

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 119 OF 2022

SOGECOA TANZANIA LIMITED..... PLAINTIFF

VERSUS

SYLVIA SIMOYO SAIDI NAMOYO (*As administratrix of the estate of
SAID NAMOYO*) **DEFENDANT**

JUDGMENT

Date of last Order: 17.03.2023

Date of Judgment 30.03.2023

A.Z. MGEYEKWA, J:

At the centre of controversy between the Plaintiff and the Defendant is a landed property standing on Plot No. 2129 Block 'A' Makongo Juu in Kinondoni within the City of Dar es Salaam (henceforth the suit premises). The material facts of this case are very brief and not difficult to comprehend. They go thus: in the year 2018, the Plaintiff bought the suit land from Massimo De-Amicis after satisfying that he was the lawful

owner of the suit premises. According to the plaint, the Plaintiff after complying with all the requirements successfully applied to the relevant land authority for the transfer of the Right of Occupancy.

Sometimes in November 2021, the Plaintiff noted that without colour of right and justification, the Defendant falsely and maliciously represented herself as Administratrix of the estate of the late Said Namoyo and mislead various Government Authorities that she is the lawful owner of the suit land. Following the Defendant's harassment, threats, and misrepresentation to various authorities on ownership of the suit land which caused unnecessary disturbance and interruption of the Plaintiff's peaceful enjoyment and possession of the property. The Board of Directors of the Plaintiff passed a resolution to allow the filing of the instant suit.

The Plaintiff lodged this suit claiming against the Defendant for the following reliefs;

1. Declaration that the Plaintiff is the lawful owner of Plot No. 2129, Block "A" Makongo Juu within Kinondoni, in Dar es Salaam, with Certificate of Title No. 123225 (suit land).
2. An order for a permanent and perpetual injunction to restrain the Defendant, its agents, successors, or assignees from harassing, intruding, interfering trespassing, or interrupting upon the plaintiffs' peaceful enjoyment and possession of Plot No. 2129, Block "A"

Makongo Juu within Kinondoni, in Dar es Salaam, with Certificate of Title No. 123225.

3. An order for payment of punitive damages to the tune of Tanzania Shillings 100,000,000/= following the Defendant's illegal, unlawful, and unwarranted acts;
4. An order for payment of general damages as may be assessed by the Honourable Court;
5. An order for recovery of legal costs and expenses in undertaking and pursuing this suit, including but not limited to the court fee for issuing proceedings and any other costs and expenses incurred by the plaintiff's following damages suffered and continue to be suffered by each of the plaintiffs; and
6. An order for grant of any other and further reliefs as this Honourable court shall deem fit and just to grant.

In response to the Plaint, the Defendant filed a Written Statement of Defence and a Counter Claim. The Defendant disputed all the claims and urged this court to dismiss the entire Plaint with costs and allow the Counter Claim. The Plaintiff in Counter Claim is praying for the following Orders:-

1. Declaratory order that, the Defendant's conducts are unlawful and unjustifiable as a trespasser.

2. A declaratory order against the Defendant for eviction and vacate the possession of the premises.
3. An order for payment of accrued rent as pleaded hereinabove.
4. An order for payment of Tshs. 5,000,000/= being monthly rent from the date of trespassing to the date of judgment.
5. An order for payment of interests to the principal sum from the date of judgment to the date of payment in full.
6. General damages as it may be assessed.
7. Cost of the suit be borne by the Defendant.
8. Any other reliefs as this Honourable court deemed fit and just to grant.

During the hearing of the case before this Court, the Plaintiff was enlisted by Mr. Alphonse Peter Kubaja and Ms. Miriam Moses, learned Advocates, while the Defendant was represented by Mr. Andrew Chima, learned Advocates.

Upon completion of all preliminaries, the Final- Pre Trial-Conference was conducted and the parties had agreed upon on 15th February 2023 Court recorded the following three issues:-

1. *Who is the lawful owner of the suit land.*
2. *Whether the defendant unlawfully and without justifiable cause trespassed the plaintiffs' landed property (counter claim).*
3. *To what reliefs are the parties entitled to.*

The Plaintiff's case was founded on three witnesses; Kelvin Vitus Kipeta, who testified as PW1, James Kinyasi Millya who testified as PW2 and Herman Edward Masinga who testified as PW3.

The Defendant called 2 witnesses; Sliyvia Simoyo Said Namoyo who testified as DW1, P20766 Insp. Morris Tura who testified as DW2.

The Plaintiff tendered a total of twelve documentary exhibits to wit; A copy of Certificate of Cooperation (Exh.P1) dated 13th January 2016, a Search Report and Affidavit (Exh.P2 collectively), Land Registry (Exh.P3), a letter in regard to Plot No. 2129 Block 'A' Makongo Juu Dar es Salaam dated 29 June 2018 (Exh.P4), a Form dated 27 June 2018 (Exh.P5), a Certificate of Approval of Disposition dated 29 June 2018 (Exh.P6), a copy of Certificate of Title. No. 123225 (Exh.P7), a copy of the Building Permit dated 2 August 2018 (Exh.P.8). A copy of the Certificate of Incentive (Exh.P9), a copy of the Environmental Impact Assessment Certificate (Exh.P10), a copy of 7 days' Notice dated 13 December 2021 (Exh.P11), an original Board Resolution of SOGECOA (Exhibit P12).

On her side, the Defendant tendered three exhibits; a Letter of Probate and Administration of the Estate of Said Ally Salum Namoyo (Exh.D1), a letter dated 24th December 2006, and two Public Notice dated 21st December 2016 (Exh.D2), a Certified copy of an Italiano Passport (Exh.D3).

In his effort to prove his case PW1, Kelvin Vitus Kipeta testified that he is an Assistant Commissioner for Land, Dar es Salaam Region. PW1 testified to the effect that according to their records, in 1958, Plot No. 2129 Block 'A' Makongo Juu Kinondoni DSM CT 123225 measuring 5.18 acres, was allocated to Gillian Stanly. In 2000, Gillian Stanley transferred the ownership to Massimo De Amicis and he was registered as a buyer.

PW1 went on to testify that in 2010, De Amicis surrendered the Right of Occupancy for the re-surveying of plots. He said that as per the requirement of the law, De Amicis had to surrender the Title before changing the usage of the Plot. In 2011, the re-surveying exercise was done and Plot No. 2129 Makongo Juu was created in 2013, a new Title was issued to Mr. Massimo De Amicis.

PW1 continued to testify that Sylvia (DW1) lodged a complaint in their office that she has an interest in the suit land, however, the Commissioner for Land did not find any relevance of her claims in connection to the suit land. PW1 said that the letters from the Street Government in regard to Sylvia's claims are irrelevant to the information which they have in their records. They directed DW1 to submit relevant documents in regard to the said ownership such as a letter of administration of the estate and sale agreement, but DW1 did not comply with the directives, she only attached an affidavit of Jillian declaring that he sold the suit land to someone else.

James Kinyasi Millya (PW2), a Director of SEGECOA Company in Tanzania registered in 2016. PW1 said that he is a majority shareholder for the Plaintiff and in 2018, the Company bought the suit land from Massimo, In support of his testimony, he tendered a copy of the Certificate of Cooperation dated 13th January 2016 as an exhibit and the same was marked exhibit P1. According to PW2, before buying the suit-landed property, the Company conducted an official search and confirmed that Massimo was a registered owner of the suit-landed property. To substantiate his testimony, he tendered Official Search documents and an affidavit which were admitted and marked as exhibit P2 collectively.

PW2 went on to testify that they had to pay a fee of Tshs. 80,000/= for transferring the Title and the Kinondoni Municipal issued them with a receipt. To substantiate his testimony, he tendered payment receipts dated 29th June 2018, a letter in regard to Plot No. 2129 Block 'A' Makongo Juu Dar es Salaam (Exh.P3), a prescribed Form titled dated 27th June 2018 (Exh.P5).

He testified further that the transfer of ownership from Massimo to their Company SOGECOA was successful. To substantiate his testimony, he tendered a copy of the Certificate of Approval of Disposition dated 29th June 2018 (Exh.P6) and Certificate of Title No. 123225 (Exh.P7).

In his testimony, PW2 stated that after the transfer, they obtained a building permit and planned to construct a hotel. To substantiate his

testimony, he tendered a copy of the Building Permit dated 2nd August 2018 which was admitted as exhibit P8. He testified that they headed to the investment center and obtained a Certificate of Incentive for tax evasion. To substantiate his testimony, PW2 tendered a copy of a Certificate of Incentives which was admitted as exhibit.P9. Thereafter they applied and obtained a Certificate of Environment Assessment. To substantiate his testimony, he tendered a copy of the Environmental Impact Assessment Certificate which was admitted as Exh.P10.

PW2 testified that they could not fulfill their dream to construct a 10-floor building after Sylvia Simoyo (DW1) claimed that she is the owner and in December 2021, PW2 received a notice intending to sue the Plaintiff. To substantiate his testimony, he tendered a copy of 7 days' Notice dated 13th December 2021 (Exh.P11).

PW2 testified to the effect that the DW1 was harassing people and causing nuisance claiming that she is the administratrix of the estate of her late father. According to PW2 testimony, the Plaintiff convened a board meeting and the board issued a board resolution to sue the Defendant and his agents. To substantiate his testimony, he tendered an original copy of the Board Resolution of SEGOCEA which was admitted as exhibit P12. PW2 ended by urging this Court to declare the Plaintiff as the lawful owner of the suit landed property and the Defendant to pay costs of the suit.

Herman Edward Masinga testified as PW3 working with Kinondoni Municipal and among his duties is to prepare Certificate of Titles, transfer of ownership, and prepare revocation of Certificate of Title. He testified to the effect that the law allows a Tanzanian to buy a piece of land and a foreigner must pass through Tanzania Investment Center. PW3 said that their records reveal that the Plaintiff bought the suit-landed property from Massimo De Amicis. PW3 said that they received an application for transfer from Massimo De Amicis to the Plaintiff and in 2018 the transfer was effected. According to PW3, the Plaintiff is the lawful owner of Plot No. 2129 Makongo Juu which was registered in 2013.

During cross-examination, PW3 testified that the sale agreement was between Massimo De Amicis and SOGECOA Tanzania LTD and all procedure in transferring the suit landed property was adhered to and the Company was registered.

The first Defendant, Slivia Simoyo Said Namoyo resisted the Plaintiff's claims with some force. In the Written Statement of Defence and through her testimony, DW1 countered that the Plaintiff is not the lawful owner of the suit land. DW2 testified to the effect that, she is aware that the suit land belongs to Jillian and her husband Donald Stanely since 1958. She testified that Stanley sold the suit land to her late father and he died without paying the outstanding amount. PW1 testified that after their father's death, family members appointed Hamis Namoyo to administer the estate

of her late father. Hamis Namoyo passed away hence they appointed Kasimu Makanga as an administrator of her late father's estate who rented the suit landed property to a Massimo, Italian Citizen. She testified that in 1994, Massimo delayed paying house rent, therefore, her uncle Kassimu reported the matter to Makongo Police Station but still, Massimo did not pay the outstanding rent. DW1 testified that later she was appointed to administer the said estate. To substantiate her testimony, she tendered a letter of Probate and Administration of the estate of the Said Ally Salum Namoyo which was admitted as exhibit D1.

According to DW1 testimony, she meet Jillian who narrated the genesis of the suit landed property and informed her that she is the one who sold the suit land to her late father. But, unfortunately, Jillian could not give her any document instead she had to swear an affidavit that he was the lawful owner of the suit landed property and sold the same to Said Namoyo.

She testified that she reported the matter to Street Government who tried to search for Massimo to no avail. To substantiate his testimony, she tendered a letter dated 24th December 2006 and two Public Notices dated 21st December 2016 which were admitted as exhibit D2. According to DW1, they had to report the matter to Oysterbay Police Station, and Massimo was arrested.

During cross-examination, DW1 testified that she was appointed to administer the estate of her late father in 2015 (Exh.D1), the exhibit D1 read she was appointed to administer the estate of her late father in 2005.

The second Defence witness was P20766 Insp. Morris, a Police Officer working at Oysterbay Police Station in the Criminal department, said that his duties are to investigate cases, collect exhibits and various evidence, and interview suspects. DW2 further testified that in 2015, DW1 opened a claim file at the Oysterbay Police Station against one Massimo. DW1 testified that he inspected Massimo and found him in a possession of an Italian passport and a Title Deed. DW2 said that Massimo has forged the documents. To substantiate his testimony, he tendered a certified copy of an Italian Passport which was admitted as Exh.D3. DW2 testified that Lee Dingh, bought the suit-landed property from Massimo while Lee Dingh was a non-citizen.

DW2 further testified that the first owner of the suit landed property was Jillian and Massimo bought it from Jilian. He testified that in transferring the titled deed number changed. He testified that the Title Deed is issued for usage of 33, 66, and 99 years but this Title Deed is forged and reads 56 years.

Having heard the testimonies of both parties and considering the final submission of the learned counsel for the Plaintiff and Defendant, I should

state at the outset that, in the course of determining this case I will be guided by the principle set forth in civil litigation and which will guide this Court in the course of determining this suit. Section 110 of the Evidence. Act. Cap.33 [R.E 2019] places the burden of proof on the party making the assertion that partly desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows: -

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Similarly, In the case of Hemedi Said v Mohamedi Mbilu (1984) TLR 113 it was held that "he who alleged must prove the allegations".

Similarly, in the case of **Abdul Karim Haji v Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal held that:-

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

Equally, in the case of **Anthony M. Masanga v Penina (Mania Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT) (unreported) where it was further held that:-

"The party with legal burden also bears the evidential burden on the balance of probabilities."

See also the cases of **Charles Richard Kombe v Evarani Mtungi and Two Others**, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Limited v Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported).

Another salient principle of the law, which is applicable in civil litigation and which will guide this Court in the course of determining this suit is "*Parties are bound by their pleadings.*" Pleadings in this sense include the Complaint, Written Statement of Defense, affidavits, and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the complaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted.

At the close of the defence case the parties were allowed to make final submissions in terms of Order XXVIII of the Civil Procedure Code, Cap.33. Counsels for the parties have been timeous in filing their final submissions. I commend the three Counsels for being time observant.

In resolving the controversy before me, the above underlying principles, and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, pleadings together with the final

submissions by the learned counsels, and with earlier framed issues by the court will be resolved seriatim.

As already alluded to hereinabove, before me, there are three issues for determination. The first issue is *who is the lawful owner of the suit land.*

Section 2 of the Land Registration Act, cap 334 R. E 2019 states that,

“Owner” means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered;”

The analyses of this issue reveal that the parties herein lock horns on who is the lawful owner of the suit property. In circumstances where two parties are competing on ownership over the suit land, the one with the Title Deed will have an advantage over the one who has not. In the case of **Amina Maulid Ambali & 2 Others v Ramadhani Juma**, Civil Appeal No. 35 of 2019(unreported) where the Court of Appeal held that:-

“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....”

In a chronological account of the ownership of the property, I have scrutinized the evidence and documentary evidence such as the Certificate of Title. The Plaintiff to prove his ownership the Letter of Offer issued The Plaintiff alleged that he is the lawful owner of the suit land which he bought from Massimo De Amicis in 2018. PW2 stated that suit

land was originally allocated to Gillian Stanley in 1958. PW2 added that in 2000 Gillian Stanley transferred the ownership to Massimo De Amicis and he was registered as a lawful owner, then Massimo De Amicis transferred the ownership to the Plaintiff who transferred the ownership of the suit landed property to his name.

The above evidence was supported by PW1's testimony who is working as assistant Commissioner for land. PW1 confirmed that in their registry of is no record in relation to the ownership of the suit landed property which the suit lands in connection with the defendant.

I have scrutinized the evidence and documentary evidence such as the Official Search Reports (Exh.P3) conducted by the Plaintiff before buying the suit land. Certificate of Title (Exh.P7) and Certificate of Approval of Disposition (Exh P6) which prove that the Plaintiff has proved his ownership of Plot No. 2129 Block 'A' Makongo Juu in Kinondoni within the City of Dar es Salaam.

Moreover, the Plaintiff proved his allegations of ownership by tendering a Certificate of Approval of Disposition dated 29 June 2018 (Exh. P6). The testimony of PW1 and PW2 was backup by the testimony of the PW3, Herman Edward Masinga (PW3) who is working at Kinondoni Municipal under Commissioner for Land.

The plaintiff tendered various documents related to the Company including the affidavit (Exh.P2) which I did not refer them in determining the issue of ownership.

To the contrary, DW1 did not prove her ownership. There is no any documentary evidence to prove that the land is registered in her name or his late father Said Ally Salum Namoyo. Reading the evidence on record, it is clear that DW1 has miserably failed to prove her claims against the vendor, Massimo because there is no any relevant documents such as the Sale Agreement which shows Said Ally Salum Namoyo bought the suit landed property from Jillian or Stanley. In other words, DW1 did not prove if the Title passed from Jillian or Stanely to Said Ally Salum Namoyo. I have heard the testimony of DW1, her evidence are mere words, and this Court cannot rely on mere words of DW1 in making a decision in her favour.

Again, DW1 tried to allege that she is the administratrix of the estate of the late Said Ally Salum Namoyo. Mr. Kubaja in his final submission, the *locus standi* of DW1 claiming ownership of the suit landed property is questionable. In her Written Statement of Defence specifically, paragraph 8, claimed that she is the administratrix of the estate of the late Said Ally Salum Namoyo. During the hearing, DW1 tendered a letter of Probate and Administration (Exh.D1), however, DW1's name is not featured in the said exhibit. Reading exhibit D1, the Court granted the letters of administration

of the properties of the late Said Ally Salum Namoyo to Sophia Namoyo and Simoyo Namoyo, not Sylvia Simoyo Saidi Namoyo.

Moreover, reading exhibit D1, shows that DW1 tried to prove her allegations by tendering a letter of probate and administration which was issued in 2005. While when DW1 was cross examined, DW1 testified that she was appointed to administer the estate of her late father in 2015 later she admitted that she was not telling the truth that she was appointed to administer the estate of her late father in 2015. Therefore, it is my considered view that with the above mentioned shortfall, DW1 has miserably failed to prove her ownership of the suit landed property and hence her claims raised in the Counter Claim are unfounded. In the case of **Hemed Said v Mohamed Mbilu (1984)** TLR 113 HC, in which the court said:

"According to the law, 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."

Applying the above principle in the case at hand, the evidence is clear that the Plaintiff presented two witnesses from the land authority who gave the history of the suit land as stated in the Land registry from 1958 to date. The Plaintiff also managed to tender exhibits showing that the ownership over the suit-landed property was successfully transferred from Massimo

to the Plaintiff. The plaintiff has even tendered Building Permit (Exh.P8) which the Plaintiff was authorized to develop it.

DW2 was trying to prove that Massimo is not a Tanzanian hence he cannot sell any piece of land. DW2 also tried to prove that the Certificate of Title was forged, however, as right pointed out by Mr. Kubaja, once a title is surrendered, the Commissioner for Land does not issue a new tenure, instead, it is issued with a residual time remaining from the original title, in the case at hand, when the Commissioner for Land issued the exhibit P7, the residual time was 56 years. Therefore, DW2 testimony is unfounded.

In addition, DW2 in his testimony said that Massimo is a non-Citizen of Tanzania, in my considered view, this allegations cannot hold water since DW1 did not establish her interest in the suit land, thus, DW2 allegations are unfounded. Considering the fact that DW2 evidence are mere words, he did not tender any cogent evidence to prove his allegations a copy of passport (Exh.D3) alone cannot suffice without tendering official documents from the respective authority to move this Court to decide that Massimo is not a Tanzanian Citizen.

Regarding the issue of fraud. The claim of fraud must be strictly proved. In the case of Court of Appeal for **Eastern African Ratilal Gordhanbhai Patel v Lalji Makanji**, [1957] E.A 314. In this case, the defunct Court of Appeal for East Africa held on page 317 that-

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond a reasonable 18 doubt, something more than a mere balance of probabilities is required”.

The above holding was reiterated by the Court of Appeal of Tanzania in **Omari Yusuph v Rahma Ahmed Abdulkadr** [1987] TLR 169 to the effect that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt but rather something more than a mere balance of probabilities required in ordinary civil cases. DW2's testimony was mere hearsay evidence, he did not prove the allegation of fraud.

On my evaluation of the evidence I find that the evidence adduced by the Plaintiff was a lot weightier than that of the Defendant. See the case of **Hemedi Saidi v Mohamed Mbilu** [1984] TLR 213. Therefore, the Plaintiff has proved his ownership and hence he is the lawful owner of the suit landed property.

Addressing the second, issue, *whether the Defendant unlawfully and without justifiable cause trespassed the plaintiffs' landed property (counter claim)*. According to the Black Law Dictionary Eighth edition; the term trespasser is defined as,

“Trespasser, one who commits a trespass; one who intentionally and without consent or privilege enters another’s property”.

From the above definition, it is clear that a person cannot raise a ground of trespass without first establishing his ownership over the suit land. The fact that the Plaintiff in the Counter Claim has failed to prove her ownership means she cannot claim for trespass against Defendant in the Counter Claim. Hence the second issue is answered in negative.

This takes me to the third issue *what reliefs are parties entitled to.*

The Plaintiff is claiming total general damages to the tune of Tshs. 100,000,000/= .I shall start with the aspect whether there was any finding on the proof of damages?

It is the trite law that general damages must be averred that such damage has been suffered by the Plaintiff after the consideration and deliberation on the evidence on record able to justify the award. And in awarding general damages, the court has to assign reasons for awarding the same. See **Alfred Fundi v Geled Mango & 2 Others** Civil Appeal No. 49 Of 2017 CAT Mwanza, **YARA Tanzania Limited v Charles Aloyce Msemwa and 2 Others**; Commercial Case No. 5 of 2013: HC of Tanzania (Commercial Division) at Dar es Salaam (unreported). In my considered view, the Plaintiff did not tender any cogent evidence to prove his alleged damages therefore, in my view, prayer (d) crumble.


The last prayer is about the costs of the suit. In the case at hand, the Plaintiff has prosecuted his case successfully and, certainly, has incurred costs in this endeavour. Based on the circumstances of the case at hand, I find it prudent to award the Plaintiff in the main case half costs.

For the aforesaid reasons, I proceed to grant the following orders:-

1. *The Plaintiff is the lawful owner of Plot No. 2129, Block "A" Makongo Juu within Kinondoni, in Dar es Salaam, with Certificate of Title No. 123225.*
2. The Defendant in the main case, its agents, successors or assignees are permanently restrained from harassing, intruding, interfering trespassing, or interrupting upon the Plaintiffs' peaceful enjoyment and possession of Plot No. 2129, Block "A" Makongo Juu within Kinondoni, in Dar es Salaam, with Certificate of Title No. 123225.
3. The Defendant will pay half of the costs of the case taxable by the Taxing Master.

Order accordingly.

DATED at Dar es Salaam this 30th March 2023.

A.Z.MGEYEKWA
JUDGE
30.03.2023

Judgment delivered on 30th March 2023 in the presence of Mr. Alphonse Kubaja, counsel for the Plaintiff, and the Defendant.



Right to appeal fully explained.