

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

LAND CASE NO. 34 OF 2021

ESTER NIWEZESHA SAUKA 1ST PLAINTIFF

NICE IMMANUEL KOMBE 2ND PLAINTIFF

**HANS IMMANUEL KOMBE (*Under the Guardianship
of Ester Niwezesha Sauka*) 3RD PLAINTIFF**

VERSUS

SHAMMAR MINISTRIES NETWORK 1ST DEFENDANT

FIRST WORLD INVESTMENT COURT BROKER 2ND DEFENDANT

JUDGMENT

13th December, 2022 & 10th March, 2023

TIGANGA, J.

The trio plaintiffs are blood related. The 1st plaintiff is the biological mother of the 2nd and 3rd plaintiffs. They are all claiming interest over ownership of land with Title No. 1758, LO 316848 located at Plot No. 167, Block A Olodnyomas within Arusha City (the suit property). The essence of dispute in respect of the suit land will be shown hereinafter along with the analysis of the evidence presented before the court.

It is noteworthy albeit briefly, to point out for general understanding the essence of the dispute that led to this suit. Briefly,

Emmanuel Invocavity Kombe who testified as (PW1) and another person not a party in this case, were ordered by the Arbitrator in the matter of arbitration to pay Tanzanian Shillings One Hundred and Twelve Million Five Hundred and Thirteen Thousand, Six Hundred (112,513,600/=) and 50% of the Arbitrator's fees to the 1st defendant (Shammah Ministries Network). The arbitration proceedings were arbitrated by one Modest Akida, Advocate and Sole Arbitrator. The resultant award was registered and decreed by this court via Misc. Civil Application No. 230 of 2015. That was followed application for execution of the award, and the execution orders were made by Hon. Seif Kulita, Deputy Registrar (as he then was) by appointing the court broker and ordered him to attach the suit land, which was recognised and proved before him to be the property of PW1.

The process was unsuccessfully objected via objection proceedings in Misc. Civil Application No. 16 of 2019, therefore the execution was left to proceed as ordered. Following such attachment order, a forcefully eviction to the plaintiffs who were by then living on the suit premises was successfully made and fulfilled by the second defendant (First World Investment Court Broker) who did so by the order of the Court.

Aggrieved by that eviction, the plaintiffs at different times sought and filed various objection proceedings in this court in vain. As a matter of law, they could not appeal against the decision and orders emanating therefrom and therefore, opted to file this case as a fresh one. The records are silent on whether the suit property has been disposed to date or not, and if it has been disposed to who? And if not disposed, then is it still with the court brokers or it was handed over to the defendant. In the plaint before this Court, the plaintiffs sought the following orders:

- i. Declaration that the suit land belongs to the plaintiffs;
- ii. Eviction order against the defendants;
- iii. Demolition of any development whatsoever done on the suit land;
- iv. Compensation to damaged properties on a suit land;
- v. Costs; and
- vi. Any other relief this court deems just to grant.

The 1st defendant who appeared through Reverend Lawrence Joseph Mapunda (Managing Director) disputed the claims through the Written Statement of Defence. The plaintiffs' case was supported by the testimonies of Emmanuel Invocavity Kombe (PW1), who is the husband

of the 1st plaintiff, and a biological father of the 2nd and 3rd plaintiffs, Ester Niweshesha Sauka (PW2) and Nice Emmanuel Kombe (PW3). Through these witnesses and exhibits P1-the Deed of Gift between PW1 and all plaintiffs, P2-Land Rent letter, P3-Property Tax Bid, P4-property demand, P5-rated demand note and P6-the Right of Occupancy were tendered. On the defence side, Reverend Lawrence Joseph Mapunda (DW1) testified solo and his evidence was supported by exhibits D1-a decision in Misc. Civil Application No. 16 of 2019 between Esther Niwezesha Sauka against the 1st defendant, 2nd defendant and PW1 and exhibit D2-a decision between Nice E. Kombe against the 1st defendant, Jibu Group, PW1 and 2nd defendant.

In the matter at hand, the 2nd defendant neither filed written statement of defence nor testified despite the fact that the final submission filed in court by the defence side, indicates his involvement.

As intimated above, the plaintiffs had the legal assistant of Advocate Samson S. Rumende whereas the 1st defendant appeared through Reverend Lawrence Joseph Mapunda as a legal representative of the 1st defendant. In his testimony, PW1 told the court that, he was working with Jibu Group Company in the year of 2013. Also, he was the owner of the landed suit property before transferring it to the plaintiffs

through the deed of gift executed by himself and the plaintiffs before the Commissioner for oaths, one Chang'a, the State Attorney transferring the suit property. The said suit property is alleged to have been transferred to the 1st plaintiff (the wife of PW1), Nice Immanuel Kombe and Hans Immanuel Kombe, both being the children of PW1.

Testifying further, PW1 told this Court that, he transferred the suit land to Ester Niwezesha Sauka, Nice Emmanuel Kombe and Hans Emmanuel Kombe. That, the said suit property has three houses and the transfer was witnessed by the said Chang'a from the office of the Attorney General and a hamlet chairman whose name is Elias. The same was also stamped. PW1 tendered the said deed of transfer in court and it was admitted as exhibit P1.

The other witness was Ester Niwezesha Sauka (PW2). In her sworn testimony she stated that, she is married to PW1 in 2000 and they have two children, Nice and Hans. She further testified that, on 27/11/2012 PW1 transferred the suit land to her and their two children. She said further that, in order to give the transfer legal force, they made an agreement of transfer which was witnessed by a lawyer. Upon being shown the exhibit P1 (agreement of transfer), she identified it and prayed the court to use the said agreement of transfer as exhibit.

PW2 went on adducing evidence that, the suit property borders Balki in the North, Didace Baltazar in the East, Ruth Mamuya in the West and South. She stated that, after being given the land, she started the survey processes and later on, she was granted the certificate of title, paid all land rents and was issued with rent payment receipts which bear her names and the certificate of title was given in her names as well. The said receipts dated 30/06/2021, 07/07/2015, 16/07/2019 and the one with Serial No. PTA/ A. 15257 were received and admitted as exhibit P2, P3, P4 and P5 respectively. Also, the certificate of title No. 1758 Plot No. 167 was tendered and admitted as exhibit P6.

PW2 testified further that, she was astonished by the court broker attaching the suit property on the ground that, PW1 was indebted by the 1st defendant but she was not concerned with the debt. That, she was not given any document to substantiate the attachment, thus, she filed a case in this court but lost it because it was decided that the agreement had no stamp duty.

The last witness on the part of the plaintiffs was Nice Emmanuel (PW3). She testified on oath that, on 27/11/2013 their father (PW1) handed over the suit land to them (children) and their mother (PW2). She said, the handing over was made before the State Attorney, one

Chang'a before whom the agreement between them was signed. It was her further testimony that, the suit property has three houses built therein. She identified exhibit P1 for having their signatures and the stamp by Mr. Chang'a and that after such agreement of transfer, her mother (PW2) proceeded with the process of being granted with the certificate of title which she successfully secured. PW3 also identified exhibit P6 upon being shown to her. She did so through her names and signature. After these testimonies, the plaintiffs' case was closed, hence, paved the way to the defence side to start its oration.

Reverend Lawrence Joseph Mapunda was the sole witness who testified as DW1, when fending the position, he testified that, PW1 was indebted and therefore they sat down and tried to sort the issue out of court. That, they planned and in fact agreed with PW1 that Mr. Modest Akida, Advocate from Tanganyika Law Society should be their Arbitrator. That was in 2012 and after arbitration the Arbitrator gave an award. He said, all the time when the application was before Honourable Kulita, DR (as he then was) PW1 had never raised that, the suit land was transferred to the plaintiffs. DW1 testified further that, the objection to the attachment of the landed property in dispute was also raised before Hon. Nkwabi, DR (as he then was) by the 1st plaintiff and failed because

they had no evidence to prove the transfer of the suit property. That, the exhibit, the plaintiffs tendered were ruled out as forged in the ruling delivered by Hon. Nkwabi, Deputy Registrar in Misc. Application No. 16 of 2019. The same was tendered and admitted as exhibit D1.

DW1 went on testifying that, after the letters written to the Chief Justice from both sides, it was directed that, the parties be heard and the decision be given to that effect. He further said, after being heard on merit before Hon. Gwae, J, the plaintiffs also lost the case because they had no evidences to prove transfer of the suit land to them from PW1. He said, if the plaintiffs had evidence, they would have tendered the same before Hon. Gwae, J, to substantiate the alleged transfer of the suit land. The said ruling Misc. Application No. 92 of 2020 was tendered and admitted as exhibit D2. Lastly, DW1 prayed the court to dismiss the case with costs because the matter had been in court for more than ten years litigating on the same matter. He consequently closed his defence case.

After both sides' testimonies, parties filed their final submissions which I will not reproduce in verbatim but I will surely consider them in the course of my analysis of evidence. Before commencement of the trial, the following issues were framed for determination;

- i. Whether the plaintiffs are the lawful owners of the suit land,
- ii. Whether the transfer of the suit land from Emmanuel Nivocavity Kombe to the plaintiffs was valid,
- iii. Whether the defendants trespassed into the land or there was a court order allowing them to enter,
- iv. To what reliefs are the parties entitled.

Before responding to the framed issues, I find myself compelled to tackle the issue raised by the defendants in paragraph 6 of the written statement of defence and at page 6 of their written final submission. They raised the issue of *res judicata*. That, because the matter had already been disposed off through Exhibits DI and D2, this case is therefore *res judicata*. The plaintiffs through their Advocate, Mr. Samson Rumende countered the issue by citing Order XXI, Rule 62 of the **Civil Procedure Code**, [Cap 33 R.E. 2019] to show that, after the plaintiffs had failed in objection proceedings, they had no option other than filing a fresh suit because they have interests in the suit property.

Without much discussions, I agree with Mr. Rumende regarding the issue as to whether the suit is *res judicata* or not. This is because, where an objection proceeding preferred by a person who was not a party to the case fails, the objector is not barred to file a fresh suit like

what the plaintiffs did. The position of the law on this is clear and settled in our jurisdiction, as provided under Order XXI, Rule 62 provides that;

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

The above provision of the law is underpinned by the decision of the Court of Appeal of Tanzania in the case of **Kezia Violet Mato vs National bank of Commerce and 3 Others**, Civil Application No. 127 of 2005 at DSM (unreported) where it was observed that;

"We have carefully considered the submissions by both learned counsel. There is no dispute that the application before us originated from the decision in objection proceedings. The decision which held that, the applicant's application for objection proceedings was time barred and had no merits. There is also no dispute that, where a claim or an objection is preferred, the party against whom an order is made has no right of appeal but may institute a suit to establish the right which he claims to the property in dispute, as provided for under Order XXI Rule 62 of the Civil Procedure Code."

Guided by the above authorities, it is crystal clear that, the principle of *Res Judicata* cannot apply in the circumstance where the

application was for objection proceedings. The party against whom the order was made is at liberty to institute a fresh suit in order to establish the rights he thinks to have been involved in the property in dispute. In the circumstances, the cases of **Piniel Lotta vs Gabriel Tanaki and 2 Others**, Civil Appeal No. 61 of 1999 and **Ester Ignas Luambano vs Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014 (both of CAT and Unreported) and section 9 of the Civil Procedure Code, cited by the defendants are distinguishable and misplaced to the nature of this case.

Turning to the issues raised for determination; according to the evidences available as to the ownership of the suit land from the plaintiffs and PW1 is that, the land was transferred to the plaintiffs from PW1 way back on 27/11/2013. This is also justified by exhibit P1 which is the agreement of transfer. Following that alleged transfer, the certificate of title was prepared by the Commissioner of Lands and issued to the plaintiffs. The certificate of title was admitted in this court as exhibit P6. It was issued on 01/01/2021 to all the plaintiffs as tenants in common in equal shares for the term of Sixty-Six (66) years. On that basis, the plaintiffs started to pay land rents and other property taxes as proved by exhibits P2, P3 and P4 which are receipts from Tanzania Revenue Authority and Arusha City Council respectively. To the

plaintiffs, those exhibits and evidences adduced by them and PW1 are vivid justifications that, they are the owners of the suit property.

However, on the part of the defence side the story is different. They are claiming that, the narration and exhibits given by the plaintiffs and PW1 are fabricated and the documents are forged in order to justify the false transfer of land to the plaintiffs. In the defence's views, PW1 did so in order to escape the liability of paying the debt to the 1st defendant. As said above, DW1 gave only rulings of the Court which decided in favour of the 1st defendant during objection proceedings. These are exhibits D1 and D2.

As I start responding to the raised issues, I propose to start with the second one because it is the main issue upon which other issues will probably be resolved. I say so owing to the reason that, the questions of ownership, trespass and reliefs depends on the issue of transfer. In other words, the question as to the validity of transfer of the suit property from PW1 to the plaintiffs supersedes the remaining issues and its results gives the direction of the determination of the remaining issues.

It must be clearly understood that, in exhibit D1 the court rejected the so-called agreement of transfer tendered by the 1st plaintiff in Misc.

Civil application No. 16 of 2019 before Hon. Nkwabi, DR (as he then was) now exhibit P1 as being fabricated. The part of the excerpt of the said ruling at page 3 reads;

"I agree with the averment by the 1st respondent in his counter affidavit that the alleged transfer could have been fabricate and fraudulent and an afterthought. To do away with that, since the alleged contract was executed in public office, the office of the State Attorney in Arusha, I would have expected an exchequer receipt for the payment made for the service to be exhibited to show authenticity of the execution which will do away with the making false transfer and back dating the same... The same applies to where the local government officer signed and stamped. Further, there is no stamp duties fixed on it. Without such supporting documents, then the contract cannot be genuine..."

All of those requirements elaborated by Hon. Nkwabi, in order to make the contract of transfer genuine and authentic were the ones without which the transfer agreement could not be genuine. In an attempt to cure the agreement, it is only the stamp duty which was honoured by the plaintiffs. They did not, while tendering exhibit P1 include the said exchequer receipts in order to prove that, the contract of transfer is genuine with legal force.

I am aware that this is a fresh suit and therefore, this court is not bound by the contents of the decisions of the previous objection proceedings. However, I am not convinced that, a party who is entitled to bring a fresh suit after failing in objection proceedings is allowed to bring new evidences and documents (exhibits) in order to prove the case. Doing so, would be allowing fabrications. It is also not correct to bring similar evidence which were rejected on account of forgery or in ingenuineness. The provision of Order XXI Rule 62 of the Civil Procedure Code does not allow appeal because the matter is regarded to have been finally and conclusively determined at that stage. In order not to close the right of the aggrieved party, it gave an alternative of filing a fresh suit for establishing his right which he claims to have been encroached. In my view, the exhibits and evidence in the fresh suit should not be much away from those submitted during objection proceedings just as it could have been in appeal. Ruling otherwise is giving a green card and blank cheque to fabrication of which I believe was not the intention of the legislature when it enacted the provision cited hereinabove.

That being the position, the contract of transfer between PW1 and the plaintiffs being found to be fabricated, and that being the base upon

which the certificate of title was sought and obtained in the circumstances in which the base upon which the court based its ruling on fabrication makes the resultant document doubtful. In my view, so long as the plaintiffs knew that in the Misc. Civil Application No.16 of 2019 the contract of transfer was declared to be fabricated, they could not present the same documents to be based upon as a necessary document in obtaining the title deed without clearing the doubt spotted by the court and upon which the court based to declare fabricated the contract of transfer. Using that document to obtain the title deed makes the same documents to be tainted. As without order removing the ruling declaring the document as a fabricated makes the documents obtained in that base legally tainted.

Further to that, and in the circumstances pertaining in this case, they could have called Mr. Hangi M. Chang'a, the State Attorney who witnessed the contract of transfer and the Mr. Mosses Joel, the hamlet chairperson who was alleged to be present at the transfer form signing to testify on the genuineness and authenticity of the said document. Otherwise, they were required to tender the exchequer receipts as it was decided in the objection proceedings. Failure to give effects to

either of the alluded two conditions above is tantamount to mishap on their side as such.

In the case of **Ecobank Tanzania Limited vs Future Trading Company Limited**, Civil Appeal No. 82 of 2019 CAT at DSM (unreported) regarding the issue of calling a key witness to testify in court had the following to observe:

"No wonder all this happened because the initial email from Anita Moshi was not verified by DW3, and she was not called to testify although she was the only person in a position to explain the original source. We must emphasize that, in the circumstances where a key witness, like Ms. Moshi in this case, is not called to testify on a material aspect of the case, the court is entitled to draw an adverse inference against a party who ought to have called the witness.

It is our considered view that the said Anita Moshi was a material witness who could have explained the missing links in the appellant's allegations of the instruction from the respondent, and thus drawing an adverse inference against the appellant by the trial court was an appropriate stance to take."

Adopting the above position in this case, so long as the plaintiffs knew that the alleged contract of transfer had already been doubted and

of course ruled to have been ingenuine by the court in Misc. Civil Application No. 16 of 2019 also, that the missing receipts were not tendered, the remaining opened door in this case was to bring the person who witnessed the document to testify on the genuineness and authenticity of the document.

Failure to do so is as good as accepting that the contract of transfer was fabricated and therefore make this court draw adverse inference against the plaintiffs on the said document. In light of the above holding, I find the 2nd issue to be resolved in the negative and against the plaintiff.

As above intimated onset, when starting to respond to the second issue, the 1st and 3rd issues remain hand caped and clipped for the obvious reasons among them being that, so long as there was no valid transfer of the land in dispute from PW1 to the plaintiffs, it cannot be said that, the plaintiffs are lawful owners of the suit land and therefore, the defendants cannot also be termed as trespassers to the land which belongs to PW1 who was the Judgment Debtor in the execution application of the decree emanating from Misc. Application No. 230 of 2015 a land in which they entered via a court order allowing them to execute the decree against PW1.

Furthermore, there is also another quagmire in respect of the possession of the suit property. Neither in their plaint nor in their evidence adduced in court, the plaintiffs demonstrated as of now, who is holding the suit property which they claim ownership from. It is not certain therefore if the suit property is in the hands of the 1st defendant, the 2nd defendant or has it been disposed. This in my view was an important aspect which would even ease execution process had they been successful in the matter at hand. In the circumstances, their claims remain unfounded and not proved to the required standard as held in the case of **Maria Amandus Kavishe vs Norah Waziri Mzeru (Administratrix of the Estate of the late SILVANUS MZERU) & Another**, Civil Appeal No. 365 of 2019 CAT at Dsm (unreported) that;

*It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his or her favour. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of civil nature, the standard of proof was on a balance of probabilities, which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. See: **Anthony Masanga v. Penina @ Mama Ngesi & Another**, Civil Appeal No. 118 of 2014*

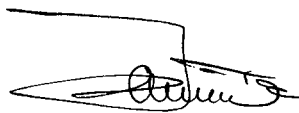
*and **Hamza Byarushengo vs Fulgencia Manya & 4 Others**, Civil Appeal No. 33 of 2017 (both unreported). It is again trite, that the burden of proof never shifts to the adverse party until the party on whom onus lies, discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case.*

That being so and for encapsulating the 4th issue, it is hereby ruled that, the plaintiffs have lost the case in totality. The certificate of title with No. 1758 Plot No. 167 Block 'A' Oldonyomasi, Arusha City is hereby declared to have been fraudulently procured as the suit property is registered on a fabricated agreement of transfer. Cost to be paid by the plaintiffs.

It is accordingly ordered

DATED at ARUSHA this 10th day of March, 2023.




J. C. TIGANGA
JUDGE