

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 37 OF 2017

MARENGA INVESTMENT COMPANY LTD..... PLAINTIFF

VERSUS

DENIS LINUS MTENGA.....DEFENDANT

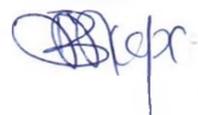
23/09/2020 & 16/10/2020

JUDGMENT

MKAPA, J:

The plaintiff, Marenga Investment Company Limited (Marenga Company) has filed this suit praying for judgment and decree against the defendant, Denis Linus Mtenga in respect of 16 acres piece of Land located at Oria Kahe within Moshi Rural district in Kilimanjaro Region (the suit land) for the following reliefs:-

- i. A declaration that, the plaintiff is the lawful owner of the suitland.
- ii. A declaration that, the deffendant is a tresspasser into the suitland.
- iii. An order restraining the defendant permanently from entering and interfering with the plaintiff's quiet enjoyment of the suit land.
- iv. An order for the defendant to pay general damages assessed by the court.
- v. An order for the defendant to pay cost of the suit.



- vi. Any other relief (s) that this Court may deem just and fit to grant.

The defendant filed his written statement of defence disputing all claims by the plaintiff and prayed for the suit to be dismissed with costs.

On the date when this case was set for hearing the plaintiff was represented by Mr. Eric Gabriel learned advocate while the defendant was represented by Mr. Hamis Mayombo also learned Advocate. The plaintiff had a total of four witnesses while the defendant defended for himself

The following were the agreed issues;

- 1. Whether the suit land formed part of the estate of the late Linus Mtenga.*
- 2. Whether the sale transaction of the suit land between Justine Mtenga and the plaintiff was legal.*
- 3. Whether the plaintiff can institute legal proceeding without Board's Company resolution.*
- 4. Whether the defendant trespassed on the suit land*
- 5. What are the reliefs the parties are entitled to.*

The plaintiff's case started with PW1 Jonas Hembaeli Mshiu who informed the court that he was an Assistant Director to Marenga Company. That, the suit land belongs to their company as they



had acquired the same from one Justine Mtenga a blood brother to the defendant in 2011 until 2017 when the defendant trespassed the suit land, and ordered his employees to vacate the premises. He further testified the fact that he reported the matter to Moshi Central Police Station and as a company they convened a meeting and resolved to institute a case before the court.

PW1 also informed the court that when he acquired the suit land there were other people who witnessed the sale transaction named Frank Mbuya, the neighbour who later on became a Village chairman and Edith Justine Mtenga. He also testified that after he had acquired the suit land he started cultivating maize and beans for about seven years before the defendant trespassed but nobody had claimed ownership of the suit land before. On cross examination PW1 stated further that, a notice was posted relating to the sale of the suit land dated 15th October 2010 to the effect that Mr. Justine Mtenga was selling his farm land. Further that, the said Justine Mtenga assured him that the suitland belonged to him and he produced documents evidencing the same.

PW2 Joseph Benedict Kimoso's testimony did not differ much from that of PW1, and in addition he tendered minutes of the Company's Board meeting which resolved to bring the matter before the court. The same was admitted as Exhibit P1. PW3



Frank Laurent Mbuya, cemented on PW1's testimony to the effect that, he was a member of Oria village council in 1994 and he participated as a chairman of the ward tribunal in a dispute involving the suit land. He testified the fact that the dispute was between Mr. Justine Mtenga the complainant against Mr. Fadhili Jumanne Mteti who had trespassed his piece of land measured 12 acres. The latter never entered appearances for three consecutive time when the dispute was called for hearing. However, the tribunal did not determine the matter but it referred the dispute to the ward land tribunal. PW3 further testified that, Mr. Linus Mtenga defendant's father did transfer the suit land to his son Justine Mtenga in writing and records were left with the village office. He added that, he was not aware if Mr. Linus Mtenga had other children including the defendant until when the dispute arose.

PW4 Justine Linus Mtenga testified the fact that, he sold the suit land to Marenga Company vide two sale transactions effected in 2011 and 2012 respectively. He informed the court that he sold the suitland as a lawful owner as he inherited the same from his late father Linus Mtenga. Further that, the handing over of the suitland from his late father was witnessed by village council (serikali ya kijiji). He tendered handing over agreement and was admitted by the Court as Exhibit P2. PW4 went on testifying that his late father had 13 children and was partially



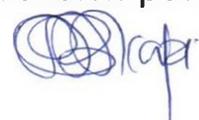
incapacitated with poor sight that's why he decided to hand over the suit land to him as the caretaker of the whole family. On cross examination PW4 admitted that it not true that his late father did instruct him to institute a suit at the District Land and Housing Tribunal because during those days the Tribunals were yet to be established. He also stated that there were mixing up of issues in the sale transaction since the name of VEO who signed the document is not shown and also Agnes Linus Mtenga his sister who was a witness to the sale transaction but the signature is not hers as the Chairman signed on her behalf.

In his defence, the defendant DW1 Denis Linus Mtenga, testified the fact that the suit land measures 30 acres and is jointly owned by the children of the late Linus Mtenga including himself. That, previously the suit land was owned by the late Linus Alfonce Mtenga who passed away in 1996. Further that, before his death he informed his children that all his estate was free to be inherited including the suit land (30 acres). He added that prior to his death, their late father had never distributed any of his assets including the suit land and when he was admitted at Muhimbili hospital, he cautioned them to be careful with their brother Justine Mtenga because he was dishonest because through the late advocate Cecil Maruma they had instituted a suit against their late father in respect of the suit land. They



met as a family and decided to petition for letters of administration of estate of the late Mr Linus Mtenga and at a family meeting they proposed him to be an administrator of the estate of their late father. He applied for letters of administration at the Moshi Urban Primary Court which granted him the same. He then filled and filed form No. V and VI after collecting deceased assets and distributed the same equally to all 9 children of the late Linus Mtenga according to his wishes. Minutes of the family meeting, Letter of Administration and Form No V and VI issued by Moshi Urban Primary of Mirathi No. 104/2014 relating to the late Linus Mtenga were admitted as Exhibit D1, D2 and D3 He finally testified that, there was no consent between family members in respect of the sale transaction between Marenga Company and Mr Justine Linus Mtenga and more so, the suit land had already been distributed to beneficiaries. On cross examination, DW1 added that their late father inherited the suit land from Mangi of Kahe and he was not aware of their late father handing over the suit land to Mr Justine Mtenga alone. Further that, between 1996 and 2014 the suit land was leased to different people by Mr. Justine Mtenga but the family never received any proceeds but they still trusted him as their blood brother.

In his final submission Mr. Eric for the plaintiff submitted in respect of the issues framed that the suit land does not form part



of the late Linus Mtenga estate since the same had already been inherited by Mr. Justine Mtenga from 1994 when he sold the same to the plaintiff in 2011. Therefore the sale agreement between them was legal. He further contended that, the plaintiff had legal capacity to institute the current legal proceeding since the board of directors of the plaintiff resolved the same as evidenced in Exhibit P1. Learned counsel also submitted that, the plaintiff lawfully acquired the suit land from Mr. Justine Mtenga thus he is the lawful owner while the defendant is a trespasser. On the reliefs claimed the learned counsel prayed this court to grant the relief (s) as prayed in their plaint and reproduced at the beginning of this judgment.

Mr. Mayombo for the defendant made his submission to the effect that the suitland is part and parcel of the estate of the late Linus Mtenga and the same had been divided equally among his rightful heirs including Mr Justine Mtenga who was given six acres. He added that the Plaintiff was duty bound to undertake due diligence on the suit land prior to acquiring the same in line with law of contract principle of "CAVEAT EMPTOR" let the buyer beware.

Learned Counsel also submitted that the plaintiff failed to prove their case to the standard required by the law since all four witnesses for the Plaintiff's case had failed to testify on the legality of the sale agreement between the Plaintiff and PW4



Justin Linus Mtenga. More so, the purported sale agreement had a lot of shortcomings including the fact that it did not disclose the name of the person who were authorized by the Plaintiff Company to sign on their behalf. Furthermore Exhibit P2 which purported to prove the handing over was forged and fabricated hence rendered the whole transaction invalid. Mr. Mayombo submitted further that, the plaintiff's company initiated legal proceedings in the court of law without legally acceptable board resolution as the same had involved a person who was not a board member contrary to the principle established by High Court of Tanzania (Commercial Division) in the case of **Investment House Limited V. Webb Technologies (T) Limited** and two others Commercial Case No. 97 of 2015 which is elaborative in the role and powers of the Board of Directors.

The learned counsel for the defendant finally submitted that, the defendant was not a trespasser to the suit land as he was dully appointed by the court to administer the estate of their late father. Therefore the plaintiff is not entitled to any relief, he prayed that the suit be dismissed with cost.

Having narrated what had transpired in the court, I will now turn to consider the framed issues. To begin with the first issue as to whether the suit land formed part of the estate of the late Linus Mtenga. In his testimony PW4 who sold the suit land to the



plaintiff admitted to have been handed over the suit land by their late father when he stated;

"The late father was partially incapacitated with poor sight that's why he decided to hand over the suit land to me. The late Linus Mtenga had 13 children."

It is evidence from PW4's own words the fact that he was entrusted by the late Linus to be a caretaker of his family of 13 children and not to own all the properties for his personal gain. More so, PW4 himself had admitted the fact that the late Linus Mtenga had 13 children in my view even common sense dictates that the suit land which was handed over to PW4 was to be distributed equally among the 13 children.

Furthermore, even the document which PW4 relied upon to have handed him ownership which this court admitted as Exhibit P2 is wanting because though certified as true copy is not reliable as it is uncertified photocopy of the copy which is not readable though I managed to gather the following;

*"Hivyo baada ya kuona maradhi yananisumbua hivyo sitaweza kuendelea na kesi tena. Nilimkabidhi mwanangu Justin Linus Mtenga afungue kesi katika **baraza la ardhi la wilaya mwaka 1968**, na kesi hiyo ilikuwa katika **baraza la ardhi la wilaya ya Moshi**, dada yangu alishinda kesi hiyo ilikuwa ni*



baada ya kesi hiyo Justin hakuweza kurufaa kesi hiyo
... (Emphasis Mine)

From the above excerpt it is clear that a case was lodged before the District Land Tribunal of Moshi in 1968 while in actual fact by then the land tribunals were yet to be established. In Tanzania land tribunals were firstly established in the year 1999 by **sections 167 and section 62 of the Land Act of 1999** Cap 113 and **Village Land Act of 1999** Cap 114 but they became operational in the year 2002 when the **Land Disputes Courts Act** came into force. Before the introduction of land tribunals, the land disputes were referred to the normal courts such as Primary Courts, District Courts, Resident Magistrate's Courts and High Court. Therefore, the above quoted statement is enough proof that the document was forged.

From the foregoing, I am of the considered view that the suit land forms part and parcel of the late Linus Mtenga's estate. PW4 was only a caretaker of the same as the elder son to the deceased.

On the 2nd issue as to whether the sale of the suit land between Justine Mtenga and the plaintiff was legal. Since I have answered the 1st issue in affirmative it therefore goes without saying that, the sale agreement was not legal. It is opportune for me to point out the principle governing proof of case in civil suits to the effect that he who alleges must prove. **Sections 110 and 111 of the**



Law of Evidence Act, Cap 6 R.E. 2019 are illustrative on the fact that as follows;

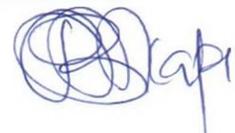
"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

In the present suit, the sale agreement did not qualify the test of standard sale agreement as a result it was successfully objected by the defence and this court sustained the objection. Furthermore, the purported sale agreement was not endorsed with stamp duty contrary to the law as fortified by the Court of Appeal of Tanzania in the case of **Zakaria Barie Bura V Theresia Maria John Mubiru** [1995] TLR 211 that;

"The sale documents did not bear any stamp duty and were thus inadmissible in evidence"

Additionally, as rightly submitted by the defendant's counsel, the plaintiff was duty bound to undertake due diligence to satisfy himself on the status of ownership of the suit land before acquiring the same including site inspections, in order to ascertain whether there existed conflicts on boundaries



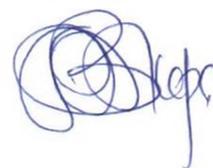
and/or with neighbors, whether there were subsisting disputes with other people considering the fact that the late Linus allegedly handed over the suit land while the same had on - going dispute. This is the rationale behind the principle of *caveat emptor*. Had the plaintiff made such inquiry, it is my considered view that, this case would have not been in court today.

Furthermore, the exact size of the suit land is also questionable. The plaintiff stated that the suit land is 16 acres, PW4 who sold the suit land testified that he sold 24 acres to the plaintiff while PW2 Joseph Benedict Kimoso who is also the Executive Director of the Plaintiff herein testified the fact that they had acquired 25 acres from PW4.

In the case of **Farah Mohamed Said V Fatuma Abdallah** [1992] TLR 205 it was stated that;

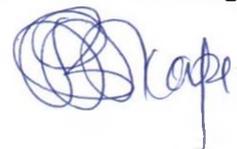
"Who does not have legal title to the land cannot pass good title over the same to another..."

In the instant case it is apparent that PW4 did not have legal ownership of the suit land to pass it on to the plaintiff. PW4 cannot claim ownership over the suitland which he personally admitted to have been told by his late father to be a caretaker on behalf of his family members.



As mentioned earlier, in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In discharging this burden the weight/quality and not quantity of evidence adduced is considered. Addressing similar position as to who bears evidential burden the Court of Appeal of Tanzania in **Anthony M. Masanga versus Penina (Mama Ngesi) and another**, Civil Appeal No. 118 of 2014 (unreported), cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities stated that: -

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it; a value of 1 is returned to and the fact is treated as having happened"



From the evidence on record and in light of the above analysis, it is undisputed that the plaintiff failed to establish that the sale agreement with PW4 was legal.

Coming to the 3rd issue as to whether the plaintiff can institute a suit without a legally acceptable board resolution, it is a trite principle that, when a company intends to sue, authority and consent from board of directors is mandatory. In the case of **Bugerere Coffee Growers Ltd V Sebaduka and Another** [1970] 1 EA 147 it was held *inter alia* that;

"... (i) In commencement of legal proceeding a resolution or resolutions have to be passed either at a company or board of directors,

(ii) Where an advocate has brought a legal proceeding without any authority of the purported plaintiff, the advocate becomes personally liable to the defendants for the cost of the action."

(See also **Danish Mercantile Co. Ltd V Beaumont** [1951] 1 C 680)

In the present suit the records reveal that, the Plaintiff's Company had three directors named Joseph Benedict Kimosso, Christopher Benedict Kimosso and Jonas H. Mshiu, the same is evidenced in Exhibit P1. However, according to the exhibit, the number of board members who passed the resolution were four

including Benard Benedict Kimosso while he was not a company director. My view is, since all directors were present and they reached unanimous decision together, their resolution therefore binds them. I do not see how the 4th member vitiated the resolution reached. This issue is therefore answered in negative, the plaintiff properly sued the defendant.

The 4th issue as to whether the defendant trespassed into the suit land is also in negative. Since I have pointed out earlier the fact that the sale agreement was invalid the issue of trespass collapses.

On the final issue as to what reliefs are the parties entitled to, I firmly hold that, the plaintiff has failed to prove the case at the balance of probability. In the circumstances, the plaintiff is not entitled to the reliefs prayed. The suit fails for want of merit and is hereby dismissed with costs.

Dated and delivered at Moshi this 16th day of October, 2020




S.B.MKAPA
Judge
16/10/2020