unreported).

In his written submissions, at page 3, last paragraph plaintiff's counsel admits that the court order prohibiting the sale or transfer of the house at Plot 376 Block 45 "C" Kijitonyama was not known to the responsible authority making approval for registration of land. I doubt, but if that is possible the transferor was 100% aware of the same. This is so because PW2 was a party to that proceedings and other subsequent appeals filed by him. He has also not denied awareness of such an order and therefore was duty bound to observe the court's order without reservations.

To be precise, after the attachment order dated 28th September 2005, the suit property ceased to belong to Hashimu Rungwe, until the conclusion of the execution on 08.07.2012 through which the suit property was sold to the 1st Defendant. In other words, the disposition by way of Gift between PW2, Hashimu Rungwe and the Plaintiffs was unenforceable as Hashimu Rungwe did not have a transferable right in 2006.

Second, according to the evidence on the records, before her participation into the public auction, 1st defendant had acted with due diligence by

investigating on the validity of the auction. DW4, an officer from the 1st defendant disclosed to the court that he first heard of the announcements of the auction, he discussed the issue with his bosses and later visited the court Broker offices for clarification and confirmation of the soundness of the auction. DW4 also told the court that, DW3 assured them by serving them a copy of the proclamation of sale issued by the Kinondoni Resident Magistrate court. He conducted an official search in the year 2012 where he was informed that the suit property is in the name of Hashimu Rungwe. He only came to know the changes of ownership through the search he conducted in the year 2016. This evidence is supported by evidence of PW1, PW2, PW3 and DW1 and exhibit P5 which all shows that the changes on the Title deed from the name of Hashimu Rungwe to Bock Juma Rungwe were affected on 17/2/2015.

Given the situation above, it is obvious that 1st defendant purchased the suit property in good faith. He is a bona fide purchaser who, according to the court of Appeal case in **Suzana S. Waryoba V Shija Ndalawa**, Civil Appeal No. 44 of 2017, CAT- Mwanza;

*"...someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. **In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller,***

and not the purchaser, and the purchaser would be allowed to retain the property. "(emphasis added)

Undoubtedly, 1st defendant falls squarely onto the above description. He has all rights to enjoy the property which he has bought in good faith and without negligence. If anything, plaintiff need to take up the matter with his brother Hashimu Rungwe who proceeded to transfer to him the Title despite the fact that he was aware of the attachment of the suit property by the court.

Thirdly, the claimed transfer was not free from encumbrances. In her evidence, PW3 an officer from the Commissioner for Lands indicated three circumstances that can hinder the transfer shift from one person to another **(i)** where there is a different use of the land apart from the approved use, **(ii)** where there is incumbrance that is where the title has mortgage, registered caveat or bond registration, **(iii)** where the transferor is not the lawful owner. Apart from attachment of the suit property that hindered the transfer of any kind, the suit property was incumbered with three different registered caveats one dated 11.11.2003 by Naftal Mero, second dated 10.09.2012 from Tunu Hashimu Rungwe and the third dated 30.06.2014 from Tunu Hashimu Rungwe, withdrawn on 21/1/2015. Of relevance to our case is the caveat filed by Naftali Mero on 11/11/2003 which according to exhibit P5 remained intact on the records. DW1 told the court that this caveat was deemed withdrawn 30 days after 5/9/2005 after service on the caveator a notice for the registration of a mortgage by Hashimu Rungwe in favour of the Standard chartered Bank. However, such a notice was not tendered in court as exhibit.

I am aware of the position of the law as was pointed out in the case of **Amina Maulid & 2 Others Vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 (Unreported) which ruled out that; -

*"In our considered view, when two persons have competing interest in a landed property, the person with a certificate thereof will always be taken the lawful owner **unless it is proved that the certificate was not lawfully obtained**" (emphasis added).*

As concluded above, the Title by the plaintiff was not lawfully obtained. He is therefore not the lawful owner of the suit property despite the fact that he is holding the certificate of Title.

The final issue is to what reliefs are the parties entitled to. For the reasons I have endeavoured to address, the plaintiff has failed to prove the case to the standards required. 1st defendant is, by this decision declared owner of the suit property. Plaintiffs Title over the suit property is annulled and the Registrar of Title is hereby ordered to effect the 1st defendant's application for registration of a transmission by operation of law.

Costs to follow the events.

Order accordingly.

...TED AT DARE ES SALAAM this 5th Day of November, 2021



E.Y. MKWIZU
JUDGE
05.11.2021

COURT: Right of appeal explained



E. Y. MKWIZU
JUDGE
05.11.2021

