IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KAIRO, J.A)

CIVIL APPEAL NO. 7 OF 2018

BARRETO HAULIERS (T) LTD.....1st APPELLANT

MOSES PAUL SOZIGWA.....2nd APPELLANT

VERSUS

MOHAMOOD MOHAMED DUALE.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Dar es Salaam Registry at Dar es Salaam)

(Teemba, J.)

dated the 21st day of August, 2015
in
Land Case No. 157 of 2012

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JUDGMENT OF THE COURT

28th October & 21st December, 2022.

SEHEL, J.A.:

This is a first appeal against the decision of the High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam (henceforth the High Court) that struck out the appellant's plaint and allowed the counter claim filed by the respondent.

The facts giving rise to the present appeal are such that; on 12th September, 2011, the respondent bought a landed property situated at Plot No. 19, Kurasini Tom Estate, Temeke District in Dar es Salaam Region (the disputed property) from Paul Sozigwa (PW3), the father of the 2nd appellant at a contract price of TZS. 600,000,000.00. Prior to the said sale transaction, the 1st appellant was a tenant over the suit premises. Its tenancy agreement was for thirty (30) months from 15th July, 2009 to 14th January, 2013. It is noteworthy that on 26th January, 2009, PW3 executed a power of attorney in favour of his son, the 2nd appellant, authorising him to sign any transaction relating to his property including letter of offer, title deed and other matters incidental thereto. Acting on that power of attorney, on 15th March, 2011, the 2nd appellant revised the period of the initial agreement and extended it to six (6) years commencing from 15th January, 2013 by concluding an addendum to the lease agreement with the 1st appellant.

Believing that he has a lawful title over the disputed property on account of purchase from the owner, the respondent, acting through his advocate, the late Dr. Masumbuko Lamwai, issued to the 1st appellant a

notice to give vacant possession of the property, upon expiry of its lease agreement on 14th January, 2013. It is from this notice that prompted the appellants to institute a suit before the High Court against the respondent seeking the following reliefs:

> *1) For declaratory orders that; one, the demand to yield vacant possession of the suit premises with effect from 14th January, 2013 was unlawful and two, the term of the lease agreement to be expired on 14th January, 2019.*
> *2) The sale agreement executed between the respondent and the donor of the Power of Attorney was unlawful, null and void.*
> *3) The 1st appellant be given the first right of option to purchase the suit premises from the 2nd respondent.*
> *4) Costs of the suit.*
> *5) And any relief deemed fit to grant.*

The respondent filed a written statement of defence wherein he raised three points of law and also counter claimed against the appellants seeking the following orders:

> *1) The appellants suit be dismissed.*
> *2) The respondent counter claim be granted and the 1st appellant be ordered to yield vacant*

possession of the suit premises to the respondent immediately upon the expiry of the lease on the 14th January, 2013.

3) Costs of the suit.

4) Any order deems fit to grant.

The High Court upheld the preliminary objection. Consequently, it struck out the suit and the trial proceeded with the counter claim. After hearing the evidence, the High Court found that, although PW3 denied to have sold any of his properties, there was ample evidence coming from his wife, PW2 and the lawyer who witnessed the sale agreement that PW3 sold the suit premises to the respondent. It also found that PW3 signed all land transfer forms. Accordingly, it declared the respondent the lawful owner of the suit premises.

Regarding the extension of the lease agreement, the High Court found that the 2nd appellant had no authority to extend the lease agreement as the donor of the Power of Attorney had taken over the powers conferred upon him through revocation and sale. It further held that the donee has no right to insist on representing the donor when the latter is present and decided to act on his own.

At the end, the High Court ordered the 1st appellant to pay rental charges for its presence in the suit premises from 2013 when the tenancy lapsed up to the time of giving vacant possession. It also allowed the 1st appellant to recover its money paid to the 2nd appellant in respect of the addendum lease agreement and the 2nd appellant was condemned to pay costs of the suit. The appellants were not satisfied with that decision. Accordingly, they lodged the present appeal raising the following four grounds:

1) *That, the learned trial Judge erred in law and fact for failure to analyze the tendered power of attorney.*
2) *That, the learned trial Judge erred in law and fact for failure to evaluate the procedure of revoking the granted power of attorney.*
3) *That, the learned trial Judge erred in law and in fact for failure to evaluate the testimonies of PW3, Paul Sozigwa.*
4) *That, the learned trial Judge erred in law and fact for holding that there is no valid lease agreement.*

At the hearing of the appeal, Mr. Benedict Bagiliye, learned advocate appeared for the appellants, whereas, Mr. Roman Selasini Lamwai, also learned advocate appeared for the respondent.

At the outset, in terms of Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009, Mr. Bagiliye sought and was granted leave to argue two additional grounds of appeal. He informed the Court that the appellant abandons the fourth ground of appeal. The additional grounds are:

> *1) The successor Judge Teemba had no jurisdiction to proceed with the hearing of the case without assigning reasons for her taking over from the predecessor Judge.*
> *2) The trial court erred in law for not ordering a joinder of necessary parties in the suit.*

In arguing the appeal, Mr. Bagiliye started with the additional grounds. For the first ground, he referred us to page 120 of the record of appeal and argued that Hon. Mwakipesile, J. who was the trial Judge, disqualified himself from the conduct of the case. However, after her recusal there is no reason stated in the record as to why the case was placed before Hon. Teemba. He contended that the omission to state the

reasons was fatal and rendered the proceedings conducting Hon. Teemba irregular. To fortify his submission, he referred us to the cases of **Mariam Samburo (legal personal representative of the late Ramadhani Abas) v. Masoud Mohamed Joshi and 2 Others,** Civil Appeal No. 109 of 2016 (unreported). He therefore prayed for the irregular proceedings to be quashed and the dismissal order be set aside.

Mr. Lamwai replied that the facts in the appeal before us are different from the cited case of **Mariam Samburo** (supra) since Hon. Teemba took over the proceedings at the preliminary stage during the first pre-trial conference. That is, she took over the proceedings before the reception of the witness evidence. For that reason, he argued, there was no need of giving reason. Accordingly, he urged us to find the first additional ground of appeal baseless and prayed for it to be dismissed.

Mr. Bagiliye reiterated that the appellants were prejudiced as there was already preliminary hearing which dismissed the suit filed by the appellants. He therefore prayed for the appeal to be allowed with costs.

From the submissions by the learned counsel for the parties, the issue stands for our deliberation is whether, given the circumstance of the

case, there was a need to state the reasons for taking over of the proceedings. We are alive with the position of the law, that is, Order XVIII rule 15 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) permitting the evidence taken and recorded by a trial Judge or Magistrate to be taken over by a successor Judge or Magistrate upon the death of the predecessor Judge or Magistrate; or upon his/ her transfer; or due to any other cause that prevented the predecessor Judge or Magistrate to conclude with the trial of the case. The rationale of such requirement is to ensure that a trial which was commenced by the trial Judge or Magistrate is finalized by the same presiding judicial officer unless prevented by death, transfer or any other cause- see: the case of **Leticia Mwombeki v. Faraja Safarali and 2 Others**, Civil Appeal No. 133 of 2019 (unreported).

In the present appeal, Mwakipesile, J. recused herself from the conduct of the case during the preliminary stage. She recused herself after delivering a ruling on the raised preliminary objections which she uphold and dismissed the appellant's suit. This is clearly gathered from page 120 of the record of appeal. From there, Teemba, J. took over the conduct of the case by conducting the first pre-trial conference. Thereafter, the case

went for mediation. Mediation was marked failed hence the file returned to Teemba, J. for trial. The trial commenced with Teemba, J. who heard the evidence of both the plaintiff and the defendants and at the end, she composed and delivered the judgment to the parties. Much as we agree with Mr. Bagiliye that the ruling written and delivered by Mwakipesile, J. sustained the preliminary objection leading to the dismissal of the suit filed by the appellants but since Teemba, J. took over the proceedings at the initial stages before the trial of the case commenced, we are satisfied that there was no contravention of the dictates of Order XVIII rule 15 (1) of the CPC. Accordingly, we find this additional ground of appeal has no merit and proceed to dismiss it.

For the second additional ground of appeal, Mr. Bagiliye argued that since there was a challenge on the validity of the sale agreement and ownership of the suit premises, the trial court ought to have ordered for the seller and the Registrar of Titles who were necessary parties to be joined to the counter claim in order for the trial court to arrive at a just decision. He cited the case of **John s/o Magendo v. N.E. Govani** [1973] L.R.T. No. 60 where it was stressed that the trial court is not expected to sit back as a spectator or a referee but rather it has a duty to do justice to

the parties and determine the dispute between them judiciously in accordance with the law.

Mr. Lamwai disagreed with the submission of Mr. Bagiliye that the seller and the Registrar were necessary parties to the counter claim. Mr. Lamwai pointed out that the respondent who was the plaintiff in the counter claim had no dispute over the sale and ownership of the disputed property hence there was no reason to implead the seller and the Registrar of Titles. Nonetheless, he added, the seller was called as a witness to establish the plaintiff's claim that the disputed property was sold to him.

Here, we wish to state that we shall not dwell much on this additional ground of appeal because upon appraisal of the record of appeal we note that all parties were at one that Paul Andrea Reuben Sozigwa (PW3) was the initial owner of the disputed property and the same was sold to the respondent. We also find that the main issue litigated before the High Court was whether the owner of the disputed property had a mandate to sell his property which he had earlier on put under the care of DW2 through the power of attorney. Given the evidence on record, we entirely agree with Mr. Lamwai that there was no dispute over ownership of the

disputed property. Neither was there a disagreement that the owner sold the disputed property to the respondent. As such, there was no need to implead the seller and the Registrar of Titles. The second additional ground of appeal also lacks merit and we dismiss it.

On the first ground in the memorandum of appeal, Mr. Bagiliye contended that the power of attorney, exhibit P3 appearing at page 214 of the record of appeal, bestows upon the 2nd appellant wide and irrevocable powers to perform any act whatsoever in relation to the disputed property, including signing the new lease agreement. In that respect, he argued, that had the High Court properly analyzed the wording of exhibit P3, it would have not reached to the conclusion it had reached that the 2nd appellant had no mandate to sign the lease agreement.

For the second ground of appeal, he argued that the procedure for revoking the power of attorney was not completed as there was just an application for revocation of the issued power of attorney as evidenced by exhibit P2 and there was no notice issued to the Registrar of Titles as required by section 96 of the Land Registration Act, Cap. 334 R.E. 2019 (the LRA). It was his submission that since the procedure for revocation

was not completed, the principal had no power to act on the disputed property that was placed under the power of attorney.

Mr. Lamwai replied jointly to the first and second grounds of appeal that the principal is not barred to act over the matter he had previously assigned power of attorney to the agent. In that respect, he contended that PW2 being a principal acted within his powers hence the agent cannot insist on the assigned power of attorney.

Mr. Bagiliye re-joined that the nature and issue that were before the High Court suggested that parties were not at one on the issue of ownership since the respondent contended that the disputed property was sold to him by the owner while the appellant claimed that PW3 had no right to sell it.

Having heard the submissions from both counsel we find that the issue for our determination is whether the principal had authority to act on the disputed property which he placed under power of attorney. In order to adequately deal with that issue, we find it prudent to define 'the power of attorney'.

According to the **Black's Law Dictionary**, 9th Edition, at page 1290 the power of attorney is defined as follows:

> *"1. An instrument granting someone authority to act as agent or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal. 2. The authority so granted; specifically, the legal ability to produce a change in legal relationship by doing whatever acts are authorized."*

Flowing from the above definition, it is clear that a deed of power of attorney is executed by the principal in favour of the agent. In other words, by a deed of power of attorney, an agent is formally appointed to do all acts and deeds specified therein, on behalf of the principal, which when executed will be binding on the principal as if done by him. Essentially, a grant of power of attorney is governed by Chapter X of the Law Contract Act, Cap. 345 R.E. 2019 (the LCA) which covers the obligations and powers of the principal and the agent. It is in that respect, Lord Brooke L.J, in the case of **Gregory and Another v. Turner and Another R (on the application of Morris) v. North Somerset Council** [2003] 2 ALL ER

1114 considered *"the grant of a power of attorney is, in principle, no more than the grant of a form of agency."* Here, we wish to emphasize that the scope of the power of attorney is for the agent to exercise such powers to the extent donated to him. He cannot use the power of attorney for his own benefit. As such, for the agent to conclude a sale or lease agreement in respect of an immovable property, the power of attorney should expressly authorize such powers of executing lease or sale agreement to the agent.

At this juncture, we wish to comment, by passing, that section 96 (1) of the LRA mandatorily requires the agent and the donor of a power of attorney to make a joint application, in writing, to the Registrar of Titles to register a power of attorney which contains any power to make applications under the LRA to effect dispositions of, or otherwise to act in relation to registered land. Further, pursuant to subsection (2) of the same section, where there is revocation of the said power of attorney registered under sub-section (1), the donor of the registered power of attorney may give notice of revocation to the Registrar of Titles. Therefore, the argument by Mr. Bagiliye on non-compliance with such section is misplaced because

the deposition of the disputed property was not done on account of the power of attorney as we shall shortly demonstrate.

The counsel for the appellant argued that the powers conferred upon the 2nd appellant in exhibit P3 were wide enough to encompass execution of the lease agreement. At the outset we wish to state the obvious that there is no dispute on 26th January, 2009, the respondent issued a power of attorney to his son, the 2nd appellant to deal with the disputed property. An excerpt of that power of attorney reads:

> *"The donor hereby irrevocably appoints **Moses Paul Sozigwa** to be his attorney and to act on behalf and in the name of the principal on the following transaction:*
>
> 1. *To sign for and on behalf of the donor on any documents relating to the transaction including letter of offer, title deed and on the other matters incidentally made.*
> 2. ***In general**, to perform every other act whatsoever and howsoever in relating to the said certificate of title as amply and effectually to all intents and purposes as the donor could not do in person if this deed had not been made.*

And I the said ***Paul Andrea Ruben Sozigwa*** *hereby agree at all times hereafter to ratify and confirm whatsoever the said* ***Moses Paul Sozigwa*** *shall lawfully do and cause to be done."*

From the above, it is evident that it does not in any way give powers to the agent to conclude, execute and sign any lease agreement in respect of the disputed property. Furthermore, we failed to find any specific word or term which could have been inferred or construed either directly or impliedly to vest to the agent general powers as impressed upon by Mr. Bagiliye. On the contrary, we find that the powers were specific to transaction relating to letter of offer, title deed and on matters incidental thereto. We failed to find any wording in clause 2 suggesting or granting powers to the 2nd appellant to execute lease agreement. As we have stated earlier, the power of attorney is a creation of an agency whereby the grantee is required to do the acts specified therein on behalf of the grantor and is not expected to act beyond the power issued to him.

The counsel for the appellant also contended that since the procedure for revocation of the power of attorney was not completed the principal had no mandate to act on the assigned powers. Section 159 of

the LCA specifies that the power of attorney may be revoked either expressly or impliedly through the conduct of the principal. However, in terms of section 160, such termination will become effective upon the agent having notice of such revocation. As to the termination by conduct, the English case of **Re X v. Y and Another** [2000] 3 ALL ER 1004 puts it clear that:

> *"...the donor had to have intended to revoke the earlier power, and that also had to be the effect of the donor's words or conduct. Moreover, conduct could only amount to revocation if it was inconsistent with the continuation of the agency, and it could only be inconsistent if it was unambiguous in its effect. Thus, it was not sufficient that the conduct should be reasonably understood as amounting to revocation."*

In the present appeal, there was an application for revocation of the power of attorney of which the 2nd appellant has notice but argued it was not effective as it was not registered. With respect, we are not persuaded by such argument because the law on agency is clear that revocation becomes effective upon the agent becoming aware of the revocation. Since there is evidence as to the donor's intentions of revoking the power of

attorney and that evidence is exhibit P2 and since the appellants were aware of it, we are satisfied that the donor expressly revoked the power of attorney issued to the 2nd appellant. The argument that the power of attorney ought to be registered is misplaced in the circumstances of the present appeal.

Besides, the donor may also revoke the donated power of attorney by doing any act which is inconsistent with the continuation of the power and of which the donee has notice. With that in mind, since the donor sold the disputed property to the respondent and the 2nd appellant was aware of the sale then we entirely agree and accept the holding of the learned High Court Judge that although the principal donated powers to the 2nd appellant over his property, still the agent has no right to insist on representing the principal as his conduct is taken to have revoked it. For the reasons we have explained, we find that the first and second grounds of appeal have no merit and we dismiss them.

On the third ground of appeal, the counsel for the appellant argued that the evidence of PW3, the donor, is inconsistent with the holding of the

High Court because the witness denied to have sold the disputed property to the respondent.

Mr. Lamwai responded that the sale agreement was reduced into writing hence in terms of section 100 (1) of the Evidence Act, Cap. 6 R.E. 2022 (the Evidence Act) the oral account of PW3 cannot supersede the documentary evidence. He added that PW2 identified the respondent as the person who bought the disputed property from her husband.

On this ground, we entirely agree with Mr. Lamwai. Section 100 (1) of the Evidence Act clearly provides as follows:

> *"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."*

The disposition of the disputed property in the present appeal was reduced in writing and admitted in evidence as exhibit P1. That exhibit clearly shows that PW3 sold the property to the respondent. Since the sale agreement was reduced in writing and expressly shows that PW3 sold the disputed property to the respondent, we agree with Mr. Lamwai that the oral account of PW3 cannot supersede the documentary evidence. Further there is evidence of PW2 and PW4 to the effect that they witnessed the sale transaction on 12th September, 2011. For instance, PW4 told the trial court the following:

> *"Mr. Sabasaba, the legal advocate for Mohamood Duale produced a sale agreement and gave a copy to Paul Sozigwa and another copy was given to me as a lawyer for the seller. Mzee Paul Sozigwa read the agreement and made some corrections on some areas. The sale agreement was written in English. After some corrections, all conceded to the contents and signed it. It was signed on 12/9/2011."*

With that evidence on record and with the evidence that PW3 was suffering from dementia we find the argument by the counsel for the appellants is without merit.

For the above reasons, we find that the appeal is not merited. Accordingly, we dismiss it with costs.

DATED at **DAR ES SALAAM** this 19th day of December, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 21st day of December, 2022 in the presence of Mr. Benedict Bagiliye, learned counsel for the 1st and 2nd Appellant and Mr. Roman Selasini Lamwai, learned counsel for the Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL