

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CIVIL APPEAL NO. 60 OF 2016

DOMINA KAGARUKI APPELLANT

VERSUS

1. FARIDA F. MBARAK
2. FARID AHMED MBARAK
3. TANZANIA BUILDING AGENCY
4. ELIUS A. MWAKALINGA
5. THE COMMISSIONER FOR LANDS
6. THE HONOURABLE ATTORNEY GENERAL

} RESPONDENTS

(Appeal from the decision of the High Court of Tanzania

at Dar Es Salaam)

(Mgeta, J.)

Dated the 30th day of June, 2015

in

Land Case No. 51 of 2004

JUDGMENT OF THE COURT

10th May & 19th June, 2017

MUGASHA, J.A.:

The first two respondents who were husband and wife were together with other four (4) respondents sued by the appellant in the High Court Land Division at Dar-es-salaam. The cause of action rested on: **One**, an alleged 3rd respondent's breach of agreement for sale to

the appellant of a semi-detached House No. 2 on plots 105 and 106 located at Burundi/Kinondoni road, **Two**, 1st and 2nd respondents' claim to have purchased the whole of plot No.105 from the liquidator of the defunct Agricultural and Industrial Supplies Company Limited (AISCO) and that they uprooted hedges after trespassing into the appellant's premises. And **three**, the 4th respondent's claim to have purchased from the Government a detached house on the whole of plot 106 at Kinondoni/ Burundi road. The appellant sought reliefs including: payment of special and general damages; a declaration that the 1st respondent's bid was to purchase a semi-detached House No. 1 on Plot No. 105 at Burundi Kinondoni; a declaration that the appellant is the legal owner of House No. 2 constructed on plots No 105 and 106 Burundi Road at Kinondoni in Dar-es-salaam; an order for plot division and re-survey of plots No. 105 and 106 Burundi Road at Kinondoni in Dar-es-salaam. The appellant sought to be paid damages at the tune of Tshs. 120,000,000/= in respect of the damaged hedges and in the alternative, she sought to be paid Tshs. 600,000,000/= being compensation in case her ownership of house No. 2 is affected in any way.

According to the appellant, she alleged to have occupied the house in question which she rented from BIT in 1999. In 2004 she purchased it through the Permanent Secretary, Ministry of Works at a consideration of Tshs.13, 000,000/= pursuant to the sale agreement executed by the parties on 5/1/2004. However, despite paying the purchase price to the 3rd respondent, ownership of the house in question had not yet been transferred in her name. She was yet to acquire title from the Land Office.

She told the trial court that, the 2nd respondent purchased from the liquidator of **AISCO** the other semi-detached House No. 1 situate on Plot No. 105 also held under Certificate of Title No. 186030/6 covering an area measuring 1,864 square meters. However, he fraudulently caused the entire plot No. 105 to be transferred and registered in his name. Subsequently, and without justification the 2nd respondent trespassed into her premises and uprooted her fence made of hedges used for security. The hedges were in existence for more than twenty years. Her family has been maintaining the fence by paying labour charges of Tshs. 20,000 per month.

The 1st and 2nd respondent denied the appellant's claims. They averred to own Plot No. 105 having purchased it from the liquidator of the defunct **AISCO**. They contended that, such property was vested in **AISCO** after the dissolution of State Trading Corporation (STC). As such, by operation of the law plot No. 105 was among properties which vested in **AISCO**. The transfer in question involved the transfer of right of occupancy including Plot No 105 which was sold to the 1st respondent. They denied to have trespassed and damaged the fence hedges but rather cleared it for intended construction. Since the appellant was in occupation of their premises, they raised a counter claim for the delayed construction of a double storey building. They sought to be paid costs and general damages and a perpetual injunction against the appellant and her agents from entering on Plot No. 105 Burundi/Kinondoni Road.

In the written statement of defence, the 3rd respondent admitted to have legally possessed a semi-detached house No. 2 situate on plots 105 and 106 which was legally sold to the appellant. Besides, the 3rd respondent averred to have taken reasonable efforts to effect the transfer of the disputed property to the appellant. However, they

contended that the appellant has no claim whatsoever against the 3rd respondent.

The 4th respondent denied the appellant's claims and averred to own House No. 3 which he purchased through the Permanent Secretary, the Ministry of Works pursuant to a sale agreement dated 7th December, 2004.

At the trial, some of the controlling issues were: **One**, whether the appellant was the lawful owner of a semi-detached house No. 2 partly constructed on plots No. 105 and 106 Burundi/ Kinondoni Road, Kinondoni District, Dar-es-salaam. **Two**, whether the 1st and 2nd respondents lawfully acquired the whole of plot No. 105 or semi-detached House No. 1 and whether there was a valid transfer of the said plot between the liquidator and 1st and 2nd respondents. **Three**, whether plots Nos. 105 and 106 Burundi/ Kinondoni Road Kinondoni District were subjected to existing boundaries separating semi-detached houses No. 1 and No. 2 and detached House No. 3. **Four**, whether the 4th respondent purchased a detached house No. 3 or plot No. 106 Burundi Road, Kinondoni District, Dar-es-salaam. **Five**, whether the appellant is entitled to any special and general damages from the 1st and 2nd respondents.

At the trial, two witnesses testified for the appellant namely: **DOMINA RWEITOIJELA KAGARUKI (PW1)** and **ONESMO KAMALA (PW2)** and seventeen (17) documentary exhibits were tendered as evidence. Six witnesses testified for the respondents namely: **FARID AHMED MBARAK (DW1)**, **TOGOLAI KIMWERI (DW2)**, **THEONEST BUSHOKE (DW3)**, **ASANGALWISYE MWAKALINGA (DW4)**, **OPTATUS KANYESI (DW5)** and **FRANK JOHN MINZIKUTWE (DW6)**. The respondents produced five (5) documentary exhibits.

After scrutinizing the evidence, the trial judge held against the appellant having concluded that, she is not the lawful owner of the property as nothing was sold to her by the 3rd respondent who had no title on such property. The 1st and 2nd respondents were declared lawful owners of the whole of plot No. 105 plus the semi-detached houses situated therein. The 4th respondent was declared the lawful owner of the whole of plot No. 106 and the detached house therein.

On the basis of these findings, the trial Judge proceeded to deny the appellant most of the reliefs she was seeking except a refund by the 3rd respondent of Tshs. 13,000,000/= the purchase price plus interest, costs and Tshs. 50,000,000/= as general damages. In the alternative,

the 1st, 2nd and 3rd respondents were ordered to look for and hand over to the appellant an alternative house within the city of Dar-es-salaam if she so wished. Apart from being ordered to vacate from the premises, the appellant was condemned to pay damages at the tune of Tshs. 100,000,000/= to the 1st and 2nd respondents.

At the hearing of the appeal, the appellant was represented by Mr. Joseph Rutabingwa and Mr. Eustace Rwebangira learned counsel. The 1st and 2nd respondents had the services of Mr. Richard Rweyongeza, learned counsel. Mr. Hangi Chang'a learned State Attorney represented the 3rd, 5th and 6th respondents. The 4th respondent did not enter appearance though duly served through his advocate one Mr. Zahran Sinare. Mr. Rweyongeza informed the Court that he was requested but declined to hold brief of advocate Sinare because of the conflicting interests of their respective clients in this matter. In view of such absence, and considering that, Mr. Sinare was duly served but defaulted appearance, the appeal was heard in the absence of the 4th respondent in terms of Rule 112 (2) of Tanzania Court of Appeal Rules, 2009 (the Rules).

The appellant filed a memorandum comprised of 13 grounds of appeal. However, at the hearing ground 13 was not argued. We found ground no 12 relating to demolition of House No. 2 not based on the record before the Court and as such, we shall not determine it.

The parties filed written submissions for and against the appeal save for the 3rd, 4th, 5th and 6th respondents. The grounds of appeal and the written submissions basically hinge on mainly four issues namely:

1. Whether the appellant is the lawful owner of a semi-detached house No. 2 on plots 105 and 106 held under Certificate of Title No. 186030/6 located at Burundi/Kinondoni road.
2. Whether the 1st and 2nd respondents are lawful owners of plot No. 105.
3. Whether the 4th respondent is the lawful owner of the whole of plot No. 106.
4. What reliefs are the parties entitled to.

Before considering them from the outset, we wish to point out that since this is a first appeal, the Court has a right and duty to re-consider

and re-evaluate the evidence and draw its conclusions (See **OKENO VS REPUBLIC (1972) E.A.32**. However, such jurisdiction must be exercised with great caution. The jurisdiction can be exercised if there is no evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. (See **PETERS VS SUNDAY POST LIMITED (1958) E.A 424**).

Pertaining to whether the appellant is a lawful owner or not, from the beginning we wish to point out that, the 3rd respondent supported the appeal and in the written statement of defence, admitted to have owned a semi-detached House No 2 on plot No. 105 and 106 which was sold to the appellant. The 3rd respondent made efforts to ensure the transfer of such property to the appellant. However, at the trial Togolai Kimweri (DW2) who was the 3rd respondent's former Chief Executive Officer, had this to say for the 1st and 2nd respondents. According to him since the Board of Internal Trade (BIT) had no title to pass to the 3rd respondent, nothing was passed to the appellant. In his evidence DW2, apart from testifying that, the appellant resided as tenant in the respective house which was handed over by BIT to the 3rd respondent

and sold to the appellant, he added that, later they discovered to have no authority over it. As such, they decided to allocate her another house but she refused because of the pending suit before the High Court. When cross-examined by the learned State Attorney he replied as seen at pages 679 to 680 of the record that, before sale, evaluation was conducted and the Government did not sell plots but houses including those sold to the appellant and the 4th respondent. DW2 testified as well to have complied with law and Regulations and used Circular No. 6 of 2003 which directed that the tenant residing in the house indicated for sale, qualified to purchase the house. The 4th respondent at page 684 recounted that, Government houses had no title numbers as they had to be surveyed in order to get the exact plot numbers.

At page 978 of the record, the trial Judge concluded as follows:

" It is evident that the suit house is built partly on plot no 105 and partly on plot No 106. And I have found that it was not owned by the Government in general and in particular TBA basing on the historical background I tried to demonstrate herein and the evidence adduced. And therefore TBA had no legal right to sell it to the plaintiff.

At page 981 the trial judge observed as follows:

"BIT wished the suit house to be amongst its houses and there it was. The BIT wished the suit house to be occupied by its staff and there it was; the plaintiff occupied the house. The BIT wished to have the House transferred to TBA, and there it was. A result of this wishful thinking made TBA to sell the suit house to the plaintiff on assumption that the suit house belonged to BIT, the assumption which was later on proved wrong as the TBA itself realized that they mistakenly sold something not belonging to it"

We have gathered that, the BIT established by virtue of Act No. 15 of 1973 was mandated to supervise and coordinate the activities and management of certain parastatal companies including those in the process of being dissolved such as STC. This was after the nationalization and acquisition of buildings including those on plots no. 105 and 106 which were originally owned by one Mackenzie. On this accord, on 8th June 1999, BIT entered into tenancy agreement (exhibit P1 at page 738) with the appellant on house No. 2 on plot 106/5. On 13th June 2002 in terms of exhibit P2, BIT notified the appellant to vacate from House No. 2 not later than 14th September, 2002. This was pursuant to Government's decision that BIT should transfer its properties to the

Ministry of Works as reflected in the Notice at page 218 of the record which states as follows:

"RE: TRANSFER OF BIT PROPERTIES TO THE GOVERNMENT.

I wish to bring to your attention that the Government has decided to transfer to the Ministry of Works properties belonging to Board of Internal Trade with immediate effect. Such properties include Plot 106/5 House No 2 Burundi Road in which you are residing.

I have thus been directed to serve you a three months' notice to deliver vacant possession commencing on 15th June, 2002. You will be expected to hand over the property to the Ministry of Works by 14th September, 2002. In the mean time you are required to settle all outstanding rent up to 15th June when notice will become effective. You should also be ready to grant access to officials of the Ministry of Works as and when required."

On the strength of the stated documentary and oral evidence, DW2's evidence that semi-detached House No.2 was mistakenly sold to the appellant is hard to buy due to the following: **One** at page 751 of the record, the 3rd respondent executed with the appellant the sale agreement dated 5th January, 2004, **Two**, in exhibit P8 at page 767 of the record, the letter with Ref. 210/228/0226/33 dated 10th September,

2004 , the 3rd respondent notified and directed the appellant, in any correspondence relating to the purchased House No. 2, reference should be made in respect of House No. 2 on Plot 105/6 because it is situated on two plots namely: plots 105 and 106.

Three, at pages 757 to 758 of the record are Exchequer receipts. No. 20095805 dated 2/4/2004 and 1837807 dated 23/1/2004 in respect of appellant's payment of the purchase price of House No. 2. This was in respect of exhibit P5, which was acknowledged and appreciated by the 3rd respondent who requested the Commissioner for Lands to register the appellant as owner in the same regard. **Four**, at page 791 of the record exhibit P11, in a letter dated 19th July, 2004, with Ref. 210/228/0226/28 the 3rd respondent notified the appellant that following advice by the Attorney General the respective house was sold to the appellant and the Government had no interest in it.

In the light of the said oral and documentary evidence, the 3rd respondent owned semi-detached House No 2 subsequent to transfer from BIT. This is what made the 3rd respondent sell the respective house to the appellant who executed the sale agreement (exhibit P3), and she paid the purchase price. As such, the trial Judge's findings that the sale

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agreement of semi-detached House No. 2 was cancelled is not backed by the evidence because the 3rd respondent, apart from acknowledging and appreciating appellant's completion of payment of purchase price, the 3rd respondent applied on her behalf that she be registered as owner of such property. Moreover, the trial Judge ought to have taken full significance and appreciation that DW2 was not a reliable witness.

Therefore, we are in agreement with learned counsel for the appellant that she is the lawful owner of a semi-detached House No. 2 on plots 105 and 106 at Burundi/ Kinondoni road. In the circumstances, it was unjustifiable for the trial Judge to condemn the appellant being an innocent purchaser for value to pay damages to the 1st and 2nd respondents. However, the appellant did not specifically prove as to how she suffered loss of Tshs. 120,000,000 on the upkeep of the uprooted hedges. The law is settled that, special damages must not only be pleaded but also strictly proved (See **KIMANI v A.G. & (1969) E.A 502**) **CMC vs ARUSHA OCCUPATIONAL HEALTH SERVICES (1990) TLR 96**, **TANZANIA SARUJI CORPORATION v AFRICAN MARBLE COMPANY LIMITED (2004) TLR 155**.

Regarding the legality of the ownership by 1st and 2nd respondents of plot No. 105, the learned counsel for the appellant faulted the trial Judge in declaring the 2nd respondent as lawful owner of plot No. 105 held under certificate of Title No 1806030/6. It was pointed out that, since the 1st respondent was not registered as legal owner, she could not legally transfer such property to the 2nd respondent without obtaining consent of the Commissioner for Lands. That being the case, it was argued that, there was no legal transfer of the said property between the liquidator and the 2nd respondent and no statutory fees were paid on the purported transfer between the 1st and 2nd respondent.

It was further submitted that, the signatures of the 1st respondent were forged by the 2nd respondents in the sale agreement (Exhibit P13) and the Memorandum of Understanding (Exhibit P14) which were relied upon to execute the sale and effect the transfer of the Certificate of Title to the 2nd respondent. In this regard, learned counsel for the appellant argued that the purported transfer between the 1st respondent and 2nd respondent was inoperative in terms of Regulation 3(1) of the Land Regulations of 1948. He referred us the case of **NITIN COFFEE ESTATE LTD AND 4 OTHERS vs. UNITED ENGINEERING WORKS LTD AND ANOTHER**

**(1988) T.L.R. 204 AND MALMO MONTAGEKONSULT AB TANZANIA BRANCH
VS MARGARET GAME, Civil Appeal No. 86 of 2001(unreported)**

For the 1st and 2nd respondents it was submitted that, the decision of the trial Judge is justified because the evidence of DW6 is to the effect that, upon the request by 1st respondent the ownership of **AISCO** in respect of plot No. 105, was directly transferred to the 2nd respondent. It was further argued that the purchased plot no.105 has never been under BIT. In the alternative, Mr. Rweyongeza contended that, if there was an omission to pay tax, then upon compounding the offences, taxes would have been paid. Mr. Rweyongeza added that, the issue of the validity of transfer to the 2nd respondent has no relevancy as it does not affect the appellant in the case at hand.

On the part of the 3rd, 5th and 6th respondents, Mr. Chang'a learned State Attorney submitted that, what was sold to the 1st respondent is a semi-detached house No. 1 on plot No 105 covering an area of square meters 1,864 held under Certificate of Title 1803060/6 pursuant to bids invited by the liquidator's notice for the purchase of the respective House No 1.

The trial Judge believed the 2nd respondent's account on being mandated to sign on behalf of the 1st respondent, tender documents,

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sale agreement, the Memorandum of Understanding and the transfer deed. And, the trial judge found that, the appellant was not supposed to complain on behalf of the 1st respondent who had not lodged any complaint. Therefore at pages 982 to 983 the trial Judge concluded as follows:

"Moreover, DW3 who sold the landed property on plot 105 to the 1st defendant through the 2nd defendant was the one who prepared sale agreement, he signed and the 2nd defendant signed. He then requested the certificate of title in respect of plot No. 105 from LART who was keeping it. Upon request by the 1st defendant, transfer deed was prepared in the names of 2nd defendant. It was LART therefore which released the title deed to the 2nd defendant. Later on the Commissioner for Lands advised a Memorandum of Understanding involving the 1st defendant, the 2nd defendant and liquidator be prepared. It was indeed prepared, signed and subsequently submitted to and accepted by the Commissioner for Lands. This then enabled the registration of the landed property in the names of the 2nd defendant as owner of right of occupancy comprising of plot 105. If there was at all fraud or deceit or cheat flowing from the 1st and 2nd defendants that could be considered to have been done against Commissioner for lands."

That, the 1st respondent bid to purchase House No. 1 on plot No. 105 at Kinondoni/Burundi Road with a certificate of title No. 1806030/6 covering the area of 1,864 square meters is supported by the 2nd respondent's account that, it was made after having read the liquidator's

public notice inviting bids. He denied to have cheated but rather signed the sale agreement on behalf of his wife after so agreeing with the liquidator that the documents will be in the name of the 2nd respondent. Subsequently, the liquidator wrote to the Commissioner for Lands who obliged by transferring the title in his name.

It is not in dispute that, according to the sale agreement (exhibit **P13**) between the liquidator of **AISCO** and the 1st respondent one **FARIDA AHMED MBARAK**, what was sold to her is plot no 105 held under certificate of title No. 186030/6. Apparently, the entire submission of learned counsel and the finding of the trial judge are premised on the assumption that, what was sold and transferred was plot 105. This is not the case and we shall state our reasons later.

As earlier stated, following dissolution of the State Trading Corporation, its activities were supervised, coordinated and managed by the Board of Internal Trade which was established under Act No 15 of 1973. A facilitation to dissolve of the State Trading Corporation (**STC**) was vide Act No 22 of 1973, whereby under section 5(1) (a) the Minister responsible for Commerce by order in the Gazette was mandated to transfer any asset or liability of **STC** to any parastatal organization. As

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such, pursuant to the State Trading Corporation (Transfer of Assets) Order, Government Notice No. 262 of 1/11/1974, the Minister did transfer to **AISCO** a building on plot No. 105 held under certificate of title 186030/6 located at Junction Road and Davis Road Dar-es-salaam. (Currently Burundi/Kinondoni road). Following liquidation of **AISCO**, the liquidator issued a Public Notice (exhibit P6) advertised in Guardian Newspaper dated 28th June 1997, invited bids for the purchase of several assets of **AISCO** and in part it reads as follows:

"PUBLIC NOTICE

AGRICULTURAL AND INDUSTRIAL SUPPLIES COMPANY
LIMITED

(UNDER LIQUIDATION)

Notice is hereby given to the general public that Tanzania Audit Corporation (TAC) acting under power of attorney granted to it by their principal The Loan and Advances Realisation Trust (LART) hereby invites bids for purchase of assets of Agricultural and Industrial Supplies Company Limited (AISCO) Located in Dar-es-salaam, Mwanza, Tanga , Iringa and Songea.

Under item II: 1.0 of the Public Notice the immovable assets offered for sale were Land and Buildings including item 8 in the list which was described as follows:

Type of asset: Residential Semi-detached House No. 1

Description: *It is semi-detached residential building in a medium density neighbourhood in Kinondoni area.*

Location: *Plot No. 105 House No. 1 Kinondoni/ Burundi Road, Kinondoni Dar-es-salaam.*

Tenure/ Ownership: *Certificate of Title No. 186030/6 Area 1,864 sq.m*

Moreover, LART and the principal of the liquidator in (exhibit P7) a letter dated June 28, 2004 which was addressed to the appellant, LART among other things, categorically pointed out that, the whole of plot No. 105 constitutes 42,224 square feet which is equivalent to 3,924.75 square meters. LART, added that what was entrusted to the liquidator and a subject for sale is as per liquidator's notice inviting bids which was based on the physical verification and valuation report dated 1996 (exhibit P 17) which described the property for sale as follows:

"PLOT NO 105, HOUSE NO.1 BURUNDI/ KINONDONI ROAD

DAR-ES-SALAAM CITY

" General Description

This property is a semi detached residential building set in a medium density neighbourhood in Kinondoni area.

Tenure

The land on which the property is built is registered under certificate of title 1806030/6

Plot and site works

The plot is rectangular shaped, measuring about 1,864. It is enclosed with hedges fencing."

Since the 2nd respondent told the trial court that the 1st respondent's bid was to purchase item No. 8 which is a semi-detached House No. 1 as advertised in exhibit P6, even if it is assumed that, she mandated the 2nd respondent to sign whatever documentation on her behalf, the crucial issue here is whether what was sold is what was offered. The answer is absolutely in the negative because: **One**, Plot No. 105 in the sale agreement at page 796 of the record between the liquidator and Farida Mbarak does not reflect what was offered for purchase, that is a semi-detached house No. 1 on plot 105 covering an area of sq. m 1,864 as reflected in exhibits P6, P7 and P17. **Two**, Plot No. 105 in the Memorandum of Understanding (Exhibit P14) at page 802 of the record was signed eight months after the transfer was effected. It is purported that the 1st and 2nd respondents agreed that plot No. 105 be transferred to the 2nd respondent. This is as well a non starter because plot no 105 was not offered for sale. **Three**, the transfer of plot 105 to

Farid Ahmed Mbarak in terms of exhibit D1 at page 830 of the record is not compatible with what was offered for sale. This position is cemented by the evidence of the liquidator who testified that, the property which was a subject of sale was as published in the notice inviting bids for purchase of a semi-detached House No. 1 situate on plot No 105 covering an area of 1,864 square meters.

In the circumstances, the question of the transfer being inoperative or tainted with fraud or being forged does not arise here because what was sold and transferred is not what was for sale.

At page 977 of the record, the trial Judge acknowledged that what was advertised for sale is a semi-detached residential building House No. 1 covering an area of 1,864 square meters on plot No 105 at Burundi/Kinondoni road held under CT 1806030/6. However, relying on exhibits P13 and D1 at page 978 of the record he concluded that the 1st respondent purchased the whole semi-detached building on plot 105.

With respect, having opted to rely solely on exhibits P13 and D1 which do not reflect the actual property which ought to have been sold, the learned trial judge completely missed the type of the property ought

to be sold. The trial Judge was duty bound to consider the whole of the evidence and not picking some pieces and leaving aside the crucial evidence. (See **DAUDI SABAYA VS REPUBLIC**, [1995] T.L.R 148 and **JOSEPH JOHN MAKUNE VS REPUBLIC** [1986] T.L.R 44. The trial Judge did not consider the exhibits P6, P7 and P17 which were crucial in determining that, what ought to be sold to the 1st respondent was the semi-detached house no. 1 and not the whole of plot 105. This is cemented by the evidence of DW3 Theonest Bushoke for the liquidator who is on record to have admitted that what he advertised for sale was in compliance with exhibit P17 namely, the Verification and Valuation of semi-detached house No 1 which was a subject of sale.

Apparently, the confusion in the process began with the drawing of the sale agreement (exhibit P13) and it was all along carried over to the Memorandum of Understanding at page 802 of the record and exhibit P15 which indicates that, what was transferred is the entire Certificate of Title No. 1806030/6 which is not the case. It is evident that, the entire plot No. 105 was not a subject for sale because semi-detached Houses No. 1 and 2 are adjoined but semi-detached house No 2 falls partly on plots 105 and 106. In this regard, with respect, we do not agree with

Mr. Rweyongeza's line of thinking that, what was vested in **AISCO** by virtue of GN 262 Of 1/11/1974 is reflective of what ought to have been sold to the 1st and 2nd respondents. The 1st and 2nd respondents were not among the persons/ institutions vested with the properties and assets of the defunct **STC**. We agree with the appellant that the trial Judge's finding that the 1st respondent purchased the entire plot No. 105 is not at all backed by the evidence on record.

In view of the aforesaid, we are satisfied that, the 1st and 2nd respondent are entitled to the semi-detached House No. 1 located on plot No 105 Kinondoni/ Burundi road which answers issue no. 2 in the negative. Since the 1st and 2nd respondents failed to prove ownership of the whole of Plot No. 105, we are in agreement with the appellant's counsel that the counter claim was not proved. This as well applies to damages sought which hinge on the appellant's lawful occupation of the premises she purchased.

As to whether the 4th respondent purchased the entire plot No. 106, at pages 978 to 979 of the record, the trial Judge concluded that plot No. 106 which has a detached house is lawfully owned by the 4th respondent having purchased the same from the Government. This

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conclusion is not compatible with **one**, the evidence of the 4th respondent who at page 704 to 705 of the record testified that he was among the employees who benefited in the Government's scheme of selling houses and purchased House No. 3 on plot No 106 at Burundi/Kinondoni road. **Two**, in terms of exhibit P10 at page 784 of the record, the 4th respondent applied to purchase House No.1069/3, and so stated at page 712 to 713 of the record and confirmed that the plot is not yet surveyed. The agreement appearing at page 853 of the record whose authenticity was doubted by the Counsel for the appellant, does not change the fact that, the 4th respondent applied to purchase a house and not plot 106. This was confirmed by the evidence of **DW5 OPTATUS KINYESI** an official from Land Office who at page 724 of the record confirmed that, the 4th respondent did not purchase land because the Government never sold plots but houses.

In view of the aforesaid it is unfortunate that, the trial Judge did not consider the entire evidence before reaching what he concluded at page 972 that:

" From the foregoing, one can learn that what were being transferred from one body to another were plots and not houses. I find the evidence

by DW3 on this aspect credible. One can also learn from evidence adduced that the Government was doing so through Government Notices. But there is no evidence showing that the sult house built partly on plot no 105 and partly plot 106 was transferred from STC to either AISCO or BIT.

Such conclusion is with respect a misdirection. Apart from absence of evidence to what was concluded, the trial Judge failed to appreciate the weight bearing circumstances admitted and proved, as held in the case of **PETERS VS SUNDAY POST LIMITED** (supra).

In the premises, we are of a considered view that, the purchase made by the 4th respondent is similar to that of the appellant and it is in line with the policy and the evidence that the Government sold houses and not plots. We are thus satisfied that, the 4th respondent is the lawful owner of detached House No. 3 and not the whole of plot No. 106.

On the reliefs the parties are entitled to in respect of plots 105 and 106, it is not disputed that, the three houses were built and owned by one Mackenzie. However, the development which followed from nationalization, acquisition of buildings, Government's scheme of selling houses and the revocation by His Excellency the President of the United Republic of Tanzania, necessitates a resurvey and subdivision of plots

No. 105 and 106 to enable each party to be allocated his/her entitlement. In this regard, we hereby order the 5th respondent to make a resurvey of plots 105 and 106 and subdivide them into three equal plots for the appellant, 1st and 2nd respondent and 4th respondent. This exercise should be effected expeditiously taking into account of the litigation which has dragged in courts for over thirteen (13) years and appreciating value of land.

With all said and done we allow the appeal with costs.

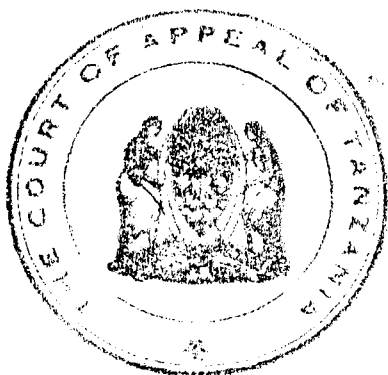
DATED at DAR ES SALAAM this 13th day of June, 2017.

S. MJASIRI
JUSTICE OF APPEAL

S.E.MUGASHA
JUSTICE OF APPEAL

S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL