"ORIGINAL"

IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO. 1 OF 2011

EMMANUEL MARANGAKIS as Attorney of
ANASTASIOS ANAGNOSTOU ..... PLAINTIFF

VERSUS

THE ADMINISTRATOR GENERAL ..... DEFENDANT

Date of last order: 10/05/2011
Date of Ruling: 13/05/2011

J U D G M E N T

Dr. Fauz Twaib, J:

This is a case stated for this Court's opinion in terms of section 65 and order XXXIV of the Civil Procedure Code, Cap 33 (R.E. 2002) (hereinafter "the CPC"). The suit was filed as a Special Case by way of a Plaint and supplemented by a Schedule thereto (both of which have been signed by both the Plaintiff and the Defendant). The two documents together set out the facts that led to the dispute. In the Plaint, the parties also framed the issues that the Court is being called upon to determine.

The material facts in this case are not in dispute, though in his affidavit filed on 4th March 2011, Mr. Gilbert Peter Buberwa, Counsel and Senior

Officer in the office of the Defendant, attempted to introduce some new facts from those earlier agreed and filed with the Plaint and the Schedule thereto. However, in view of the legal position that a party may not be allowed to depart from his pleadings without the Court's leave, I will ignore the averments in paragraph 2 that attempt to depart from the facts as agreed by both parties in the Plaint and its annexures.

Furthermore, in his written submissions, Mr. Zake, learned Counsel for the Plaintiff from Rweyongeza & Co., Advocates, has complained that paragraph 6 of Mr. Buberwa's affidavit introduces a new position from the Defendant. The paragraph proposes that the property in dispute be placed in the hands of the Administrator General "so that it can be determined" who is legally entitled to own the property or that the same "be placed under the Public Trustee". It is true that this paragraph contains a new position and a prayer that is not contained in the Plaint. However, in view of my decision in this judgment, the controversy brought about by this new stance on the part of the Defendant will have no consequence.

In brief, the material facts as agreed by both parties are as follows:

On 7th May 2006, a Tanzanian lady of Greek origin, DIANA ARTEMIS RANGER, *née* Anagnostoy Georgio, died intestate at the Aga Khan Hospital, Dar es Salaam. She left behind an estate comprising, among other things, a landed property situate at Plot No. 648 Upanga, Dar es Salaam, registered under Certificate of Title No. 186172/28. Though the parties state that the deceased had only one surviving heir (her brother ANASTASIOS ANAGNOSTOU), it would appear that she had at least two others, IRANIS ANAGNOSTOU (a niece) and GEORGIOUS ANAGNOSTOU (a nephew). All three of them were, apparently, non-Tanzanians. The brother was a Greek citizen.

By Power of Attorney, the said Anastasios Anagnostou appointed EMMANUEL MARANGAKIS, who is acting on his behalf herein, to be his attorney and agent in respect of his interests in the estate of his late sister. The Power of Attorney also gave the said Emmanuel Marangakis the power to "donate the property by gift *inter vivos* to anyone, including himself by self agreement" and generally to deal with the property as he deemed fit.

With the consent of Anastasios Anagnostou, Emmanuel Marangakis applied for Letters of Administration of the deceased's estate in Probate and Administration Cause No. 46 of 2006. His application was opposed by the deceased's niece, Iranis Anagnostou and nephew, Georgious Anagnostou. Mandia, J., in a ruling delivered on 7th May 2007, appointed the latter to be the administrator of the estate.

The Plaintiff was not satisfied. He appealed to the Court of Appeal in Civil Appeal No. 51 of 2007 and partly succeeded. The Court of Appeal removed Georgious Anagnostou as Administrator and appointed the Defendant Administrator General in his stead. While the appeal was pending in the Court of Appeal, the Administrator (presumably the then Administrator Georgious Anagnostou) disposed of a second landed property at Masaki, Dar es Salaam. In a compromise between Anastasios Anagnostou, Iranis Anagnostou and Georgious Anagnostou, it was decided that the rest of the estate, for our particular purposes the suit property at Upanga, Dar es Salam, should go to Anastasios Anagnostou, the deceased's brother and the Plaintiff herein.

According to Annexure CS4 to the Schedule to the Plaint, a letter from Georgiuos Anagnostou dated 4th May 2010, the heirs further agreed as follows:

1. Georgiuos Anagnostou distributes the assets from the sale of the house in Masaki (belonging to the estate) and other minor assets already in his hands, together with bank balance in Tanzania, to all the heirs except Anastasios Anagnostou.

2. Anastasios Anagnostou gets the house at Upanga (the suit property) and the car and Emmanuel Marangakis is relieved of having to pay rent for the use of the house and the car over the past four years.

However, the Defendant Administrator General felt that he could not distribute the suit property to Anastasios Anagnostou because, in his view, being a non-citizen, the said beneficiary is not entitled to own land in Tanzania by virtue of the provisions of the ***Land Act***, Cap 113 (R.E. 2002) (hereinafter "*the* ***Land Act***").

Anastasios Anagnostou claims his right to inherit as a beneficiary of the estate of his sister (and upon the consent of all the other heirs). It is his position that it is not upon the Defendant as Administrator of the estate to choose what to bequeath to him and what not. He has himself has already "passed over" the property to Emmanuel Marangakis, his Attorney herein, who is a Tanzanian citizen of Greek origin. The Attorney is at liberty to deal with it as he deems fit. He cannot understand why the Administrator General should not comply with his wishes.

Hence, the dispute that this Court is called upon to determine, according to the Plaint filed under Special Case procedure, relates to a determination of the following issues:

i. Whether the Administrator General can legally bequeath the House on Plot No. 648 Upanga, Ilala District, Dar es Salaam, registered under CT No. 186172/28, L.O. No. 30616 and LD No. 71622 to Anastasios Anagnostou, who is a Greek citizen and a beneficiary of the estate of the late Diana Artemis Ranger, his sister in the light of the provisions of the ***Land Act***.

ii. Whether the said Anastasios Anagnostou, the beneficiary, can pass his interest and have his share of estate as aforesaid transferred to Emmanuel Marangakis who is a Tanzanian, his duly appointed Attorney.

iii. Whether the only solution is to dispose of the property and pass the proceeds to the beneficiary or his Attorney.

The Plaint also draws as an issue whether the established value of the property in dispute in TZS 391,000,0000. However, given the nature of the case, the pleadings, the evidence and submissions, I do not think that the parties wanted to make this an issue. It does not appear to be in dispute and none of the parties has argued it. I am inclined to think that the use of the word "WHETHER..." was typographical error, and that the parties intended to say "WHEREAS..." instead. Indeed, it makes better sense that way and does not prejudice any of the parties. I will therefore read it as such.

From the foregoing, it is obvious that the dispute in this suit revolves around the interpretation of subsection (1) of section 20 of the ***Land Act***. It restricts the occupation of land by non-citizens in the following terms:

> (1) For avoidance of doubt, **a non-citizen shall not be allocated or granted land** unless it is for investment purposes under the *Tanzania Investment* ***Act*** [Cap 38, R.E. 2002]. [Emphasis mine]

Section 20 (1) falls under Part V of the ***Land Act***, which deals with "Rights and Incidents of Land Occupation." The provision immediately before it, Section 19 of the ***Land Act***, provides that the rights to occupy land under the ***Act*** are declared to be:

> (1) The rights to occupy land which a citizen, a group of two or more citizens whether formed together in an association under this or any other law or not, a partnership or a corporate body, in this Act called "right holders", may enjoy under this Act are hereby declared to be–
>
> (a) a granted right of occupancy;
>
> (b) a right derivative of a granted right of occupancy, in this Act called a derivative right.

The definition section of the ***Land Act***, Section 2 defines a "granted right of occupancy" as "a right of occupancy granted under and in accordance with Part VI of this Act";

Clearly, section 20 (1) prohibits the allocation and granting of land to a non-citizen. But what is the true import of this provision? To answer that question, we need first to answer what is meant by an "allocation" and/or a "grant" of land? It is true that the marginal notes to the section reads

"occupation of land by non-citizen restricted". Occupation would, in plain language, mean the mere holding of a right of occupancy. However, it is an established rule of interpretation in common law jurisdictions that marginal notes do not form part of the statute. They are only meant as a guide.

The Defendant has, in his written submissions, argued that the Plaintiff's Counsel is wrong in citing the provisions of section 12 (1) of the ***Land Act*** which deals with allocations, and section 22 (1) on grants of rights of occupancy. He opines that these provisions are irrelevant and, in his words, "we cannot let ourselves [be] carried in that direction". With all due respect to learned Counsel, I think he is wrong. The relevance of the cited provisions is in the fact that they are the ones that will assist us in determining what is really being prohibited by section 20 (1) of the ***Land Act***. And that is exactly what makes the provisions of sections 12 (1) and 22 (1) of the ***Land Act*** deserve this Court's consideration in resolving the issues at hand.

The ***Land Act*** provides that no allocation of land shall be valid except when done in accordance with the ***Act***. The ***Act*** provides, under section 12, for the establishment of Land Allocation Committees which are charged with the task of advising the Commissioner for Lands on the exercise of his powers to determine applications for rights of occupancy. The definition section also gives the following definitions:

The word "transfer" means "the passing of a right of occupancy, a lease or a mortgage from one party to another **by act of the parties and not by operation of law** and includes the instrument by which such passing is effected" [emphasis mine]. So, under the ***Land Act***, a bequest upon death is **not a transfer**, because it is not a "passing of a right of occupancy by

an act of one party to another". Rather, **it is a transmission**, a word which section 2 of the ***Land Act*** defines as "the passing of a right of occupancy, a lease or a mortgage **from one person to another by operation of law on death** or insolvency or otherwise" [emphasis mine].

On the other hand, grants of rights of occupancy are made under Section 4 (5), which provides as follows:

> "A grant of a right of occupancy shall be made in the name of the President and shall be sealed with a seal of a nature and pattern which the President may, by order published in the Gazette, approve.

Having transgressed a bit in order to look at some relevant provisions of the law, let me now return to the central issue as to whether it is legally proper to bequeath a right of occupancy belonging to a deceased's estate to a heir who is not a Tanzanian. Indeed, the issue raises some other pertinent questions, such as whether a non-Tanzanian son or daughter of an owner of land in Tanzania can succeed his/her parent in the ownership of landed property in view of the restriction imposed by section 20 (1) of the ***Land Act***.

It is perhaps in order to begin with section 4 (6) of the ***Land Act***, under which all rights in land that have accrued before its commencement are preserved, which means that the property of a deceased's person are rights that can and should be inherited by his/her heirs. Would it be proper to argue, as the defendant appears to do herein, that those rights are to be extinguished upon the rights holder's death simply because his/her heirs are non-Tanzanians? The subsection stipulates:

> (6) Nothing in this section shall be construed to affect the validity of any right of occupancy lawfully granted or deemed to have been granted or consented to under the provisions of any law in force in Tanzania before the commencement of this Act.

I do not think it will be within the spirit of this provision to say that a deceased's heir cannot inherit landed property unless he/she is a Tanzanian. Indeed, from the legal position as I have endeavoured to explain above, it is clear to me, and I so hold, that a bequest of a deceased's property upon his/her the death is neither a grant nor an allocation of a right of occupancy. Consequently, it is legally possible for a bequest to be made in favour of a non-citizen.

In addition, the position I have taken is fortified by the provisions of sections 68, 71 and 140 of the ***Land Registration Act***, Cap 334 relating to what is termed a "Transmission on Death." These are the applicable provisions where landed property devolves to an heir. Section 68 of Cap 334 provides for dispositions and assents by legal personal representative. The procedure for such registration is provided for under section 140, which stipulates:

> On the death of the owner of any estate or interest, his legal personal representative, on application to the Registrar in the prescribed form and on delivering to him an office copy of the probate of the will or letters of administration to the estate of the owner, or of his appointment under Part VIII of the ***Probate and Administration of Estates Act*** or the Fourth Schedule to the ***Magistrates' Courts Act*** shall be entitled to be registered as owner in the place of the deceased.

These transmissions are to be recorded under section 71 of Cap 334, which gives the Registrar powers to do so. It is also of some significance

to say that nowhere in the ***Land Registration Act***, Cap 334, is there a restriction against a transmission by operation of law in terms of section 68 of the said Act, against a non-Tanzanian. That is the law of the land as I understand it.

As intimated earlier, and as correctly argued by both learned Counsel, Mr. Zake for the Plaintiff and Mr. Kitainda for the Defendant, the dispute before me **does not** relate to a **grant** of a right of occupancy. Neither does it relate to an **allocation** of land. None of those is being contested here. What is being contested is an intended bequest, **a transmission by operation of law** of a property in the estate of the late Diana Artemis Ranger. As I hope I have been able to demonstrate, the process of acquiring title by inheritance is not a grant or allocation of land. It cannot, therefore, be said to be restricted under section 20 (1) of the ***Land Act***. It was plainly not the legislature's intention to place any such restrictions.

To conclude, therefore, I would give the following answers to the issues as framed, and I hold, as follows:

i. That the Administrator General can legally bequeath the House on Plot No. 648 Upanga, Ilala District, Dar es Salaam, registered under CT No. 186172/28, L.O. No. 30616 and LD No. 71622 to Anastasios Anagnostou, who is a Greek citizen and a beneficiary of the estate of the late Diana Artemis Ranger, his sister in the light of the provisions of the ***Land Act***.

ii. That the said Anastasios Anagnostou (the beneficiary) can pass his interest and have his share of estate as aforesaid transferred to Emmanuel Marangakis who is a Tanzanian, his duly appointed Attorney.

iii. It is not correct, in the eyes of the law, to say that the only solution is to dispose of the property and pass the proceeds to the beneficiary or his Attorney

In the premises, I order that the Defendant Administrator General should bequeath the suit property to the Plaintiff Anastasios Anagnostou, either directly or through his duly constituted Attorney, in accordance with the procedures laid down under sections 68, 71 and 140 of the ***Land Registration Act***, Cap 334.

With this holding, one may be tempted to argue that section 20 of Cap 113 likewise does not restrict sales and other transfers of existing rights of occupancy to non-citizens since, like transmissions by operation of law, they are neither grants nor allocations. However, that is a terrain I would not venture into at this moment. In the words of the Court of Appeal in *DPP v Bernard Njavike* (1988) TLR 18: "there is a place and season for everything".

As I said at the beginning, this is a case stated. The parties were simply litigating for the legitimate purpose of obtaining an authoritative interpretation of the law by the Court, there apparently being no previous judicial guidance on the matter. I am therefore of the view that it is a fit case for each party to bear its own costs. It is so ordered.

Dated at Dar es Salaam this 13th day of May, 2011.

Dr. Fauz Twaib

Judge

13th May, 2011