

TANZANIA / JUDGMENT

denis mureithi mvumbaguh v christine skytte mkwaya another 2024 tzhclandd 32 22 february 2024

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND CASE NO. 221 OF 2022 DENIS MUREITHI MVUMBAGUH PLAINTIFF VERSUS CHRISTINE SKYTTE MKWAYA 1^{®^} DEFENDANT ARAPHA HAMIDU CHOKOLA @ ARAFA HAMIDU 2[°] DEFENDANT

JUDGMENT

29/01/2024 to 22/02/2024 E.B. LUVANDA,J The Plaintiff named above Is claiming against the First and Second Defendants above mentioned for the following reliefs: One, a declaration against the Defendants, jointly and severally that, the Plaintiff herein Is a lawful owner of all parcel of land comprised on Plot No. P21135, Title No. DSMT 1012935 Kawe KInondonI Municipality Dar es Salaam (the suit land) and with all rights In rem against the whole world; Two, general damages to be assessed by the Honorable Court against the Defendants jointly and severally; Three, permanent orders of Injunction against the Defendants jointly and severally from disturbing the Plaintiff on lawfully ownership of the suit land; Four, costs of the suit; Five any other relief (s) as the Court may deem fit and just to grant. 1 The facts giving rise to this suit can be recapped briefly as foiiows: The second Defendant \was the registered titie holder of an erstwhile farm described as farm No. 999/LO No. 118694 with titie No. 37846 Kawe Kinondoni Municipal. On 31/05/2019 the Second Defendant deposed the whole farm to the First Defendant for a consideration of Tshs 400,000,000/= where the First Defendant paid initial payment of Tshs 341,000,000 as part payment of the purchase price remained a balance of Tshs 59,000,000/= For the reasons which were not clearly stated in these proceedings, on 30/06/2019 the Second Defendant surrendered her certificate of titie No. 37846 in respect of farm Plot No. 999 Kawe Kinondoni, to the Assistant Commissioner for Lands, as per the deed of surrender of a right of occupancy exhibit P6. It appears this act of surrender prompted the First Defendant to sue the Second Defendant vide Land Case No. 131 of 2019 craving for an order compelling the Second Defendant either to receive a remained balance of Tshs 59,00,000 out of Tshs 400,000,000 (purchase price) or to refund the First Defendant a sum of Tshs 341,000,000, or an order prohibiting the Second Defendant herein to surrender a certificate of Titie No. 37846,farm No. 999 LO No. 118694. In the said Land Case No. 131/2019 parties settled amicably out of court,

where in the amended deed of settlement exhibit P2 which was the only document produced in this case, the First Defendant herein agreed to be refunded back the purchase money a sum of Tshs. 299,000,000/= plus Tshs 26,000,000 being cost sharing on money paid to Ms. Real Estate Agent, a total of Tshs 325,000,000/= In the said deed of settlement Ms. Crucial Investment Limited (a third party, not party to those proceedings), was named to be under obligation to pay a sum of Tshs 325,000,000 to the First Defendant herein. According to the Second Defendant who testified herein as DW1, it is when the idea of apportioning or petitioning the farm Plot No. 999, into small or subdivided plots, come in, and the idea was introduced by the said Ms. Crucial Investment Limited, and it was a proposal for purpose of effectively refunding the First Defendant her money a sum of Tshs 325,000,000 aforesaid. Sequel to that, on 05/05/2020, the Second Defendant crafted a letter (exhibit P13) to the Director of Applied Geodensy Consultant requesting for survey of her area at Mbezi Beach into plots. It would appear the Second Defendant made another request for surveying her farm land located Kawe, to the Municipal Director at Kinondoni, as reflected in a letters dated 05/02/2020 and 04/03/2020 being from the Municipal Director Kinondoni, exhibit PIO and P12 respectively, and a receipt dated 10/02/2020 exhibit P11. According to the testimony of the Plaintiff(PW1) a fact that the original farm land was subdivided into plots was acknowledged by way of inspiration in the court ruling dated 22/10/2021 in Misc. Land Application No. 373/2021, exhibit P9 where at page 3, reflect farm No. 999 was devlded into three independent plots namely Plot No. 21133, P21134 and P21135. This subdivision and reproduction of these plots, was also confirmed by the office of the Commissioner for Lands vide a letter dated 10/01/2023, exhibit P16. On 28/04/2020 the Second Defendant and the Plaintiff herein, entered into a sale agreement in respect of a plot described by its size 963.03 square metres with a drawing depicting the following mark KRL, KR7, DQ529, KR6, on the East bordering Edwin William Ngewe, North - Christopher Pendaeli, West - Mpomabiva, South - Jean Moyo Milliken located at Mbezi Kawe. It is to be noted that the name of Jean Moyo Milliken is also appearing as the Second Applicant in exhibit P9 mentioned above where the proceedings therein substantiality ended in amicable settlement, as also reflected in a deed of settlement exhibit D4. The sale agreement between the Second Defendant and Plaintiff herein were admitted as exhibit P7, including a supplementary sale agreement dated 06/08/2020 exhibit P8, where the Plaintiff paid the Second Defendant a total of Tshs 70,000,000 as a purchase price. Meanwhile, the First Defendant herein initiated execution proceeding vide Execution No. 58/2020 exhibit PI in respect of deed of settlement in Land Case No. 131/2019 exhibit P2. In the warrant of attachment exhibit P3, the Deputy Registrar directed attachment and sale of the entire landed property under Title No. 37846 Farm No. 999 L.O. No. 118694 located at Kawe Kinondoni, for the same to be auctioned to satisfy the balance decree of Tshs 325,000,000. Among properties which were auctioned include the parcel of land purchased by the Plaintiff to the Second Defendant herein vide exhibit P7 and P8, which later was revealed to be known as Plot No. 21135 Title No. DSMT 1012935 Kawe Area Kinondoni Municipal. The said plot was purchased on auction by one Bonaventure Ignatius Mosha (not a party to these proceedings), as reflected in his letter of complaint lodged to the Minister of Lands, dated 08/09/2023 exhibit D6. Following attachment above said, the Plaintiff herein filed objection proceedings vide Misc. Land Application No. 481/2021 as per the pleadings (affidavit of the Plaintiff herein) exhibit D2, submissions of the Second Defendant herein exhibit D3 and ruling

dated 21/03/2022 exhibit P5. The objection proceedings were dismissed as depicted in exhibit P5, it is when the Plaintiff initiated this suit on 30/08/2022. On 02/09/2021 at a verge of attachment and execution (exhibit P3) and amid objection proceedings exhibit D2, D3 and P5, the Plaintiff herein was granted a certificate of occupancy in respect of Plot No. P21135, Title No. DSMT 1012935 measuring 964.00 square metres, as per exhibit P4. It would appear in between, the Registrar of Tities rectified the land register in respect of Plot No. P21135 Title No. DSMT 1012935 by making an entry of the name of one Bonaventure Ignatius Mosha as a registered right holder as per a search exhibit D1. Thereafter the Plaintiff lodged a complaint to the Registrar of Tities cum Commissioner for Lands, who in turn made an inquiry to the office of Deputy Registrar of this Registry via a letter dated 10/01/2023, exhibit P16, asking for clarification on Land Case No. 131/2019 (exhibit P2), Misc. Land Application No. 373/2021 (exhibit P9) and Land Case No. 221/2022 before hand. On 09/03/2023 the Deputy Registrar made a clarification as per a letter exhibit P17. On 27/03/2023 the Registrar of Tities issued a notice to one Bonaventure Ignatius Mosha for the intention to register rectification, replace and reinstate with the name of the Plaintiff herein and asked the former to surrender his title, as per exhibit P18. On 17/04/2023 Bonaventure Ignatius Mosha responded a letter exhibit P18, via a letter exhibit D5 where he refused to surrender a title deed and threatened to take legal action. Notwithstanding a response from the said Bonaventure Ignas Mosha, on 03/05/2023 the Registrar of Tities granted a certificate of title to the Plaintiff herein, exhibit P15. In view of the above narration, PW1 insisted that he is a registered right holder of a title to the suit plot. Meanwhile the vendor DW1 asserted that sale agreement between DW1 and PW1 was void for reason that she did not have a good title to pass to the Plaintiff on account that by the time of sale she had nothing to sell on explanation that she had already sold it to the First Defendant. DW1 asserted that she was all along willing to refund the Plaintiff purchase money Tshs 70,000,000, but the latter refused and declined the offer. The First Defendant(DW2)stated that the court appointed the broker to auction the farm for her to be refunded her money, but the court broker did not manage to auction for reason that he encountered people who alleged to have a claim against the Second Defendant. DW2 asserted that later those people settled out of court and refunded her money. DW2 disowned the Plaintiff being a stranger to her. However, DW2 made a reservation that she was not much acquainted with the facts for reason that she engaged one Felix to assist her to handle the matter. At the final pre trial conference, the following issues were framed: One, whether the Second Defendant had a good title over Plot No. P 21135, Title No. DSMT 101 2935 Kawe Kinondoni, to pass to the Plaintiff; Two, whether the sale of the suit land between the Plaintiff and Second Defendant is or was valid in law; Three, whether the Plaintiff is the lawful owner of the disputed property. Four, to what reliefs are the parties entitled to. Regarding issue number one. Let it be known that this suit is a result of a claim or objection to the attachment which was determined by this Court vide exhibit P5. In exhibit P5 the Plaintiff herein was the claimant or objector (Applicant), where as the First and Second Defendant herein were First and Second Respondent, respectively along with CRDB Bank and Nzige Auction Mart who are not parties herein. At page 15,16, in exhibit PS this Court made the following findings, I quote in extenso, "Further, the applicant is objecting attachment and sale of the suit property by the 4th respondent claiming that he is the lawful owner of the suit property, having purchased the same from the 2nd respondent. On their side, Mr. Kaiume and Mr.

James for the and Z" respondents significantly stated that, the applicant purchased the suit property while it was already encumbered as there was a pending Land Case No. 131 of 2019 and a subsequent Deed of Settlement between the F" and Z" respondents. Now, my duty here is also to examine the records available to see as whether there was any purported transfer to the applicant in other words if, at the time of attachment the applicant was in ownership of the suit property. If the answer is to the affirmative then, if the same was free from any encumbrance. Annexure A1 to the affidavit is the Saie Agreement between the Z" respondent and the applicant. The agreement was executed on 28/04/2020. On the other hand, Annexure C-1 to the counter affidavit is the Saie agreement between the and the 22" respondents whereas the 22" respondent disposed the suit property to the respondent. The agreement was executed on 31/05/2019. It is obvious on the date when the applicant entered into the purported Saie Agreement with the 22" respondent, that is 28/04/2020, the suit property had already been sold to the 1" respondent hence encumbered. Further, it is on record that there was Land Case No. 131 of 2019 (Annexure C-3) where the 1" respondent and the 22" respondents signed a Deed of Settlement over the suit property. As the records loudly speak. Land Case No. 131 was instituted in 2019 and the Amended Deed of Settlement between the 1" respondent and the 22" respondent was executed on 13/03/2020 prior to the applicant's purchase of the suit property which was on 28/04/2020. Though the preamble of the said Saie Agreement states that the said suit property is legally owned by the 22" (sic), but it is obvious that it was not free of encumbrances at the time the applicant signed the said Saie Agreement between the applicant and the Z" respondent. Consequently, no title could have passed from the Z" respondent to the applicant."

Notwithstanding a fact that at the end of the day this Court advised the Plaintiff herein to sue and prove if there was a sale between the Plaintiff and Second Defendant herein, but literally, the findings of this Court in exhibit P5 had the ultimate effect of determining the fate of a transaction of sale between the Plaintiff and Second Defendant, where it ruled at page 17 and 18.1 quote, "It is clear that on 28/04/2020 the Z" respondent did not have title to pass to the applicant and that is why in her affidavit she is willing to refund the applicant the purchase price" This Court went on to say, at page 18. "Further, it is also questionable on how the Title Deed was issued to the applicant considering that there is no proof of surrender of the original We Deed and or survey of the suit property, neither is there known notice of the division of the suit property" Therefore the argument by the learned Senior Counsel Mr. Mafuru Mafuru Advocate for the Plaintiff that the rights of the parties were not determined in the said objecting proceedings, is a misconceived one. This is because parties therein were effectively, fairly and full heard, where the Applicants therein (Plaintiff herein) filed affidavit exhibit D2, to prove his claim or objection, and filed submission to amplify his argument as per a reply filed by the Second Defendant herein exhibit D3. Exhibit D2 was referred extensively in the ruling exhibit P5. Order XXI rule 58, of the Civil Procedure Code, Cap 33 R.E. 2019, with marginal notes, evidence to be adduced by claimant, provide and I bold portion of interest to me, "TVS re claimant or objector must adduce evidence to show that at the date of attachment he had some interest in, or was possessed of, the property attached" Therefore in exhibit P5 parties therein who are parties herein were accorded a fair hearing as aforesaid. Indeed there is no formal complaint which was lodged elsewhere that parties therein or any of them was or were denied the right to a fair hearing. May be for purpose

of clarity, in objection proceedings the claimant or objector is presupposed to show that he had some interest over the property subject to attachment, and in case of refusal of his objection and if he reach at this stage, he is enjoying a wider scope of establishing the right he is claiming to the 11 property indispute. Order XXI rule 62 Cap 33 (supra) provide, note boiding is mine, "Where a claim oran objection Ispreferred, the party against whom an order In (sic), made may institute a suit to estabiish the right which he ciaims to the propertyin dispute, but, subject to the result ofsuch suit. Ifany, the order shall be conclusive" To my respective view, the above provision give a wider scope for the claimant/objector or the would be plaintiff, to estabiish his rights which he claim to the attached property. This to my view was enacted to safeguards the rights of the Plaintiff in case of disallowance of his claim (objection proceedings). However this provision does not mean that in the subsequent proceedings or suit the Plaintiff will re open up his objection or claim on the same grounds and evidence, and then to live under expectation that the same court will eventually come up with a different or opinion conflicting decision. If this is let to happen, it will render the entire process prone to a state of complete disorder and confusion. In a sale agreement exhibit P7 and P8, depict the Plaintiff purchased from the Second Defendant a plot with the following reference: KRI, KR7, DQ529, KR6. But these reference are neither reflected in the certificate of title exhibit P4 and 12 P15 granted to the Plaintiff on different occasion, nor reflect in a pian drawing issued on 10/06/2020 exhibit P14. Importantiy, at the time of the purported saie on 28/04/2020 (exhibit P7) the Second Defendant had aiready surrendered to the President of the United Repubiic of Tanzania, the whoie of her iand comprised in the right of occupancy registered under Titie 37846 in respect of Piot No. 999 Kawe, as acknowledged by the Assistant Commissioner for Lands via a deed of surrender of a right of occupancy, exhibit P6. There is no notice or evidence showing reversai of this titie back to the Second Defendant between the date of surrender on 30/06/2019 when her right of holder is deemed to have been effectiveiy extinguished and ceased, up to 28/04/2020 when the purported saie was conducted. I therefore go along with the argument of Mr. James Laurean Evarister Igakinga learned Counsel for First Defendant who applaused the position of this Court in exhibit P5, that on 28/04/2020 the Second Defendant did not have titie to pass to the Piaintiff, hence the aiieged saie was void ab initio and of no iegal effect. The argument of the Senior Counsei Mr. Mafuru Advocate for the Piaintiff that after surrender by the Second Defendant as per acknowledgement exhibit P6 and subsequent survey as per correspondences exhibit PIO, P12, P13, that the surveyed iand or new plots were avaiiabile for alocation to any citizen, the 13 Plaintiff inclusive, with due respect, it is a misleading idea. This is because exhibit PIO, P12, P13 were mere correspondence during initial pre - survey process. Neither of It depict any survey to have been carried out. Even in the sale agreement exhibit P7, the Second Defendant avoided to say the farm was resurveyed, rather said it was divided into three plots. Interesting, neither exhibit P7 nor exhibit PIO, P12 or P13 mentioned any plot. Above all a sale agreement it self exhibit P7 and P8 does not reflect or bear the description of a suit plot. Infact the learned Counsel for Plaintiff was bringing a self defeating argument, at first said exhibit P7 and P8 were executed by the parties in respect of unsurveyed piece of land comprising 963.93 metres(sic, square metres), at the same time is saying the Plaintiff was allocated a surveyed plot. However, the learned Counsel for the Plaintiff was unable to mention the allocating authority. Essentially, there was no evidence forthcoming from the

Plaintiff vindicating formal allocation of the disputed plot by way of request and/or offer of right of occupancy and acceptance thereof, apart from a sale agreement exhibit P7 and P8 along with certificate of title exhibit P4 and P15, which have already been faulted above. 14 Therefore the first and second issues are in disaffirmative. The Second Defendant had no title to pass to the Plaintiff over Plot No. P21135, Title No. DSM T 101 2935 Kawe and the sale thereof was invalid. The third issue is consequential. That is to say if no title passed from the Second Defendant to the Plaintiff and if the sale thereof was invalid, it follows automatically that the Plaintiff is not the lawful owner of the suit property. Finally, to what reliefs are parties entitled. The interests and rights claimed by the Plaintiff over the suit property is for value. Undisputably, in a sale agreement exhibit P7 and P8, the Plaintiff paid to the Second Defendant a sum of Tshs 70,000,000 as a purchase price for a suit plot. Through these proceedings including during objection proceedings exhibit PS, the Second Defendant voiced loudly for an offer to refund the Plaintiff a sum of Tshs 70,000,000/= In her written statement, the Second Defendant repeatedly asserted that she had no good title to pass to the Plaintiff, and argued that the sale was void ab initio. Again she repeatedly and insisted to refund the Plaintiff a purchase price Tshs 70,000,000.00. Even in her testimony, DWI cling to the same facts. It is to be noted that, this Court made comment regarding the conduct of the Second Defendant, at page 19 first paragraph in exhibit P5, 15 'With the sequence of events, it is obvious that there is a game that was played by the 2nd respondent which would require proceedings other than objection proceedings' In his evidence, DWI stated that after purchasing a suit plot from the Second Defendant he effected development on the suit land by erecting a dwelling house (double storey) estimated to be valued Tshs 500,000,000/= Neither the learned Counsel for First Defendant nor for Second Defendant, cross examined on this fact. It is a rule that facts not cross examined or controverted amount to concession, and are deemed to have been admitted. In the case of Shadrack Balinago vs. Fikiri Mohamed @ Hamza & Two Others, Civil Appeal No. 223 of 2017 the apex Court said, at page 20, 'As rightly observed by the learned trial judge in her judgment, the Appellant did not cross examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross examine the first respondent amounted to acceptance of the truthfulness of the appellant's account' 16 Therefore the Plaintiff is entitled for the following as against the Second Defendant.

1. Refund of purchase price a sum of Tshs 70,000,000/=
2. General damages a sum of Tshs 500,000,000/=
3. Punitive damages a sum of Tshs 20,000,000 which is charged under the umbrella of other reliefs, and the undertaking is grounded vide comments regarding the conduct of the Second Defendant in exhibit P5 cited above.
4. A sum of 70,000,000/= will attract an interest of 20% per month from the date of purchase on 28/04/2020 to the date of this judgment, as per clause on the second paragraph on page 3 of exhibit P7, executed by parties on their own volition.

5. A sum of Tshs 500,000,000 (general damages) and 20,000,000 (punitive damages) will attract an interest of 7% per annum from the date hereof to the date of full satisfaction.
6. The second Defendant will foot costs of this suit. The suit is granted to the extent demonstrated above. /OV E. B. LUVANPA— IUDGE 2: 22//p2/2024 Judgment delivered in the presence of the Plaintiff, Mr. Abel Ngallaba learned Counsel for First Defendant and Mr. James Laurean Evarister Igakinga learned Counsel for Second Defendant. XX 1 (VANDA c> HJDGE /02/2024 V- <' •- 18

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