

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO. 16 OF 2019

PETER GREGORY MAKOLE..... PLAINTIFF

VERSUS

EMMANUEL CYPRIAN NGAPE.....1ST DEFENDANT

KIKUBE WAN'GERA WAMBURA.....2ND DEFENDANT

JUDGEMENT

Date of last order: 22/06/2021

Date of judgment: 25/06/2021

F. K. MANYANDA, J.

1. Introduction

In this case, the Plaintiff, **Peter Gregory Makole**, is suing the Defendants jointly and severally for a declaration that he is the lawful owner of the Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City, hereafter referred to as "**the suit property**". Further, he is praying for a declaration that the act by the 1st Defendant to sell and transfer the title of the said Plot to the 2nd Defendant is unlawful. In addition, he is seeking for an order of the court nullifying the purported



sale and transfer of title of the said plot from the 1st Defendant to the 2nd Defendant.

He is also praying for an order of the court compelling the 1st Defendant to return the Title Deed to the Plaintiff and 2nd Defendant's name be deregistered from the Title Deed in issue; payment of general damages and any other relief(s) the court may deem fit to grant.

2. Background

The dispute on ownership in this suit, based on averments in the plaint, may be traced from 07/03/2012 when the Plaintiff purchased a piece of land from a person known as Said Hassan Ngassa, by then, it was measured as 30 x 35 footsteps. After some time, in 2013, a dispute over ownership of the suit property arose between the Plaintiff and the 1st Defendant, during which the Plaintiff found himself constrained to file a suit in the District Land and Housing Tribunal for Mwanza (DLHT).

He filed Land Application No. 02 of 2013 against the said seller Said Hassan Ngassa and the 1st Defendant. The DLHT heard the application in absence of the 1st Defendant and decided in favour of the Plaintiff



declaring him a lawful owner of the suit property. Efforts to set aside the ex-parte judgement against the 1st Defendant and appeal thereon proved futile. While in that situation, the 1st Defendant managed to obtain a Title Deed and in 2017 sold the suit property to the 2nd Defendant who transferred to his name Kikube Wan'gera Wambura. Seeing this situation, the Plaintiff lodged the instant suit against the Defendants with claims mentioned above.

The Defendants in their joint written statement of defence refuted all the claims by the Plaintiff stating that the suit property belongs to the 1st Defendant after purchasing the same from Said Hassan Ngassa on 10/12/2011 and subsequently resold the same to the 2nd Defendant. The Defendants conceded that the Plaintiff successfully sued the 1st Defendant and the said Said Hassan Ngassa in Land Application No. 02 of 2013 in the DLHT for Mwanza. However, the 1st Defendant obtained the same plot from the said Said Hassan Ngassa after been compensated through the 1st Defendant in Land Application No. 08 of 2012 by the Buswelu Ward Tribunal.

3. Representation

At the hearing of this case the Plaintiff was represented by Mr. Julius Mushobozi, learned Advocate, while both Defendants enjoyed representation services of Mr. Paul B. O. Obwana, learned Advocate.

4. Issues

At the Final Pre-trial Conference held on 04/02/2021 four (4) issues were agreed by the parties and framed by the court namely; -

- i. Whether the Plaintiff is the lawful owner of the Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City together the foundation thereon and the ten (10) trips of stone.*
- ii. Whether the Defendants severally or jointly trespassed into the Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City;*
- iii. Whether the transfer of right of occupancy in respect of Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City between the Defendants was justified and lawful; and*

iv. What relief(s) each party is entitled to.

5. Summary of the Plaintiff's Evidence.

Peter Gregory Makole, testified as (PW1) he was the only witness and the plaintiff. He tendered exhibits P1 (a Judgement in Land Application No. 02 of 2013), P2 (a Ruling in Application No. 02B of 2016) P3 (a Ruling in Land Appeal No. 123 of 2016) P4 (Caveat) and D1 (Sale Agreement dated 07/03/2012).

In his testimony PW1 stated that he purchased the Plot in dispute from Said Hassan Ngassa on 07/03/2021 who is now dead. Later on, he learnt that the 1st Defendant also claimed to have purchase the same Plot from the same Said Hassan Ngasa. He filed Land Application No. 02 of 2013 in the DLHT for Mwanza after doubting the allegations of which judgment (Exhibit P1) was given in his favour and declared him as a lawful owner of the suit property.

The defendants in that suit were Said Hasssan Ngassa and the 1st Defendant. The judgment has not been challenged to date (as per Exhibits P2 and P3).

Fearing the 1st Defendant to dispose of the suit property he lodged a caveat on 12/07/2017 to the Registrar of Documents who informed him that the 1st Defendant had already sold the Plot to the 2nd Defendant. He stated further that the 1st Defendant transferred the suit property with full knowledge that the plaintiff was declared by the Court a lawful owner of the suit property.

He prayed for prayers in the Complaint and stated that the foundation and ten (10) trips of stones were valued at Tsh 53,000,000/= which he claims to be paid. Also claimed to be paid general damages of Tsh 30,000,000/= and costs of the case.

In cross examination PW1 stated that the Plot was surveyed at the time he purchased from Said Hassan Ngassa. He conceded to have not conducted search but only inquired from the seller and neighbours who assured him. He later on learnt that the suit property had a dispute hence

he filed the case in the DLHT. The suit property measured 30X35 footsteps (hatua).

He also stated that sale of the plot between him and Said Hassan Ngassa was made on 07/03/2012 even if the Sale Agreement (Exhibit D1) is dated 19/4/2012 because he reported to the Mtaa Chairperson Veronica Deo Gervas (PW2) on 19/04/2012 hence, the Sale Agreement was reduced into writing.

In Re-examination he stated that the 1st Defendant was also attending in Court during the proceedings in Land Application No. 02 of 2013.

6. Summary of Defendants Evidence

The defence case was manned with five (5) witnesses namely, **Emmanuel Cyprian Ngape** (DW1) who tendered D2 (Sale Agreement dated 10/12/2011), D3 (court order dated 30/07/2013) and D4 (sketch map), **Veronica Deo Gervas** (DW2), **Kikube Mangéra Wambura** (DW3) who tendered exhibit D5 (the Title Deed), **Martha Boniface Mpazi** (DW4) and **Japhet Simon Nehemia** (DW5).

Emmanuel Cyprian Ngape testified as **DW1** stating that on 10/12/2011, before the area was surveyed, purchased a piece of land measuring 29 X 22 footsteps (per Exhibit D2), a Sale Agreement. Later on it was discovered that the area was on a road reserve. The seller refused to substitute it with another piece, hence, he filed Land Case at Buswelu Ward Tribunal which ordered the seller, (Said Hassan Ngasa) to provide an alternative plot. In execution of the Ward Tribunal decree, he was given a piece of land of Said Hassan Ngassa by a Court Broker namely, Tisa Auction Mart, which measured 15 x 16 meters. He purchased another piece of land measuring 15 x 16 meters from one Japhet Simon Nehemia (PW5). Then, he combined the two plots and processed for a Title, Deed which he obtained. After obtaining the said Title Deed, which comprises of the suit property, he sold the same to the 2nd Defendant. He conceded that he knew existence of the case which was filed by the Plaintiff, but at the time he sold the suit property, the said case was withdrawn from the Court, therefore there was no any case in Court.



He was unaware that later on the case was refiled and decided in favour of the Plaintiff in his absence. He didn't succeed to assail against it in the High Court.

In cross examination DW1 stated that he did not purchase Plot No. 43 Block "F" but he purchased a piece of land in 2011 which later on was found to be in a road reserve. He didn't know when it was surveyed, but discovered that it was surveyed in 2012. He repeated his statement in examination in chief that he was handed with the piece of land as an alternative to his plot in the road reserve by the Ward Tribunal in 2014 and that he purchased the other piece from Simon Japhet (PW5) in October, 2012 measuring 15 x 16 meters, hence, making a 16 x 30 meters, he processed for a Title Deed and sold it to the 2nd Defendant.

As to timing of purchases of land he (DW1) testified that he purchased the piece of land from Said Hassan Ngassa, on 10/12/2011 (per exhibit D2) and PW1 did purchase a piece of land from the same Ngassa on 13/10/2012 (per exhibit D1).

In re-examination DW1 testified that the Plot in dispute measures 16 X 15 meters while the Plaintiff's Plot is 30 X 35 footsteps, the two plots are different.

Veronika Deo Gervas testified as **DW2** that in April, 2012 was called to witness a Sale Agreement between Said Hassan Ngassa and Peter Gregory Makole (Exhibit D1). She refused to witness the Sale Agreement because she neither saw the area nor witness the money payments.

On 29/10/2012 she witnessed sale of a piece of land between Emmanuel Cyprian (DW1) and Japhet Simon Nehemia (DW5) measuring 16X15 meters. On 03/09/2013 also she witnessed handing over of a piece of land by a Court broker to Emmanuel Cyprian (DW1) measuring 16 x 15 meters.

On cross examination she stated that Said Hasssan Ngassa had a huge area part of which he sold to Emmanuel Cyprian but it was a road reserve. The Ward Tribunal ordered Said Hassan Ngassa to compensate Emmanuel Cyprian

Kikube Mang'era Wambura testified as **DW3** by stating that his proper name is Kikube Mang'era Wambura not Kikube Wang'era Wambura

therefore the word "Wang'era" is a slip of a pen. That on 06/12/2016 he purchased a house built on Plot No. 43 Block "F" Buswelu with Certificate of Title Number 51641 Exhibit D5 Collectively). After agreement and payment, they reduced their Sale Agreement into writing and effected transfer of right of occupancy at the Land Department on 18/04/2017.

On cross examination he testified that he did not know that the suit property had a dispute about its ownership and that the seller Emmanuel Cyprian was defeated in a case in court over the same. He learnt that Japhet Simon Nehemia (DW5) sold a piece of land measuring 15 x 16 meters to Cyprian Emmanuel hence making the plot in issue. He could not have purchased the plot had he knew that it had a dispute.

Martha Boniface Mpazi testified as **DW4** and stated that as a Resident Magistrate she is recognized by the law as a commissioner for oaths and in her official capacity as such attested various documents. She refuted to have attested Exhibit D1. The reasons she gave are that the document though bears her names and a purported signature, she refuted

to have signed on it also there is neither name of a person introducing the attesting person nor receipts for payment of fees.

Japhet Simon Nehemia testified as **DW5** stating that on 29/10/2012 entered into a sale agreement of a piece of land between him and Emmanuel Cyprian measuring 16 x 15 meters for TShs. 200,000/=. The sale agreement was reduced into writing and witnessed by Veronica Deo (DW2).

He gave a history of the area that before survey it was a huge shamba which belonged to Ngassa who divided it into various portions and sold them to various persons. After been surveyed, some portions interfered with others in the surveyed plots as such owners started buying those portions falling out of their surveyed plots. Hence, he sold his portion measuring 16 x 15 meters to Emmanuel Cyprian where Emmanuel Cyprian erected a house. He did not know if there was a dispute about the plot Emmanuel Cyprian owned.

After closure of the defence case, this Court visited the locus in quo where it found that the plots overlap each other.

7. Standard of Proof in Civil Cases.

It is trite law that he who alleges must prove and in civil cases the standard of proof is that of balance of probabilities. The principle is enshrined under Sections 110 and 111 of the Evidence Act, [Cap. 6 R. E. 2019].

The principle is based on an ancient rule that *incumbit probation qui dicit non qui negat*, which means the burden of proving facts rests on the party who substantially asserts the affirmation of the issue and not upon the party who desires it; for a negative is usually incapable of proof.

In our land, this principle of law was clarified by the Court of Appeal of Tanzania in the case of **Anthony Masanga vs. Penina Kitira and Another**, Civil Appeal No 118 of 2014 (unreported), where it stated *inter alia* that: -

"It is the principle of law that in civil cases, the burden of proof lies on the party who alleges. It is a common

knowledge that in civil proceedings, the party with legal burden bears the evidential burden and the standard in each case is on the balance of probabilities."

8. First Issue

Having stated the principle of law governing standard of proof in civil cases, let me start with the first and the second issues as they are closely related, that is, whether the Plaintiff is the lawful owner of the Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City together the foundation thereon and the ten (10) trips of stone and whether the Defendants severally or jointly trespassed into the Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City.

The evidence adduced by the Plaintiff is that he purchased a plot of land from Said Hassan Ngassa. That plot of land according to exhibit D1 was number 43 Block "F". In her testimony in chief, PW4 denied to have attested exhibit D1, however, during cross examination she conceded that she could not recollect whether she attested the document or not due to lapse of time. I agree with the submissions by the Counsel for the Plaintiff

that where a witness does not recall the contents of a document, the same may be proved by other pieces of evidence. This is what Section 73 of the Law of Evidence Act, [Cap. 6 R. E. 2002] provides, it reads: -

"73. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

The evidence proving that the Plaintiff purchased a piece of land measuring 30 x 35 footsteps, is from the Plaintiff himself (PW1). His evidence is also to the effect that he later on cut away part of it measuring 5 footsteps and donated the same to his neighbour. Then he started developing it by mobilizing building materials including construction stones and managed to construct a foundation.

Then the Plaintiff alleging that the 1st Defendant trespassed into the plot filed Land Case No. 02 of 2013 which was decided in his favour. The Plaintiff relies heavily on the decision of that case which he testified that it has not been challenged to date.

The evidence does not show that the Plaintiff executed the decree in Land Case No. 02 of 2013 instead, he filed the instant case because when

Land Appeal No. 123 of 2016 by the 1st Defendant which originated from Land Application No. 02 of 2013, was pending, the 1st Defendant sold the suit property to the 2nd Defendant. The Plot in dispute therefore belongs to him.

The 1st Defendant's evidence is that he purchased a piece of land from the very person Said Hassan Ngassa but it was in a road reserve, hence sued the said Said Hassan Ngassa at Buswelu Wars Tribunal which ordered compensation to him with another plot from Said Hassan Ngassa. It was a court broker who showed the 1st Defendant the alternative plot as compensation which he cut away from a piece of land he thought it belonged to the said Said Hassan Ngassa. Then he purchased another piece of land from Japhet Simon Nehemia (PW5), combined the two pieces of land and successfully processed for a Title Deed.

A question that arises is, if the Plaintiff purchased a surveyed plot but measured in footsteps, was the land surveyed by the time Said Hassan Ngassa sold the two pieces of land to the Plaintiff and the Defendant? The answer to this question is in negative. I say so because the evidence reveals that Said Ngassa owned his shamba under customary right of



occupancy and sold the pieces of land locally. Also the evidence by the Plaintiff is to the effect that the plot he purchased from Said Hassan Ngassa was measured in *hatua* (footsteps) as 30 x 35 footsteps (Exhibit D1). The evidence by the 1st Defendant is that the plot he purchased from the same Said Hassan Ngassa was also measured in *hatua* (footsteps) as 22 x 29 footsteps (Exhibit D2). Later on, the said plot was found to be in a road reserve. Can a surveyed plot be measured in footsteps? The answer is no.

The evidence further reveals that the Plaintiff cut away part of the piece of land he had purchased from the said Said Hassan Ngassa measuring five (5) footsteps and donated it to his neighbour. The Court Broker also subdivided a plot and allocated the 1st Defendant as an alternative plot for the one on road reserve to the 1st Defendant. My understanding of the law is that a surveyed plot can only be altered by partitioned or combined with another plot after seeking and obtaining a permission from the Land Registrar.

There is uncontroverted evidence that Plot No. 43 Block "F" was registered on 03/11/2014 in the name of the 1st Defendant after combing

two plots of land. Exhibit D5 is conspicuous on this fact. This Court is increasingly of the view that Said Hassan Ngassa owned his shamba under customary right of occupancy and sold the plots locally, while the land was not surveyed, otherwise, the Title Deed could have been indicative of the said two plots.

The Counsel for the Plaintiff after discussing the evidence by his client he concluded: -

"In short the plaintiff's plot however is situated in the land he indicated to have bought."

This means the plot of the Plaintiff was a piece of a shamba and that of the Defendant was also another piece of the same shamba.

Upon visit in quo this Court found the plots as overlapping on the same piece of land. The area shown by the Plaintiff been relatively larger than that of the 1st Defendant.

On the other hand, as stated above, the 1st Defendant registered the land after locally acquiring the two pieces of a shamba, his occupation became formalized to that of granted right of occupancy after registering it

and obtaining a Title Deed (Exhibit D5). The Plaintiff does not contest the Title Deed as such, his complaint is against selling of the suit property during the pendency of Land Application No. 02 of 2013. The 1st Defendant's evidence is that he registered the plot after combining the two plots of a shamba and that he was aware of existence of the case but he sold the same when it was struck out and he was not aware whether it was refiled.

The Defendants' Counsel spent most of his submissions trying to point out contradictions in measurements of the plots contending that the same go to the root of the case. Having re-visited the evidence of both sides, this Court did not find any serious contradictions going to root of the case. The contradictions by the Plaintiff concern an issue whether the plot was measured in footsteps or meters, and the same were corrected during re-examination. This court as explained above, is of the views that, the plot was measured in footsteps.

However, it remains a fact that the Plaintiff purchased a piece of land measuring 30 x 35 footsteps, the 1st Defendant also purchased a piece of

land from PW5 measuring 16 x 15 meters. This piece of land has nothing to do with the Plaintiff's plot. It is a piece of land measuring 16 x 15 meters allocated to the 1st Defendant by a Court Broker that interfered with the Plaintiffs piece of land. Therefore, it suffices to say that at one time both the Plaintiff and the 1st Defendant owned an overlapping piece of a shamba measuring 16 x 15 meters. This is the piece of land in controversy, the Plaintiff purchased from Ngassa and the Defendant was allocated with by a Court Broker.

This Court is of the firm opinion that since the piece of land in controversy measuring 16 x 15 meters was first purchased by the Plaintiff and later on allocated to the 1st Defendant as compensation by a Court Broker, that piece belongs to the Plaintiff. The other piece which the 1st Defendant purchased from PW5 belongs to him. It follows that the first issue is answered in affirmative on in respect of the piece of land measuring 16X15 meters cut away.

Later on, the 1st Defendant combined both, the piece he purchased from PW5 and the one he obtained from execution and registered in his



name as a plot under one Title Deed. By registering the plot, the 1st Defendant obtained granted right of occupancy and extinguished the customary right of occupation by the Plaintiff in the overlapping piece of land. This act by the 1st Defendant trespassed into the rights of the Plaintiff in respect of the piece of land in controversy, measuring 16 x 15 meters. Issue number two is also answered in affirmative.

As regard to issue number three that is, whether the transfer of right of occupancy in respect of Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City between the Defendants was justified and lawful. This issue should not detain me more. The evidence lead by the Plaintiff is that he successfully sued the 1st Defendant and Said Hassan Ngassa in the DLHT for Mwanza. Even if the case was determined *ex parte* against the 1st Defendant, albeit, he became aware of its existence, hence he applied to have it set aside but he was out of statutory time. He filed Misc. Land Application No. 2B of 2016 for extension of time whose ruling was delivered on 12/07/2016 refusing to set aside the *ex parte* judgement against the 1st Defendant for want of merit.



He appealed against that ruling to the High Court in Land Appeal No. 123 of 2016 which dismissed the appeal for want of merit on 20/04/2017. Exhibit D5, the Title Deed and the Land Transfer Forms, show that the 1st Defendant transferred the suit property on 06/12/2016. This means that when the 1st Defendant was transferring the suit property to the 2nd Defendant was quite aware that the judgement of the DLHT was live and that his attempt to set it aside proved futile.

Further he was alive that he had filed an appeal in this Court pending determination. He knew as well or he ought to have known that any tempering with the suit property was contempt of court. It was therefore unlawful for him to transfer the suit property against the orders in the judgement and the decree of the DLHT he was assailing before the same were vacated. In other words, he was still bouting with the District Land and Housing Tribunal decision. The third issue is answered in affirmative.

The last issue is what relief(s) the parties are entitled to. The Plaintiff prayed for the following reliefs: -

1. A declaration that he is the lawful owner of the Plot No 43, Block "F" at Bulola "A" Buswelu, Ilemela Municipality in Mwanza City;
2. A declaration that the act by the 1st Defendant to sell and transfer the title of the said Plot to the 2nd Defendant is unlawful;
3. An order of the court nullifying the purported sale and transfer of title of the said plot from the 1st Defendant to the 2nd Defendant;
4. An order of the court compelling the 1st Defendant to return the Title Deed to the Plaintiff and 2nd Defendant's name be deregistered from the Title Deed in issue;
5. Payment of general damages and costs of the case; and
6. Any other relief(s) the court may deem fit to grant.

The Defendants prayed for the following orders that is: -

- i. The suit be dismissed;
- ii. A declaration that the suit land belongs to the 2nd Defendant;
- iii. The Plaintiff be condemned to pay costs of this suit;

- iv. The Plaintiff be restrained permanently from trespassing into the suit land; and
- v. Any other relief(s) that this Court may deem fit to grant.

After analysis of the evidence and on the reasons stated above, I have found in favour of the Plaintiff only in respect of the piece of land in controversy that is, the one measuring 16 x 15. It was first purchased by the Plaintiff and later on allocated to the 1st Defendant as compensation, that piece of land belongs to the Plaintiff. He held that piece of land informally under customary right of occupancy. The other piece which the 1st Defendant purchased from PW5 belongs to the Defendant which he also occupied informally under customary right of occupancy. However, as the right of occupancy of the same has been already formalized and consequently became a granted right of occupancy, the act of registering the piece of land in controversy by the 1st Defendant extinguished the right of occupancy by the Plaintiff in that piece of land. This act curtailed the rights of the Plaintiff in respect of the piece of land in controversy, measuring 16 x 15 meters. Basing on these findings, this Court makes the following orders: -

1. Following registration of the suit property in the name of 1st Defendant, the same became under the ownership of the 1st Defendant.
2. The 2nd Defendant acquired that ownership through the transfer effected by the 1st Defendant;
3. The Plaintiff is entitled to compensation in a form of damages amounting to Tanzanian Shillings Twenty Million only (TSh. 20,000,000/=) in respect of the piece of land measuring 16 x 15 meters which was wrongly engulfed by the 1st Defendant during registration of the granted right of occupancy and subsequently obtaining of a Certificate of Occupancy with Title Number 51641, Land Office Number 565490 on Plot No. 34 Block "F" Buswelu – Ilemela Municipality.
4. Costs of the case shall be paid by the Defendants.

Order accordingly.




F. K. MANYANDA
JUDGE
25/06/2021