

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

MISC. LAND APPLICATION NO. 353 OF 2021
(Arising from Land Case No. 33 of 2020)

MELCHISEDECK SANGALALI LUTEMA.....APPLICANT

VERSUS

**THE TANZANIA FEDERATION OF
COOPERATIVES LIMITED.....1ST RESPONDENT
IMPACTPLAN ASSOCIATES.....2ND RESPONDENT**

Date of Last Order: 07.09.2022
Date of Ruling: 28.10.2022

RULING

V.L. MAKANI, J.

This is an application by MELCHISEDECK SANGALALI LUTEMA who is seeking for an order to make a discovery and so that the respondents produce documents listed in the Chamber Summons. The application is made under Order XI Rules 10 and 12 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) and is supported by the affidavit of the applicant herein. The respondents have filed counter affidavits to oppose the said application.

At the hearing of the application, which proceeded orally, Ms. Subira Omari, Advocate represented the applicant. In her submissions she adopted the contents of the Chamber Summons and the affidavit that were filed in this court on 16/07/2021. She also adopted the Reply to the Counter-affidavits that were filed on 11/11/2021 and 15/11/2021 respectively. Ms. Subira pointed out that under paragraphs 12 and 15 of the 2nd respondents counter-affidavit there is an admission that two copies of the Sale Agreement that were acted upon, Transfer Deed and Approval were returned to the 2nd respondent. But under the same affidavit it says only Land Form No. 35 was returned. She said apart from the statements being contradictory it is apparent that the 2nd respondent denied production of the requested documents. She said the respondents are supposed to have the original documents because they are necessary to denote that the respondents genuinely procured the transfer of the disputed property and so as to complete the transfer from the name of the applicant herein to the name of the plaintiff in the main suit (Mohamed Nassoro Ally).

Ms. Subira said the 1st respondent in the counter affidavit which sworn by Peter Mtenda in paragraph 2(vi), admits having custody of the

Transfer Deed acted upon by the relevant authority which transfer is between the 1st respondent (Tanzania Federation of Cooperatives Limited) and the applicant herein. She said the 1st respondent ought to produce the said Transfer Deed under oath because this document is necessary to procure the transfer from the applicant to Mohamed Nassoro Ally. She said there is no handover or any document to tally their defence as the respondents have not mentioned the name of the custodian whom they claim to have these documents and the reasons why these documents should not be in their possession as stated. There are no reasons either why these documents cannot be sought from the alleged custodian of the said documents. She asked the court to take judicial notice that the documents are missing from the Office of the Commissioner for Lands and Kinondoni Municipality. She also asked the court to take note of **Annexure "H"** of the affidavit of the applicant in which the 1st respondent admitted having the document and requested the 2nd respondent to avail the documents as they are the ones who did the transfer.

Ms. Omary further went on to say that the 2nd respondent under the directives of the 1st respondent paid Capital Gains Tax, Stamp Duty and registration fees and were given receipts, she thus said they

ought to produce these receipts in court under oath to enable the transfer of the property known as Plot No. 190, Oysterbay Area Kinondoni District with Certificate of Title No. 186036/70 (the **suit property**) from the name of the applicant to that of the plaintiff, Mohamed Nassoro Ally. She concluded by praying for an order directing the respondent or their officers to make discovery on oath and produce and/or present true and correct copies of the documents listed in the Chamber Summons.

Mr. Munishi who appeared for the 1st respondent adopted the counter affidavit that was sworn by Peter Mtenda, the Research and Marketing Officer of the 1st respondent. He said he had nothing to add apart from what was stated in the counter affidavit.

Ms. Jesca Massae appeared on behalf of the 2nd respondent. She adopted the contents of the counter affidavit of Daudi Kiza Kheri, Officer, the Managing Director of the 2nd respondent. She further said that the 2nd respondent was not a party to the Sale Agreement between the Applicant and the 1st respondent but was only procured to facilitate the transfer of ownership from the 1st respondent to the applicant herein. She said the 2nd respondent's responsibility did not

go beyond the submissions of the document to the relevant authorities, that is, Kinondoni Municipal Council, TRA and the Commissioner for lands. She said the required documents are not in possession of the 2nd respondent since she was not part of the Sale Agreement and further that the 1st respondent and the applicant have a contractual duty to be in possession of the said documents. She said it is difficult for the 2nd respondent to issue the said documents since she was not party to the contract between the 1st respondent and the applicant. She said since the duty and obligation were only to submit the documents to the relevant authorities it is impossible for her to have the original documents.

Ms. Massae said after completion of the duties the documents were returned to the 1st respondent as per paragraph 2(vi) of the counter affidavit of the 1st respondent. She said the whole of paragraph 2 of the said counter affidavit shows proof of the documents requested by the applicant. she concluded by stating that since the duty of the 2nd respondent was transfer of ownership from the 1st respondent to the applicant herein, and the said transfer was completed and genuinely procured then the 2nd respondent does not have the requested documents.

In rejoinder Ms. Subira said that though the 2nd respondent was not a party to the Sale Agreement, but she was the one who was contracted to do the transfer. She said under paragraph 12 of the counter affidavit by Daudi Kiza Kheri, he admitted that the Transfer Deed, Sale Agreement and Consent were returned by the authorities to the 2nd respondent. She further said the 2nd respondent's responsibility was not only to submit documents to the authorities but to make relevant payments which receipts must have been supplied to the 2nd respondent. She said there is nowhere in the counter affidavit of Daudi Kiza Kheri or in Counsel's submission stating that they are not in possession of the said documents and there is no written confirmation to that effect. She said they have no problem with the allegations that the respondents have made payments to the relevant authorities what is in question is proof of payment and the amounts paid. She reiterated her prayers. Ms. Subira further clarified to the court that the documents requested are intended to be used in the main suit and also in the transfer from the applicant to Mohamed Nassoro Ally.

I have listened to the Counsel for the parties herein, and the main issue for consideration is whether this application has merit.

Discovery and production of documents is governed by Order XI of the CPC. The relevant sub-rules in our case are sub-rules 10, 11 and 12 which states as follows:

(10) Any party may, without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in his possession or power, relating to any matter in question therein and on the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at the stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit:

Provided that, discovery shall not be ordered when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs:

Provided also that, discovery shall not be ordered where there is produced to the court a certificate under the hand of a Minister that, in his opinion, discovery, either generally or in relation to a certain document or a certain class of documents, would be injurious to the public interest.

(11) The affidavit to be made by a party against whom such order as is mentioned in rule 10 has been made, shall specify which (if any) of the documents therein mentioned he objects to produce.

(12) It shall be lawful for the court, at any time during the pendency of any suit to order the production, by any party thereto upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents when produced, in such manner as shall appear just:

Provided that, production shall not be ordered of a document where any enactment or rule of law authorises or requires the withholding of the document on the ground that the disclosure of the document would be injurious to the public interest.

There is no dispute that there was sale transaction of the suit property between the 1st respondent and the applicant herein. There is also no dispute that the 2nd respondent was commissioned by the 1st respondent to supervise and conduct the transfer exercise from the 1st respondent to the applicant. In his counter affidavit on behalf of the 1st respondent, Peter Mtenda, does not dispute that there was such a transaction but denies that the 1st respondent is in possession of the said documents sought by the applicant.

As for the 2nd respondent, the Managing Director, David Kiza Kheri in his counter affidavit does not deny that the 2nd respondent was commissioned by the 1st respondent to do the transfer of the suit

property from the 1st respondent to the applicant. But he alleged that the documents requested by the applicant are not in the custody of the 2nd respondent. He said the Certificate of Title is with Mr. Lyimo, Advocate, and the other documents are with their custodian (see paragraph 12 of the counter affidavit of David Kiza Kheri).

The explanations above shows that indeed, there was sale and transfer of the suit property. However, the counter affidavits of Peter Mweta and David Kiza Kheri are contradictory and raises a lot of questions. It is apparent that there was a sale transaction between the applicant and the 1st respondent, and the transfer exercise was by the 2nd respondent on behalf of the 1st respondent. Consequently, all the transfer documentation must have been handled by the 2nd respondent including payment of taxes and presentation of documents to the various authorities involved in the said transfer. The argument by Ms. Massae that the 2nd respondent's responsibility did not go beyond the submissions of the documents to the relevant authorities, that is, Kinondoni Municipal Council, TRA and the Commissioner for lands, is misplaced because though it is true that the 2nd respondent is not a party to the sale transaction, but on the other hand, the 2nd respondent was, and does not deny being

commissioned to conduct the transfer transaction by the 1st respondent. For a reasonable mind such an exercise does not entail mere presentation of documents and walking away, but it requires payments and follow-ups and in the course of such an exercise there must be proof given for the payment of filing/presentation of documents such as receipts and dispatch forms and the like. It is therefore quite obvious that the 2nd respondent must be in possession of the documents that has been requested by the applicant or the whereabouts of the said documents are known to them. Mr David Kiza Kheri in his affidavit has all along averred that the documents were given to the custodian. And as correctly said by Ms. Omary, the said custodian has not been mentioned by name and there is no proof as to when the said documents were handed over to the said custodian. In the absence of substantial proof, the court joins hands with the applicant that the 2nd respondent is in possession of the alleged documents or otherwise she is in knowledge of the whereabouts of the same.

On the other hand, Peter Mtenda has averred in paragraph 3 that the seven documents are not in possession of the 1st respondent as most of these documents were seized by the government for purposes of

investigation and they are yet to be returned as investigations are ongoing. The deponent did not mention which department of the government seized the documents, what documents among the listed were seized, and when the seizing was conducted. **Annexure FH1** which was purported to be the handing over document was not attached to his counter-affidavit and not presented to court even after Counsel was asked to do so. In the absence of proof of handover the assumption is that the documents are in possession of the 1st respondent or the whereabouts of the said documents are known to them.

In totality thereof, the documents that have been requested are in possession of the respondents and if not, then they know where and who is in possession of the said documents as such have the power to produce them in court under oath.

In the result, the application has merit and it is granted with costs. The court hereby makes a discovery and orders the Principal Officers of the 1st and 2nd respondents to produce in court, under oath, the true and correct copies of all the documents that have been listed in the Chambers Summons by the applicant. The documents have to be

filed in court before the first date of hearing of the main case, namely,
Land Case No.33 of 2020.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
28/10/2022