

TANZANIA / JUDGMENT

CHARLES STANSLAUS MALLYA V

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI MISC. LAND CASE APPLICATION NO. 12 OF 2023 CHARLES STANSLAUS MALLYA
..... APPELLANT VERSUS THADEUS JOSEPH 1st
RESPONDENT NICHOLAUS JOSEPH 2nd RESPONDENT

RULING

29/02/2024 & 18/3/2024 SIMFUKWE, J Charles Stanslaus Mallya the applicant herein, filed this application under the provision of section 78 (4) of the Land Registration Act, (Cap 334 R.E

2002) and Order XLIII Rule 2 and section 95 of the Civil Procedure Code (Cap 33 R.E 2019),
praying on the following orders: Page 1 of 9

- a. That this honorable High Court may be pleased to grant order for removal of Caveat entered by the Respondents registered on C.T.NO: 32308 Land Registry, Moshi.
- b. That this Honorable High Court may be pleased to grant eviction to evict the Respondents and or their assignee, agents, workers and their whoever (sic) from plot No. 343- 348 Block MMM Karanga Moshi Municipality with C.T.NO: 32308 Land Registry, Moshi.
- c. Costs of this application be granted against the Respondents.
- d. Any other order(s) and relief(s) the Honorable Court may deem fit to grant The application is supported by an affidavit sworn by the applicant which was contested by joint counter affidavit sworn by the respondents. When the application was called on for hearing, the applicant was represented by Ms. Fay Grace Sadallah, learned counsel whereas, the respondent enjoyed the services of Mr. Willence Elisonguo Shayo, learned counsel. Page 2 of 9 Supporting the application, the applicant's advocate submitted to the effect that sometimes in 2012 the respondents herein entered caveat against the applicant on CT No. 32308 Land Registry, Moshi. The learned counsel submitted further that in the year 2015 the respondents sued among others, the applicant in Land Case No. 20 of 2015 which was later withdrawn. He said, despite the fact that Land Case No. 20 of 2015 was withdrawn by the respondents, the caveat remained intact. Hence, the applicant decided to file the instant application. Ms. Fay referred this court to section 78 (4) of the Land Registration Act (supra) read together with section 95 of the Civil Procedure Code (supra) which empowers this court

to order that the caveat should be removed. Countering the respondents' counter affidavit, Ms. Fay submitted that the respondents' argument that the applicant purchased the suit property from Fredrick Vendeline Massawe is unfounded as the said Fredrick registered the suit property into his name illegally. She added that Fredrick Vendeline is facing criminal charges in Criminal Case No. 56 of 2022 which is pending before Moshi District Court. Ms. Fay argued that all allegations are baseless as the applicant is the bona fide purchaser of the suit property. She was of Page 3 of 9 the opinion that nothing from the record can prevent the applicant to purchase the suit property for the reason that the respondents have interest on the property. Ms Fay cemented her submission by citing the case of Suzana S. Waryoba vs Shija Dalawa (Civil Appeal 44 of 2017 [2019] TZCA 66 particularly at page 4, 5, 6 and 7 which underscored the point that a bona fide purchaser's right has to be protected. Submitting on pendency of criminal case, Ms. Fay contented that the allegation that there are criminal charges against the applicant is a mere allegation because in the said case, the accused is yet to be convicted and on top of it the applicant is not an accused person in the alleged criminal case. She was of the view that this court should not rely on such allegations as to do so is unconstitutional under Article 13(6)(b) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time which provides that: "No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence." Concluding her submissions, Ms. Fay stated that the caveat entered by the respondents is devoid and the same has to be removed since the Page 4 of 9 respondents are using the said caveat as a shield to hinder the applicant to exercise his right over the property; to wit, evicting them from the property. On the above reasons, the learned counsel for applicant prayed that the applicant's prayer be granted. In reply, Mr. Willence, opposed the application and prayed to adopted the respondents' contents of counter affidavit to form part of his submission. He started his submission by drawing the attention of the court that this application is improperly before this court for non-joinder of the Registrar of Titles. According to Mr. Willence the Registrar of Titles is the one who registered the caveat and is the one to be ordered to remove the said titles if the court will deem it proper. He stated that the Registrar of Titles should have been joined as the respondent to avail him/her an opportunity to be heard. He referred the case of Ngerengere Estate Company Limited vs Edna William Sitta, Civil Appeal No. 209 of 2016, CAT which held that: "In view of the settled law on the right to be heard we are of a serious considered view that, it will be absurd for this court to make any order against the Registrar of Titles as prayed by the appellant without availing her opportunity to be heard. In this regard, we agree with Mr. Lutema that, the Registrar of Titles ought to have been joined as a Page 5 of 9 party in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal." Based on that authority, Mr. Willence submitted that the application at hand is untenable hence deserves to be dismissed with costs. Replying on the prayer of eviction order, Mr. Willence submitted that this prayer is baseless since the lawful owner is yet to be determined by the court. He stated that the applicant is applying for eviction order and removal of the caveat which renders the application to be omnibus. Thus, ought to be

dismissed with costs. He stated further that the said caveat was registered by the respondents in accordance with section 78 (1) of the Land Registration Act (supra) which requires any person with interest in any registered land to register the caveat. That, the respondents have not withdrawn their interest in the said land and that is the reason the caveat still exists to protect the interest from being alienated by the applicant herein and or any other person. Page 6 of 9 In addition to that, the learned counsel submitted that there are criminal charges to wit: forgery and uttering false documents against the applicant. He contended that, the suit property was illegally registered in the name of Fredrick Vendeline Massawe who later on sold the same to the Applicant. According to Mr. Willence, if the application will be granted before determination of criminal cases which are pending and prospective land case, the rights of the respondents will be jeopardised in case of removal of caveat. Responding to the contention that the applicant is a bona fide purchaser, Mr. Willence, said that the applicant is not a bona fide purchaser of the suit property as he has not been declared the legal owner of suit property. That, a bona fide purchaser does not hold any entitlements over and above the legal owner. He distinguished the cited case of Suzana S. Warioba (supra) in which the court was not dealing with caveat. It was dealing with the land disputed. He insisted that, apart from that mischief also the applicant has failed to join the Registrar of Titles. In his conclusion, the respondents' counsel submitted that the applicant has not advanced sufficient reasons to warrant grant of the application. On the above reasons, he implored the court to dismiss the application with costs. Page 7 of 9 I have carefully considered the argument for and against the application. The issue is whether the application has merit. The applicant is seeking an order to remove caveat in respect of the landed property under C.T. No. 32308 located at Plot No. 343-348 Block MMM Karanga Moshi Municipality. On the other hand, the respondent urged the court not to grant the application for failure to join the Registrar of Titles. I am I live that the issue of non-joinder of Registrar of Titles was raised in the reply submission. However, since it is the matter of law, I think it is prudent to determine the same because it is the Registrar of Titles who registered the caveat. I am saying so, because non-joinder of the Registrar of the Titles may render the order inexecutable. It should be noted that, for the court to order the Registrar of Titles to remove the said caveat it must at first place accord her the right to be heard. The case of Ngerengere Estate Co. Ltd (supra) is relevant. As correctly submitted by Mr. Willence, failure to join the Registrar of Tittles renders the instant application incompetent. In the upshot, I hereby strike out the application with costs. It is so ordered. Page 8 of 9 Dated and delivered at Moshi this 18th March, 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 18/03/2024 Page 9 of 9

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