

**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA
[IN THE DISTRICT REGISTRY]**

AT ARUSHA

LAND CASE NO. 01 OF 2017

WILLIAM TITUS MOLLEL (*Suing as an administrator of
the estate of the late **TITUS ARON MOLLEL***)**1ST PLAINTIFF**

PETER FRIDOLIN TEMU (*Suing as an administrator of
the estate of the late **TITUS ARON MOLLEL***)**2ND PLAINTIFF**

Versus

PHILEMON VANAI SAITERU MOLLE**DEFENDANT**

JUDGMENT

~~09/02/2021 & 07/05/2021~~

MZUNA, J.:

WILLIAM TITUS MOLLEL and **PETER FRIDOLIN TEMU**
(hereafter referred to as the 1st and 2nd plaintiff) in their capacities as
personal legal representatives of **TITUS ARON MOLLEL** (deceased)
claims against **PHILEMON VANAI SAITERU MOLLEL** (hereafter the
defendant) for ownership of four parcels of land located at Plots Numbers
29, 30, 31 and 32 in Block 'BB' Ngulelo area, Arusha (hereafter the suit
properties).

Brief facts being that the plaintiffs who paraded three witnesses,
alleges that the defendant encroached into the said suit properties which
belongs to their late father Titus Aron Mollel at the time when the

administrator of the estate had not distributed to the lawful heirs. They pray for the court to declare him as a trespasser and the defendant be evicted so that the suit properties can easily be distributed to the beneficiaries of the deceased.

On the other hand, the defendant through his four witnesses, says he lawfully purchased the suit properties from Jimmy Titus Mollel, one of the children of the deceased Titus Aron Mollel and there is valuable consideration which was paid. He had even built a petrol station on plots No. 31 and 32. he has also built three houses and fence it on plots No. 29 and 30 which was originally a hill. He prayed for the court to declare him as the lawful owner of the suit properties.

During the hearing of this case, Mr. Andrew Maganga and Moses Mahuna both learned counsels appeared for the plaintiffs whereas Mr. Dismas Lume also learned counsel represented the defendant. Two issues were drafted and are subject for determination. First, who is the rightful owner of the disputed suit properties? Second, what reliefs to which the parties are entitled thereto?

Let me start with the first issue as to who is the rightful owner of the suit properties? According to the testimony of Aaron Titus Mollel (PW1), the suit properties belong to the deceased who passed away on

24th November, 1998. He was appointed to administer the estate vides probate letters, exhibit P1. He then suffered from blindness due to diabetic as evidenced by medical report exhibit P2. This witness passed away before conclusion of the case, now under consideration. The reasons for filing the suit was due to the fact that it was learnt that his brother, Jimmy Titus Mollel (PW3) had entered into a lease agreement with the defendant without involving the family members. On his part, PW3 denies to have sold the suit plot instead says entered into a joint venture lease agreement with the defendant for plot No. 32 Block BB Ngulelo to build a petro station which he says was his own plot. The tenancy agreement ended in 2017 the period during which the defendant was to run it for 10 years then it could have reverted back to the family. He admitted was paid Tshs 500,000/- up to Tshs 2,000,000/- monthly as upkeep allowance. This witness admitted that by the year 2007 during the alleged sale agreement, there was no administrator who had been appointed.

Emmanuel Steven (PW2) testified that he is the Assistant Registrar of the registration of titles' office. He identified and tendered four certificates of title in respect to the suit properties which were received and admitted as exhibits P-4, P-5, P-6 and P-7 respectively. According to his testimony all the four plots are registered in the name of the deceased

since 2015 without change of ownership specially so because the deceased passed away in 1998. He admitted that there are filed caveats on all title deeds by the defendant as well as by Christina Titus Mollel and Jimmy Mollel.

For the defence is that the suit plots were sold out to the defendant Philemon Vanai Mollel (DW1) and were registered in his name. He relied on the sale agreements purportedly drafted and supervised by Edward John Mrosso (DW3), an advocate. As per the testimony of DW2 (Anicet Andrea) an Estate Manager of the defendant, the suit properties were purchased from Jimmy Titus between 2009 and 2010. According to DW4 Losinyari Meshikini @ Lorian Meshikini, the plot No 32 where the petro station is built and run, was allocated to Jimmy (PW3) after her mother repossessed it from the buyer from Titus (husband).

Now, the question is who is the lawful owner of the suit properties? Looking at the evidence of both DW2 and DW3, it is clearly admitted that the defence knew at the time of sale of the suit properties that they never belonged to the said Jimmy Titus Mollel but the deceased. I say so because the title deed were and are in the name of the deceased.

The question here is: *Does the sale agreement alone effect transfer? Does an estate of a deceased person pass to another person without proper probate procedures?*

Admittedly, the sale of land is just an arrangement to effect transfer alongside execution of relevant other instruments, and the Land Form Number 35 in particular. Sale agreement sets the terms of transfer but legally what transfers the interests in the property is the transfer deed in this case Land Form No. 35. The dispositions (be it sale, transfer, lease, assignment or licence) is regulated by sub-Part Three of Part IV of the Land Act, Cap 113 (hereafter the Act). It imposes a mandatory requirement to comply with the provisions of sections 37, 38, 39 and 40 of the Act. These provisions cover notification for disposition, application for approval and grant of the approval to the intended disposition as well as reconsideration of grant of approval in the event it is withheld. *Section 36 (1) (b)* of the Act states that: -

"A disposition shall be void if the provisions of this section and sections 37, 38, 39 and 40 are not complied with."

[Emphasis mine].

Parallel to the above quoted transcript of the law, section 62 (2) of the Act states that: -

"No instrument effecting any disposition under this Act shall operate to sell or assign a right of occupancy or create, transfer or otherwise affect any right of occupancy...until it has been registered in accordance with the provisions of the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made."

There are anomalies identified in the purported sale agreements as follows:- First, scrutiny of the said sale agreements reveals that some of them do not even bear the date on which they were executed for instance exhibits D2 and D3 (Plot No. 30 and 31 respectively). Second, the evidence of the defence in its totality admits that there has never been a
~~transfer of interests in the suit properties. DW3 tried to implore the court~~
that the said anomalies do not invalidate the sale. Interestingly, the testimony of this witness is wanting in reason and logic altogether. I am saying so because he admitted that he never saw the title deeds in respect of the land from which Mr. Jimmy Titus Mollel purported to have interest. Seemingly, the defence witnesses relied on the information given by the parties to the said sale agreements. That is clear proof that the whole process was not done in good faith. It is tainted with fraud, which I am aware its proof must be beyond the normal standard of proof required in a civil cases. That was held in the case of **Omary Yusufu vs Rahma Ahmed Abdulkadr** [1987] TLR 169, 176 that;

"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."

It is said the logic and rationale of that rule being *"that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof..."*

On the same token the disposition has never been formalized by registration as required by the law. This could not have been possible since the official search, still reveals that the properties were and still are registered in the deceased name. In that regard, the sale is not only tainted by uncertainty but also illegality. I say so because it is a trite law that no one can give a better title than he himself possess. In the case of **Farah Mohamed v. Fatuma Abdallah** [1995] TLR 205 it was held that:-

"He who has no legal title to the land cannot pass good title over the same to another."

This is cemented by the Latin maxim: "**Nemo dat non-habet**" which means "no one can transfer a better title than he himself has". As it was quickly admitted by DW3 that the vendor of the suit properties did not show him the title deeds for proof of his ownership, it is still at large that

defendant also in this case fails to trace the seller's title to the properties he allegedly bought under contract.

The doctrine of caveat emptor reminds us that the buyer must always search and confirm every necessary detail about the thing he intends to buy. Failure to do so shall be at his own detriment, so does the defendant. In view of the testimony of PW2, the defendant would have known the real legal owner if he had exercised due diligence. In this respect the defendant did not buy the suit properties from the true owner. I say so because by that date, the owner was dead and probate procedures were incomplete. It is therefore only the owner (deceased) or his administrator who could dispose the suit properties be it by sale, lease or as the case may be.

Based on the analysis, issues, reasons and authorities cited, I am settled that the defendant is not the rightful owner of the suit properties. I refer to section 2 of the Land Registration Act, Cap 334 which defines owner to mean: -

*"means in relation to any estate or interest, the person for the time being **in whose name that estate or interest is registered.**"* [Emphasis added]

Further reference from the Black's Law Dictionary (9th ed) at page 1214, owner is defined to mean "**one who has the right to possess, use and convey something...**". As testified by PW2 all the Plots constituting the suit properties have been registered under the deceased name. It is prima facie true that the deceased is presumed to be the owner unless otherwise proved to the contrary. Similarly, under section 119 of the Evidence Act Cap 6 the defendant bears the burden of proving that the deceased is not the owner. The registration status can only be changed by invoking probate and administration procedures. The allegation in the statement of the defence that the vendor of the suit properties is a legitimate child of the deceased is nothing but an afterthought.

There is an argument that the vendor of the suit properties was the one supposed to be administrator. It is not the mandate of the defendant to choose who would administer the estate of the deceased because at one time they suggested that the said Jimmy Titus Mollel being a senior brother ought to have been appointed as the administrator. With due respect, such argument is unassailable. Even if he was so appointed, which is not the case, he could not as clearly indicated above dispose the deceased estate as if it is for his own property. There was also an

argument that he received a blessing of her mother while DW1 did admit that the title deed were in the name of Titus Aaron Mollel.

When he was cross examined by Mr. Mahuna, advocate, DW1 is quoted to have said the following:-

"When I purchased the said plots, I verified on ownership. I knew that the registration was in the name of Titus Aarom Mollel. He was my friend i.e Mr. Titus Aaron Mollel. When I did the purchase transaction I was aware that Titus Aaron Mollel was by then deceased... The sale transaction does not say that Jimmy Titus Mollel was selling it as the administrator of estate of Titus Aaron Mollel."

From the above defence evidence, the alleged sale from Jimmy Titus Mollel is both invalid and also inoperative for creating or transferring any interest in respect of the suit properties in view of the clear provisions of section 41 of the Land Registration Act, Cap 334 RE 2002 which states that:-

"41.

(1) No disposition shall be registered unless there is furnished to the Registrar, a certificate in writing by the Commissioner for Lands signifying his approval to the deposition.

(2) No disposition unless registered shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered land."

The alleged affidavit of the invalid seller cannot pass title or cure the defect.

The defendant did not purchase the suit properties in good faith because he admitted the sale agreement for plot No. 29 the name of Jimmy was not mentioned and never signed. He never acquired interest over it. To this end, I find that the first issue is answered against the defendant.

This takes me to the second issue on reliefs. In other words, what
~~are the remedies to which the parties are entitled?~~ The first prayer by the plaintiff is a declaration that all the parcels of land registered under exhibits D-1, D-2, D-3 and D-4 form part of the estate of the deceased. The testimony of PW2 and exhibits PE-4, PE-5, PE-6 and PE-7, proves on the required standard that the owner of the suit properties is one Titus Aron Mollél who passed away since 24th November 1998. Therefore, since there has been no change of ownership for the suit properties, it is correct to hold and find that the same form part of his estate. It is hereby declared that the land parcels registered under the Plot No. 32 CT No. 11535, Plot No. 31 CT No. 11540, Plot No. 30 CT No. 11536 and Plot No. 29 CT No. 11542 (i.e. exhibits D-1, D-2, D-3 and D-4) all located at Block 'BB' Ngulelo

area within Arusha City belongs and forms part of the estate of the deceased.

The second prayer is for an order of trespass against the defendant. As above shown, the alleged purchase of the suit plots by the defendant was tainted with fraud, as the alleged sale was from the wrong person without title to the plots. Trespass had been proved because as it was held in the case of **Jela Kalinga v. Omari Karumwana** [1991] TLR 67 (CA): -

*"...one of the defences against an action for trespass is a claim by the defendant that he had a right to the possession of the land at the time of the alleged trespass or **that he acted under the authority of some person having such right.**"*

(Emphasis mine).

None of the two conditions stated in the above cited case has been successfully shown by the defence. This no doubt, shows that the defendant committed an act of trespass to the suit properties against the real owner.

The last sub-issue on reliefs is whether plaintiffs suffered damages. The plaintiff pleaded general damages to be assessed by the court. In their testimony the plaintiff averred that the defendant destroyed the suit properties by uprooting trees and erecting petrol station facility on one of

them. However, this testimony is still wanting on the types, nature and size of the trees uprooted by the defendant.

On the construction of petrol station facility, it was averred that the defendant used excavator and bulldozer to realign and levelling the surface area of Plot No. 32 (*exhibit PE-7*). It was held in the case of **Tanzania Saruji Corporation v. Africa Marble Company Limited** [2004] TLR 155 that: -

"General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of; the defendant's wrongdoing must, therefore have been a cause, if not the sole, or a particularly significant, cause of damage."

The testimony of PW2 shows that defendant did not trespass the suit properties between 2007 and 2017. This case was registered in court on 2nd January, 2017. If we are to go by the record, the said trespass survived between 2017 to date. Again, the claim of general damages in an unspecified quantum is bound to fail. The court may grant general damages on discretion, however, in view of the decision in the case of **Masolele General Agencies v. African Inland Church Tanzania** [1994] TLR 192 (CA),

"Once a claim for a specific item is made, that must be strictly proved, else there would be no difference between a specific claim and a general one..."

The claim that the defendant uprooted trees without further explanation from the plaintiffs cannot sustain an order for award of general damages since it was specifically raised but never proved specifically. Thus, the prayer for general damages is refused.

In the final analysis, the plaintiffs' claim has been proved to the required standard of proof. The defendant being adjudged as a trespasser, should be evicted therefrom to give room for conclusion of the administration process. Judgment for the plaintiffs with costs.



**M. G. MZUNA,
JUDGE.
07. 05. 2021.**