

TANZANIA / JUDGMENT

registered trustees of st lucia trust fund another vs karama care africa connect limited 2021 tzca 727 3 december 2021

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3 December 2021

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: NDIKA. J.A.. LEVIRA. 3.A., And FIKIRINI. J.A.) CIVIL APPEAL NO. 95 OF 2019 THE REGISTERED TRUSTEES OF ST. LUCIA TRUST FUND FIRST APPELLANT WINIFRIDA MWASHALA..... SECOND APPELLANT VERSUS KARAMA CARE AFRICA CONNECT LIMITED..... RESPONDENT (Appeal from the Judgment and Decree of the High Court of Tanzania, at Arusha) fMaahimbi. J.^ dated the 29th day of February, 2016 in Land Case No. 20 of 2013 JUDGMENT OF THE COURT 30th November & 3rd December, 2021 NDIKA. J.A.: This is an appeal from the judgment and decree of the High Court of Tanzania at Arusha (Maghimbi, J.) dated 29th February, 2016 in Land Case No. 20 of 2013. Karama Care Africa Connect Limited ("the respondent") sued The Registered Trustees of St. Lucia Trust Fund and Ms. Winifrida Mwashala ("the i first and second appellants" respectively) for a declaration that it was the sole owner of landed property described as Plot No. 163, Moshono area within Arusha Municipality as it claimed that the appellants had trespassed on that property since 2012 and that they had refused to yield up vacant possession. On that basis, the respondent prayed, in addition, for vacant possession of the property, a permanent injunction against the appellants, mesne profits, general damages, interest on the decretal sum and costs of the suit. By their joint amended written statement of defence, the appellants denied the respondent's claim. They averred that since the first appellant's inception in 2005 it had lawfully and exclusively occupied a piece of land situate at Moivaro within Arusha region. The trial court drew up two issues for trial, namely, one, who is the lawful owner of the land in dispute; and two, to what reliefs are the parties entitled. It is common ground that the second appellant and her then friend Ms. Costance Naber jointly acquired two adjoining pieces of land from the previous owner, a certain Mr. Godfrey Joel. Having bought the first one on 28th December, 2005 at the price of TZS. 20,000,000.00 vide a sale 2 agreement executed on that day, they acquired the second piece at the price of TZS. 36,000,000.00 vide a sale agreement dated 7th January, 2008. Both agreements were admitted collectively as Exhibit D.6. It is undisputed that the two friends had envisioned developing their land into a property for the care of orphans and children living in vulnerable conditions. At some point, however, they parted company due to a misunderstanding on how to execute the intended project on their jointly held land. The learned trial Judge found it

established that following their falling out, the two former friends started racing against each other separately to have their jointly held land surveyed and titled in their respective names. The efforts culminated in a very unusual situation in which two separate certificates of title were issued apparently over the same piece of land. While it appears that Ms. Naber had Certificate of Title No. 36312 (Exhibit P.5) issued on 23rd May, 2012 in the name of the respondent describing the land as Plot No. 163, Moshono area within Arusha Municipality measuring 14,513 square metres, the second appellant had Certificate of Title No. 42067 (Exhibit D.5) issued on 29th January, 2014 in the name of first appellant citing the land as Plot No. 100, Moivaro, Arusha City Council measuring 14,983 square metres. A visit of the locus in quo by the trial court conducted on 15th January, 2016 confirmed that despite the differing descriptions of the property in the two certificates, the subject matter in both cases was the property in dispute. In order to determine how this strange situation occurred, the trial court considered survey data transcripts over the disputed land issued by the Ministry of Lands and Human Settlements. It found on the evidence on record that the disputed property was surveyed on two different occasions and that a wrong procedure was followed. Most importantly, the court unearthed in its judgment, as shown at page 300, that: "... none of these registration processes had any evidence to show that the original buyers of the suit land, that is, the [second] defendant and Costance Naber had approved the initiation of the registration of the suit land. In fact, neither the plaintiff nor the [first] defendant whom the disputed land is in their separate names has proved any ownership over the suit land prior to its illegal registration." The learned trial Judge went further observing, at page 301, that: "According to the evidence on record, the plaintiff registered the land in her name from the fact that Ms. Costance Naber partly owns the land and the first defendant registered the land in her name on the ground that the second defendant owns the land. But the actual fact not denied by any of the parties is that the [second] defendant and Ms. Costance Naber jointly bought the land in dispute, and as per records, none of them approved the registration of the suit land in ... the plaintiff's name [or] the first defendant's name. For that reason, both registrations of land and consequently certificates of titles namely Exhibits P.5 and D.5 are hereby declared... null and void." Having nullified the two certificates, the trial court was conscious, apparently in answering the first issue, that the land in dispute had now remained the joint property of the second appellant and her former friend Ms. Naber as per the two sale agreements (Exhibit D.6). However, the court went further making the following consequential orders: one, that the property in dispute be re-surveyed and its actual size established and thereafter it be divided into two equal and accessible pieces of land between the second appellant and her former friend Ms. Naber as joint owners on the basis of Exhibit D.6. It was further ordered that the piece of land belonging to Ms. Naber be registered in the name of the respondent while the other 5 one belonging to the second appellant be registered in the name of the first appellant. In challenging the above decision, the appellants cited nine grounds of complaint. However, when the appeal came up before us for hearing, Mr. Meinrad D'Souza, learned counsel for the appellants, abandoned all grounds except the sixth and seventh grounds, namely:

6. That the Honourable Trial Court erred in law and in fact in not considering the fact that there was no proof of disposition of the suit land from the original owners to the respondent
7. That the Honourable Trial Court erred in law and in fact in sub- dividing the suit land between the first appellant and the respondent In his very brief but focused submissions, Mr. D'Souza argued the above two grounds conjointly. While supporting the trial court's nullification of the two certificates of title on the ground that they were issued without the two original owners having transferred their joint interest in the disputed land to either the first appellant or the respondent, he censured the court for ordering the subdivision of the said land so as to distribute a piece to each of the two protagonists in the matter (the first appellant and the respondent). He argued that since Ms. Naber was not a party to the suit, it was wrong for the trial court to order a re-surveying and subdivision of the land without according her a hearing. On that basis, he urged us to allow the appeal and vacate all consequential orders made by the trial court so that the disputed land remains the joint property of the two original owners on the basis of Exhibit D.6. He did not press for costs. For the respondent, Mr. John Nicholas Mseu, learned counsel, conceded unreservedly with remarkable forthrightness that the impugned consequential orders were unfounded. He supported his learned friend's submission that on the basis of Exhibit D.6 the two original owners remained the joint owners of the property in the eyes of the law as they did not transfer their title to the land in dispute to either the first appellant or the respondent. We have painstakingly examined the record of appeal and taken account of the concurrent submissions of the learned counsel. With respect, we are in agreement with the learned counsel that since the second appellant and the said Ms. Naber had a joint title to the disputed property traceable to the same instruments (Exhibit D.6) and since they did not together transfer their title to either the first appellant or the respondent, the titling of the land in favour of the first appellant vide Exhibit D.5, on the one hand, and the respondent vide Exhibit P.5, on the other, was patently irregular. None of the alleged transferees had a good title upon which the survey and titling could have been lawfully done. In the premises, we uphold the learned trial Judge's nullification of the two certificates of title (Exhibits P.5 and D.5). However, we think that having so found, the learned trial Judge should have determined the first issue framed for trial against the first appellant and the respondent; that none of them was the lawful owner of the suit property. On that basis, the suit should have, there and then, been dismissed. Looking at the matter this way, we have no difficulty in endorsing the concurrent submission of the parties that the consequential orders made by the trial court for re-surveying and subdivision of the disputed property as well as the distribution and registration of the subdivided plots as separate properties of the first appellant and the respondent were unwarranted. Besides, as rightly submitted by Mr. D'Souza and conceded by Mr. Mseu, the trial court's consequential orders were objectionable on the further ground that they could not be lawfully made without hearing Ms. Naber, who was not a party to the suit before the High Court. Accordingly, we find merit in the sixth and seventh grounds of appeal. 8 In the final analysis, we find the appeal

meritorious and proceed to allow it. Accordingly, we set aside all consequential orders complained of with the effect that the suit property remains the joint property of the second appellant and the said Costance Naber. Each party to bear its own costs. DATED at ARUSHA this 2nd day of December, 2021. G. A. M. NDIKA JUSTICE OF APPEAL M. C. LEVIRA JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL The Judgment delivered this 3rd day of December, 2021 in the presence of Mr. Pius Kabwe holding brief for Mr. Meinrad D'Souza, learned counsel for the Appellants and Mr. John Mseu, learned counsel for the Respondent, is hereby certified as true ■Pv^ - DEPUTY REGISTRAR

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Prepared on 13 October 2026 · Esheria