

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 220 OF 2023

(Arising from the decision of the District Land and Housing Tribunal for Ilala District at Ilala in Land Case No. 106 of 2014)

TWAHA SAID MASSAWE.....APPELLANT

VERSUS

SALUM JUMA NGONYANI.....1ST RESPONDENT

BENJAMIN JOSEPH LUHWAGO.....2ND RESPONDENT

KAPIPI ALLY SALIM.....3RD RESPONDENT

JUDGEMENT

Date of last Order: 01/11/2023

Date of Judgment: 21/11/2023

MWAIPOPO, J:

I have found it apposite to preface this judgment with the illuminating quotation from the judgment of the Court of Appeal of Tanzania in the case of **Hadija Masudi as the legal representative of the late Halima Masudi vs. Rashid Makusudi Civil Appeal No.26 of 1992 (Unreported)**. In the said case, our Apex court lucidly stated that:

"We have found it necessary to give a chronological background to this case since the outcome of this appeal is to say the least, a startling demonstration of the truth that this court, like all courts, can do justice only in accordance with the law and not otherwise (Emphasis mine).

Embracing that wisdom, I shall, therefore, endeavor to render the justice the parties herein are seeking in accordance with the law and not otherwise".

Mwai Popo

Before embarking on the merit or otherwise of this appeal, I find it appropriate to narrate the facts of this case, which are largely undisputed and are not difficult to comprehend, as can be gleaned from the record of appeal.

The chronological background of this case which gave rise to this Appeal involving Twaha Said Massawe, the Appellant herein, and Salum Juma Ngonyani and two others, the Respondents herein, who are at loggerheads, is as follows; A plot of land described as Plot No. 50 Block 12 located at Mzizima B, Kariakoo, Dar es Salaam "**suit property**" was allegedly owned by one Remigius Thomas who died intestate on the 10th July 1987. Two decades or so later, one Elias Thomas petitioned for a grant of letters of administration before the Kariakoo primary court vide Probate and Administration Cause No.12 of 2010. On 12th March 2010, Elias was duly appointed as the administrator of the deceased estate. Unfortunately, he also passed away in 2012 before he had completed to administer the said estate. Subsequently, Benjamin Joseph, the 2nd Respondent, applied for a grant of letters of administration before the same court and he was duly appointed as the administrator of the deceased estate on 16th February 2012.

The 2nd Respondent, clothed with such powers, proceeded to sell a house situated on the said plot to the Appellant for Tshs 40,000,000 on 10th July 2013. A sale agreement dated 10th July 2013 was tendered and admitted in the District Land and Housing Tribunal "DLHT" for Ilala District at Ilala. The 2nd Respondent, subsequently, handed over the house to the Appellant. However, the Appellant discovered that the 3rd Respondent was residing in the said house. He later discovered that the house had been sold to the 3rd Respondent by the 1st Respondent. He also unearthed new facts that the 2nd Respondent's appointment as administrator was revoked on 25th April 2014 and that the 1st Respondent had been appointed new administrator and subsequently sold the same house to the 3rd Respondent.

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In view thereof, the Appellant Instituted Land Case No. 106 of 2014 against the Respondents beseeching the DLHT, among other things, to declare him the lawful owner of the suit property.

After hearing both parties, Hon. M. Mgulambwa, the DLHT Chairman who presided over the case, decided in favour of the Respondents.

Being aggrieved by that decision, the Appellant has filed this Appeal through a Memorandum of Appeal that fronts three grounds of appeal namely;

- (1) That the trial Chairman erred in law and fact in rejecting to declare the Appellant the lawful owner on the ground that he did not produce ownership documents while in fact he produced the letters of administration of estate issued to Benjamin Joseph Luhwago and the sale agreement to that effect.
- (2) That the trial Chairman erred in law and fact by not properly examining the evidence adduced by the Appellant.
- (3) The trial Chairman erred in law and fact for not declaring null and void the sale agreement of the 1st Respondent and 3rd Respondent as it was made after the property had been sold by the former administrator.

When this Appeal was called on for hearing, the Appellant was represented by Yuda Thadei Paul, learned counsel while the 1st Respondent and 3rd Respondent were represented by Isihaka Yusuph, learned counsel. The 2nd Respondent did not enter appearance despite having been duly served by way of substituted service in the Mwananchi newspaper dated 23rd September, 2023 hence the matter proceeded in his absence.

Upon taking the floor, Yuda Thadei, learned counsel for the Appellant, argued the three grounds of Appeal seriatim. In amplifying the grounds of appeal starting with ground one, he submitted that Plot No. 50 Block 12 at Kariakoo belonged to one Remigius Thomas who succumbed to death in 1987. He elaborated that the 2nd Respondent was granted letters of administration of

his estate and sold the house to the Appellant. The said Letters of administration and sale agreement were tendered and admitted in the DLHT. The 2nd Respondent's appointment was subsequently revoked and the 1st Respondent was appointed as the new administrator. The Appellant didn't get vacant possession since the 1st Respondent, as the new administrator, had sold the same house to the 3rd Respondent. He further submitted that notwithstanding the fact that the 2nd Respondent's appointment had been revoked, the law is clear that subsequent revocation of letters of administration does not invalidate prior sale of the property to a bona-fide purchaser. Thus, in his view, the said sale to the Appellant was not affected by the revocation. To buttress his argument, he cited the case of **Davita Nanga vs. Jibu Group company Ltd & another Civil No. 324 of 2020** (Unreported) CAT.

With regard to ground two, Yuda Thadei argued that the Appellant's evidence was very clear that the Appellant bought the house from the 2nd Respondent who was clothed with powers to sale it as he had been duly appointed administrator of the deceased estate and further that the letters of administration and sale agreement were tendered and admitted in the DLHT.

He was surprised as to why the trial Chairman said the Appellant had failed to tender ownership documents while the two documents had been tendered as shown above.

He concluded his submissions in chief by stating that the sale of the house to the 3rd Respondent was null and void as by then there was no any house to be sold as the same had already been lawfully sold to the Appellant.

From the adversary side, Isihaka Yusuph, learned counsel for the Respondents, in his rebuttal submissions, prefaced the reply by opposing the appeal that it has no merit and it should thus be dismissed with costs. With regard to ground one, he submitted that in law he who alleges must prove but the Appellant had failed to discharge his duty at the DLHT hence the

Chairman was right to dismiss his case. He elaborated that the Chairman stated that the Appellant was required to prove that the suit property was initially owned by the late Remigius but he failed to prove it. Moreover, he argued that there was no evidence to show that the 2nd Respondent as an administrator of the estate discharged his obligations of registering the property under his name as per section 67 and 68 of the Land Registration Act Cap 334 RE 2019 thus the 2nd Respondent had no mandate to sell the suit house, hence the sale was null and void as in law no one gives a better title to property than he himself possesses. To reinforce his perceptive, he cited the case of **Paschal Maganga vs. Kitinga Mbariki, Civil Appeal No. 240 of 2017 (Unreported) CAT.**

Regarding ground two, he submitted that the trial Chairman properly analyzed the evidence before him in respect of the issue of ownership and made a correct decision hence he should not be faulted. He alluded that the availability of the Sale Agreement and letters of administration alone could not show the root or chain of ownership of the land from the deceased person to the appellant. Based on such defects the evidence of the appellant contradicted with the case of **Paschal Maganga(supra)**

With regard to ground three, he submitted that the trial Chairman did not error when he refused to hold that the sale agreement between the 1st Respondent and the 3rd Respondent was null and void. This is because, as stated earlier on, the sale agreement between the Appellant and the 2nd Respondent was null and void above initio.

In his rejoinder submissions, Yuda Thadei vehemently submitted that there was no dispute in the DLHT regarding the deceased Remigius being the original owner of the suit house and no wonder both parties were referring to the same plot belonging to the late Remigius Thomas and referred this Court to page 5 Para 3 of the Tribunal's judgement which is to that effect. He argued that, if anything, it was the duty of both parties to submit the relevant certificate of title of the deceased to show that he was, indeed, the owner of

the suit property. He went on to state that once a person has been appointed as an administrator, he is vested with powers to deal with the deceased properties. Hence, when the 2nd Respondent sold the suit house to the Appellant, it was under his custody and thus belonged to him and he was, consequently, justified to sell it.

Finally, he submitted that he wished to emphasize that it was unlawful for the 1st Respondent to sell the suit house to the 3rd Respondent as by then the house had been sold to the Appellant. He thus concluded that the sale agreement between the 1st Respondent and the 3rd Respondent was null and void.

Having heard the competing arguments made by the learned counsel for both parties and having thoroughly examined the record of appeal, I now proceed to determine the grounds of appeal. In discharging this noble duty, I will be guided by the decision of the Court of Appeal of Tanzania in the case of **Melita Naikiminjal and Loishilal Naikiminjal vs Sailevo Loibanguti, 1998 TLR 120**. The Court stated that, an appellate court, so long as it grasps the essence of the case before it, does not need to deal with the grounds of appeal separately and seriatim.

First and foremost, I wish to state, at the outset, that it is a cardinal principle of Civil Procedure that not only are the parties confined to their respective pleadings but also the courts. That legal position is long settled and there is a litany of authorities to that effect. See, for instance, the case of **Masaka Musa vs Rogers Lumenyela & two others, Civil Appeal No. 497 of 2021 (Unreported)**, where the CAT stated:

"... It is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is for the parties to suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings and are not allowed to depart from such pleadings and create their own case.....As it can be clearly

observed, the new issues framed went further to the extent of questioning whether the sale and transfer of Plot No. 437 from one Said Khamis to the appellant was lawful. It should be noted that according to the 1st respondent's case before the High court, the appellant's title over plot No. 437 was not disputed by any of the parties including the 1st respondent who had instituted the suit.....".

With the aforesaid fundamental legal position in mind, I now revert to the instant appeal. I fully subscribe to the views expressed by Yuda Thadei, learned counsel for the Appellant, that the trial Chairman grossly misdirected himself when he set up a new issue, which was not one of the framed issues during the trial. The issue whether the original owner of the suit property was the late Remigius Thomas as framed by the trial Chairman when composing his judgment, was not among the agreed framed issues. Consequently, the parties were denied their right to lead evidence and address the DLHT on the matter. However, that was a minor error, which does not vitiate the proceedings and is thus saved by the Oxygen principle.

I now turn to discuss whether, in the eyes of the law, the 2nd Respondent had mandate/was clothed with powers to sell the suit property to the Appellant.

The 2nd Respondent was duly appointed as the administrator of the deceased estate on the 16th February 2012. The Law, Section 99 of the Land Registration Act, Cap 334 RE 2019 (LRA), is very clear that by being appointed as administrator of the estate of the late Remigius Thomas, the Appellant became the legal representative of the deceased for all purposes and all the properties of the deceased were vested on him. Further, the provisions of Section 67 & 68 of the Land Registration Act require a legal representative to apply to be registered as owner of a deceased property in the place of the deceased person. Upon being so registered, he becomes vested with the mandate to exercise various powers including disposition. This legal position was underscored in the case of **Aziz Daud vs Amin**

Ahmed Ally and another; Civil Appeal No. 30 of 1990 (Unreported)

where the Court of Appeal of Tanzania (CAT) held that;

Once an administrator of the estate is appointed, the ownership of the deceased property must be changed in all documents to reflect the administrator's name leaving the property at his discretion for him to administer it faithfully to the best way he can.

In the same vein, the CAT emphasized it to be a mandatory requirement in the celebrated case of **Abbas Ali Athumani Bantulaki and another vs Kelvin victor Mahity and another, Civil Appeal No. 385 of 2019 (Unreported-CAT)**. Briefly, one Eric Peter Walcher was appointed administrator of the estate of his late father, Peter Walcher, who had died intestate. Eric applied and was registered as a legal representative of the deceased. He sold it to the 1st Appellant and executed a sale agreement. However, when he wanted to transfer the property in his name, he met a snag as the plot had already been transferred in the name of the buyer/Appellant. The CAT thus stated:

"The Law is clear that by being duly appointed as administrator of the late Peter Walcher, Eric Peter Walcher became a legal representative of the deceased... A legal representative is required to apply to be registered as owner of a deceased property in the place of the deceased and upon being so registered he becomes vested with the mandate to exercise various powers stipulated therein in terms of Section 68 of the Land Registration Act including disposition. Eric Peter Walcher applied to be registered as owner of the disputed plot...It was when he initiated the process to register himself as owner of the disputed land that he found the Letter of Offer missing and instituted the present case. On the clear terms of Section 68 of the LRA, he lacked mandate to sell the property of the deceased.... There was no valid disposition of the disputed land

between Eric Peter Walcher and the 1st Appellant and the registration of the latter as owner of it is thereby rendered invalid and ineffectual. ..."(Emphasis mine).

Having laid down the above legal principles obtaining in the above-cited authorities as they relate to the circumstances of this appeal and the issues at stake, I now proceed to determine whether the 2nd Respondent duly complied with the law when he sold the suit property to the Appellant. The determination of this Appeal, largely, hinges on this issue.

The suit property being on registered land, the 2nd Respondent was duty bound to apply to be registered as owner of the suit property before he sold the same to the Appellant. Unlike the Appellant's contention, this is not a mere formality but a mandatory legal requirement.

It is common knowledge that the 2nd Respondent served as the administrator of the deceased estate from when he was appointed on 16th February 2010 to 25th April 2014 when the 1st Respondent was appointed administrator following revocation of the letters of administration granted to the 2nd Respondent. At no time during this period did the 2nd Respondent apply to be registered as owner of the suit property in strict compliance with the law. I wish to reiterate the basic rule, in terms of Section 110 of the Evidence Act that the burden of proof lies on who alleges existence of a fact. The CAT rightly stated in the case of **Pendi fulgence Nkwenge vs Dr. Wanda Shangali, Civil Appeal No. 368 of 2020** (Unreported) that:

" Let's begin by re-emphasizing the ever-cherished principle of law that in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of Sections 110 and 111 of the Law of Evidence Act Cap 6 RE 2002".

As Yuda Thadei, learned counsel for the Appellant, alleges that the said sale was lawful, his client, the Appellant, ought to have established that the 2nd

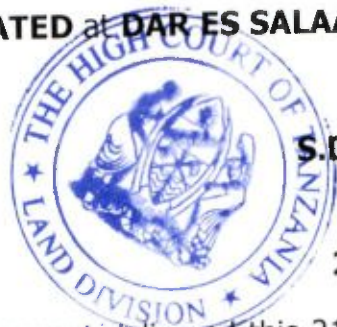
Respondent strictly complied with the law. Unfortunately, he failed to discharge this duty. What is glaringly apparent is that the 2nd Respondent sold the suit property to the Appellant without having been registered as the owner of the suit property in compliance with the law. In these circumstances therefore, the 2nd Respondent couldn't, thus, pass good title to the Appellant as contended by learned Counsel Isiaka Yusuph. This is in tandem with the decision of the Superior court in the case of **Paschal Maganga vs Kitinga Mbariki**, (supra). Consequently, the purported sale was null and void abinitio.

The trial Chairman, therefore, did not error in law and fact when he held that the Appellant was not the lawful owner of the suit property after properly analyzing the evidence adduced. Furthermore, he was correct for rejecting to hold that the sale agreement between the 1st Respondent and the 3rd Respondent was null and void on the ground that the suit property had not been lawfully sold to the Appellant.

In the upshot, I find that this appeal is devoid of merit and I hereby dismiss it with costs.

It is so ordered.

DATED at DAR ES SALAAM this 21st day of November, 2023



S.D. Mwaipo
S.D. MWAIPOPO

JUDGE

21/11/2023

The judgement delivered this 21st day of November, 2023 in the presence of learned Advocates; Yuda Thadei Paul for the Appellants and Yusuph Isiaka for the 1st and 3rd Respondents, is hereby certified as a true copy of the original.



S.D. Mwaipo
S.D. MWAIPOPO

JUDGE

21 /11/2023