

TANZANIA / JUDGMENT

fatna iddi haruna iddi as administrators of estate of the late zainabu omar vs bank of africa ltd another 2019 tzhccomd 13 14 february 2019

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14 February 2019

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT ARUSHA MISC. COMMERCIAL APPLICATION NO. 6 OF 2018 FATNA IDDI & HARUNA IDDI as administrators of the estate of the late ZAINABU OMARI..... APPLICANTS VERSUS BANK OF AFRICA TANZANIA LIMITED..... FIRST RESPONDENT VENANCE PAUL MILIONI.....SECOND RESPONDENT

RULING

Date of Submissions: 11/02/2019 Date of Delivery: 14/02/2019 AMOUR S. KHAMIS, J: Fatna Iddi and Haruna Iddi as joint administrators of the estate of the late Zainab Omari moved this Court to declare that a property on Plot No. 58, Block 21, Kaloleni area, Arusha Municipality comprised under Certificate of Title No. 43771 was not liable to attachment in execution of the decree in Commercial Case No. 4 of 2015. The joint administrators of the estate of the late Zainabu Omari further moved the Court to investigate the 2 claim and establish as to who is the lawful owner of the named property that will be referred to as the disputed property, for convenience purpose. The application was filed by way of Chamber Summons under Order XXI Rule 57(1) of the Civil Procedure Code, Cap 33 R.E 2002 and supported by a Joint Affidavit of Fatna Iddi and Haruna Iddi. In their Joint Affidavit, the duo stated that on 8th February 2016, the Arusha Urban Primary Court vide Probate and Administration Cause No. 7 of 2016, appointed them as joint administrators of the estate of the late Zainab Omari, their biological mother. Fatna Iddi and Haruna Iddi deposed that the late Zainab Omari died on 27th December 2014. It was alleged that at all material times, the late Zainab Omar was a lawful owner of the disputed property and that until her death, she never transferred it to anyone. It was deposed that between the year 2013 and 2014, Zainab Omar had applied for a certificate of a right of occupancy from the land office and paid all requisite fees in respect of the application. 3 Further to that, Fatina Iddi and Haruna iddi stated that the late Zainab Omari was paying land rent and property tax in respect of the disputed property and was recognized by the Government (Electronic) Payment System as a lawful owner of the property. The applicants disclosed that in an unknown date, Venance Paul Milioni (the second respondent) fraudulently and without authority from the late Zainab Omari collected the original certificate of title for the disputed property from the office of the Assistant Registrar of

Titles at Moshi and went ahead to forge a signature of Zainab Omari purporting to transfer the property to him. It was further stated in the Joint Affidavit that when the late Zainab Omari discovered a fraud done by Venance Paul Milioni, she was highly shocked and could not withstand a trauma that led to her untimely death. The affidavit show that through chairman of the West Kaloleni Street Council, the applicants learnt that a prohibitory order against Venance Paul Milioni was given by this Court in Commercial Case No. 4 of 2015 in respect of the disputed property. Through that prohibitory order, the applicants learnt that a sum of Tshs. 741,485,436.00 was decreed in favour 4 of the Bank of Africa Tanzania Limited, the first respondent herein. Upon perusal of the Court file in Commercial Case No. 4 of 2015, the applicants learnt that the Court had issued an execution order for attachment and sale of the disputed property. Following their appointment as administrators, the applicants lodged a complaint with Police in Arusha through file number: AR/IR/2121/2016 and AR/RB/2420/2016. In addition to that, the applicants filed Land Case No. 88 of 2016 in the High Court of Tanzania, Arusha District Registry. The defendants in the case were named as Bank of Africa Tanzania Limited and Venance Paul Milioni. It was also disclosed in the affidavit that since commencement of criminal investigations against him, Venance Paul Milioni disappeared into thin air and was nowhere to be traced. Venance Paul Milioni was served with summons of the present proceedings vide Mwananchi Newspaper of 17th October 2018. 5 On 7th November 2018, B. M. Sehel, J (as she then was) made an order for exparte proof against Venance Paul Milioni. In a counter affidavit by Daniel Dannland Lyimo, learned advocate for Bank of Africa Tanzania Limited, the bank stated that the disputed property was previously owned by the late Zainab Omari who transferred it to Venance Paul Milioni. The learned advocate Daniel Lyimo deposed that Venance Paul Milioni had secured the property with the bank for a loan. The learned advocate further deposed that upon an official search at the land registry, the bank noted that the disputed property had a caveat from Arbogast Paskazi Mrosso and Iddi Suleiman. Daniel Dannland Lyimo added that disappearance of Venance Paul Milioni was a mere attempt to frustrate realization of the property to recover an outstanding and decretal sum. In a further reply, the counsel stated that Land Case No. 88 of 2016 was withdrawn from the Court. % 6 In their Joint Reply to the Counter Affidavit, Fatna Iddi and Haruna Iddi admitted that Land Case No. 88 of 2016 was withdrawn but disputed lack of merits as a reason for its withdraw. The application was orally argued. Ms. Neema Mutayangula, learned advocate, was in conduct of the applicants' case while Mr. Daniel Lyimo and Wilbard Massawe, learned advocates, jointly acted for the Bank of Africa Tanzania Limited. Ms. Neema Mutayangula and Mr. Wilbard Massawe submitted in line of their client's respective affidavits or counter affidavit. I need not repeat their submissions save where I will find necessary in the course of addressing the relevant issues. The main issue is whether the disputed property on Plot No. 58, Block 21, Kaloleni area, Arusha City comprised under Certificate of Title No. 43771 is liable for attachment and sale in execution of a decree in Commercial Case No. 4 of 2015. The present application is founded on objection proceedings of which Order XXI Rules 57 (1), 58 and 59 of THE CIVIL PROCEDURE CODE, CAP 33 R.E 2002 are applicable. The said rules reads: 7 "57(1) Where any claim is preferred to, or any objection is made to the attachment of any property attached in execution o f a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with a like power as regards the examination o f the claimant or

objector and in all other respects, as if he was a party to the suit: Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

58. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.
59. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment." In Commercial Case No. 4 of 2015 parties were: Bank of Africa Tanzania Limited V Venance Paul Milioni and Arbogast Paskazi Mrosso. The decree in that case show the following: "The defendants are in default of obtaining leave to appear and defend the summary suit, thus the allegations in the Plaint are deemed to have been admitted by both the defendants and the Plaintiff is entitled to a summary judgment as prayed in the reliefs contained in the Plaint. " 9 Upon perusal of the Plaint in Commercial Case No. 4 of 2015, I noticed that the Bank of Africa had advanced a short term loan facility and an overdraft facility to Venance Paul Milioni at the sum of Tshs. 60,000,000/= and Tshs. 50,000,000/= respectively. At the time of filing the suit, the outstanding sum had rose to Tshs. 402,362,457/ = . I also noticed that Venance Paul Milioni did not mortgage the disputed property to the bank as alleged by the bank. The Plaint showed that a property mortgaged to secure a loan to Venance Paul Milioni was on Plot No. 70, located at Ilkiurei Village, Sakina area, Arusha Municipality comprised under Certificate of Title No. 27738 and registered in the name of Arbogast Paskazi Mrosso. That explains why Arbogast Paskazi Mrosso was the second defendant in Commercial Case No. 4 of 2015. However, the question remains: why attaching the present disputed property? The answer is that the property was named in the application for execution. 10 In the order of 4/06/2018, B.M.A Sehel, J (as she then was) partly stated that: "..... Therefore in terms of Order XXI Rule 11 of the Civil Procedure Act, Cap 33 it is hereby ordered that an attachment and sale by auction shall be made in respect of landed property on Plot No. 58, Block 21, Kaloleni area, Arusha Municipality comprised under Certificate of title No. 43771 in the name of Venance Paul Milioni, 1st Judgment debtor's property..." The applicants contended that Venance Paul Milioni had fraudulently collected the original certificate of title in respect of the disputed property from the land registry without authority from the late Zainab Omari. In support of that allegation, a document from the Assistant Registrar of Titles Moshi was annexed to the affidavit as annexure FH - 4. I have inspected that document shown to have been certified as true copy of the original by the Assistant Registrar of Titles on 3rd May 2016. The document show that Venance Paul Milioni collected the original certificate of title no. 43771 from the land registry on 30/06/2014. 11 No evidence was produced by the bank or Venance Paul Milioni to

show that Venance Paul Milioni was duly authorized to collect the original certificate of title on behalf of Zainabu Omari Mwinyipembe, the registered owner. It should be noted that under Section 112 of THE EVIDENCE ACT, CAP 6 R.E 2002, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. In view of that, the bank and Venance Paul Milioni had a duty to prove that the second respondent had a mandate from Zainab Omari to collect the certificate of title from the land registry. I hold that they failed to do so. Following my order of 11th February 2019, the advocate of Bank of Africa Tanzania limited, produced a certified true copy of Certificate of Title No. 43771 for Plot No. 58, Block 21, Kaloleni area, Arusha City. I scanned the said certificate of title and noticed that it was issued in the name of Zainabu Omari Mwinyipembe of P.O. Box 672, Arusha for a 99 years term effective from 1st April 2014. The certificate of title was issued on 30th June 2014. Comparing annexure FH 4 and this certificate of title, it is 12 clear that Venance Paul Milioni collected the certificate of title on the very day that the Assistant Registrar of Titles signed or issued it. How could the late Zainab Omar prepare necessary document to authorize Venance Paul Milioni to collect the certificate of title in the same day of its issuance? Considering the distance from Moshi where the certificate of title was prepared and issued and Arusha where the late Zainab Omari resided, there was no chance that the late Zainab Omari could be aware that her certificate of title was ready for collection on that day. Further to that, the certificate of title show that a transfer of a right of occupancy was made in favour of Venance Paul Milioni on 24th October 2014 vide filed document no. 39534 allegedly at a consideration of Tshs. 150,000,000/=. Assuming that the late Zainab Omari had sold the property to Venance Paul Milioni, it was the duty of the bank and Venance Paul Milioni to prove that the alleged sale was lawfully done and that Venance Paul Milioni acquired a good title. However, that was not done again in contravention of Section 112 of the Evidence Act (supra). 13 The land Law No. 4 of 1999 provides that all transactions on land conveyance must be reduced to writing. The respondents failed to produce sale agreements evidencing that the late Zainab Omari is sold her property to the second respondent. In the course of submissions, Ms. Neema Mtayangula asserted that the applicants were in possession of the disputed property, a fact that was not denied or disputed by the respondent's counsel. That being the fact, how could the late Zainab Omari and her family sale the property and remain to be in possession of it for five (5) years thereafter? This explains why Venance Paul Milioni disappeared into thin air. For these reasons, I am satisfied that the late Zainab Omari Mwinyipembe is the lawful owner of the disputed property on Plot No. 58, Block 21, Kaloleni area, Arusha City and that Venance Paul Milioni fraudulently caused registration of his name on that property. Consequently, I declare the applicants, Fatna Iddi and Haruna Iddi as administrators of the estate of the late Zainab Omari as lawful owners of the disputed property and hereby direct the Assistant Registrar of Titles at Moshi to rectify the land register and record them as such. 14 Any certificate of title issued to Venance Paul Milioni in respect of the disputed property should be cancelled accordingly. Consequently, I declare that the disputed property is not liable to attachment in execution of this Court's Decree in Commercial Case No. 4 of 2015 and any order previously made in respect of the property is hereby lifted and or vacated. The

applicants are entitled to costs of this application.

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Prepared on 14 October 2026 · Esheria