

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

LAND CASE NO. 124 OF 2019

SOPHIA MOHAMED FARAHANI.....PLAINTIFF

VERSUS

JOSHUA JOYBOY MUNGEREZA.....1ST DEFENDANT

JOSEPH JOSHUA MUNGEREZA.....2ND DEFENDANT

Date of Last Order: 08.04.2022

Date of Judgment: 29.04.2022

JUDGMENT

V.L. MAKANI, J

This suit is by SOPHIA MOHAMED FARAHANI. She has come to this court seeking for the following orders:

- (a) *Declaratory order that the plaintiff is a lawful owner of the farm/land situated at Bunju A, Mkoani Village within Kinondoni District.*
- (b) *Perpetual injunction restraining the defendants from interfering with the plaintiff's farm situated at Bunju A, Mkoani Village within Kinondoni District.*
- (c) *An order requiring the defendants to vacate and demolish houses built by the defendants in the disputed land.*

- (d) *An order cancelling the Certificates of Title granted to the 1st defendant.*
- (e) *Payment of general damages to be assessed by the court.*
- (f) *Payment of interest on (e) above from the date of judgment until full payment at 12%.*
- (g) *Costs.*
- (h) *Any other relief (s) this honourable court deem fit and just to grant.*

In this case the plaintiff was represented by Mr. Tarzan Mwaiteleke, Advocate, while the defendants were represented by Mr. Akiza Rugemalira, Advocate.

The following were the framed issues:

1. *Who is the lawful owner of the suit land namely the land located at Bunju A Mkoani Village measured at 3 acres (the **suit land**).*
2. *Whether the 1st defendant is a trespasser to the suit land.*
3. *To what reliefs are the parties entitled to*

The plaintiff was the first witness (**PW1**). She said she bought the suit land from James Muhoja Petro Shija on 12/03/1998 and she paid TZS 450,000/=. She said her brother-in-law Emmanuel Haule

connected her with Hamisi Rashid Mpoli and that the seller James Muhoja is his friend. She said they inspected the land, and she was accompanied by Abdulaziz Mohamed in presence of the seller and Hamisi Mpoli. She said the land had cassava and banana trees and it measured 3 acres. She said upon satisfaction she made payment according to the Sale Agreement (**Exhibit P1**). She said there was a Confirmation of the Agreement that was signed on 20/09/2019 (**Exhibit P2**). The **plaintiff** told the court that she started farming in 1999 and she planted palm trees, mango and guava trees. She said she also built a small house ("*kibanda*") with two bedrooms and a toilet in 2000. The small house was built as a security to hold the land so that no one else would take the land, as she had intention of moving and residing at the suit land. Further in her testimony she said there was a caretaker in 2001 to 2006 known as Juma and in 2007 the 1st defendant put someone in the small house known as Mpare who lived there until 2008 whereas her daughter, Amina Yusuph, moved in the said house up to early 2010 when she left for Zanzibar. In the same year Charles and his family moved in the small house and they are living there to date.

The plaintiff said she knows the 1st defendant, he was his side friend ("*concubine*") since 1992. She said she bought the suit land using her own money and did not want to involve the 1st defendant though he was her friend, but he came to know about the suit land in 1999 when she started working on the land and she took him to the said land. She said in 2001 there was a "*fundl*" known as Justin and another one known as Kipara and they started a foundation and two small houses which were complete in 2005. She said the 1st defendant incurred costs of these new developments because he was her lover ("*Bwana Yangu*") and this was known to the neighbours.

The Plaintiff went on saying that the 1st defendant had promised to bring a surveyor but that was not done instead the caretaker Charles told her that the son of the 1st defendant was building a house. She said she visited the suit land in 2018 and found a building which was almost complete and when he called the 1st defendant he turned around and told her that she was poor and she could not own such land. She decided to go to the Regional Commissioner (then Hon. Makonda) who referred her to the District Commissioner who advised her to write a complaint and in return they gave her a recommendation letter (**Exhibit P3**). She said there was a

Committee which mediated the dispute, and they advised the 1st defendant to handover the suit land to her, but he refused so she decided to come to court. She insisted that the 1st defendant is not the owner of the suit land and the defence that she and Emmanuel Haule were witnesses to the purchase made to him is not true because the 1st defendant does not know Emmanuel Haule. She said there was a case at the Ward Tribunal between the 1st defendant and his neighbour Angelista Makundi and she went to show the boundaries of the suit land accompanied by the seller. She said the survey in the name of the 1st defendant is wrong because the suit land does not belong to him and he did it behind her back. She said the Certificate of Title that has been annexed to the plaint is questionable because there is no Sale Agreement annexed. She prayed for the court to declare that the Certificate of Title in the name of the 1st defendant was obtained unlawfully and she also prayed for demolition of the house built on her land, compensation, and costs of the case.

In cross examination the plaintiff maintained that the suit land was sold to her by James Mhoja Petro Shija and when she bought the land the area was a forest. She said **Exhibit P2** is a confirmation of what

was agreed upon in 1998 it was not a new agreement. She admitted that at the Ward Tribunal she was a witness for the 1st defendant who was sued by Angelista Makundi. She also admitted that James Mhoja Petro Shija was also a witness and testified that he sold the land to the 1st defendant. she also said the suit land in reality is about 2¼ and not 3 acres as stated in the plaint as part of the land was taken away (*"ilimezwa"*). She admitted that the 1st defendant is known in the area by neighbours and she also agreed that he participated in water project. But according to the **plaintiff** he did this because he was her lover and she acknowledged that when they started their relationship, he had a family. She said she is not claiming any property belonging to the family but what they acquired together. She said she came to court because the 1st defendant did not adhere to the recommendations by the District Commissioner. She conceded that she has not complained to the Ministry of Lands about the Certificate of Title in respect of the suit land which is in the name of the 1st defendant.

PW2 was James Petro Mhoja and he said he knew the plaintiff since 1998 when he sold the suit land to her. He said Hamisi Rashid Mpoli was the one who introduced her to him. He said he sold the suit land

on 12/03/1998 and Hamisi was his witness and on the part of the plaintiff it was Abdulaziz Mohamed. He said the land was given to him as a gift by his bosses Edwin and Agnes Hoza and at the time he sold the suit land it was boarded by forest. He said he sold the suit land at TZS 450,000/= to the plaintiff who later showed the land to his husband the 1st defendant. He said he did not know the 1st defendant, it was the plaintiff who introduced him. He said he has never sold the suit land in 1997 to anybody but to the plaintiff in 1998. He said he remembers that he was called to show the boundaries of the suit land in a case between Angelista Makundi and the 1st defendant. he said his bosses who gave him the land also gave him a letter as proof to that fact (**Exhibit P4**). Before the sale of the suit land there were steel rods surrounding the suit land to demarcate it and these were instilled in 1997.

On cross-examination **PW2** said his name is James M. Petro and the name appearing on **Exhibit P1** is James M. Petro Shija and in school he used the name Mhoja Serengeta Shija. He said he did not have any ID that had the names of James M. Petro but the National ID has the name of Mhoja Serengeta Shija. He asked the court to identify him as James M. Petro Shija. **PW2** admitted that the letter from his

bosses did not give any explanation of the neighbours it only mentions "*shamba la Bunju*". He admitted that Bunju is a big area and there are many farms.

PW3 was Rashidi Mpoli. He asserted that he knows the plaintiff since when she bought the suit land on 12/03/1998. He said the plaintiff was introduced to him by Emmanuel Haule. He said after inspection of the suit land, they were satisfied and they paid for the land on the same day at TZS 450,000/=. He said he was with **PW2** and the plaintiff was with Abdulazizi and they later signed as witnesses.

On cross examination he said after the sale the plaintiff called **PW2** and him in order to show the piece of land to his husband the 1st defendant. He said it was about three months after the sale and they showed them the boundaries of the suit land. He said after the sale he has not been on the suit land until 16/08/2021 when he was called as a witness by the plaintiff who was taking photos of the area and she said she was doing so because it was her land.

PW4 was Karim Iddi Mshakangoto. He said he knew the plaintiff since 2000 when she asked him to construct her house in the suit land. He

said he built a house of only two rooms from October, 2000 to December, 2000 and he came to understand that the suit land belonged to the plaintiff. He said he was introduced to the 1st defendant by the plaintiff who he understood were living like husband and wife.

PW5 was Charles Dismas Mmasi. He said he has been on the suit land since 2010 as a caretaker. He said he was permitted to live in the suit land by the plaintiff but after consultation with the 1st defendant. He said when he first went to the suit land there were two unfinished houses and a foundation. He said there is another house by the 2nd defendant of which construction started in 2012. He said when the 2nd defendant started building, he told the plaintiff and she used to come to the suit land. He said he knows the relationship of the plaintiff and 1st defendant as that of a husband and wife.

PW5 could not state for sure who was the owner of the property, but he insisted that he could not have lived in suit land without the permission of the 1st defendant.

On cross examination he emphasized that he cannot state that the suit belongs to the plaintiff or the 1st defendant, but he said it belongs

to the plaintiff who never comes to the suit land quite often. He admitted that the 1st defendant is well known in the area. He said he has never heard any complaints from the local leaders (*Mjumbe Serikali ya Mitaa*) that the 2nd defendant was constructing a house in the plaintiff's land. He said there are plots for the other children of the 1st defendant within the suit land and he has told the plaintiff about this. He said the division of the plots is after the survey which was initiated by the 1st defendant. He said the suit land is known as belonging to the 1st defendant.

PW6 was Amina Yusuf Migoko. She said she is the daughter of plaintiff. She said she lived in the suit land from 2008 to 2010 when she left for Zanzibar. She said she was allowed to live in the house by the plaintiff and she did some renovation to the house. She said she was living with the father of his child one Salmin Patrick. She told the court that she decided to live in the suit land because it was close to the school where she was doing business. She said she knows the 1st defendant as her guardian ("*Baba Mlezi*") and she has known him since she was in Class 5. She said the 1st defendant used to assist her with school fees, uniforms, books until she completed Form VI. She said Mohamed and Mussa, her younger brothers, all knew the 1st

defendant as their guardian father. She said while living at the suit land the 1st defendant used to visit and bring water because there was a problem of water. To her understanding the owner of the suit land is the plaintiff.

On cross examination **PW6** said she did not know when the plaintiff acquired the suit land. She just saw a document saying that the plaintiff bought land from James. She said she did not see the size of the suit land in the document and did not see who witnessed the said document. She said she has never seen the plaintiff doing any construction works on the suit land. She did not know who did the construction of the foundations and who was responsible for the payments but she kept on emphasizing that the 1st defendant was taking care of them as their father.

The first defence witness was the 1st defendant (**DW1**). He said the case against him is not genuine as the suit land belongs to him. He said he bought the suit land from James Petro in 1997. He said the suit land was surveyed and a Certificate of Title was issued. He said there are plots within the suit land and he has given it to his children namely Joseph (2nd defendant), Nelson and Vicktam Mungereza. The

1st defendant tendered the letter applying for survey and the Certificate of Title No. DSMT10001427 as **Exhibit D1** and **D2** respectively. He said during the survey neighbours were involved and they signed forms (**Exhibit D3**). He said he got the suit land when he was looking for a place to keep his animals. He said the plaintiff who was his friend connected him with his brother-in-law Emmanuel Haule and he directed them to James Petro. He said all four of them went to the suit land and after inspection he paid TZS 300,000/= for the 2½ acres. He said the transaction was in the house of Emmanuel Haule and he paid in cash. He said, unfortunately the document for Sale was lost/misplaced and he reported to the police who directed him to go to court and he went to Kinondoni District Court. Thereafter he published the loss of the Sale document in Nipashe Newspaper. The Police Loss Report was admitted as **Exhibit D4**, the affidavit as to loss as **Exhibit D5** and the Advert in Nipashe Newspaper as **Exhibit D6**. He said he cleared and cultivated the suit land and in 2000 neighbours joined together in a Water Project and each household was supposed to pay TZS 100,000/=. He said the plaintiff has never participated in the development of the suit land or cultivated any crops.

The 1st defendant said in 2005 he was sued at the Ward Tribunal by Angelista Makundi for trespass in her land. He said all those who were involved in the sale transaction of the suit land were his witnesses including James Petro, Emmanuel Haule and the plaintiff. The judgment of the Ward Tribunal (**Exhibit D7**) was in favour of Angelista Makundi. He said there is a dispute with the other neighbour Mwarabu and there are minutes to that effect (**Exhibit D8**). He said the fence of the school is within the suit land but the dispute has not been resolved yet. He said the claims by the plaintiff are baseless as she only participated in the transaction and she is not the owner of the suit land and nothing can be cancelled or demolished. He said the evidence of the plaintiff and her witnesses in this case are pre-arranged.

On cross examination the 1st defendant said he is not the husband of the plaintiff and **Exhibit P1** shows that the suit land is in Bunju A which is a very big area. There is no proper description. He said **Exhibit P2** which is a Confirmation of **Exhibit P1** is different. He prayed for the court to dismiss the suit. The defendant further admitted that in the Loss Report and the Newspaper Advert (**Exhibits D4 and D6**) there is no year of when the 1st defendant bought the

suit land. He also admitted that in the Affidavit of Loss (**Exhibit D5**) the name of the seller is not reflected.

DW2 was Joseph Joshua Mungereza who is also the 2nd defendant. He said the area he is living now is owned by him since 2012. He said the plot was given to him as a wedding gift by his father (the 1st defendant) and mother on 22/09/2012. In the same year he erected cement poles and in 2013 he started mobilizing building materials. In 2014 he started construction. He said though the house is not fully completed but it is habitable, and he has been living in the said house since 2017. He said according to the Certificate of Title the plot has 1500 square meters (**Exhibit D9**) and it is in his name. He said his neighbours are Victor Mungereza (P9767), Joshua Joyboy Mungereza (P9768) and Nelson Joshua Mungereza (P9766). He said the 4 plots were surveyed and Certificate of Titles were granted and so the claim of trespass is not true. As for **Exhibit P1** he said it is very general and the suit land cannot be 3 acres but approximately 2½ acres. He said he does not know why there is Confirmation (**Exhibit P2**) while the buyer and seller are present and so is the Sale Agreement. He said **Exhibit P2** contains a lot of additions and he said it may also be a new Agreement. He further observed that in **Exhibit P2** though the

witnesses are not reflected but the land is described; while in the Sale Agreement **Exhibit P1** the land is not described. He said the decision of the Committee by the District Commissioner in **Exhibit P3** was purposely intended to favour the plaintiff as he was not given an opportunity to be heard. He said on 15/08/2021 the plaintiff and her group came to the suit land and started to take measurements. He said no Local Leader was present and even when the leader came the plaintiff continued with what she was doing. He said he wrote to the court to complain because the plaintiff said he was sent by the court. The letter of complaint is **Exhibit D10**. He said maybe the plaintiff came to get the details of the suit land because in the plaint it is reflected as 3 acres but here in her testimony she said the land is 2¼ acres. He said he has a Certificate of Title and since then he has not received any complaint. He prayed for the suit to be dismissed with costs.

On cross examination he said he has a Certificate of Title and the Commissioner for Lands who is not a party to this suit knows of the genuineness of the said Certificate of Title. He insisted that the small house was built by Justine and he used to ferry him to the site in 2003 and by then he was about 25 years. He admitted that he has never

seen the Sale Agreement of the suit land between his father and **PW2**.

DW3 was Angelista Samweli Makundi. She said she knows the 1st defendant and in December 1997 she came to know that they were neighbours and share boundaries. She said in 2003 she found that part of her farm, about ½ an acre, was invaded. She said she informed the Local Leader who informed the people who were clearing the land to stop. He also called the 1st defendant who did not turn up and the people continued to cultivate the land and plant cassava and other crops. So, she decided to take the matter to the Ward Tribunal as Land Dispute No. 60 of 2005. She said at the Tribunal she was the complainant against the 1st defendant who called **PW2**, the plaintiff, Emmanuel Haule and Ausi Salehe as his witnesses. She said **PW2** at told the Tribunal that he sold the suit land to the 1st defendant at TZS 500,000/=. He said the first time she saw the plaintiff was when they went to visit the site to show boundaries together with the sellers, Hemed on her part and **PW2** on the part of the 1st defendant's. She said **PW2** said the suit land was given to him by Hoza who bought it from Ausi Saleh. She said the plaintiff at the Ward Tribunal said she witnessed when the 1st

defendant was purchasing the suit land. She said the Ward Tribunal decided in her favour as per **Exhibit P7**. She said after the judgment the 1st defendant withdrew from her land and they have lived happily thereafter but she is surprised that the plaintiff is claiming to be owner of the suit land while at the Tribunal she was a witness for the 1st defendant.

DW3 said further that she signed the survey forms to state that she was the neighbour of the 1st defendant and she participated in village issues with the 1st defendant including the water project where they all paid TZS 100,000/=. She further said she has not seen the **plaintiff** at the suit land or in the village meetings except when she came for the site visit as ordered by the Tribunal. She said she is aware that the 1st defendant has divided the suit land into plots to his sons. She said the suit should be dismissed as it has no merit.

On cross examination **DW3** said the judgment of the Ward Tribunal was signed by the Secretary of the Tribunal only and it said that the 1st defendant did not bring the original Sale Agreement but a copy. She said at the Tribunal the relationship of the plaintiff and the 1st defendant was that of a defendant and witness.

Justine Butamanya Rwabona (**DW4**) testified that he was the one who built the small house (*kibanda*) at the suit land. He said he knew the 1st defendant from 1990 and he used to work for him in building and renovation of his houses. He said in 2003 he was instructed by the 1st defendant to build an emergency small house in the suit land. He wanted the house for purposes of keeping a caretaker who would watch the crops because they were being destroyed. He said they did a foundation of two rooms, and one room had two windows while the other had one window and the each of the rooms had a door. He said afterwards, the 1st defendant's wife gave him a window because one of the windows was blocked by cement. He said the window was not given to him by the plaintiff but the 1st defendant's wife. He said he knows the plaintiff because he was instructed by the 1st defendant to renovate and build a milk shack for her ("*kibanda cha maziwa*") in Kinondoni where the plaintiff was residing close by. He said he has never built any other house at the suit land and he said he does not know **PW4** who allege to have constructed the small house. He said the two bedroomed house was the only building on the suit house in 2003. He said if building equipment were needed at the site it was the 2nd defendant or Kamugira (another employee) who were sent to

deliver them. He said he was always under the instruction of the 1st defendant and he has never collaborated with anyone else in building the small house at the suit land. On cross examination **DW4** said in 2003 he did not find any foundation on the suit land and he built the small house within two weeks. He said he has never been on suit land after completion of the construction of the small house.

Yohana Malogo (**DW5**) was the Local Leader (*Mwenyekiti wa Shina No. 21, Mkoani Street, Bunju*), since 2000. He said he knows the plaintiff and the defendants. He said he first met the 1st defendant in 1998. He said their office is opposite the suit land. He said he knew the dispute between Angelista Makundi and the 1st defendant which ended through the Ward Tribunal. He said he knew the plaintiff from 2019 when he came with a letter from the District Commissioner, saying that the letter was just for records as she has been given the right to the land. He said he told the plaintiff to bring a letter which was stamped by the District Commissioner, but she did not do so.

DW5 said on 15/08/2021 he got a call from the 2nd defendant that they were people in his home. And when he went, he found the plaintiff with other people including **PW5** taking measurements of the

area. When he asked the plaintiff what she was doing, she told him that she was under the instructions of the court and this was not his business so he left. He said when he went back to the office, he just wrote a report of what he saw (**Exhibit D11**). He said he understands that the suit land belongs to the 1st defendant since 1998 when he first arrived in Bunju A and he has never seen the plaintiff in the area except when she brought the letter from the District Commissioner, and the second time is when she saw her measuring the suit land and taking photos. He said all residents are known to him and the 1st defendant always informs him if there are new people in the suit land.

DW6 was Mr. Mabunduki Lugendo. He said he knew the 1st defendant since 1997 when he bought the suit land. He said **PW2** told him he had land in the said area given to him as a gift by his boss Hoza, and he showed him the letter from his boss. He said in 1997 he was caretaker of the land of **DW3** and **PW2** accompanied by the 1st defendant, a woman, and another guy came and inspected the suit land and left. He said he did not see the lady clearly, but he saw her at the Ward Tribunal when there was a case between **DW3** and the 1st defendant. He said at the time they bought the land the area was

a thick forest so measurements were difficult. He said that they assisted the 1st defendant to clear the land and plant crops. He said the suit land is known to belong to the 1st defendant and he has never seen the plaintiff doing any activities on the said land. On cross examination he insisted that the suit land was bought by the 1st defendant in 1997.

DW7 was Safiel Mkodo Senzige. He said he knows the defendants but not the plaintiff. He said he has known the 1st defendant since 2008 when he was a caretaker and living in the suit land. He said in 2010 he was employed to construct three foundations. He said he was living in the small house in the suit land. He said he left early 2012. He said he did not know the plaintiff as she has never invited him in the house or chased him away. He said he was in the suit land from 2008 to 2012 and the Local Leaders knew him. He said after he left a lady lived for a short time and then **PW5** the current caretaker moved in. He said he was paid by the 1st defendant to build the foundations. He repeated that he does not know the plaintiff and he has never seen her.

In his final submissions, Mr. Mwaiteleke for the plaintiff pointed out two procedural irregularities. He said the defendants did not get leave to file their WSD to the Amended plaintiff and secondly, the defendants presented 7 witnesses without leave as opposed to what they stated in the First Pre-Trial Conference. He prayed for the WSD to the Amended plaintiff and the testimonies of **DW6** and **DW7** be expunged from the record.

As for the first issue, Mr. Mwaiteleke submitted that from the evidence the plaintiff has proved that she is the lawful owner of the suit property. He said the plaintiff proved that she bought the suit property from James Petro (**PW2**) who also testified that he sold the suit property to the plaintiff. He said **Exhibits P1** and **P2** also corroborates the sale. He said the Loss Report, affidavit as to loss and the advert in Nipashe Newspaper (**Exhibits D4, D5** and **D6**) which were obtained after the survey has to be disregarded as they were an afterthought. He said the **Exhibit D5** does not state from whom the 1st defendant bought the suit property. He said the affidavit mentions the name of the person who sold property to the 1st defendant at Wazo but does not state the seller of the suit property in Bunju. He also pointed out that **Exhibit D5** states that the 1st

defendant purchased the suit property in 1998 but in his testimony he said that he bought the property in 1997. He observed that even in the Ward Tribunal the Sale Agreement between the 1st defendant and **PW2** was not tendered, and **DW2** also confirmed that he had not seen the Sale Agreement between his father and **PW2**. He concluded by submitting that the 1st defendant had never possessed or entered into agreement with James Petro as alleged.

Mr. Mwaiteleke further submitted that since the 1st defendant admitted that he got the Certificate of Title without the Sale Agreement or the Loss Report then the said Certificate was obtained fraudulently. He said the defendants did not call any officer from the Ministry of Lands as such the court should draw an adverse inference that if the witnesses were called then it would have been contrary to the interests of the defendant. He relied on the case of **Hemedi Said vs. Mohamed Mbilu [1984] TLR 113** and **Dominic Singooi Kivuyo vs. The National Bank of Commerce Limited, Land Case No. 115 of 2016 (HC-Land Division)** (unreported).

Mr. Mwaiteleke went on submitting that there was no proof that the 2nd defendant was given the suit land by the 1st defendant and there

were no facts pleaded that the defendants built their house and made unexhausted improvements immediately after purchase of the suit property. He said the testimony of **DW4, DW5, DW6** and **DW7** were afterthoughts, conflicting and wanting and the credibility of these witnesses is questionable. He said the plaintiff's witnesses were credible and **PW5** and **PW6** proved the actual occupation by the plaintiff and **PW4** proved that he built the small house under the instruction of the plaintiff. He said that a party is bound by his pleadings and the testimonies of the defendants' witnesses is not backed by the WSD to the Amended Plaint. He relied on the cases of **Georgia Celestine Mtikila vs. Registered Trustees of Dar es Salaam Nursery School & Another [1998] TLR 512** and **James Funke Gwagilo vs. Attorney General [2004] TLR 161**, **Fatma Idha Salum vs. Khalifa Khamis Said [2004] TLR 423** and **Barclays Bank (T) Limited vs. Jacob Muro, Civil Appeal No. 357 of 2019 (CAT-Mbeya)**(unreported) where it is stated that parties are bound by their pleadings.

Mr. Mwaiteleke submitted further that the plaintiff has proved the case to the required standards according to section 110 of the Evidence Act CAP 6 RE 2019 and the cases of **Lamshore Limited &**

J.S. Kinyanjui vs. Bizanje KUDK [1999] TLR 330 and **Mwalimu Paul John Mhozya vs. Attorney General [1996] TLR 229** and **East African Road Services Limited vs. J.S. Davis & Co. Limited [1965] EA 676**. He also submitted that the plaintiff's case has more weight and credibility as in the case of **Melitat Naiminjal & Loishalaani Nakiminja vs. Saileveo Laibangali [1998] TLR 120** and **Damson Ndaweka vs. Ally Aid Mtera, Civil Appeal No/ 5 of 1999 (CAT-Arusha)**(unreported). He thus said the issue should be answered that the plaintiff is the lawful owner of the suit property located at Bunju A, Mkoani Village measured at 3 acres.

As for the second issue Mr. Mwaiteleke submitted that since it has been established that the suit property belongs to the plaintiff, it is clear that the defendants are trespassers in the suit property. As to what are the parties entitled to? Mr. Mwaiteleke repeated the reliefs prayed for in the Amended plaint.

In his final submissions on behalf of the defendants Mr. Rugemalira started by narrating the evidence by the parties. As for the first issue he prayed to adopt the WSD to the Amended plaint and further submitted that the defendants have proved this case on balance of

probabilities and thus they are the true owners of the suit property under the Certificate of Title issued by the Minister for Lands as per **Exhibits D2** and **D9**. He also relied on section 33(1) of the Land Registration Act CAP 334 RE 2019 which provides that the owner of any estate shall except in case of fraud, hold the same free from all estates and interests. He further said **Exhibit P1** which was relied by the plaintiff does not specifically state the location of the suit property and **Exhibit P2** which is Confirmation of the Sales Agreement does not state the reasons for the plaintiff and **PW2** having such a Confirmation. He was of the view that the Confirmation was prepared to cure the weaknesses in the Sale Agreement. Mr. Rugemalira continued to state that **Exhibit P3** reflects the name James Petro while under **Exhibits P1** and **P2** the name appearing is that of James M. Petro Shija which is a different name. He went on to say that **Exhibit P3** has no merit because it was given by Kinondoni District Commissioner who has no power to determine Land Disputes in terms of section 3(1) and (2) (a)(b)(c)(d) and (e) of the Courts (Land Disputes Settlement) Act RE 2019 and thus whatever directive that was issued by the District Commissioner is a nullity on the face of the law.

Mr. Rugemalira said the plaintiff and **PW2** alleged that the suit property was 3 acres but during hearing the plaintiff said it was 2¼ acres without saying where the other part went. He said it was evidence of the 1st defendant, **DW6** and **Exhibit 7** that the land in dispute was bought by the 1st defendant in the presence of the plaintiff and Emmanuel Haule and it was not disputed that the 1st defendant had a boundary with **DW3**. He said the plaintiff and **PW2** could not explain how they concluded a Sale Agreement while they were the 1st defendant's witnesses in 2005/2005. He said the defendants' evidence was heavier as per the case of **Hemed Said vs. Mohamed Mbillu** (supra). Mr. Rugemalira further said whoever alleges must prove but the plaintiff has failed to do so according to the evidence and wondered how **Exhibit P4** remained in the hands of **PW2** while he said he sold the suit land to the plaintiff. He further observed that **PW2** admitted having used different names in different transactions though he had no Deed Poll to prove the alleged names by him. He concluded that the plaintiff has failed to prove her case on balance of probabilities as no evidence was tendered to prove the existence of her rights over the suit property unlike the defendants who brought witnesses who are neighbours and familiar over the suit

land. He said the evidence of **DW3, DW5** and **DW6** justify that they know that the suit property is owned by the 1st defendant since 1997.

As for the second issue on trespass, Mr. Rugemalira said there is nothing like trespass as the suit land belongs to the 1st defendant. He further said the allegations in the plaint that the 1st defendant demolished a house and cut trees in 2010 was not proved. He further wondered why the plaintiff did nothing from 2010 when the alleged trespass was conducted to 2019 when this suit was filed. He said he who alleges must prove and this has not been done by the plaintiff. He relied on the case of **Abdul Karim Haji vs. Raymond Nchim Aloyce & Joseph Sitta Joseph [2006] TLR 420** and section 110,111 and 112 of the Evidence Act. He prayed for the suit to be dismissed with costs in its entirety.

Before tackling the issues raised, I would wish to address the irregularities that were raised by Mr. Rugemalira in his final submissions. At the outset I would wish to state that the observation on the irregularities is an afterthought and without merit. In my considered view, the said irregularities ought to have been raised in the course of the hearing when all the parties had an opportunity to

respond thereof. Raising them at this stage is condemning the defendants unheard and this is an injustice on their part. Further, the issue of leave to file WSD has no merit because this court on 20/10/2020 granted the defendants leave to file their WSD to the amended plaint on 25/11/2020 and an extension was granted on 08/12/2020. This argument is therefore misplaced.

Now, addressing the main issues I will be guided by the principle that whoever alleges must prove as asserted by Counsel for the parties.

This principle has been embodied in Section 110 of the Law of Evidence which reads:

(i) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove those facts exists.

(ii) 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 **Anthony M. Masanga Vs. Penina Mama Mgesi & Lucia (Mama Anna) Civil Appeal No. 118 of 2014** (unreported)

the Court of Appeal in underscoring this principle stated:

".....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 in his favour." '

In commentaries by Sarkar's Law of Evidence 18th Edn., MC. Sarkar, S.C. Sarkar and P.C. Sarkar, it was observed at page 1896 as follows that:

".....the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.....until such burden is discharged, the other party is not required to be called upon to prove his case, The Court has to examine as to whether the person whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of the weakness of the other party....."

The plaintiff has alleged that she is the owner of the suit land. But it is on record from the hearing that the 1st defendant is owner of the suit land by virtue of the Certificate of Title (**Exhibit D2**).

Section 2 of the Land Registration Act Cap 334 R.E 2019 the term owner has been defined to mean;

"in relation to any estate or interests the person for the time being in whose name that estate or interest is registered. "

The above legal position was illustrated in **Salum Mateyo vs. Mohamed Mateyo (1987) TLR 111** where the court held:

"This means, any presentation of a registered interest in land is prima facie evidence that the person so registered is the lawful owner of the said land."

Also, the Court of Appeal in **Amina Maulid Ambali & 812 Others vs. Ramadhani Juma Civil Appeal No 35 of 2019 (CAT Mwanza)** (unreported) observed:

"In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawful obtained."

It is apparent from the above provision of the law that through the said **Exhibit D2** and **D9** the defendants have managed to establish that they are the lawful owners of the suit land as the title deeds granted to them **Exhibits D2** and **D9** is a conclusive proof that the said land belongs to them. Indeed, the plaintiff is claiming that the survey was not properly done but there is no proof to that effect as there was no officer from the Ministry of Lands who came to testify about the survey and about the fact that the Certificates of Titles were not properly granted. **DW3** was among the neighbours who was involved in the survey by showing the boundaries and she participated in the said exercise by virtue of **Exhibit D3**. In view thereof, the Sale Agreement presented by the plaintiff cannot in any way supersede

the Certificate of Titles that were granted to the defendants to prove their ownership of the suit land.

Further the evidence of the defendants clearly shows that at the Ward Tribunal the plaintiff and **PW2** were witnesses for the 1st defendant. And PW2 testified that he was the one who sold the suit land to the 1st defendant. This meant the plaintiff and **PW2** acquiesced and supported that the 1st defendant was the owner of the suit land. The plaintiff is therefore estopped from claiming ownership of the suit land because she earlier on at the Tribunal testified to have witnessed the sale transaction between **PW2** and the 1st defendant. There is also the fact that the plaintiff is unknown to the neighbours and **DW5**, the Local Leader, testified that his office only recognises the 1st defendant and not the plaintiff as the owner of the suit land.

I have noted that there are a lot of doubts in the evidence by the plaintiff. For instance, there was no plausible explanation as to why there would be a Sale Agreement and a Confirmation thereof (**Exhibits P1** and **P2**). If at all the Sale Agreement was genuine and conclusive then a Confirmation was unnecessary because the purpose of the confirmation was not reflected anywhere and the witnesses

including the plaintiff were not led in evidence to clearly explain the purpose of the confirmation. Further, what was confirmed is different. As correctly said by Mr. Rugemalira the Confirmation was intended to cover up the gaps that were not reflected in the alleged Sale Agreement including the description of the suit land.

Another doubt is that the plaintiff did not know the size of the suit land. In the plaint it is stated 3 acres but in her testimony she said 2¼ acres and part of the land was swallowed (*"ilimezwa"*). But the plaintiff did not state how the land was swallowed to reduce the acreage. In his final submissions on behalf of the plaintiff the acreage of the suit land is reflected as 3 acres. The inconsistency means the plaintiff did not know the actual measurements of the suit land which she claimed to be the owner. With these doubts, the balance of proof therefore leans more in favour of the defendants.

The plaintiff categorically stated that the District Commissioner recommended by virtue of **Exhibit P3** that the suit land belongs to her. But as correctly stated by Mr. Rugemalira, the District Commissioner is not among the machinery provided by law to resolve land disputes by virtue of Section 3(1) and (2) (a)(b)(c)(d) and (e)

of the Courts (Land Disputes Settlement) Act. In any case the decision/recommendation by the District Commissioner of 03/09/2019 came after the defendants were granted their Certificates Of Title in 28/05/2019 and 16/09/2019 respectively as such it is only the courts who are entitled to nullify the grant of the Certificates already granted to the defendants. With the above analysis it is an obvious fact that the 1st defendant is the owner of the suit property. The plaintiff has failed to prove ownership of the suit land to required standards of the law. The first issue is therefore answered in the favour of the defendants.

Having established the ownership of the suit land the second issue is straight forward that the 1st defendant is not a trespasser to the suit land. In other words, the owner of the suit property cannot at the same time be a trespasser. Subsequently, the second issue is answered in the negative.

As for the final issue what reliefs are the parties entitled? The plaintiff has claimed general damages to be awarded by the court. The court discretionarily awards general damages after taking into consideration all relevant factors of the case (see the case of **Cooper**

Motor Corporation Limited vs. Moshi Arusha Occupational Health Services [1990] TLR 96). In the present instance, it is apparent that the injury/loss on the plaintiff (if any) in this whole transaction was not actuated by the defendants thus I do not find it necessary to award any damages to the plaintiff and I hold as such.

According to the case of **Hemed Said vs. Mohamedi Mbilu** (supra), both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win. And in this case, it is evident that the evidence by the defendants is heavier. And for the reasons I have endeavoured to address, the plaintiff has failed to prove the case to the standards of law required and as previously stated the balance leans in favour of the defendants.

In the result, the suit is without merit and it is hereby dismissed with costs. The plaintiff is not entitled to the reliefs prayed in the plaint or at all. It is so ordered.


V.L. MAKANI
JUDGE
29/04/2022

