

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 42 OF 2015

MOHAMED S. GHONA.....PLAINTIFF

Versus

MAHAMOUD MWEMUS CHOTIKUNGU.....DEFENDANT

Date of Last Order: 07/03/2018

Date of Judgment: 13/04/2018

JUDGMENT

S.A.N. WAMBURA, J:

MOHAMED S. GHONA instituted this suit against the defendant

MAHAMOUD MWEMUS CHOTIKUNGU for the following reliefs:-

- (a) Declaration that the plaintiff is the rightful owner of the suit premises.*
- (b) The defendant be removed from the suit premises and be restrained from interfering with the Plaintiff's peaceful and quit enjoyment of the suit premises and stop trespassing into the suit premises and/ or otherwise claiming or masquerading as the owner of the suit premises.*
- (c) Defendant be ordered to pay general damages to the plaintiff at the level the Court will deem fit to compensate for the hardship, pain, frustration and inconveniences the plaintiff has been suffering at the Defendant's intransigence.*
- (d) The Defendant pay costs of this suit.*

(e) Any other or further reliefs as the Court will deem fit to grant.

The defendant in his written statement of defence denied the entire allegations in the plaint and alleged that he is the lawful owner of the land in dispute having purchased it from Morogoro Regional Trading Company (MORETCO). He therefore prayed for dismissal of the suit with costs.

At the hearing of this case the plaintiff was represented by Mr. J.R. Kambamwene Advocate while the defendant was represented by Mr. Benitho Mandele Advocate.

The brief facts of this case are that the plaintiff bought the suit premises way back in 1996 from Morogoro Regional Trading Company under a receivership. That the plaintiff's initiated to transfer ownership of the suit premises to his name but his efforts were always frustrated by the defendant interfering by raising opposing claims by showing his forged documents hence he filed this suit to claim over the ownership against the defendant.

The defendant disputed the plaintiff's allegations by stating in his written statement of defence that the properties in dispute were

lawfully sold to him by the Morogoro Regional Trading Company (MORETCO) before it was wound up.

Before the commencement of the hearing of the suit, two issues were framed to be determined by the Court being:-

(1) Who is the lawful owner of the suit premises?

(2) To what reliefs are the parties entitled to?

In supporting his case, the plaintiff **Mohamed S. Ghona** (Pw 1) invited one witness namely Happiness Nyabunya (Pw 2).

On the defence side the defendant **Mahamoud Mwemus Chotikungu** (Dw 1) testified himself to support his case.

Both counsels filed their final written submissions as scheduled. I am thankful to them as the submissions have been helpful in the writing of this judgment.

I will now move to determine the issues which were raised in this case in seriatim.

1. Who is the lawful owner of the suit plots?

It is a common principle of law that the one who alleges has to prove the same. This has been so provided under the provisions of Sections 110 and 111 of the Evidence Act which provide inter alia that whoever desires any Court to give judgment as to any legal right which he asserts must prove these facts exist. **Section 110 of the Evidence Act, 1967, Cap 6 R.E. 2002** which places the burden of proof on he who alleges by stating *inter-alia*:

"110. (1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

(3) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person

In the case of **ABDUL KARIM HAJI VS RAYMOND NCHIMBI ALOIS AND ANOTHER Civil Appeal No. 99 of 2004** (unreported) where the Court of Appeal held that;

".....it is an elementary principle that he who alleges is the one responsible to prove his allegations"

Thus the burden of proof of the same at the required standard is left to the plaintiff being the one who alleges.

What this Court is to decide upon is whether the burden of proof has been discharged by the plaintiff.

According to the evidence on record the plaintiff testified that he is the lawful owner of the disputed plots No. 16, 17 and 18 situated at Ifakara Town, Viwanda Street having purchased the same from the receiver one Majar and Rwechungura Advocates. He stated that before that he was a tenant of RTC for five years. Thereafter RTC was under receivership hence he went to the Management of RTC and asked for the procedure of purchasing the disputed plots. He averred that he was given a form which he filled it and returned to them. He tendered the form which was admitted as Exhibit P 2.

Pw 1 further stated that he purchased the disputed plots and was given a transfer of a right of occupancy by RTC. That the process of transfer failed because the defendant also claimed ownership

over the disputed plots. He therefore prayed to this court to grant his prayers as prayed. His evidence was supported by the testimony of one Happiness Nyabunya (Pw 2) who confirmed that the Board of Directors namely Charles Rwechungura, Mwajuma Maajar and Kameja are the ones who sold the disputed plots to the plaintiff.

On the other hand the defendant disputed the plaintiff's allegations by testifying that he is the lawful owner of the disputed plots having purchased the same from RTC Morogoro on 1994 for the sum of Tshs. 8,000,000/=. That after the purchase, he went to the Ministry of Lands for transfer of the ownership but the same could not proceed because he was told by the Ministry of Lands that the plots are in dispute as the plaintiff also claimed ownership of the same. He stated that he then filed a suit at the District Land and Housing Tribunal on which he was declared as the lawful owner of the disputed plots.

He averred that the plaintiff being aggrieved by the said decision filed a suit at the District Land and Housing Tribunal which was

struck out, and thereafter he filed a Civil Case No. 15/2014 at the High Court at Dar es Salaam Registry whereby he and the plaintiff entered into a Deed of Settlement before Hon. Mutungi J. He tendered the Deed of Settlement which was admitted as Exhibit D 1.

During the hearing of the plaintiff's case, the plaintiff conceded that he filed an application in the District Land and Housing Tribunal for Kilombero District challenging the decision of the same Tribunal which declared the defendant as a rightful owner of the suit land, the fact which was also admitted by the defendant in his defence.

The court record further shows that after the plaintiff lost in the District Land and Housing Tribunal for Kilombero District at Ifakara, he decided to file Civil Revision No. 15 of 2012 the High Court of Tanzania, Dar es Salaam to challenge the decision of the District Land and Housing Tribunal for Kilombero District. The result of the said Civil Revision No. 15 of 2012 was a Memorandum of Amicable Settlement dated 9th August, 2012 by Hon. Mutungi, J.

It is from the above evidence that this court finds the defendant as the lawful owner of the disputed plots. This is because the Deed of Settlement (Exhibit D 1) clearly shows that the plaintiff herein admitted to surrender all his rights over the disputed plots and grant the ownership of the same to the defendant. For clarity the agreement reads as follows; I quote;

THE APPLICANT and RESPONDENT (Mohamed Selemani Ghona and Mahhamoud Madenge Chotikungu) respectively; HEREBY AGREE as follows:-

" 1. That the applicant (Mohamed Selemani Ghona) hereby recognizes the decision of the District Land and Housing Tribunal for Kilombero/Ulanga dated 25th day of August 2009 declaring the respondent(Mahamoud Madenge Chotikungu as the rightful owner of the whole parcels of lands known as plots No. 16, 17 and 18 Block "A", V/60 Ifakara Kilombero which previously known as plots No. 333,334 and 335, Ifakara Industrial Block and which were previously owned by Morogoro Regional Trading Company Limited(Morogoro RTC) and which the said Morogoro RTC sold to Mahamoud MADENGE Chotikungu and later on Consolidated Holding Corporation sold the same to Mohamed Selemani Ghona.

In the circumstances, I believe the evidence herein adduced is not sufficient to prove that the plaintiff is the lawful owner of the suit premises as he had already transferred his rights over the disputed plots to the defendant on 23rd August 2012.

In fact this matter is actually res judicata and I cannot set aside the Deed of Settlement thereto filed.

(2) What reliefs are the parties entitled to?

Having found that the matter is res judicata then I believe the plaintiff is not entitled to be granted any of the reliefs prayed for in this suit.

In the circumstances, the suit is accordingly dismissed with no order as to costs. This is because had the defendant raised this earlier the case would not have been in Court for this long and we would not have taken trouble to hear the matter.


S.A.N. WAMBURA
JUDGE
13.4.2018