

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

LAND CASE NO. 11 OF 2021

(Originating from the High Court of Tanzania(Original Jurisdiction))

TUMAINI ZEBEDAYO WANJERU.....PLAINTIFF

VERSUS

1. NOEL H. MKISI.....DEFENDANT

2. SWALEH BAKARI *(Administrator of the Estate of the late
HALIMA IDD MAKILA)*..... **DEFENDANT**

3. HABIB MANSOUR KHALIFAN..... DEFENDANT

4. BUJIKU EMMANUEL MACKENZIEDEFENDANT

5. KAHAMA MUNICIPAL COUNCIL..... DEFENDANT

6. COMMISSIONER FOR LANDS..... DEFENDANT

7. ATTORNEY GENERAL..... DEFENDANT

JUDGMENT

Date of last Order: 10/11/2023

Date of Judgment: 15/11/2023

B. E. K. Mganga, J.

Brief facts of this case are that, on 12th November 2021, Tumaini Zebedayo Wanjeru, the abovenamed plaintiff, filed this case against Noel. H. Mkisi, Swalehe Bakari (Administrator of the Estate of the late Halima Idd Makila), Habib Mansour Khalfan, Bujiku Emmanuel Mackenzie, Kahama Municipal Council, Commissioner for Lands and the

Attorney General, the abovenamed 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th defendants.

It was alleged by the plaintiff that, on 15th November 2012, he purchased 180 square feet of land at Nyahanga ward Kahama from the 1st defendant for TZS 10,000,000/=. It was further alleged by the plaintiff that, in 2016 the 5th defendant surveyed part of the said piece of land in favour of the 2nd defendant and produce plot No. 580 block "N" Nyahanga, Kahama Municipality. It was also alleged by the plaintiff that, to his surprise, in 2019, the 1st defendant sold the same piece of land to the 4th defendant. It was further alleged by the plaintiff that, the 2nd defendant disposed plot No. 580 block "N" Nyahanga Kahama Municipality to the 3rd defendant, who was issued a certificate of occupancy by the 6th defendant.

Based on the above facts, plaintiff filed this suit praying the court to issue (i) a declaration order that plaintiff is the lawful owner of the suit property, (ii) an order that sale of the suit property between the 1st and the 4th is a nullity, (iii) an order that the survey of the land by the 5th defendant in favour of the 2nd defendant, disposition of the land by the 2nd defendant to the 3rd defendant and subsequent issuance of Certificate of Occupancy by the 6th defendant to the 3rd defendant are nullity and ineffectual, (iv) an order revoking the Certificate of

Occupancy issued to the 6th defendant to the 3rd defendant on 3rd May 2016, (v) an order for costs of this suit against the defendants and (vi) any other order and relief as the court deems fit and just to grant.

On 19th April 2023, plaintiff prayed the suit to proceed ex-parte against the 1st and 4th defendants as they failed to file their written statement of defence after they were served with the plaint. On 23rd August 2023, plaintiff also prayed the suit to proceed ex-parte against the 2nd defendant who filed the written statement of defence but failed to enter appearance. In all these incidences, this court granted the prayer and issued the orders as prayed by the plaintiff. Therefore, in this judgment, there will be no reference to evidence by the 1st, 2nd, and 4th defendants because the suit was heard ex-parte against them.

On 11th May 2023, three issues were drafted and agreed by the parties namely, (i) Who is the lawful owner of the disputed parcel of land on plot No. 580, Block "N", Nyahanga Kahama Municipality as between the plaintiff and the third defendant, (ii) Whether procedures for the grant of certificate of right of occupancy to the third defendant in the disputed plot was lawful, and (iii) to what reliefs are the parties entitled to.

In the bid to prove his case, plaintiff (PW1) testified that, on 15th November 2012 he purchased a plot of land at Nyahanga Kahama from Mzee Mkisi at the price of TZS 10,000,000/=. He testified further that the size of the said land was 180 x 180 feet. PW1 described boundaries of the said land stating that, it is adjacent to Adam James Kilindi in the south, the Kahama District Commissioner's residence in the North, borders, Mahamud Jan Salwenda in the West, and Hon. Kishimba's apartments in the East. PW1 also testified that, the said piece of land is situated at place popularly known as Nyahanga Uzunguni.

It was further evidence of PW1 that the witness to the said purchase of the said land were VEO, Peter Ramadhani and Mr. Seif Mohamed. He went on that, in 2012 Nyahanga was a village which is why, he involved the aforementioned people and family members of Mzee Mkisi and that, these people, assured him that the said piece of land was property of Mzee Mkisi. He added that, the said sale agreement was signed by himself as the buyer, Mzee Mkisi as seller and Village Executive Officer (VEO) who stamped his seal and that both the buyer and seller appended their passport photo.

It was also evidence of PW1 that, after the said purchase, he planted various no-fruit trees and applied to be issued with a certificate of occupancy. He added that, to date, he has not been given the right of

occupancy. PW1 testified further that, late on, he learnt that 3rd defendant trespassed on the said piece of land and erected building. He further stated that, the said farm had produced three plots as per initiative taken by the 3rd defendant. PW1 added that, one of the plots produced from the said piece of land is 580 Block "N" now owned by the 3rd defendant, and plots No. 576 and 578 Block N. PW1 stated further that, it appears that, 2nd defendant sold plot No. 580 to the 3rd defendant. PW1 also stated that, 1st defendant also sold the same plot to the 4th defendant. He added that, the said sale caused a dispute between 3rd and 4th defendants and further disputes amongst 1st, 2nd, 3rd, and 4th defendants.

PW1 testified further that, to his knowledge, what was done by the defendants is purely trespass on his lawful land and that, the said trespass has been blessed by the 5th to 6th defendants. In his evidence, plaintiff prayed the court (i) to declare him as the rightful owner of the suit land, (ii) to declare sale of the disputed land to the 3rd and 4th defendants as unlawful and that Mkisi be compelled to surrender the said land and be ordered to stop from interfering the disputed land, (iii) to nullify the right of occupancy issued in favour of the 3rd defendant and the same be registered in his name, (iv) to order the defendants to

general damages and costs of this suit and (v) to grant any other relief as it will deems fit.

When PW1 was cross examined by counsel for the 3rd defendant he stated that, he doesn't know as to when the disputed plot was surveyed or as to whether at the time 2nd defendant sold it to the 3rd defendant was already surveyed or not. PW1 admitted that he doesn't know as to when 3rd defendant built foundation plot No. 580 block N. PW1 stated further that, Mzee Mkisi told him at the time of sale that he was the owner of the piece of land he bought.

When PW1 was cross examined by State Attorney for the 5th, 6th, and 7th defendants, he stated that, the disputed land is 180 square feet. He admitted that, in the plaint he did not mention neighbours to the disputed land. He further admitted that, at the time of sale, there were witnesses one of them being Israel Kasoga. He also admitted that, neighbours did not witness purchase of the disputed land and that, he doesn't know importance of the neighbours to witness sale agreement. PW1 stated further that, at the time of filing this case, on the disputed land there was a foundation built by the 4th defendant.

During re-examination, PW1 stated that he can't recall as to when 3rd defendant built a foundation over the disputed plot.

Testifying in support of the plaintiff's case, Israel Mjalifu Kasoga (PW2) stated that, he resides at Nyahanga Kahama since 2018 and that he is the best colleague of the plaintiff since 1992. PW2 stated that, in 2012, plaintiff involved him in the purchase of a piece of land at Nyahanga- Uzunguni area within Kahama. In his evidence, PW2 gave descriptions of the said piece of land in terms of boundaries similar to the one that was given by the plaintiff(PW1). PW2 also stated that, the piece of land that was purchased by plaintiff was 180 square feet and that the same was also witnessed by VEO.

When PW2 was cross examined by counsel for the 3rd defendant, he stated that he doesn't recall that neighbours witnessed the said sale agreement. He admitted that he was not neighbour to the said piece of land and that, at that time, he was residing at Mondo village while the disputed plot was at Nyahanga village. He also stated that, there was no need of involving neighbours as it was the plot of Mzee Mkisi, who, in the presence of VEO, ten cell leader and chairperson, assured them that the land belonged to him. PW2 stated further that, at the time PW1 purchased the disputed land, there were trees and that he doesn't know who planted them. He added that, after the purchase of the said land, plaintiff had not planted any tree.

When PW2 was cross examined by State Attorney for the 5th, 6th, and 7th defendants, he stated that, he is accountant by profession and that, he didn't verify that the money plaintiff paid as consideration of the said piece of land was TZS 10,000,000/=. He added that the said money was verified by VEO. PW2 stated after making calculations, that, 180 feet is equivalent to 54 square meters. PW2 admitted that, 54 square meters cannot be equal to 1187 square meter.

In re-examination, PW2 stated that, in 2005 he was residing at Mondo village but in 2012 he was residing at Nyasubi village within Kahama District. He stated further that, he was not aware or informed about the plaintiff to have planted trees on the disputed plot.

In his evidence, Habib Mansour Khalfan(DW1), the 3rd defendant stated that, on 15th September 2015, he purchased plot No. 580 block "N" Nyahanga Kahama Municipality from Swalehe Bakari, 2nd defendant at the price of TZS 8,000,000/= and signed sale agreement(exhibit D1) in the presence of Ibrahim Kwikima Advocate. He also stated that, the 2nd defendant is at Kahama, but he is sick. DW1 stated further that, after the said agreement, he applied to be issued with a certificate of title. He added that, in 2016 he was issued with a certificate of title No. 874 block 580 block "A" Nyahanga Kahama Municipality(exhibit D2) for 33 years and that, the size of the said plot is 1187 square meters. It was

evidence of DW1 that, in 2017 at the time he was preparing to develop the said land, the dispute arose because plaintiff was claiming to be the owner of the said plot No. 580 block "N" Nyahanga. He added that, he followed all legal procedures in acquiring the said plot and a certificate of occupancy and prayed the case be dismissed with costs. He further prayed the court to declare him as the lawful owner.

When he was cross examined by counsel for the plaintiff, DW1 stated that, Swalehe Bakari is sick, which is why, he has stopped to appear in court. When further cross examined, DW1 stated that 2nd defendant was sick only seven days ago. He admitted that, 2nd defendant filed his written statement of defence. On further cross examination, DW1 stated that, exhibit D1 does not show that Salehe Bakari is the administrator of the estate of the late Halima Idd Makara. He added that, at the time of purchase, Halima Idd Makara has already dead and maintained that exhibit D1 was signed in the presence of an advocate.

DW1 further stated that, exhibit D2 shows that it is for plot No. 580 block "N" Nyahanga Kahama Township and that there is no words "Kahama Municipality" in exhibit D2. DW1 admitted to have not known the date/year the plot was surveyed or as to when demarcation survey was done. He stated that, at the time of purchase, there was an offer

for the said plot No. 580 block "N" Nyahanga Kahama and that the offer was in the name of Halima Idd Makira. He went on that, at the time of sale, they also signed transfer form and that 2nd defendant informed him that the said plot was the estate of the late Halima Idd Makira who was his grandmother. He added that, the 2nd defendant showed and gave him a copy showing that, he (2nd defendant) was the administrator of the estate of the late Halima Idd Makira. DW1 admitted that he is not aware that 1st defendant had already sold the said plot to another person.

When DW1 was cross examined by state Attorney for the 5th, 6th, and 7th defendants, he stated that, after purchase of plot No. 580 Block "N" Nyahanga Kahama, the seller gave him an offer for the said plot and that the said offer was in the of Halima Idd Makira. He added that, after purchase, he applied to Kahama Land offices to be issued with a certificate of occupancy. He added that in his application he attached the said sale agreement, transfer form and an offer for the said plot. DW1 also stated that, 1st defendant is not relative of the 2nd defendant. He went on that, in the sale agreement, 2nd defendant sold the said plot as the legal representative of the late Halima Idd Makira and that, the later was grandmother of the 2nd defendant.

Testifying on behalf of the 5th, 6th, and 7th defendants, Yusuph Shaban Luhumba (DW2) stated that, being an authorized officer and employee of the Ministry for Lands stationed at Kahama, amongst his duties is to keep all records relating to land, collect tax and payments relating to land. DW2 stated further that, plot No. 580 block "N" Nyahanga Kahama Municipality was surveyed in 2014 and that, it was sold to Habib Mansour, 3rd defendant, the current owner. He added that, in 2015, 3rd defendant was issued with a certificate of occupancy(exhibit D2). He went on that, in his application to be issued a certificate of Occupancy, 3rd submitted sale agreement signed also by Swalehe Bakari the administrator of estate of Makira, application form and probate form No. 4 showing that the said Swalehe Bakari was appointed as administrator of the estate of the late Makira. DW2 stated further that, the certificate of Occupancy (exhibit D2) was issued at Tabora on 03rd May 2016 and it was registered on 12th May 2016. He added that, Certificate of title No. 1874 (exhibit D2) that was issued in favour of the 3rd defendant has never been revoked.

It was further evidence of DW2 that, plot No. 580 Block "N" Nyahanga Kahama is medium density and that its size is 1187 square meters. He further stated that the said plot is adjacent to a road (Street) in the North, plot No. 581 in the South, plot No. 582 that is owned by

Benard David in the East and plot No. 578 that is owned by Daniel Laurent in the West.

DW2 testified further that, their record shows that, they only received a written complaint from 3rd defendant that someone is claiming to be owner of the said plot and that the case has been filed in court. He went on that, they took no action because 3rd defendant said a case is pending in court. He added that, in 2017 he visited the plot and find that it was not developed.

In his evidence, DW2 also stated that 180 square feet is almost 16.5 square meters. He added that, 180 Square feet is very small hence cannot be allocated or issued as a plot to an individual. DW2 stated further that, normally, plots are of high density, low density, and medium density. He added that, in surveyed plots, high density starts with 450square meters that is equivalent to 4,850 square feet.

When DW2 was cross examined by counsel for the plaintiff, he stated that, prior to 2014 there was no any survey over the disputed plot hence there was no offer. DW2 stated that 3rd defendant applied to be issued a certificate of Occupancy attaching sale agreement and probate form No. 4. DW2 stated further that, at the time of survey, the disputed area was owned by Halima Idd Makira. He went on that, after survey, after survey the plot was registered in the name of the

customary owner and the later sold the plot to the 3rd defendant who applied to be registered as owner. He admitted that a certificate of occupancy can be revoked if the plot was illegally acquired.

After closure of evidence of the parties, learned counsel both for the plaintiff and the defendants filed their final submissions.

In his final submissions, Mr. Bakari Chubwa Muheza, learned counsel for the plaintiff, answered the 1st issue that plaintiff bought a piece of land (shamba) from the 1st defendant. He submitted further that, 2nd defendant invaded part of the said piece of land and sale to the 3rd defendant. Counsel went on that, in their written statements of defence, defendants only noted paragraph 11 of the plaint in which plaintiff stated that he purchased the said piece of land. With those submissions, Counsel for the plaintiff answered the 1st issue in the affirmative

It was further submissions by counsel for the plaintiff that, plaintiff claims that the suit land was surveyed without his involvement as the original owner. He added that, worse, the land was surveyed in favour of the 2nd defendant who had no title to land. Counsel went on that, there is no evidence to prove that the said land was owned by the family of Idd Makira i.e., 2nd defendant's family who disposed it to the 3rd defendant. It was further submissions by counsel for the plaintiff that,

non-appearance of the 2nd defendant after he has filed his written statement of defence implies that he avoids his wrongful acts of invasion and illegal sale of the disputed plot to the 3rd defendant to be revealed. Mr. Muheza, counsel for the plaintiff questions legality of ownership of Plot No. 580 block "N" Nyahanga by the 3rd defendant and the manner a certificate of title was issued, arguing that, 3rd defendant gave contradictory , lies and confusing evidence on how he acquired the said plot.

Counsel for the plaintiff submitted further that, no landforms were used to dispose plot No. 580 to the 3rd defendant contrary to the dictate of the provisions of section 61(1) of the Land Act[Cap. 113 R.E. 2019]. He also cited the case of ***Abualy Alibhai Aziz v. Bhatia Brothers Ltd*** [2000] T.L.R 288 to support his submissions on the requirement of use of landforms in disposition of a surveyed plot. Counsel for the plaintiff further submitted that, 2nd defendant had no capacity to dispose the disputed plot to the 3rd defendant because according to exhibit D1, 2nd defendant disposed the disputed land as legal representative of the late Halima Idd Makira, the alleged owner. He argued further that, disposition of a deceased property is supposed to be done either the administrator or administratrix.

Counsel for the plaintiff, cited and relied on the exception given in the case of ***Amina Maulid Ambali and 2 Others v. Ramadhan Juma***, Civil Appeal No. 35 of 2019(unreported) and submitted that, disposition of the disputed land from the 2nd defendant to the 3rd defendant was tainted with illegalities, fraud and was done in contravention of the law. He concluded that the 2nd issue should be resolved by holding that the whole process of acquiring the disputed land by the 3rd defendant is a nullity and that the certificate of title should be revoked.

Counsel for the plaintiff submitted further that, according to evidence which was not disputed by the 1st and 4th defendants, as the case was heard ex-parte against them, sale of suit land by the 1st defendant to the 4th defendant was unjustified. Learned counsel took that stance arguing that the 1st defendant had no title to dispose after he had disposed it to the plaintiff. Counsel concluded that, plaintiff proved his case and prayers in the plaint be granted.

It was submitted by Geoffrey M. Tuli, learned counsel for the 3rd defendant that, in his evidence, plaintiff(PW1) stated that he is claiming his piece of land with 180 length feet. Counsel further submitted that, plaintiff has failed to prove his case because, his claim is 180 feet that is equal to 16.5 square meters that is not enough even to build a single

room and not plot No. 580 Block "N". It was further submissions by counsel for the 3rd defendant that, plaintiff had a duty to prove his case and cited the case of ***Hemedi Said v. Mohamed Mbilu*** [1984] T.L.R 113 to the position that he who alleges must prove. Counsel for the 3rd defendant submitted that, 3rd defendant purchased plot No. 580 block "N" from the 2nd defendant and that he was issued with a certificate of title. Counsel for the 3rd defendant cited the provisions of section 2 of the Land Registration Act [Cap. 334 R.E. 2019) and the case of ***Salum Mateyo v. Mohamed Mateyo*** [1987]T.L.R 111 to the position that proof of ownership is by one whose name is registered. He further cited the case of ***Nacky Esther Nyange vs. Mihayo Marijani Wilmore and Another***, Civil Appeal No. 207 of 2019, CAT(unreported) to the position that, the certificate of title is conclusive proof of ownership of land. He therefore answered the 1st issue in favour of the 3rd defendant as owner of plot No. 580 block "N" Nyahanga Kahama.

On the 2nd issue, Mr. Tuli submitted that, 3rd defendant followed all procedures in acquiring the said land and applied to be registered as owner. Counsel cited the case of ***Leopold Mutembei vs. Assistant Registrar of Titles, Ministry of Land, Housing and Urban Development and Another***, civil Appeal No. 57 of 2017, CAT(unreported) to support his submissions.

On the reliefs, Mr. Tuli counsel for the 3rd defendant prayed 3rd defendant be declared as lawful owner of plot No. 580 block "N" at Nyahanga Kahama municipality and that the case by the plaintiff be dismissed with costs.

On the other hand, Mr. George Kalenda, State Attorney for the 5th, 6th and 7th defendants submitted that, plaintiff testified that he bought a piece of land with 180 feet from the 1st defendant as also pleaded in paragraph 11 of the plaint. Counsel submitted further that, in his evidence, PW1 stated that the land he bought, is adjacent to the District Commissioners residence in the North, Adam James Kilindi in the south, Mzee Kishimba in the East and Mahamudu Jaa Swalenda in the West. The learned state Attorney further submitted that, plaintiff failed to tender proof of how he bought the disputed land. He further submitted that, 3rd defendant was legally issued with a certificate of title and cited the case of ***Ncholaus Mwaipyana v. The Registered Trustees of Little Sisters of Jesus Tanzania***, Civil Appeal No. 276 of 2020, CAT(unreported), ***Amina Maulid & Two Others v. Ramadhani Juma*** [2020]TZCA 19(unreported) to support his submissions that, the one in possession of a certificate of title, is always taken to be the lawful owner, unless it is proved that the certificate was not lawfully obtained.

He therefore answered the 1st in favour of the 3rd defendant as the lawful owner.

On the 2nd issue, Mr. Kalenda submitted that, procedures were followed because 3rd defendant submitted sale agreement, application letter and probate form No.4. He submitted further that, plaintiff failed to shake evidence of the defendants on procedures used to prepare and grant right of occupancy to the 3rd defendant.

On relief, Mr. Kalenda submitted that plaintiff has trespassed on the land of the 3rd defendant and cited the case of ***Tenende S/o Budotela & Another v. The Attorney General***, Civil Appeal No. 27 of 2011, CAT(unreported) and ***Grace Olotu Martin v. Amin Ramadhani Mpungwe***, Civil Appeal No. 91 of 2020, CAT(unreported) and that he should vacate from the said land. He further prayed the case be dismissed with costs.

I have considered evidence and submissions made by counsel on behalf of the parties. Before considering the issues drafted, I should point out from the start that, parties are bound by their own pleadings. That is now settled law in our jurisdiction. In fact, there is a litany of case law to that position. See for example the case of ***James Funge Ngwagilo vs the Attorney General*** [2004] T.L.R. 161, [*Astepro Investment Co. Ltd vs Jawinga Co. Ltd*](#) (Civil Appeal 8 of 2015)

[2018] TZCA 278 -Tanzlii, [YARA Tanzania Limited vs Ikuwo General Enterprises Limited](#) (Civil Appeal 309 of 2019) [2022] TZCA 604 -Tanzlii, [Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others](#) (Civil Appeal 66 of 2019) [2021] TZCA 168-Tanzlii, [Salim Said Mtomekela vs Mohamed Abdallah Mohamed](#) (Civil Appeal 149 of 2019) [2023] TZCA 15 -Tanzlii, [Charles Richard Kombe T/a Building vs Evarani Mtungi & Others](#) (Civil Appeal 38 of 2012) [2017] TZCA 153-Tanzlii and [Barclays Bank T. Ltd vs Jacob Muro](#), Civil Appeal No. 357 of 2019 [2020] TZCA 1875-Tanzlii, to mention but a few. In the **Mtomekela's case**, (supra) the Court of Appeal held that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings..."

Therefore, plaintiff is bound by his pleadings that on 15th November 2012, he purchased a piece of land from the 1st defendant with the size of 180 square feet as stated in paragraph 11 of his plaint.

I should also point out the settled position of the law that he who alleges has the onus of proof of the allegations against the other party. See the case of *Hemedi Said v. Mohamed Mbilu* [1984] T.L.R 113, *James Makundi vs Permanent Secretary, Ministry of Lands, Housing & Human Settlements Development & Others* (Civil Appeal 181 of 2021) [2022] TZCA 242(unreported), *Ikizu Secondary School vs Sarawe Village Council* (Civil Appeal 163 of 2016) [2018] TZCA 387(unreported), *Yeriko Mgege vs Joseph Amos Mhiche* (Civil Appeal 137 of 2017) [2020] TZCA 266(unreported) to mention just a few. This being a civil case, plaintiff is required to prove his case at the balance of probabilities.

Having stated the position of the law, I wish, in disposing this case, to start with the 1st issue namely, who is the lawful owner of the disputed parcel of land on plot No. 580, Block "N", Nyahanga Kahama Municipality as between the plaintiff and the third defendant. As pointed out hereinabove, in his evidence, plaintiff (PW1) stated that on 15th November 2012, he purchased a plot of land at Nyahanga Kahama from 1st defendant at the price of TZS 10,000,000/= and that the size of the said land he purchased is 180 square feet. In fact, in paragraph 11 of the plaint, plaintiff indicated that, on the said date, he purchased un-surveyed land(shamba) with 180 square feet. On the other hand, 3rd

defendant, indicated in his written statement of defence that, he is the owner of plot No. 580 block "N" Nyahanga Kahama. In the joint written statement of defence, 5th, 6th, and 7th defendants, stated that 6th defendant granted the 3rd defendant Certificate of Occupancy for plot No. 580 block "N" Nyahanga Kahama. The issue is whether, a piece of land with 180 square feet that plaintiff purchased on 15th November 2012 from the 1st defendant is the same as plot No. 580 block "N" Nyahanga Kahama.

As pointed out hereinabove, in his evidence, plaintiff (PW1) stated that, the size of the land he purchased from the 1st defendant is 180 square feet. While giving his evidence under cross examination by state Attorney for the 5th, 6th and 7th defendants, plaintiff maintained that the size of the piece of land he purchased is 180 square feet. That evidence is corroborated by evidence of Israel Mjarifu Kasoga(PW2) who, stated that he witnessed the said sale and that he is the close friend of the plaintiff. PW2 clearly stated while under cross examination by counsel for the 5th, 6th, and 7th defendants after making calculations that, 180 square feet is equivalent to 54 square meters. PW2 admitted that, 54 square meters cannot be equal to 1187 square meters. I should point out that, in his evidence, PW2 testified to be an accountant by professional and that he is aware of calculations and or measurements.

On the other hand, it was testified by the 3rd defendant(DW1) that, the size of his plot namely, No. 580 block "N" Nyahanga Kahama is 1187 square meters. The same evidence was supported by DW2 that the size of plot No. 580 block "Nyahanga) is 1187 square meters. DW2 stated that, 180 square feet is almost 16.5 square meters. It was further unshaken evidence of DW2 that, the smallest size plot is high density normally with 450 square meters that is equivalent to square feet 4,850. He added that, 180 Square feet cannot be allocated as a plot and cannot be issued to an individual to own because it is very small.

I have examined sale agreement between 2nd defendant and the 3rd defendant (exhibit D1) and find that, on 15th September 2015, 3rd defendant purchased plot No. 580 Block "N" Nyahanga Kahama. I have also examined certificate of Title (exhibit D2) that was issued in favour of the 3rd defendant on 12th May 2016 and find that it relates to plot No. 580 block "N" Medium density Nyahanga, Kahama Township. Exhibit D2 shows that the size of the said plot is 1187 Square meters. From the foregoing evidence, it is my considered view that, plot No. 580 block "N" Nyahanga Kahama cannot be the same piece of land that plaintiff bought on 15th November 2012 from the 1st defendant.

Giving descriptions of the alleged piece of land that was purchased from the 1st defendant, both PW1 and PW2 stated that, it is adjacent to

Adam James Kilindi in south, residence of the District Commissioner for Kahama in Northen, Mahamud Jan Salwenda in West, and Hon. Kishimba's apartments in the East. On his part, DW2 stated that, plot No. 580 Block "N" Nyahanga Kahama is adjacent to plot No. 581 in south, a road(street) in the North, plot No. 578 owned by Daniel Laurent in the West and plot No. 582 owned by Bernard David in the East. Description of the piece of land allegedly plaintiff bought from the 1st defendant on 12th November 2012 is different from plot No. 580 block "N" Nyahanga Kahama. With those descriptions, I concluded that these are different pieces of land.

In addition to the foregoing, it cannot be said with certainty that on 15th November 2012 plaintiff purchased a piece of land from the 1st defendant. I am of that view due to contradictions in evidence of PW1 and PW2. It was evidence of PW1 that, after the said purchase, he planted non-fruits trees on the said piece of land. On the other hand, PW2 testified that, at the time of purchase of the alleged piece of land, there were trees and that, PW1 did not plant any tree.

In their evidence, both the plaintiff(PW1) and PW2 stated that, neighbours did not witness sale agreement between 1st defendant and the plaintiff on ground that, there was not need or importance of the neighbours to witness. In absence of neighbours who witnessed the

alleged sale, it cannot be conclusively said that 1st defendant was the owner of the piece of land plaintiff alleged to have bought. More so, it cannot conclusively be said that it is the same piece of land that is now plot No. 580 block "N" Nyahanga Kahama. It is my view that, neighbours were supposed to be involved as witnesses to said sale to prove among other things that, the 1st defendant was the owner of the said piece of land and also prove boundaries of the said land. In the case at hand, evidence that 1st defendant, is the one who, on 15th November 2012 sold a piece of land to the plaintiff is questionable. No reason was advanced by the plaintiff for not calling the VEO and the other witness who witnessed the alleged sale instead, he chose only to call PW2, his close friend. In my view, that was done with the purpose. That is only what I can say for now.

It is disturbing that plaintiff having filed this case against the 1st defendant, on 19th April 2023 prayed an order be issued so that the case can be proved ex-parte against the 1st defendant as a result, the order was issued to that effect. More so, though the 1st defendant is competent and comparable witness, plaintiff took no trouble to make sure that 1st defendant appears before the court and testify in relation to the alleged sale of a piece of land. From where I am standing, it is unclear as whether, 1st defendant sold any piece of land to the plaintiff

or not because, there is no sale agreement that was tendered. The 1st defendant was supposed, either to confirm or to disapprove the statement by both PW1 and PW2. More so, it was the 1st defendant who, was supposed to clear doubt as to whether the piece of land he sold to the plaintiff if at all there was sale, is the same land namely plot No. 580 Block "N" Nyahanga that was sold by the 2nd defendant to the 3rd defendant.

Unfortunately, plaintiff in praying to prove the case ex-parte against the 1st defendant, closed the gate before passing through and threw gate keys in the pit latrine. When he realized that he wants to pass again through the same gate, the keys were nowhere to be found. In short, he blocked his own way. It is therefore my view that, submissions by counsel for the plaintiff that sale of suit land by the 1st defendant to the 4th defendant was unjustified cannot be entertained. As pointed out hereinabove, it is the plaintiff who blocked the gates of his own case when he prayed to prove ex-parte the case against both 1st and 4th defendants. Had he not blocked the passage, or had he made effort for the 1st defendant to be compelled under section 127 of the Evidence Act[Cap. 6 R.E. 2022], the truth would have known. Possibly, plaintiff feared the nature of evidence that would have been given by the 1st defendant had the later been compelled by the court to appear

and testify. Since Plaintiff blocked his own way, he cannot be heard now complaining. I am of that view because, the person who was supposed to unlock the puzzle as to what exactly piece of land plaintiff purchased, if at all he did, was the 1st defendant. I am of that further view, because, in his plaint, plaintiff did not give description of the land he alleges he bought from the 1st defendant. It was the duty of the plaintiff to give that description in his plaint to enable defendants to know from the beginning the disputed land. In fact, in the case of [**Martin Fredrick Rajab vs Ilemela Municipal Council & Another**](#) (Civil Appeal 197 of 2019) [2022] TZCA 434 (unreported) the Court of Appeal held:-

"From what was pleaded by the appellant, it is glaring that the description of the suit property was not given because neither the size nor neighbouring owners of pieces of land among others, were stated in the plaint. This was not proper and we agree with the learned trial Judge and Mr. Mrisha that, it was incumbent on the appellant to state in the plaint the description of the suit property which is in terms of the dictates of Order 7 rule 3 of the Civil Procedure Code [CAP 33 R.E 2019]..."

It was submitted by counsel for the plaintiff that, plaintiff claims that the suit land was surveyed without his involvement. With due respect to counsel for the plaintiff, that is mere submissions from the bar that cannot be acted upon because, they are not evidence. See the case of [**Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another**](#) (Civil Appeal 82 of 2017) [2018]

TZCA 297 Tanzlii, [2018] T.L.R. 58 [CA], ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others***, Civil Appeal No. 147 of 2006, [*Drtc Trading Company Ltd vs Malimi Lubatula Ng'holo & Another*](#) (Civil Application 89 of 2020) [2022] TZCA 352(unreported), [*Attorney General vs Mkongo Building & Civil Works Contractors Ltd & Another*](#) (Civil Application 81 of 2019) [2019] TZCA 229 Tanzlii, [2019] 1 T.L.R. 109 [CA], [*Zuberi Athumani Mbuguni vs National Bank of Commerce Limited*](#) (Civil Application No.311/12 of 2020) [2023] TZCA 17290 (unreported). I am of that view because there is no claim in plaintiff's evidence that the said plot was surveyed without his involvement. In his evidence, PW1 only stated that he requested for survey of the piece of land he bought from the 1st defendant and that, he got no reply from the District Council. That evidence cannot be similar to what Mr. Muheza submitted that the alleged piece of land was surveyed without involvement of the plaintiff.

It was further submitted by counsel for the plaintiff that, the 2nd defendant had no title to dispose to the 3rd defendant and further that, there is no evidence to prove that the said land was owned by the family of Idd Makira. Wit due respect to counsel for the plaintiff, evidence of DW1 is clear that, at the time of sale, 2nd defendant was in possession

of an offer for plot No. 580 Block "N" Nyahanga that was in the name of Halima Idd Makira and probate Form No. 4 showing that 2nd defendant was appointed as administrator of the estate of the late Halima Idd Makira. It was evidence of DW2 that, in his application letter seeking to be issued with a certificate of Occupancy, 3rd defendant attached sale agreement and probate Form No. 4 showing that the 2nd defendant was appointed as administrator of the estate of the late Halima Idd Makira. That evidence was not challenged in any way by the plaintiff. In my view, sale agreement (exhibit D1) which shows that 2nd defendant sold the said plot No. 580 block "N" Nyahanga as legal representative of the late Halima Idd Makira should be considered in totality with evidence of both DW1 and DW2. Exhibit D1 cannot be considered in isolation of other evidence on record.

It is my view that 2nd defendant did not sale the said plot No. 580 block "N" Nyahanga in his personal capacity. In my view, presence of probate Form No. 4 showing that 2nd defendant was appointed as administrator of the estate of late Halima Idd Makira was sufficient evidence for the 3rd defendant to know that 2nd defendant has power to dispose the said plot. The same was sufficient evidence to enable both the 5th and 6th defendant to register and issue a certificate of Occupancy in the name of the 3rd defendant. I am of that considered view because

both DW1 and DW2 were not shaken during cross examination. More so, their evidence was not contradicted or challenged by that of the plaintiff. In addition to that, there is no evidence showing that the 2nd defendant was not appointed as administrator of the estate of the late Halima Idd Makira. I therefore find that submissions by counsel for the plaintiff are without substance.

It was further submitted by counsel for the plaintiff that evidence of 3rd defendant is contradictory, confusing, and full of lies on how he acquired plot No. 580 block "N" Nyahanga and that, disposition of the said plot by the 2nd defendant to the 3rd defendant is tainted with illegalities, and fraud. With due respect to the learned counsel. I have examined evidence of the 3rd defendant (DW1) and find that there is no confusion, contradiction or lies whatsoever in relation to acquisition of plot No. 580 block "N" Nyahanga. Unfortunately, in his written submissions, the learned counsel, has failed to point out the alleged lies, confusions, or contradictions. In my view, it was not sufficient for the learned counsel, as an officer of the court, just to give out those statements without substantiating them with evidence on record. In addition to the foregoing, allegations relating to fraud and illegalities were not clarified by the learned advocate and there is no evidence by

the plaintiff in support thereof. Since there is no evidence on record to support those submissions, I find them as of no help to the plaintiff.

For the foregoing, it is my conclusion that, the piece of land with 180 square feet that is equivalent to 54 square meters according to evidence of PW2, or equivalent to 16.5 square meters according to evidence of DW2, cannot, in any sense, be plot No. 580 block "N" which is 1187 square meters. I therefore conclude that, the piece of land plaintiff alleges he purchased from the 1st defendant on 15th November 2012 is not the same as plot No. 580 block "N" that 3rd defendant purchased from the 2nd defendant on 15th September 2015. I therefore answer the 1st issue that, the 3rd defendant is the lawful owner of plot No. 580, Block "N", Nyahanga Kahama Municipality.

Having held hereinabove that the piece of land with 180 square feet that plaintiff alleges that he purchased on 15th November 2012 from the 1st defendant is not the same as plot No. 580 block "N" that 3rd defendant purchased from the 2nd defendant on 15th September 2015, I find it of less importance to discuss the 2nd issue namely, whether procedure for the grant of certificate of right of occupancy to the third defendant in the disputed plot was lawful. I find it unnecessary because the piece of land is different. However, for the sake of completeness, I

hold that, procedures were followed as it was testified by both DW1 and DW2. In fact, evidence of these two witnesses were not challenged.

In the final analysis, I hold that plaintiff has failed to prove his case at balance of probabilities.

For the foregoing I hold that 3rd defendant is the lawful owner of plot No. 580 block "N" Nyahanga Kahama municipality and that certificate of occupancy No. 1874 was properly issued to the 3rd defendant. I therefore dismiss this case with costs.

Dated at Shinyanga on this 15th November, 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 15th November 2023 in chambers in the presence of Rosemary Makori, Advocate for the Plaintiff and Bakari Chubwa Muheza, Advocate for the defendant.



B. E. K. Mganga
JUDGE

