

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 70 OF 2019

**PRIMITIVA PATRICK KAMUGISHA as administratrix of
the estate of the late ALISTIDES PATRICK BABIKI.....PLAINTIFF**
VERSUS

ABINURI MOHAMED.....1ST DEFENDANT
MZEE MRISHO MATITU.....2ND DEFENDANT

Date of Last Order: 18/10/2021

Date of Judgment: 28/10/2021

JUDGMENT

MKAPA, J:

The plaintiff, Primitiva Patrick Kamugisha is suing the defendants in her capacity as an administratrix of the estate of the late Alistides Patrick Babiki. She was granted letters of administration in **Probate and Administration Cause No. 125 of 2016** at the Buguruni Primary Court. She claims that, the piece of land measuring one acre situated at Kigero area, Vikuge village, Kibaha District in Coast Region (the suit land) forms part of the deceased estate. She is praying for judgment and decree against the defendants for the following reliefs: -

- i. A declaration that she is the lawful owner of the suit land.
- ii. A declaration that the defendants have trespassed unto the suit land.
- iii. An order for vacant possession from suit land against the 1st defendant.



- iv. An order for demolition of permanent structures erected on the suit land.
- v. Payment of shillings 100,000,000/= being misuse of the plaintiff's suit land by the 1st defendant.
- vi. Payment of general damages and costs of the suit.

The 1st defendant filed written statement of defence disputing all claims by the plaintiff and prayed for the suit to be dismissed with costs.

When the hearing commenced Mr. Mutakyamirwa Philemon, learned advocate appeared for and represented the plaintiff, while the 1st defendant had the services of Mr. Ngalaba Abel. The matter proceeded ex-parte against the 2nd defendant and the following issues were drawn for determination;

1. Who is the lawful owner of the suit land.
2. Whether the 1st defendant has trespassed unto the suit land.
3. What reliefs are the parties entitled.

It was plaintiff's case through PW1 that the deceased, Alistides Patrick Babiki (plaintiff's young brother) on 15th March, 2004 acquired by way of purchase the suit land from one Mzee Mrisho Mzee (Exhibit P1). That, on 24th February, 2005 Alistides Patrick Babiki passed away. Following his demise the plaintiff travelled abroad (Cuba) to pursue further studies. It was her further testimony that when he left for Cuba he left behind her elder sister Winfrida and one Fatuma (deceased). That, Fatuma was entrusted with taking care of the suit land upon her request by engaging in subsistence agriculture.

She further testified that, when she returned to Tanzania in 2014 she visited the suit land and found a house built thereon. She arranged with the ten-cell leader to meet the owner of the house. After a month they

met with the 1st defendant together with ten-cell leader of the area and they took photographs (Exhibit P3). She testified further that, after the meeting the 1st defendant offered her a piece of land measuring 15 paces from the edge of the house to the East towards the road and 15 paces to the West. It was her further testimony that, upon consultations with her family members in Bukoba the family declined the offer hence she instituted the instant case. She prayed for this Court to declare her the lawful owner of the suit land as an administratrix of the deceased estate through letters of administration in **Probate and Administration Cause No. 125 of 2016** at Buguruni Primary Court (Exhibit P2). Secondly, she prayed for this Court to declare the defendant a trespasser and further order her to vacate the suit land. Thirdly, this Court to order demolition of the house erected on the suit land together with payment of Tshs. 100,000,000/= being compensation for misuse of the plaintiff's suit land.

When cross examined PW1 conceded the fact that the sale agreement does not specifically mention the location of the suit land, but maintained that, the same was witnessed by a ten cell leader of the area. It was her further testimony that, her sister Winfrida filed a complaint before the Vikuge Ward Tribunal which decided in favour of one Islam Mbaraka (1st defendant's husband) because the complainant in that case who is PW1's sister was yet to be appointed as administratrix of the estate of the deceased as she filed the said complaint in her individual capacity.

It was her testimony that, the suit land borders Mr. Abdallah Omar Mdudu to the East, Mr Mzee Mrisho Mzee to the North and Mzee Kipofu to the South. She refuted the allegations that, Fatuma was the

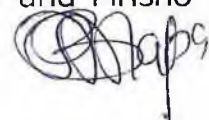


deceased's wife and further that, had she been the wife of the deceased she would have been appointed as administratrix of the deceased estate.

PW2's testimony corroborated the evidence adduced by PW1 to the effect that, he happened to have known the deceased, Alistides Patrick Babiki as his colleague teacher. That, he witnessed the sale transaction in 2004 in which the deceased purchased the suit land from Mzee Mrisho. He further testified that, Alistides Patrick met his demise a year later (2005), and after his death he noticed some developments on the suit land and the deceased's wife (Fatuma) informed PW2 that she had disposed of the suit land.

The defence's evidence was generally that, the 1st defendant was the lawful owner of the suit land. DW1, Abinuri Mohamed, maintained that the suit land on which they built a three bedrooms house with a dining place, prayer room, kitchen and sitting room was lawful acquired by way of purchase. It was her further testimony that she purchased the suit land from Fatuma Ramadhani at a purchase price of four million Shillings in December 2011. That, Fatuma Ramadhani assured her that she was the lawful owner of the suit land after she had acquired through purchase from one Mzee Mrisho. She further stated that, the same position was confirmed by the village government leaders and neighbours to Mzee Mrisho.

DW1 further testified that, the sale agreement was witnessed by a street leader one Rashid Mpute and leaders of the village government who attested with the village government's stamp. She further identified her neighbours as Abdallah Omar Mdudu, Hamis Mshuko, Peter and Mrisho



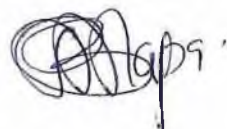
Mzee. That, in 2015 is when the plaintiff's sister first complained at the Vikuge Ward Tribunal but the tribunal decided in favour of her husband and declared him a lawful owner of suit land. DW1 explained further that, the village government is responsible for managing the affairs of the village including land allocation and since the village government was involved in the sale transaction, she is not a trespasser. She prayed for this Court to declare her a lawful owner of suit land because the plaintiff failed to prove ownership and the plaintiff's sale agreement does not disclose the location of the suit land.

On cross examination, DW1 stated that, Fatuma Ramadhani did not hand over to her any document evidencing the fact that the previous owner before Fatuma Ramadhani was Mzee Mrisho. She further stated that, the sale transaction was concluded at the office of the village government.

DW2's evidence was that, he happened to know the 1st defendant and also witnessed for the buyer in the sale transaction between Fatuma and 1st defendant. He further testified that, he was not related to Fatuma only that, they were neighbours at Kigero and that, he and Fatuma both purchased land from the same Mzee Mrisho.

While cross examined he conceded not to have witnessed the sale transaction between Fatuma and Mzee Mrisho.

DW3' evidence generally corroborated evidence by DW1's and testified that, he witnessed the sale transaction between Fatuma and the 1st defendant. It was his further testimony that he happened to know Fatuma as his neighbour at Kigero. That, Fatuma purchased the suit land from Mzee Mrisho (his father) and the village government was involved.

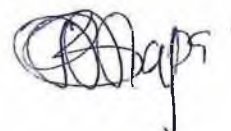


While cross examined, DW3 denied to have known the deceased though he was born and raised at Kigero. He stated that, the suit land belonged to the 1st defendant because his father (Mzee Mrisho) had once informed the village leaders that he sold the suit land to Fatuma, he conceded not to have witnessed the sale.

Having elucidated the evidence obtained from the witnesses and the exhibit tendered, prior to getting into determining the issues framed I found it opportune to mention from the outset that, the law is settled in civil cases that the burden of proof lies on the party who alleges anything in his favour. [See; Section 110 of the Law of Evidence Act Cap 6 [R.E 2019]. This legal position is underscored in **Anthony M. Masanga V. Penina (Mama Mgesi) & Lucia (Mama Anna) Civil Appeal No. 118 of 2010** (Unreported) where the Court observed;

".....Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour"

Turning to the first issue as to who is the lawful owner of the suit land, undoubtedly this is a question of evidence. In her testimony PW1 testified that the deceased Alistides Patrick Babiki purchased the suit land in 2004 from Mzee Mrisho Mzee. She tendered Exhibit P2 in support of her testimony namely, the sale agreement "HATI YA MANUNUZI YA SHAMBA" between Mzee Mrisho Mzee (the vendor) and Alistides P. Babiki (the buyer). PW2 testified in support of his testimony that, he witnessed the sale transaction as witness to the buyer.



It is established that, the sale agreement does not mention the location of the suit land except for the size which is one acre and the sale transaction was witnessed by Mr. Seif Shaban Setebe a ten-cell leader. Additionally, (Exhibit P2) was stamped with stamp duty from the Tanzania Revenue Authority (TRA) Ilala offices. On cross examination the counsel for the 1st defendant challenged as the reason for effecting stamp duty payment at Ilala while the suit land is located at Kibaha District.

Section 5 (1) of the Stamp Duty Act, reads;

5.-(1) Every instrument specified in the Schedule to this Act and which—

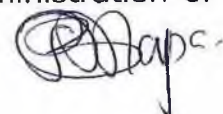
(a) is executed in Tanzania Mainland; or

(b) if executed outside Mainland Tanzania, relates to any property in Mainland Tanzania or to any matter or thing to be performed or done in Mainland Tanzania, shall be chargeable with duty of the amount specified or calculated in the manner specified in that Schedule in relation to such instrument.

A reading from the above legal provision it is plain clear that, the same does not limit payment of stamp duty within the locality in which the sale agreement is executed hence what matters is payment to be effected as the per assessment made.

The plaintiff claims ownership of the suit land having being granted letters of administration of the estate of the deceased Alistedes Patrick Babiki in **Probate and Administration Cause No. 125/2016** at Buguruni Primary Court.

While cross examined the counsel for the 1st defendant challenged the plaintiff as to the reason for petitioning for letters of administration of

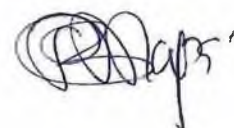


the estate of the late Aristedis at Buguruni Primary Court instead of Kibaha where the deceased demised and the suit land is located thus renders his appointment illegal.

It is worth noting at this juncture the fact that, the question as to whether the appointment of the plaintiff as administratrix of the estate of Alistides Patrick's is illegal or otherwise is no doubt a probate matter which ought to be determined by the court presiding over the probate and administration cause thus cannot be determined in the present suit. What is to be determined by this court is whether the plaintiff has managed to prove on balance of probability that the deceased is the owner of suit land thus forming part of the deceased estate of which the plaintiff has been granted letters of administration.

More so, Exhibit P1 was tendered at the hearing and the counsel for 1st defendant did not object for its admissibility into evidence. Objecting the same at this stage amounts to an afterthought which this court cannot act upon.

In her testimony the plaintiff testified that, when they met at the suit land with the defendant accompanied by the street leader, the 1st defendant had offered a piece of land measuring 15 paces to the East towards the road and 15 paces to the West. During cross examination 1st defendant did not object to that testimony and further confirmed to have no grudges with the plaintiff and they even took photograph together. My view is, the fact that the 1st defendant offered the plaintiff the area within the suit land measuring 15 paces to the East and 15 paces to West, it is as good as an acknowledgment by the 1st defendant that the suit land belonged to the deceased thus the 1st defendant had an obligation return the same to the plaintiff.



It is the evidence of DW1 that, she purchased the suit land from one Fatuma Ramadhani in 2011 at a purchase price of shillings six million and witnessed by village government officials and DW2. However, the sale agreement was not duly stamped with Stamp Duty as required by Section 47 of the Stamp Duty Act Cap 189 [R.E 2019]. Hence the agreement was rendered inadmissible as required by the law. The relevant section is reproduced hereunder;-

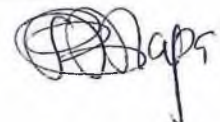
"47 No instrument chargeable with stamp duty shall be admitted in evidence for the purpose by any person having by law or consent of parties' authority to receive the evidence or shall be acted upon, registered in evidence authenticated by such person or by any public officer, unless such instrument is duly stamped"

A reading from the above provision, failure to comply with the requirements of section 47 renders the agreement inadmissible. This position is fortified by the decision of the Court of Appeal of Tanzania in **Zanzibar Telecom Ltd Vs. Petrofuel Tanzania Ltd (Civil Appeal No. 69 of 2014) [2019] TZCA** whereby the Court observed;

".....that section instructs that no instrument chargeable With duty shall be admitted in evidence unless such Instrument is duly stamped, except under conditions stipulated in clause (a) to (e) thereof....."

This position was echoed in **Zakaria Barie Bura Vs. Theresia Maria John Mubiru [1995] TLR 211** in which the Court held;

"The sale documents did not bear any stamp duty and were thus inadmissible in evidence"



Guided by the above legal position the learned counsel for the 1st defendant ought to have been aware of the mandatory requirement of section 47.

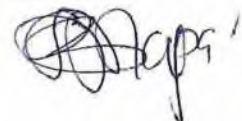
As I have mentioned earlier, the 1st defendant relied on her proof of ownership of the suit land by her testimony and that of DW2 and DW3. Evidence adduced by DW2 and DW3 in support of what was stated by the 1st defendant is that she purchased the suit land from Fatuma Ramadhani whom she had purchased the same from Mzee Mrisho Mzee. However, as challenged by the plaintiff's counsel these are mere stories as no material evidence was adduced after this court rendered the sale agreement between the 1st defendant and Fatuma Ramadhani inadmissible.

Additionally, in terms of section 8 (4) of the Village Act, Cap 114 [R.E. 2019] the village council is the sole organ responsible for the management of land as trustee of the village land for and on behalf of the villagers as its beneficiaries. This include the power to allocate land subject to prior approval of the village assembly.

It is undisputed the fact that, the land in dispute is a village land. However, none of the testimonies tendered by either party proved how and when the village council was involved in allocating the suit land.

The Court of Appeal of Tanzania in **Paulina Samson Ndawavya V. Theresia Thomas Madaha CAT, Civil Appeal No.45 of 2017** (Mwanza- unreported) observed the following on how to discharge a burden of proof in civil case;

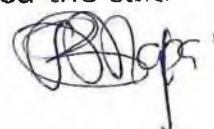
".....that degree is well settled. It must carry reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal



*can say - **We think is it more probable than not, the burden is discharged.**"*

Now in determining the first issue as to who is the lawful owner of the suit land, the law is settled that a person who alleges must prove and the standard of proof in civil cases is on balance of probabilities by weighing the weightier evidence. See **Geita Gold Mining Ltd & Another Vs. Ignas Athanas**, Civil Appeal No. 227 of 2017; **Antony M. Massanga Vs. Penina (Mama Mgesi) & Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 (both unreported).

In the present case weighing the evidence adduced by both parties in proving the ownership of the suit land, I am satisfied that the plaintiff's evidence is more weightier thus managed to discharge his duty by proving ownership on balance of probability. The reason why I hold so is that, the plaintiff apart from tendering Exhibit P1 which granted her letters of administration of the estate the deceased, she also tendered Exhibit P2 (Sale agreement). Though the same did not mention the location of the suit land, the plaintiff managed to identify neighbours to the suit land and the same was not objected by the defendant thus the non -mention of the location of the suit land is just an oversight. More so, the defendant's readiness to offer the plaintiff 15 paces to the East and 15 paces to west within the suit land as testified by the plaintiff and not objected by the defendant, tantamount to acknowledgment by the defendant that the suit land belongs the plaintiff. The plaintiff also summoned PW2 who happened to have witnessed the sale



transaction between the deceased Alistides Patrick Babiki and Mzee Mrisho Mzee.

That said, it is the finding of this court that the plaintiff has managed to prove her case on balance of probability as the plaintiff's evidence appears weightier to that of the defendant. Thus the plaintiff is the lawful owner of the suit land situated at Kigero, Vikuge Village, in Coast Region.

On the second issue, as to whether the 1st defendant has trespassed into the suit land, having resolved that the plaintiff is the lawful owner of the suit land, the second issue is answered in the affirmative.

As regards the 3rd issue as to what relief(s) are the parties entitled, the plaintiff prays for an order for demolition of the house located at the suit land. She further prays for an order for payment of Tshs. 100,000,000/= being misuse by 1st defendant of suit land thus depriving the plaintiff of use the suit land.

I have considered the prayers by the plaintiff and the fact that, the 1st defendant has on her own decided to build a house on the suit land, she no doubt has benefited on the suit land for all that period. Hence she has deprived the plaintiff from peaceful enjoyment of the suit land. Therefore I make the following orders;

- i. The plaintiff is declared the lawful owner of the suit land located at Kigero area Vikuge village, Kibaha District in Coast Region.
- ii. The defendants are hereby declared trespassers to the suit land.
- iii. The defendant is ordered to immediately vacate the suit land, and demolish all permanent structures on the suit land.



iv. Each party to bear own costs.

It is so ordered.

Dated and Delivered at Dar-Es-Salaam this 28th day of October, 2021.




S.B. MKAPA
JUDGE
28/10/2021