

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

LAND CASE NO. 102 OF 2004

RIZIKI HABIBU.....PLAINTIFF

VERSUS

RUTH SHIJA.....DEFENDANT

JUDGMENT

13th to 15th December, 2023

E.B. LUVANDA, J

On 18/06/2004 Riziki Habibu the Plaintiff herein sued Fatuma Juma (deceased) the Defendant by then. The matter proceeded *ex parte* against the late Fatuma Juma by the order of this Court dated 31/08/2004, after allegedly the deceased failed to appear or file her written statement of defence. Where on 28/12/2004 this Court decreed in favour of the Plaintiff and declared her the lawful owner of a house No. 30 situated on Plot No. 31 Block "E" Moshi Street Ilala District, (suit property subject of this judgment) as per a judgment exhibit P3 also or D1.

Following this pronouncement in exhibit P3 or D1, the Plaintiff asserted to have lodged an application for transfer of title deed, where a land register was successfully rectified to depict the name of Riziki Habibu, as

reflected in the application for registration of transmission by operation of law part of exhibit P1 and the exchequer receipt and land rent assessment exhibit P7.

On 21/12/2007 Ruth Shija (the current Defendant) lodged an application for review of a judgment (*ex parte*) exhibit P3 or D1, where on 21/10/2010 this Court granted a review and proceeded to set aside the judgment (*ex parte*) in exhibit P3 or D1, and ordered Ruth Shija to be joined as an interested party, as per ruling exhibit D2. This ruling exhibit D2, was clarified for by this Court regarding naming of parties therein to reflect Ruth Shija (as the Administrator of the Estate of the Late Andrew Shija) was the Applicant while Riziki Habibu and Fatuma Juma (deceased) were the First and Second Respondent respectively, as per the ruling dated 23/12/2021, exhibit D3.

On 21/07/2023 the Plaintiff filed an amended plaint contextually dropping the late Fatuma Juma and sued Ruth Shija as the solo Defendant. On 04/09/2023 the Defendant presented a written statement of defence along a counter claim. On 08/09/2023 the Plaintiff filed written statement of defence to a counter claim.

Essentially the evidence presented by the Plaintiff (PW1) reflect that her title is rooted on 13/11/1996 where the late Fatuma Juma sold the suit house to the Plaintiff for a consideration of Tshs 5,000,000/= a

transaction which was executed before Ilala Primary Court Magistrate as per an affidavit ID1. PW1 asserted that after payment of Tshs 5,000,000/= the late Fatuma Juma demanded additional sum of Tshs 4,000,000/= on the explanation that a suit house was valued Tshs 9,000,000/= instead of Tshs 5,000,000/= It was the testimony of PW1 that on 24/06/1997 the Plaintiff paid a sum of Tshs 1,000,000/= to Donald Mbeke (who testified as defence witness number two) as per an agreement exhibit P2. PW1 asserted that after procuring the balance, she deposited into the account of Ilala Primary Court where the first transaction was alleged done. PW1 alleged that the deposited amount is still laying in the account of Primary court todate. PW1 asserted that a sum of Tshs 9,000,000/= was deposited in the account of Ruth Shija via pay in clip exhibit P4, withdrawal clip exhibit P5 and a letter P6, alleged to be the friend cum sibling of the Late Fatuma Juma, and at once, the former escorted the latter via a motor vehicle Suzuki model. According to PW1 a suit house was purchased on her stead by Kibibi Athuman who is her grand mother, when PW1 was schooling form four.

To further vindicate her title, PW1 tendered a copy of transfer of right of occupancy from the former proprietor one Mwafatima Mohamed to Fatuma Juma along copies of offer of right of occupancy of Mwafatima

d/o Mohamed and application for registration of transmission by operation of law, exhibit P1.

On the other hand, the Defendant (DW1) who is the administratrix of the estate of the late Andrew Ndata Reuben Shija (as per a letter of administration exhibit D5), asserted that the late Andrew Shija passed away on 14/02/1994 as per certificate of death exhibit D4. DW1 counter claimed and defended her title to the effects that before the demise of the late Andrew Shija he purchased a suit house from Mashauri Ng'hanga on 09/11/1993 via a sale agreement exhibit D9, which was attested by advocate Stephano Bong'ando Chamriho who was confirmed dead by the Tanganyika Law Society vide exhibit D17, following a formal request by PW1 regarding records of Advocate Chamriho via a letter, exhibit D16. DW1 asserted that the alleged Mashauri Ng'ahanga acquired a title over a suit house through an affidavit of a will made by the late Fatu Juma or Fatuma Juma, on 22/03/1988 exhibit D7. DW1 asserted that ownership of the alleged Mashauri Ng'ahanga was approved by a clan meeting convened on 25/10/1993 post demise of the late Fatuma Juma, as per minutes exhibit D6, which was also confirmed by John Kishosha (DW3) who claimed to attend that meeting.

DW1 tendered an original offer of a right of occupancy issued before independence on 08/12/1959 to Mr. Ismail Ali Gombera (exhibit D12),

transfer of right of occupancy (in original form) from Ismail Ali Gombera to Mwafatima Binti Mohamed (exhibit D13), offer of a right of occupancy (in the original form) issued post independence on 05/08/1963 to Mwafatima Bint Mohamed (exhibit D14), transfer of right of occupancy (original) from Mwafatima Mohamed to Fatuma Juma dated 05/08/1963 (exhibit D15), transfer of a right of occupancy from Mashauri Ng'hanga to Andrew Shija dated 09/11/1993 exhibit D10, along a letter Ref. No. AS/PF/94A dated 06/01/1994 of Col. A. Shija requesting transfer of right of occupancy of a suit house into his name (exhibit D11).

According to the Defendant, the dates when the Plaintiff alleged to have purchased a suit house from Fatuma Juma, on 13/11/1996 as per ID1, 15/11/1996 as per agreement exhibit P2, payment alleged effected on 19/11/1996 as per exhibit P4, P5 and P6, Fatuma Juma was already dead way back on 13/08/1993, as per certificate of death exhibit D8, a letter dated 27/09/1993 ID2, a letter Ref. No. MZ/KW/S/2 dated 20/10/1993 ID3, which fact was supported by Donald Mbeke (DW2) (Retired Tanzania Prison Officer) who alleged to have been asked by the sibling of the late Fatuma Juma or Lushinge or Mwanalushinge to assist them to procure a certificate of death exhibit D8, equally DW3.

The issue for determination: One, who is the lawful owner of house No. 30 on Plot No. 31 Block "E" Moshi Street Ilala Area Dar es Salaam; Two, to what reliefs are the parties entitled to.

Issue number one. Generally the evidence tendered by the Plaintiff to the main suit has a lot to be desired. To start with an affidavit ID1, suggest the late Fatuma Juma confirmed sale of a suit house to Riziki Habibu on 13/11/1996, reflect the purchaser is R.J. Tego, whom PW1 mentioned in a long form to be Rehema Juma Tego, her (PW1) mother. This is contrary to what PW1 asserted that a house was purchased by her grandmother one Kibibi Athuman on her (PW1) behalf. While ID1 which indicate was executed on 13/11/1996 reflect a consideration of Tshs. 5,000,000/= was paid as satisfaction for full purchase, an agreement dated 24/06/1997 exhibit P2 reflect DW2 received a sum of Tshs 1,000,000/= as an advance payment for purchasing the suit house for a consideration of Tshs 9,000,000/=. In exhibit P2, there is no mention of a sum of Tshs. 5,000,000/= reflected in ID1. Neither made a cross reference to the affidavit dated 13/11/1996 ID1. Instead exhibit P2 refer to the agreement dated 15/11/1996, which is missing in the court proceedings, was not tendered. Indeed while the said R.J. Tego or Rehema Juma Tego who in ID1 appear as a purchaser, in exhibit P2 the same person appear as a mere witness. PW1 asserted that an additional sum of Tshs 9,000,000/=

was paid vide the account of the Defendant. Nevertheless, a withdrawal slip exhibit P4 indicate a sum of Tshs 9,000,000/= was intended to be withdraw from account number 68/01/005660 of Kibibi Athuman on 19/11/1996, at NBC Kariakoo Branch. However, at a section of credentials of tellers stamp and signature, neither tellers stamp was stamped nor appended a signature. In lieu thereof indicate a less sum of Tshs. 4,709,791.60 by red ink without further clarification. Exhibit P6, suggest a request for transfer of a sum of Tshs 9,000,000/= from account No. 68/01/005660 of Kibibi Athuman to the account number 6562004833 of Mrs. Ruth Shija. However, at the bottom reflect red pen indicating a less sum of Tsh. 4,709,791 shown by the same red ink and handwritings resembling that in exhibit P4. Exhibit P5 reflect one Kibibi Athuman was intending to pay a sum of Tshs 9,000,000/= to account number 6562004833 of Mrs. Ruth Shija. But there is no indication for approval of that transaction. In a sense that neither the payer (Kibibi Athuman) nor bank teller appended signature on it.

This signify this transaction in exhibit P4, P5 and P6 was incomplete, or a request by Kibibi Athuman to transfer a sum of Tshs 9,000,000/= from her account onto account of Mr. Ruth Shija was dishonored or bounced for reasons of insufficient funds or having a balance of a less sum of Tshs 4,709,791 only. This can be proved by exhibit P6, on which comments by

the banker of Kibibi Athuman were deliberately tempered and pierced in a manner which one could think it was damaged by a rodent or rat.

On cross examination, the credibility of PW1 was fatally shaken and successfully impeached. For instance, PW1 said a sum of Tshs 5,000,000 was received by Fatuma Juma before the magistrate, and asserted that a sum of Tshs 4,000,000 was deposited when Fatuma Juma was going to take a title deed, where a sum of Tshs 1,000,000 was taken by DW2, remained a sum of Tshs 3,000,000/= which was deposited into the account of Ilala Primary Court, making total of Tshs 9,000,000/= The asertation by PW1 mathematically make a total of Tshs 5,000,000 plus 4,000,000 plus 1,000,000 plus 3,000,000 make a total of 9,000,000, plus 9,000,000/= in exhibit P4, P5 and P6 will be 18,000,000/= However PW1 disowned having a transaction of Tshs 18,000,000.

It is to be noted that a fact that the late Fatuma Juma met her demise on 13/08/1993 was pleaded in the Defendant written statement of defence specifically paragraphs 2, 3, 4, 5, 7, 8, 9, 14, where the Defendant faulted a sale transaction to have been executed against a dead person and a case filed against a deceased. The Plaintiff did not file any reply to counter this fact, instead filed a written statement of defence to a counter claim alone. Therefore it is taken as a concession and admission. In that way, it cannot be said that any title had passed from the deceased to the said

Kibibi Athuman or R.J. Tego (Rehema Juma Tego) or PW1. Because the manner it was presented in evidence is full of contradiction. No formal sale agreement was tendered.

The alleged sale if any was against the dead person. For the first time Fatuma Lushinge @ Fatuma Juma @ Ng'wana Lushinge, was reported dead on 27/09/1993, as reflected in ID2. The same fact feature in ID3 dated 20/10/1993 minutes exhibit D6, a letter of Col. A. Shija dated 06/01/1994 in exhibit D11. In these documents there is no any element of fraudulent accounting the alleged death. Therefore a cross examination marshalled to DW2 by the learned Counsel for Plaintiff, querying as to who assigned him and why DW2 processed certificate of death (exhibit D8) on 14/03/2006, and for what purpose. The same cross examination, to my view, cannot defeat an obvious fact that the said person was not alive and was reported by all her close sibling, friend and grass root local leaders, that is cell leader and village executive officer at Kakora.

Above all, why a sale was confirmed by way of affidavit deposition (ID1), in lieu of a sale agreement. All these water down the purported sale, and create a huge and serious doubt if at all there was any valid sale of the suit house to the Plaintiff. In fact there cannot be said that a title passed to the Plaintiff at any time as aforesaid. The Plaintiff is not having crucial documentation for ownership.

Unlike her counter part who is having sale agreement, and original documentations from the first proprietor who procured a title of right of occupancy prior attaining independence and descended it in a logical order up to the late Col Andrew Shija. A mere fact that Mashauri Ng'hanga did not petition for a probate for the estate of the late Fatuma Juma, is immaterial. This is because his ownership was derived from the affidavit, exhibit P7.

A problem of naming, in exhibit D7 reflecting Fatu Juma, exhibit D15 Fatuma Juma, exhibit D6 and D8 Fatuma Juma Lushinge, ID2 Ng'wana Lushinge, ID3 Fatuma Lushinge, DW1 clarified that all these names belong to the same and one person, Fatuma Juma, whom her father was Juma Lushinge, but some people called her Fatu Juma, others Fatuma Juma Lushinge or Mwanalushinge, which fact was supported by DW2.

To my view, I take it as a minor discrepancy which do not dent a case for the Plaintiff to the counter claim. I therefore rule that the Plaintiff in the main suit failed to prove her case. The Plaintiff to the counter claim managed to prove her title on the balance of probability.

The Plaintiff case on the main suit is dismissed, and the Plaintiff on the counter claim is declared the winner of the suit house.

However, interest of justice demand me to make no order for costs.



E. B. LUVANDA
JUDGE
15/12/2023

Judgment delivered on the presence of Mr. Godfrey Mapunda learned Counsel for Defendant also holding brief for Mr. Peter Nyangi learned Counsel for Plaintiff.



E. B. LUVANDA
JUDGE
15/12/2023