

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 17 OF 2023

ZAIDI BARAKA PLAINTIFF

VERSUS

NATIONAL MICROFINANCE 1ST DEFENDANT

ADILI AUCTION MART LIMITED 2ND DEFENDANT

JUDGMENT

Date of Last Order: 02/05/2023

Date of Judgment: 26/05/2023

A. MSAFIRI, J.

At the centre of controversy there is the plaintiff and two defendants. The plaintiff claims against the defendants jointly and severally for a Court's declaration that the Plaintiff is the lawful owner of the House with Title No.55040 located at Sinza area on Plot No. 2, Block E, Kinondoni Municipality, Dar es Salaam (herein the suit property).

The brief history of the matter is that the plaintiff claims to be the lawful owner of the suit property and that he is the Director of Petromark Africa Limited. That, on 13th January 2023, the 2nd defendant's officials fixed a notice of sale on the plaintiff's house with intention to sell the said house which is the suit property through public auction which was set to

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be conducted on 27th January 2023. That, the action of the defendants' intention to sale the suit property is illegal.

Hence, the plaintiff prays for judgment and decree against the defendants as follows;

- i. Declaratory Order that the sale is illegal and void.
- ii. Permanent injunction restraining the defendants and their agents from selling the plaintiff's house with CT No. 55040 Sinza area, Plot No. 2, Block E, Kinondoni Municipality, Dar es Salaam.
- iii. Payment of general damages to the tune of TZS 50,000,000/=
- iv. Interest on the decretal sum at the court's rate of 12% p.a from the date of judgment to the date of payment.
- v. Costs.
- vi. Any other and further orders as this Honourable Court may deems just and equitable to grant.

This suit was heard ex-parte against the defendants after all attempts of the plaintiff to serve the summons to the defendants proved futile. First the defendants were served with summons on diverse dates before the hearing of the case, they received the summons but refused to enter appearance to the Court or to file their defence. Finally the Court made an order that the defendants be served by substituted service. The defendants were served through publication in a local newspaper. Still the

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defendants never appeared in Court and did not file their defence. The proof of services was produced in Court and is part of Court records.

Having been satisfied that the defendants were properly served, on 27/04/2023 the Court made an order of ex-parte hearing in absence of the defendants.

In the ex-parte hearing, the plaintiff appeared in person, he had no representation. The issues were;

1. Whether the plaintiff is the owner of the disputed land.
2. Whether the plaintiff and Petromark Africa Limited has mortgaged or entered into any contractual relationship with the 1st defendant.
3. To what reliefs are parties entitled to?

At the trial the plaintiff appeared in person and testified as PW1. He stated that he is the Director of Petromark Africa Limited. That he is also the lawful owner of the suit property with Title No.55040 located at Sinza area Plot No. 2, Block E, Kinondoni Municipality Dar es Salaam. That the Title Deed is registered in the name of Zaidi Baraka. He tendered a photocopy of the said Title Deed which was admitted as Exhibit P1.

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He said further that the reason of tendering of a photocopy is the fact that the original Title is deposited as a security on a business loan where the suit property is mortgaged as a security.

He said further that, on 15/01/2023 when he was in Dubai on business tour, he got an information about the advertisement of sale by auction of the suit property. That the advert was to the effect that the suit property was to be sold on public auction by Adil Auction Mart, the 2nd defendant for the reason that the owner has defaulted in loan repayment which was issued by NMB Mwanjelwa Mbeya. The said advert was tendered as Exhibit P2.

PW1 stated further that the suit property was never owned by Petromark Africa Ltd, and he, the owner has never entered a loan agreement or secured any loan from NMB Bank, Mwanjelwa and that he has never received any demand notice or any document to prove that he has secured a loan from the 1st defendant and defaulted on repayment. He added that, he has no any business relationship with NMB Mwanjelwa Branch.

PW1 said that upon seeing the advertisement, he had to stop his business activities and return back to Tanzania on emergency. The certified photocopy of a passport and air tickets were admitted as exhibit

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P3. He claimed that, the advertisement of sale by auction of his property has caused him a lot of suffering, and loss as his partners in business have stopped their former business arrangements.

That, the advertisement has brought him a lot of embarrassment to the public taking into board PW1's position as a Director of Petromark Africa Ltd. He prayed for the Court to grant the reliefs sought.

It is a cardinal principle of law that he who alleges must prove. This principle is enshrined under the provisions of Sections 110 and 111 of the Evidence Act, Cap 6 R.E 2019 and has been reiterated in numerous cases both of the Court of Appeal and this Court. To name few, there is a case of **Godfrey Sayi vs. Anna Siame (as legal representative of the late Mary Mndolwa)**, Civil Appeal No. 114 of 2012 (CAT) (unreported) where the Court of Appeal stated thus;

"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities."

Also, the Court of Appeal case of **Joseph Kahungwa vs. Agricultural Inputs Trust find & 2 others**, Civil Appeal No. 373 of 2019 (unreported) where it was held among other things that;

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"... It is a cardinal principle of law that the burden of proof in civil cases lies on the party who alleges anything in his favour."

Having said so, in the matter at hand, it is the duty of the plaintiff to prove his claim on balance of probabilities.

Now I will determine the issues, the first one being whether the plaintiff is the owner of the disputed land.

The plaintiff has produced a photocopy of the Title Deed which was admitted as Exhibit P1. Looking at the said Title, it is uncertified photocopy. When the Court inquired on the whereabouts of the original document, PW1 answered that the same was used as collateral to secure a business loan in another institution.

It is my view that in order to convince the Court that the Title Deed is genuine, the same being a photocopy, first the plaintiff should have certified it as a true copy of the original. Second, to cement his case, the plaintiff could have brought before the Court a witness from the said institution which is claimed to be in possession of the original Title Deed.

I am of the view that the institution by which the plaintiff's original Title Deed is deposited as security (which the plaintiff did not disclose), was a key witness in building the plaintiff's case. However such witness

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was not called to testify before this Court that the Title is indeed in the possession of the original document as claimed by the plaintiff. The mere plaintiff's verbal words that he was not in possession of the original documents does not hold water.

I understand the provision of Section 67 of the Law of Evidence Act Cap 6 [R.E. 2019] which allows the secondary evidence to be tendered in courts in some circumstances. However, the plaintiff's situation is not covered in the above provisions.

The Court admitted the photocopied document as Exhibit P1. Why then this Court is discrediting the same document? It is this Court's belief that, admitting the document in Court is one thing but according weight to that document is another different thing. The Court has failed to accord weight to Exhibit P1 because the document is a faded photocopy, it was not certified by the proper authority to ascertain that it is really a true copy of the original. Also the plaintiff did not bring a witness from the claimed institution whose the Title Deed is under its custody to prove the plaintiff's claims. I believe that witness was a key witness.

The plaintiff's failure to bring such a key witness having in custody of his original Title deed, has weaken the plaintiff's case. The plaintiff did not manage to prove that he is the lawful owner of the suit property by *Allo.*

failure to produce the valid Title Deed. He did not even manage to prove his claims that the original Title Deed is in the hands of that undisclosed institution.

In such circumstances, the Court could not rely on the mere words of mouth from the plaintiff that the original document is in the custody of another institution which was not even disclosed to the Court. It was unsafe for the Court to decide on the faded, uncertified photocopy of the Title Deed and believe that the plaintiff is the lawful owner of the suit property. The first issue is answered in negative.

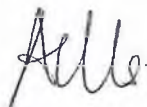
The second issue is whether the plaintiff and Petromark Africa Limited has mortgaged or entered into any contractual relationship with the 1st defendant.

As said earlier, this case was heard ex-parte against the defendants. However, the fact that the case was heard ex-parte did not exonerate the plaintiff from his obligations of proving his claims. This is because the standard of proof in ex-parte is the same in inter-parte (see the case of **First National Bank Tanzania Ltd vs Hussein Ahmed Salwar t/a Pugu Hardware & Another**, HC Commercial Court No. 2019 Dar es Salaam(Unreported). *Adle*

The plaintiff claimed that he is the Director of Petromark Africa Limited. However he did not produce any document to show the legal existence of the said Company and his Director(s) if any. About whether there was any mortgage or any contractual relationship between the plaintiff or Petromark Africa Limited and the defendants, this is uncertain. Exhibit P2 is an advertisement from Adili Auction Mart (2nd defendant) which states that;

"KWA IDHINI NA MAMLAKA TULIYOPEWA NA NATIONAL MICROFINANCE BANK (NMB) TAWI LA MWANJELWA, TUTAUZA KWA MNADA WA HADHARA NYUMBA MOJA ILIYOPO KIWANJA NA.2 KITALU "E" ENEO LA SINZA, MANISPAA YA KINONDONI **ILİYOKUWA MALI YA NDUGU PETROMARK AFRICA LIMITED...."** (emphasis added).


By this advert, it seems that the suit property which was property of Petromark Africa Limited, now in the hands of NMB Mwanjelwa Branch, was about to be sold by auction. In the circumstances where the plaintiff has failed to produce the original copy of the Title Deed, it cast a serious doubt on the plaintiff's claims that neither he as a Director of Petromark Africa Limited nor the said Petromark Africa Limited has ever mortgaged the suit property to NMB(1st defendant).



The third issue is the reliefs which parties are entitled to.

It is my view that the plaintiff is not entitled to the reliefs he is seeking before this Court. This is because he has not proved his case on the balance of probability as it is the standard in civil cases.

For the foregoing reasons, this suit is dismissed in its entirety. I issue no order for costs as the matter was heard ex-parte.


A. MSAFIRI
JUDGE
26/05/2023

