

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 122 OF 2005**

**TATU MLEMBE. . . . . APPELLANT**

**VERSUS**

**DAMIAN KINABO . . . . . RESPONDENT**

*(Originating from Resident Magistrate Court of Dar es Salaam at Kisutu in RM  
Civil Case No. 10 of 2002 before Mingi, SRM)*

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*Date of last order – 16/7/2008  
Date of Judgment – 15/12/2008*

**J U D G M E N T**

**Shangwa, J.**

This appeal is against the decision of the Court of the Resident Magistrate at Kisutu in Civil Case No. 10 of 2002 in which judgment was given in favour of the Respondent Damian Kinabo who was the defendant. Tabu Mlembe who is the Appellant in this case was the plaintiff. The dispute between the parties is over a plot of land located at Ukonga Mazizini area within the city of Dar es Salaam.

There are four grounds of appeal that have been listed in the Appellant's Memorandum of Appeal. They are as follows:-

- 1. That, the trial Magistrate erred in law in not visiting the disputed land to ascertain the boundaries.*
- 2. That, the trial Magistrate erred in law and procedure in accepting the evidence concerning a piece of land which is divided into eight plots of 30 metres by 28 metres each.*
- 3. That, the trial Magistrate erred in law in holding that the Respondent had proved the case on balance of probability.*

*4. That, the trial Magistrate erred in law and fact in not appreciating the overwhelming evidence of the plaintiff (Tatu Mlembe).*

I will endeavour to consider these grounds seriatim. On the first ground of appeal, I am of opinion that as the dispute between the parties is not in respect of the boundaries of land but over a plot of land, it was not necessary for the trial Magistrate to visit the locus in quo.

With regard to the second ground of appeal, I do not think that it has any substance. What I know is that according to law and procedure the trial court has to record evidence from both parties concerning the matter in dispute and give a decision thereon. In this case, the matter in dispute between the parties is ownership of a plot of land situated at Ukonga Mazizini within the city of Dar es Salaam. The trial Magistrate did follow the law and procedure. She

recorded the evidence from both sides concerning the piece of land in dispute and gave a decision thereon.

On the third ground of appeal, I agree with the Appellant that the trial Magistrate erred in law in holding that the Respondent Damian Kinabo had proved the case on a balance of probabilities. The said holding appears at page 10 of the trial Magistrate's typed judgment. It is a well established principle of law that in civil matters, the burden of proof lies on the plaintiff. In this case, the Appellant Tatu Mlembe who was the plaintiff before the trial court is the one who had the burden to prove her case against the Respondent who was the defendant before the trial court. The standard of proof in civil cases is on the balance of probabilities. It must always be remembered that in civil cases, he who alleges must prove his case. In this case, the Respondent Damian Kinabo had alleged nothing and he had

nothing to prove except to defend himself against the Appellant/Plaintiff's case.

The fourth ground of appeal raises a crucial issue as to whether or not there was sufficient evidence to prove that the Appellant/Plaintiff is the owner of the plot in dispute. In her testimony, the Appellant told the trial court that in 1995, she bought the plot in dispute situated at Ukonga Mazizini from one Mzee Kipara @ Anthony Bimaka at shs.300,000/= and that she paid shs.200,000/= in advance. Furthermore, she told the trial court that in 1996, she paid the balance of shs.100,000/=. She said that both transactions were put in writing. She tendered two documents which were received by the trial court as exhibits P1 and P2 respectively.

From her testimony, it appears that after buying the plot in dispute, she started constructing a house thereon but she was stopped from doing so by the Primary Court of

Ukonga in Civil Case No. 125 of 2000 between Damian Matasha and Anthony Bimaka.

There are two witnesses who were called by the Appellant/Plaintiff to testify on her behalf. One Sophia Mohamed who testified on her behalf as P.W.2 told the trial court that in 1995, she witnessed the sale of the plot in dispute between the Appellant and Anthony Bimaka which was also witnessed by a ten cell leader one Bi. Asha who was not called to testify.

Another witness who testified on behalf of the Appellant is called Mustapha Shomari. This witness testified as P.W.3 and told the trial court that he witnessed the payment of the balance of shs.100,000/= which were paid by the Appellant to Anthony Bimaka as part of the purchase price of the plot in dispute.

On the other side, the Respondent Damian Kinabo who was the defendant told the trial court that he bought a piece

of land indispute from one Mohamed Njechele in 1981 which he divided into 8 plots, sold seven of them and remained with one. The sale agreement was tendered by the Respondent and marked by the trial court as exhibit D1. Furthermore, the Respondent told the trial court that Anthony Bimaka is a Conman. He called two witnesses to testify on his behalf namely D.W.2 Mashaka Dalali and D.W.3 Oscar Philip Lugakingira. Both of them told the trial court that they know nothing about the dispute between the parties.

In giving judgment in favour of the Respondent, the trial Magistrate observed that exhibit P2 '*Mauzo ya shamba*' dated 10/3/1996 which shows that Anthony Bimaka had sold the plot in dispute to the Appellant Tatu Mlembe is not genuine. She continued to observe that when Anthony Bimaka sold the plot in dispute to the Appellant, he knew that it belonged to Damian Kinabo. She said further that the

Appellant was supposed to investigate as to whether Anthony Bimaka was the owner of the disputed plot. She invoked the principle of "*buyer be aware*" and remarked as follows:-

*"It seems plaintiff Tatu Mlembe was interested in getting a plot to build a house without first being satisfied that the person who sell it to him was the legal owner. It is very unfortunate".*

In my view, the trial Magistrate did not properly evaluate the evidence given by both parties. Had she done so, she could not have arrived at the conclusion which she did. For me, I think that the Appellant Tatu Mlembe gave credible evidence that she purchased the plot in dispute from one Anthony Bimaka in 1995 at a sum of shs.300,000/=. Two documents were tendered by the Appellant to show that she bought the plot in dispute from



Anthony Bimaka. These are exhibits P1 and P2 respectively. The Appellant was supported by two witnesses who witnessed the payment of the purchase price by Appellant to Anthony Bimaka. As already indicated, these witnesses are Sophia Mohamed (P.W.2) and Mustapha Shomari (P.W.3).

The Respondent Damian Kinabo who claimed that the plot in dispute belongs to him and that he bought it from Mohamed Njechele in 1981 was not supported by his own witnesses namely Mashaka Dalali (D.W.2) and Oscar Philip Lugakingira (D.W.3) who told the trial court that they know nothing about the disputed plot. That being the case, I wonder why the trial Magistrate gave judgment in his favour by holding that he had proved his case on a balance of probabilities whereas in fact the onus of proof did not even lie on him. I also wonder why the trial Magistrate regarded exhibit P2 to be a false document. She did not give any reason for regarding it so. In my view, exhibit P2 titled

MAUZO YA SHAMBA is a genuine document. It bears the signature of the seller Anthony Bimaka and the signature of the purchaser Tatu Mlembe (Appellant).

Furthermore, I wonder how, the trial Magistrate arrived at the view that Anthony Bimaka is a conman and that the plot in dispute did not belong to him when he sold it to the Appellant but that it belongs to the Respondent.

In fact, there was no evidence to show that Anthony Bimaka who sold the plot in dispute to the Appellant is a Conman. Also, there was no clear evidence to show that the plot in dispute belonged to the Respondent and not to Anthony Bimaka at the time when it was sold to the Appellant. As already indicated, the Respondent's claim that the plot in dispute belongs to him was not even supported by his own witnesses who said that they know nothing about it. I think therefore that the trial Magistrate erred in law and

fact by failing to appreciate the fact that the plot in dispute belongs to the Appellant and not the Respondent.

For these reasons I quash the trial court's decision and I allow this appeal. I make no order as to costs.



A. Shangwa

**JUDGE**

30/9/2008

Delivered in open court this 15<sup>th</sup> day of December, 2008  
in the presence of both parties.

A. Shangwa

**JUDGE**

15/12/2008

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