

TANZANIA / JUDGMENT

abdallah said masoud vs gharib suleiman and others 2020 tzhclandd 87 17 april 2020

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17 April 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO 398 OF 2016 ABDALLAH SAID MASOUD.....
PLAINTIFF VERSUS GHARIB SULEIMAN..... 1st DEFENDANT MAGRETH
NYATI..... 2nd DEFENDANT DICKSON SALEMA..... 3rd
DEFENDANT ZUHURA MOHAMED..... 4TM DEFENDANT HADIJA
MASOUD.... 5TM DEFENDANT STELLA 6TM
DEFENDANT Date of Submissions: 02.04.2020 Date of Judgment: 17,04.2020

JUDGMENT

V.L. MAKANL J The plaintiff in this suit is ABDALLAH SAID MASOUD. The plaintiff is claiming to be the lawful owner of the property located at Plot No. 88 Block W, Ilala, Dar es Salaam (the suit house). He has come to this court to seek for judgment and decree against the defendants jointly and severally as follows:

1. Immediate vacant possession to the suit property against all the defendant and any other person in occupation without the plaintiff's consent
2. Mesne profit of Tshs. 500,000/= per month by each and every defendant with effect from 1st January, 2013 to the date of judgment and thereafter at Tshs. 600,000/= per month from the date of judgment to the date of surrendering vacant possession to the plaintiff, failure still with compounded interest at commercial rate to the date of full settlement
3. Costs of this suit
4. Any other reliefs as this court deems fit and just to grant. At the trial the 1st, 3rd, 4th, 5th and 6th who were alleged to be tenants in the suit house failed to enter appearance and so the matter proceeded ex-parte against them. The 2nd defendant filed her Written Statement of Defence and Counter-claim. In the Counter-claim the 2nd defendant prayed for judgment and decree as follows:
 - (a) A declaration that the disputed house is part of estate of the late Mary Agnes Beyard.

- (b) A declaration that the sale of the said house to the plaintiffs unlawful, null and void ab initio.
- (c) A declaration that the transfer made in respect of sale in (b) above is invalid.
- (d) Cancellation of Certificate of Title, CT No. 86499 in the of the plaintiff which was obtained from illegal Letter of Offer.
- (e) An order of permanent injunction restraining the plaintiff, his agents or workmen from dealing with the disputed house and/or disturbing the peaceful occupation of the 2nd defendant and her tenants in the suit house in any manner whatsoever.
- (f) Costs of this suit. 2
- (g) Any other relief this honourable court may deem just and fit to grant. The plaintiff was represented by Ms. Gloria Vena nee of Kariwa & Company Advocates; and the 2nd defendant was represented by Mr. R.B. Shirima of AKSA Attorneys. The issues framed to cater for both the suit and counter-claim were as follows:
 - (i) who is the lawful owner of Plot No. 88, Block W, located at KHwa Stree Ilaia, with Certificate of Title No. 86499. (ii) Whether the plaintiff lawfully purchased the suit property. (Hi) To what reliefs are the parties entitled. The plaintiff's case was built on the evidence of two witnesses namely Abdallah Said Mosoud (PW1 and the plaintiff) and Malenga Juma Bakari (PW2). According to PW1 he bought the suit house from Christopher Burton Nyati who was the Administrator of the estate of the late Mary Agnes Beyard. He said he was satisfied that the said Christopher Nyati was the Administrator because he showed him all the necessary documents and he took these documents to his lawyer Prof. Safari who confirmed that everything was in order. He said he paid TZS 154,750,000/= through the Bank Account and the balance was in cash which money was paid before his lawyer. He said after payment of the said money he was given all the documents and he was able to secure a Certificate of Title (Exhibit PI). He said the Certificate of Titled bears his name and he has been the owner of the suit house since 2009 or 2010 thereabout. PW1 said after purchase of the suit house, he was unable to have access because the other beneficiaries sued him and the Administrator. Two beneficiaries died in the course of the pending cases at the level of the District and High Courts and the cases could not proceed after their deaths. He said the case against him at the High Court Land Case No. 157 of 2010 was to the effect that he had purchased the house unlawfully, but he emphasized that he bought the house lawfully under the instructions of his lawyer; and the cases abated on account of the deaths of the plaintiffs. He prayed for the court to order that he gets his house and he also prayed to be paid TZS 500,000/=per month after judgment and TZS 600,000/=being rent from the tenants living in the said house and other reliefs the court may deem fit to grant including costs of the suit. On cross-examination PW1 said that the Administrator Christopher Nyati did not tell him that there were other beneficiaries and his lawyer also told him nothing was wrong. He said he left everything with his lawyer including the Form for appointment of Christopher Nyati as the Administrator, the Sale Agreement and the bank slip. He said he bought the house at

TZS 200,000,000/=. He also loaned Christopher Nyati TZS 15,000,000/= but he has not seen him since though he had promised to pay him back when the issues of probate were finished. He said the loan amount was deducted from the cash amount paid to him. PW1 admitted that he did not check the house 4 before payment of the purchase price and the Certificate of Title that was shown to him did not bear the name of Mary Beyard or Christopher Nyati the Administrator. He said he remembered that there was a transfer from the late Mary Beyard to Christopher but all these documents are with his Advocate. PW1 confirmed in re-examination that he paid TZS 200,000,000/= as purchase price but he was not given any Certificate of Title by Christopher that looked like Exhibit PI. PW2 an Imaam of Masjid Songea in Ilala said he knew PW1 as one among the people in his congregation and he purchased the house at Kilwa Street House No. 73. He said the suit house was near the Mosque and he had information that it was on sale, so he shared the information with PW1 who had an interest. He said Christopher Nyati told them that he was the Administrator and they later came to understand that Christopher's uncles were in the process of nullifying his appointment as Administrator, but they could not do so at the District Court or the High Court. He said the decisions of these courts were taken to the lawyer who advised them to proceed with the purchase of the suit house. He said he was present when the Sale Agreement was being executed at the offices of the Advocate Prof. Safari. He contended that after the sale transaction they heard from Mr. Richard Nyati that the suit house was not for sale and that was why suit house could not be handed over to PW1. He said the sale between PW1 and Christopher Nyati was lawful and he prayed the court to consider PW1 as the rightful owner of the suit house. 5 On cross-examination PW2 admitted that he knew little about Nyati's family. But he was aware that Christopher Nyati was the grandchild of the late Mary Beyard and so he inherited through his father. He also admitted that Magreth, Richard and James who are the Aunty and Uncles of Christopher Nyati were not involved in the sale transaction. He further admitted that he does not know where Christopher Nyati is at the moment. He was sure that the sale transaction might have been in March, 2010 and all the documents were kept by their lawyer Prof. Safari. He said he was only an eye witness but he at least knew that TZS 154,000,000/= was deposited in the bank and the balance was given in cash. He said at the time of sale they were given a Letter of Offer and it was in original. The 2nd defendant Magreth Nyati was the only witness (DW1) to prove her case. She said she lives in Plot 88, Kilwa Street Ilala Dar es Salaam. She said the house belongs to her mother the late Mary Beyard who left behind 13 children and she is the only surviving child. She said her brother Richard Nyati was appointed the Administrator of her mother's estate according to the judgment of Primary Court Ilala (Exhibit DI). She further said after the death of her brother Richard Nyati in April, 2018 she was appointed the Administratrix of the estate of her late mother by Ilala Primary Court on 30/06/2016 and she was given Form IV to confirm her appointment (Exhibit D2). She emphasized that the suit house belonged to her mother and she pays rent and she has a Letter of Offer of Right of Occupancy of the said suit house dated 02/12/1963 (Exhibit D3). She tendered 6 receipts to show that she pays taxes on the said property for 2015 and 2019 (Exhibit D4 collectively). DW1 told the court that Christopher Nyati is the son of her brother and grandson to her late mother and she was not

aware if he had sold the suit house. She said she knows the other defendants in the suit as tenants but only two of them are remaining that is the 1st and the 3rd defendants as the others have left. She said since the death of her mother the house has been under her care and she does not know the plaintiff at all. She said the house belongs to her mother, it is a family house and currently she is living in the said suit house with children of her siblings who have passed away. She said she is not aware of sale of the house. She prayed that the court declares the suit property as part of the estate of the late Mary Beyard. On cross examination DW1 said she used to work in Kenya from 1980 but she came back in 2015 she used to come back for vacations. She admitted Christopher Nyati was also appointed Administrator together with Richard Nyati but there was an objection to his appointment. She said she was appointed Administratrix after the death of her brother Richard Nyati. She does not know where Christopher Nyati is as he has his own life. She said the Form IV by Ilala Primary Court does not show that she took over administration of the estate of the late Mary Beyard from Richard and Christopher Nyati, but she emphasized that the court would not have appointed her as Administratrix if these appointments were not nullified. He said she came back from Kenya before the death of Richard Nyati and he died while fighting for the 7 suit house. She admitted that she had not filed any inventory since her appointment as Administratrix and she did not know if there was any renewal of the Letter of Offer. On re-examination she insisted that she has not seen Christopher Nyati and that she has not received any notice of revocation from the government. The final submissions by Counsel was made before the court made the discovery. Ms. Glory Venance said that Christopher B. Nyati was the lawful appointed administrator of the estate of Mary Beyard and this was proved by Exhibit D1. She said there is no proof from the defence side that was tendered to show the contrary and that his administration was ever revoked. She said Christopher B. Nyati remains to be the lawful administrator as per section 45 of the Probate and Administration of Estate Act. She pointed out to the court that Margret Burton Nyati (DW1) recognized that Christopher Nyati was his brother's son and that he was also appointed an administrator of the estate of Mary Beyard. She said when the house was sold Margret Nyati was not in the country and neither did Richard or James Nyati challenged the sale of the said property. She concluded by stating that the plaintiff has a valid title having bought it from a lawful appointed Administrator. As for the second issue Ms. Glory said that the plaintiff is the registered owner of the property registered as Plot No. 88 Block W with Certificate of Title No. 86499 Ilala (Exhibit PI) and so the lawful owner of the suit property. She said DW1 tendered a Short-Term grant of a Right of Occupancy in the name of Male Agnes Beyard 8 which was admitted as Exhibit D1 but the same was granted in 01/07/1963 and expired on 30/06/1964. Ms. Glory submitted that since Exhibit D1 has expired it has no force of law and DW1 did not produce any evidence to show that the said Right of Occupancy was ever renewed. She said since the Certificate of Title to the suit land Exhibit PI was granted to the plaintiff lawfully and there is no fraud which has been claimed and proved against the plaintiff then he is the lawful owner of the suit property and DW1 and others are living in the property unlawfully. As to what relief is the plaintiff entitled Ms. Glory prayed for the court to order vacant possession and also mesne profit of TZS 500,000/= per month from each of

the defendants from 1st January 2013 to the date of judgment and TZS 600,000/= per month from the date of judgment to the date of surrendering the suit property to the plaintiff and costs of the suit. On his side Mr. Shirima submitted that the evidence by PW1 showed that the house was sold to him by Christopher Nyati but there was no document whatsoever to show that there was transfer or that Christopher Nyati was appointed as Administrator of the Estate of Mary Agnes Beyard as claimed. He said the fact that PW1 could not present the documents in court including the pay in slips for the purchase of the suit property claiming they were with his advocate Prof. Safari meant that there was no genuine transaction of sale of the said property by the alleged Legal Representative Christopher Nyati. Mr. Shirima further submitted that the DW1 testified that the 9 house is still in her possession and the Short-Term Right of Occupancy Exhibit D3 was never changed to the name of Christopher Nyati or the plaintiff. He further observed that the appointment of Christopher Nyati as an administrator was objected by his uncles (Exhibit D3). He further said since there were more than two administrators, Christopher Nyati could not have sold the house without the consent of the co-administrator who was Richard Nyati. He said upon the death of Richard Nyati the court by virtue of paragraph 2(c) of the 5th Schedule to the Magistrates Court Act revoked the letters of administration jointly granted to Christopher Nyati and Richard Nyati and granted the same to Margaret Nyati the 2nd defendant and DW1 herein. He also relied on the case of Mohamed Hassan vs. Mayasa Mzeer & Mwanahawa Mzee [1994] TLR 225. He thus summarised that the suit property is part of the estate of Mary Beyard and that the plaintiff failed to produce any document to prove sale in his favour. As for the second issue Mr. Shirima said the plaintiff tendered Exhibit PI which only showed his name but does not show how he bought the house from Christopher Nyati and does not show how the house was earlier on owned by Mary Beyard. He said the plaintiff did not bring the lawyer whom he claimed to have ail his documents as a witness or anybody from the Commissioner for Lands or the Municipal Council. He said the it was discovered that the original Offer of Right of Occupancy was still in the name of the late Mary Beyard and was in the hands of DW1 he said the weaknesses prove that there was no genuine purchase of the suit property. Mr. Shirima also wanted the 10 court to note that if Christopher Nyati sold the property then he did so without having genuine letters of administration as they were joint administrators appointed and so there had to be two photographs instead of one. In conclusion Mr. Shirima said the house was not purchased at all, and if it was so purchased the procedures were not proper hence unlawfully. As to the reliefs entitled to the parties, Mr. Shirima submitted that the plaintiff case deserves to be dismissed with costs as he failed to prove his case; and for the 2nddefendant, she is entitled to the reliefs prayed for in the counter-claim. For ends of justice and in order for the court to obtain proper proof and relevant facts pertaining to the case, the court invoked section 176 of the Evidence Act CAP 6 RE 2019 and called two witnesses, namely, Hadija Milulu (CW1) from the Office of the Registrar of Titles and Adelfrida Camilius Lekule (CW2) from the Office of the Commissioner for Lands. CW1 confirmed that Plot 88 Block W is situated in Ilala has been issued with Certificate of Title No. 86499 in the name Abdallah Said Masoud. And she confirmed that Certificate of Title (Exhibit PI) was from their office. She said according to the records in the file there is no

proof of revocation of the Short-Term Right of Occupancy that was issued to the late Mary Beyard (Exhibit D1). On cross-examination she observed that they do not keep transfer documents those are with the Municipal Council and they are normally forwarded to the li Commissioner for Lands and once the Commissioner is satisfied that everything is in order then their office proceeds with registration. CW2 informed the court that their file in respect of the suit land has the following documents among others:

1. A certified copy of the Short-Term Letter o f Offer in the name o f Male Beyard which was admitted as Exhibit C1.
2. Application for Legal Representative and Letters o f Administration to Christopher B. Nyati dated 02/09/2008 admitted as Exhibit C2 collectively
3. Transfer o f Right of Occupancy from Christorber B.Nyati to Abdallah Masoud signed on 30/12/2009 admitted as Exhibit C3. (certified copy)
4. Certificate o f Approval o f Disposition dated 03/03/2010 admitted as Exhibit C4 (certified copy)
5. Letter o f Offer o f Right o f Occupancy dated 06/11/2002 in the name o f Christopher B. Nyati admitted as Exhibit C5 (certified copy)
6. Letter from the Municipal Council o f Ilala to Commissioner for Lands dated 23/03/2010 admitted as Exhibit C6.
7. Letter from the Commissioner for Lands to the Registrar o f Titles dated 20/03/2010 submitting documents for registration is admitted as Exhibit C7. When cross-examined by Mr. Shirima, CW2 said the Letter of Offer for Mary Beyard was for a short term and it expired in 1964. Once a Letter of Offer expires it is reverted to His Excellency the President but an Administrator or the owner of the said property can apply for 12 renewal. She said the Transfer Deed shows that the sale was for TZS 50,000,000/= and the Letter for Administration is in the name of Christopher B. Nyati and there is only one photograph. I have listened to the evidence by the witnesses and the written submissions by the learned Counsel for the parties herein. And I will now embark on considering the matter according to the issues as framed and agreed to by the parties. I will first consider the second issue that is whether the sale of the suit property was lawful. It is not in dispute that the late Male Beyard (Mary Agnes Beyard) was the owner of the suit property at Plot No. 88 Block W, Kilwa Street, Ilala, Dar es Salaam. It is not also in dispute that Richard Hudson Nyati and Christopher Burton Nyati were jointly appointed the administrators of the estate of the late Mary Beyard by the order of Ilala Primary Court dated 05/04/2007 (Exhibit D1); and that Christopher Nyati became Administrator by virtue of him being the son of the Burton Nyati and grandchild of the late Mary Beyard. It is further not in dispute that all the children of the late Mary Beyard are deceased save for Margret Hudson Nyati who is still living in the suit property and further that Christopher Nyati was appointed co- administrator amidst protests from his uncles. The law is well settled that an Executor or Administrator has in respect of

the property vested in him, power to sale immovable property (see section 101 of the Probate and Administration of Estates Act CAP 352 RE 2019). Further, disposition shall not be registered unless such estate or interest is registered in the name of such personal representative (see section 67 and 68(1) of the Land Registration Act, CAP 334 RE 2019 and the case of Yusufu Juma Sadiki & Another vs. Nuru Mohamed Kihyo & 2 Others, Land Case No. 26 of 2008 (HC-Land Division, DSM) (unreported). In the present case, the administrators of the estate of the late Mary Beyard, that is, Christopher B. Nyati and Richard H. Nyati had the power to dispose of the properties of the estate of the late Mary Beyard. However, according to the evidence by PW1 and PW2 and also DWi, the sale of the property was by Christopher B. Nyati alone. He applied as a Legal Representative of the suit property on 15/10/2008 (Exhibit CW2) and he was granted letter of Offer in 12/12/2008 in his name (Exhibit C5). In consideration of TZS 50,000,000/= Christopher Nyati filed a Transfer of Right of Occupancy (Exhibit C3) to the plaintiff which was signed by both the plaintiff and Christopher B. Nyati on 30/11/2009. Consent of the disposition was on 01/03/2010 and on 03/03/2010 a Certificate of Approval of Disposition was issued (Exhibit C4). The documents were sent to the Registrar of Title for registration of the Certificate of Title on 20/03/2010. In all these transactions I have endeavoured to explain above, the name appearing as a Legal Representative of the late Mary Beyard is Christopher B. Nyati alone. However, as I have noted above, Christopher B. Nyati was not the only administrator of the estate of the late Mary Beyard he had a co-administrator one Richard Hudson Nyati as per Exhibit D 1. There is no proof that was presented in 14 court that Richard H. Nyati had consented to the sale transaction. There is no proof that he had permitted the co-administrator Christopher B. Nyati to proceed with the sale transaction in his absence or on his behalf. Further, Christopher B. Nyati was not by the time of the sale transaction a surviving administrator as Richard H. Nyati was still alive. In the case of May Mgaya vs. Salimu Said (the administrator of the estate of the late Said Salehe) & Another, Civil Appeal No. 264 of 2017 (CAT-Tanga) (unreported), the Court of Appeal was of the view that "...co-administrators were jointly and together responsible for everything in respect of the administration of the estate... Similarly, in the present case, if at all there was any sale transaction in respect of the suit property which was part of the estate of Mary Beyard, then the co-administrators Christopher B. Nyati and Richard H. Nyati were supposed to be responsible and involved in the transaction. It is patently clear that the sale transaction was fraudulent because there was no consent from, and the co-administrator was not involved as he is evidently not reflected in all the documents from the Letters of Administration, Application by Legal Personal Representative and also in the Letter of Offer of Right of Occupancy. In essence therefore Christopher B. Nyati had no capacity to sell and transfer the suit property because he was not the sole administrator of the estate of late Mary Beyard and he did not involve and/or get consent of his co-administrator to sell the said suit property. Subsequently, the sale of the suit property becomes unlawful as the disposition ought to have been conducted and registered in the names of both Christopher B. Nyati and Richard H. Nyati the duly appointed personal legal representatives of the estate of Mary Beyard. There is a further fraudulent observation that, according to the testimony of PW1

and PW2, the suit property was sold at TZS 200.000.000/=. The witnesses emphasized that TZS 154,000,000/= was deposited in the bank and the balance was paid in cash. However, there was no proof from PW1 that he had deposited the alleged amount of money and there was nothing to prove that Christopher B. Nyati collected the balance. More interesting, the Exhibit CW3 which is Transfer of Right of Occupancy which document was in the file of the Commissioner for Lands, reflect TZS 50.000.000/= as consideration in respect of the sale of the suit property. The difference in the purchase amount creates a lot of doubt on the part of the evidence by the PW1, and the presumption is that PW1 may have colluded with Christopher B. Nyati in the treacherous mission to dispose the suit property without the knowledge of his co-administrator in order to deprive the right of the other beneficiaries; and the lowered purchase price from TZS 200.000.000/= to TZS 50,000,000/= means the Government was also deprived of its revenue. 16 In any case, the law is very clear that a contract of disposition of a Right of Occupancy is enforceable if the contract is in writing, but unfortunately the Sale Agreement between the PW1 and Christopher B. Nyati was not produced as an exhibit in court, In the absence of this vital document, it is questionable as to resulted to Transfer of Right of Occupancy. It is quite clear that the basis of a Transfer document is the Sale Agreement but Transfer of Right of Occupancy only states the consideration and not the terms of the Sale Agreement. In such a situation, the court cannot easily state with certainty that there was purchase of the suit property by PW1. Further, one even wonders how Christopher B. Nyati was able to get the Right of Occupancy as a Legal Representative (Exhibit CW2) without having the original Letter of Offer (Exhibit D3) as the original was, according to the evidence, in the custody of DW1. These incidences undeniably create a lot of questions as to legality of the sale transaction. With the evidence on record as observed above, it is apparent that the sale of the suit property is tainted with illegality and it is not safe for the court to comfortably state that the plaintiff lawfully purchased the suit property. The second issue is therefore answered in the negative. As for the first issue; who is the lawful owner of Plot No. 88, Block W, located at Kilwa Stree Ilala, with Certificate of Title No. 86499, it is the principle of the law that he who does not have legal title to land cannot pass good title over the same to another. In other words, no one can give a better title than the one who possesses the said title. 17 In the case of Farah Mohamed vs. Fatuma Abdalla [1992] TLR 205 it was held that: "he who has no legal title to the land cannot pass good title over the same to another" In the present case, the alleged sale of the suit property was between Christopher B. Nyati and the plaintiff, and as established hereinabove, Christopher B. Nyati did not have a good title so he could not have passed titled to the plaintiff because a person without good title to the property cannot pass a title to the transferee. In the circumstances therefore, the plaintiff cannot be the lawful owner of the suit property. In the case of NBC vs. Walter T. Zurn [1998] TLR 380, the Court of Appeal after making a finding that the farm was not legally sold, proceeded to hold that no title passed to either of the two purchasers and that the property remained to be that of the respondent. Similarly, since the sale was tainted with illegalities no title could pass from Christopher B. Nyati to the plaintiff. The suit property therefore remains in the name of the late Mary Beyard. This issue is also answered in the negative. The final issue is to what reliefs are the

parties entitled to. For the reasons I have endeavoured to address, the plaintiff has failed to prove his case to the standards required by law. On the other hand, the evidence on record in a way supports the counter-claim raised by the 2nd defendant. The court therefore declares as follows: 18

1. That the suit is hereby dismissed with costs.
2. That the suit property remains to be part of the estate of the late Mary Agnes Beyard.
3. That the sale of the suit property and the transfer thereof to the plaintiff, is unlawful hence null and void.
4. That the Certificate of Title, CT No. 86499 having been obtained unlawfully in the name of the plaintiff is hereby cancelled. It is so ordered. 1 i i \ a \ J \ (X'1 c (V V a . V.L. MAiU n I
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