

**IN THE HIGH COURT OF TANZANIA**

**AT DODOMA**

**CIVIL CASE NO. 6 OF 2001**

**REGISTERED TRUSTEES OF DODOMA**

**GENERAL MUSLIMS ASSOCIATION..... PLAINTIFF**

**Versus**

**REGISTERED TRUSTEES OF**

**BAKWATA ..... DEFENDANT**

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**10/09/2009 & 30/10/2009**

**JUDGEMENT**

**HON. MADAM, SHANGALI, J.**

The plaintiff in this case **THE REGISTERED TRUSTEES OF DODOMA GENERAL MUSLIM ASSOCIATION** have sued the defendants **THE REGISTERED TRUSTEES OF BAKWATA** claiming for payment of TShs.200,000,000/= as general damages for inconveniences caused by the defendant for his failure to honour the agreement between them on the management of the Jamhuri Secondary School situated on the piece of land with certificate of

occupancy title No. 15391 within Dodoma Municipality. The plaintiff is also praying for this court to issue an order that all the income accrued from the said school from 2004 to 2007 be divided among the plaintiff and defendant.

In his amended plaint filed in this court on 2<sup>nd</sup> June 2007, the plaintiff claimed that he is the sole owner of the piece of land with certificate of title No. 1539 (copy attached to the plaint as P2). That piece of land consist of school building commonly known as Jamhuri Secondary School. That, in 1984 the Government of Tanzania handed over the school to the plaintiff who preferred to administer it through the defendant, but in 1996 the defendant decided to take over the ownership and management of the school without the plaintiffs consent. It is further alleged on the amended plaint that following the unlawful acquisition of the school, the defendant has failed to administer the same and as a result has lowered the quality of education and caused huge debts to the school. The plaintiff complained that all his efforts to reposes the school management and rectify the situation has ended in vain, and to make the situation worse the defendant has been claiming ownership of the school and the plot.

The plaintiff further stated that on 3<sup>rd</sup> June 2004 they managed to convene a meeting in which it was resolved that the ownership of the school buildings shall remain in the hands of the plaintiff while the management of the school shall remain in the

3

hands of the defendant. It was also agreed that the income generated from the school operation shall be divided equally between the plaintiff and defendant (minutes of the said meeting was attached to the plaint as P4). The plaintiff claimed that later the defendant refused to honour the agreement hence the present suit.

In his amended Written Statement of Defence filed on 11<sup>th</sup> July, 2007 the defendant denied the allegations filed by the plaintiff and raised a counter claim. In his defence he claimed that although the alleged piece of land title No. 15391 was originally registered in the name of the plaintiff on 25<sup>th</sup> November, 1963, the same was changed to the defendant on 10<sup>th</sup> January, 1995. Thereafter, the plaintiff purported to rectify the Land Register by giving false information to the land authority that the said title deed was lost and consequently managed to change the ownership to himself.

The defendant avers that the alleged school was registered and managed in the name of the defendant since its inception and as such the plaintiff have always recognized the defendant as the legitimate owners and managers of the school. It is further stated on the Written Statement of Defence that the administration and performance of the school have always been smooth and at a higher quality. The allegation of misappropriation of funds, mismanagement and low standard of education are mere fabrications and personal

grudges from some registered Trustees who were removed from Defendants Regional leadership for incompetence.

The defendant denied the existence of any meeting convened by the parties in order to resolve the issue of ownership of the piece of land and management of the school thereon. They insisted that the plaintiff's attempts to take over the management of the school is unjustifiable and unlawful.

On the counter claim, the defendant repeated that originally the alleged piece of land was registered in the land registry under title No. 15391 on 25<sup>th</sup> November, 1963 in the name of the plaintiff. However, on 10<sup>th</sup> January, 1995 the ownership was lawfully changed to the name of defendant. That, On 29<sup>th</sup> August, 2000, one **JUMA ALLY NGAIRI** (PW2), being one of the plaintiff trustees, fraudulently and without authority applied for the rectification of the land Register and managed to re-register that piece of land in the name of the plaintiff. The defendant avers that the whole exercise of rectification instigated by the plaintiff trustee was void ab-initio.

In the counter claim, the defendant prays for the following reliefs: **One**, a declaration that the rectification made on the disputed piece of land in the land Registry was void ab-initio as it was tailed with fraud; **two**, a declaration that the school belongs to the defendant and should be under the control and management of the

defendant; **three**, a permanent injunction to restrain the plaintiff from trespassing on the school premises and/or interfere with the control and management of the school without the consent of the defendant; **Four**, General damages; and **Five** costs of the suit.

In their reply to the Written Statement of Defendant and counter claim, the plaintiff insisted their claims and denied the claims countered by the defendant by calling for strict proof thereof. The plaintiff avers that the rectification applied and made by the land registry was made in good faith and without fraudulent intentions as shown in the affidavit deposed by **JUMA ALLY NGAIRI** (PW2) which has been annexed by the defendant in his written statement of defence as Annexure "B". In general the plaintiff prayed for the dismissal of the counter claim with costs and judgement be entered in his favour as prayed in the plaint.

On 10<sup>th</sup> December, 2007 before the commencement of the hearing of this suit, the parties agreed before my learned brother, Hon. Masanche, J on the main issues of the suit to be determined and resolved as;

1. Whether the disputed piece of land with title No. 15391 is the property of the plaintiff or defendant.
2. Whether the corrections or rectifications made by the Registrar of titles (Land Registry) was actuated by fraud.

3. Whether the plaintiff is entitled to payments from the rent.
4. Whether the defendant did, really constructed the buildings.

I would prefer to start with the evidence of PW2, **JUMA ALLY NGAIRI** who happened to work for both plaintiff and defendant associations in different times. Being led by Mr. Njulumu, learned advocate for the plaintiff, PW2 stated that he has been a member of the plaintiffs association since 1983. He was elected chairman since 1995. He stated that when he was an ordinary member of the plaintiff association from 1983 he was also the Regional Chairman of the defendants association since 1985. He testified to the effect that he discovered that their title deed of the piece of land in dispute No. 15391 was missing or lost. He decided to report to the Registrar of Titles and conducted an official search with an intention to get another title. That he paid the necessary fees for the official search exercise and the copy of the title was found in the name of Dodoma General Muslim Association, the plaintiff.

Thereafter he was advised by the Registrar of Title to make an application by swearing an affidavit so that he could be availed with another copy of the lost title deed. He complied, and the matter was announced/published in the newspapers according to the procedure and eventually was issued with another title deed with the same details and prescriptions but re-issued on 27<sup>th</sup> January, 1995. The title was produced in court as exhibit P1.

PW2 testified further that, following the Government Notice no. 169 of 1969, the Societies Ordinance, which provided that all rights of occupancy and properties in the ownership of the East African Muslim Welfare Societies or held by the Registered Trustees of any of these Societies shall be vested in the Registered Trustees of Baraza Kuu la Waislam Tanzania (BAKWATA) (the defendant) his office, including himself (PW2) misunderstood the Government notice. (PW2 produced the copy of GN 169 of 1969 as exhibit and marked Exhibit P2). He stated that they all misunderstood the directives in Exhibit P2 to mean that even the properties held by the plaintiff were included. He stated that due to that misconception the title Deed No. 15391 was mistakenly changed to the name of the defendant (BAKWATA). Later the mistake was discovered and the matter was resolved by the Administrator General through his letter Reference No. ADG/T/I/290/293 dated 29<sup>th</sup> November, 2001 written to the Director General, Capital Development Authority.

PW2 stated that in the said letter the Administrator General categorically stated that the properties Registered in the name of Dodoma General Muslim Association (plaintiff) are not involved or covered under GN 169 of 1969. PW2 tendered the said letter before the court as exhibit and was admitted and marked Exhibit P3. He further stated that on the basis of that discovery and clarifications on the position of GN 169/69 the "*rectifications*" were effected on the

said title deed and changed to the name of the plaintiff, the lawful owner of the plot. PW2 insisted that at that time he was the chairman of the plaintiff and was the one who initiated the changes of the said title deed.

The witness went ahead and informed this court that the alleged school was built by the Dodoma General Muslim Association, but Nationalized by the Government in 1967 or 1968 and later placed under BAKWATA, the defendant as a caretaker in 1983. PW2 stated that later the government released the Nationalized Schools, to the original owners. He said that it was at that stage when the plaintiff allowed the defendant to continue with the administration and management of the school. PW2 complained that suddenly in 1996 the defendant changed and decided to take over the school completely as his property.

PW2 testified that, the alleged plot, together with its fixed properties namely Jamhuri Secondary School buildings are the property of the plaintiff. He testified that sometimes in 2004 they convened a meeting with the defendant leaders in order to settle the matter amicably and out of court. That meeting was chaired by "*Sheikh Mkuu, Mufti wa Tanzania*" and it was agreed that the ownership of the disputed piece of land and its fixed properties should remain in the hands of the plaintiff as shown in the Title Deed, while the administration and management of the school shall



remain in the hands of the defendant on condition that they both share equally the proceed generated from the operation of the school project. PW2 produced the minutes of the said meeting dated 3<sup>rd</sup> June, 2004 as exhibit and marked exhibit P4. The same was read over before the court.

It is the evidence of the PW2 that despite of the said efforts nothing was implemented by the defendant. Instead defendant insisted on the ownership of both the plot and the school buildings. In such circumstances, PW2, contended, they had no option but to proceed with this case in court. That they, are now praying the court to declare that the lawful owner of the disputed plot and its school buildings is the plaintiff; and further order the defendant to pay damages as shown in the plaint together with costs of the suit.

In cross-examination by Mr. Kuwayawaya, learned advocate for the defendant, PW2 stated that he initiated the changes of the title deed from defendant to plaintiffs name having discovered the errors made and the directives from the Administrator General.

He also admitted that the school was registered in the name of the defendant since 1984. He also admitted that the defendant was allowed to operate business on the premises on conditions although there was no written agreement. He further admitted that from 1984 to 2001 the school has been under the administration of the

defendant as an invitee but not the owner of the buildings nor the plot.

**PW1, ISSA HAMISI RWECHUNGURA**, a businessman dealing with building construction testified to the effect that as a member of defendant Board, he is aware that the disputed piece of land is the property of plaintiff together with Plot No. 1 Block "**O**". That the plots were acquired by the plaintiff back in 1963. He supported the evidence of PW2 on how the title deed got lost and later changed to the name of defendant and eventually rectified to show the name of the lawful owner, the plaintiff.

In his defence and counter claim the defendant called two witnesses. **DW1, MASOUD ALLY**, the Chairman of the Baraza Kuu la Waislam, Tanzania, Dodoma Region (defendant), testified to the effect that when he was appointed on that portfolio in 1999 he was handed over with several properties including Jamhuri Secondary School as the property of the defendant. He emphasized that the alleged school is the sole property of the defendant and that there is no partnership of any kind with the plaintiff on the ownership of the alleged school. He testified that all properties are under the control of the Registered Trustees of Bakwata including Jamhuri secondary School.

When DW1 was shown exhibit P4, he denounced it and stated that the defendant's member of trustees were not represented in that meeting and that it was his first time to see such a document and its resolution. He prayed the court to dismiss the case with costs.

In cross-examination by Mr. Njulumi, Learned advocate for the plaintiff, DW1 conceded that he was appointed member of the Trustee in 2005 while Exhibit P4 was made in 2004. He also admitted that the "Mufti" or "Sheikh Mkuu" is the national spokesman of the Bakwata and that exhibit P4 shows that the chairman of the meeting was "Sheikh Mkuu, Mufti wa Tanzania." He eventually concluded that the plot may belong to the plaintiff but the school buildings belong to the defendant.

**DW2, ALLY SAIDI MTAKI**, (a 75 years old man who appeared tired due to the age) testified that in 1963 he was the Regional Commissioner for Dodoma Region. That he was requested by Muslim leaders from both Muslim Welfare Association and Dodoma General Muslim Associations to mobilize people to build a school at the disputed plot which was owned by the Dodoma General Muslim Association. He stated that the school was for Moslems and initially known as Moslem School and not property of Dodoma General Muslim Association. He went on and stated that to his knowledge the school belongs to the defendant.

In cross-examination he claimed that the piece of land in dispute belongs to the Government and that he does not know the owner of that land between the plaintiff and defendant.

From the above evidence, I have noted that the piece of land in dispute is the plot with certificate of the title deed No. 15391. There is no evidence that the piece of land known as Plot 1 Block "O" within Dodoma Municipality which was referred to by some witnesses is involved in this case. Available is the ample evidence on record to show that the said piece of land with title deed No. 15391 was issued to the plaintiff on 7<sup>th</sup> November, 1963 as also shown in exhibit P1. that Right of occupancy has never been revoked to justify any attempts to re-allocate the plot to any other person or association: What transpired according to the evidence of PW2 who appeared to be most credible witness, the ownership was changed from the plaintiff to the defendants in 1995 due to misunderstanding of GN 169 of 1969 commonly referred to as **BAKWATA (VESTING) ORDER, 1969** - which vested all immovable properties owned by The East African Muslim Welfare Society and Tanzania Council of the East African Muslim Welfare Societies in the Registered Trustees of BAKWATA. Rule 2 of GN No. 169 provide:

*"All rights of occupancy, Government  
Leaseholds and other estates and interest in or  
over lands whatsoever together with any*

*buildings, furniture and fixtures in or over such lands held or owned by East African Muslim Welfare Society and the Tanzania Council of the East African Muslim Welfare Society, or held or owned by the registered trustees of any of those societies, or any other person for or on behalf of the said Societies or any of them, and which, upon the dissolution of the said Societies, vested in the Administrator General by virtue of the Societies (Winding-up) order, 1968 shall, with effect from 30<sup>th</sup> June, 1969, vest in the registered Trustees of Baraza Kuu la Wailsam wa Tanzania (BAKWATA) who shall hold the same on behalf of the Baraza Kuu la Waislam wa Tanzania (BAKWATA)."*

From the above Rule it is obvious that the properties of plaintiff were not covered. This was also clarified by the authoritative letter of the Administrator General (the caretaker) Exhibit P3. In that letter it is clearly stated that the Dodoma General Muslim Welfare Society is not covered by that order. It means therefore whether the "rectification" or change of names was based on the wrong interpretation of GN 169/1969 or on what PW2 called bonafide error based on lack of consent from the committee, the position remain the same that there was no justification to change the title deed from

the plaintiff to the defendant. Apparently, I was not able to see any document or copy of a title deed which was prepared by the Land Registry in the name of the defendant. The evidence of PW2 is clear that when he discovered that the title deed was missing he procedurally approached the land Registry and applied for an official search. The result thereof revealed that the original title deed was still intact in the name of the original allocattee, the plaintiff. As a result he (PW2) was issued with another copy of the title deed in the name of the plaintiff. Therefore there is no evidence to establish that the disputed piece of land has ever been re-allocated to the defendant. That means the issue of fraud or bad faith on the part of the plaintiff has no leg to support.

On the above findings and based on the overwhelming evidence of the plaintiff side the first issue is answered in favour of the plaintiff. That is, the piece of land situated in Dodoma Municipality with title deed No. 15391 is the property of the plaintiff, The Registered Trustees of Dodoma General Muslim Association.

What is the position of the school buildings situated on the said piece of land? The stance of the law is clear, that anything permanently attached to the land is part of that piece of land. Section 2 of the Land Disputes Court Act, Cap. 216 R.E. 2002 define land as:

*" The surface of the earth and the earth  
below the surface and all substances other  
than minerals and petroleum forming part of  
or below the surface, things naturally growing  
on the land, **buildings and other  
structures permanently affixed to land**"  
(underscore mine).*

See also section 2 of the land Act, Cap 113 R.E. 2002.

That is also the position under the common law of which famous rule is **"quicquid plantatur solo, solo credit"** which means anything affixed to the soil becomes part of that soil. The buildings are naturally fixed to the land and therefore the buildings accommodating Jamhuri Secondary School are part of the plaintiffs piece of land. Incidentally, there is no evidence adduced by the defendant to establish that the said buildings were actually erected by the defendant. DW2, fumbled extensively in his testimony and his re-collection of events appeared to have betrayed him.

At first DW2 conceded that the disputed piece of land was owned by Dodoma General Muslim Association (plaintiff) and that he was approached by both plaintiff and Muslim Welfare Society to mobilize Moslems and build the school for all Moslems, but later he changed and stated that the school belongs to Bakwata (defendant)

- and the plot belongs to the Government. To crown it all, there is ample evidence that the defendant was born in 1968 and therefore could not have even participated in the exercise of building the disputed structures.

To sum-up this issue, I am satisfied that the disputed school buildings situated on a piece of land with title deed no. 15391 belongs to the plaintiff and were indeed erected by the plaintiff's efforts. The fourth issue is therefore resolved in favour of the plaintiff.

In the cause of discussing the first and fourth issues above, I have also resolved the second issue in favour of the plaintiff and would insist that any corrections or rectification, if any, made by Registrar of Titles was not actuated by fraud because the title deed is still in the name of the rightful owner, the plaintiff.

The third issue is whether the plaintiff is entitled to payments for the rent. There is no dispute that the defendant has been operating school business in those buildings without any express conditions of tenancy agreement. The evidence from the plaintiff side indicate that the defendant was granted a free licence to operate school business on the premises by the plaintiff. There is no written or oral agreement between them save for the assertion by the plaintiff that he allowed the defendant to operate school



business. Furthermore, there is no specific amount of monthly rent pleaded neither in the plaint nor in evidence. It appears that there was a sort of "*silent understandings*" between the parties which was spoiled by the decision of the defendant to claim the ownership of both the plot and school buildings. There was nothing tabled before this court to substantiate rent claims.

Be it as it may, the position of the law is that court can not consider and award a relief which was not sought and proved. There is no basis to determine the issue of rent.

The next point for consideration and decision is whether the plaintiff is entitled to the sum of TShs.200,000,000/= as general damages. My first question is, what is the basis for this claim. In his plaint the plaintiff claimed the same to be damages for inconveniences caused by the defendant for his failure to honour the agreement exhibit P4. Unfortunately there was no further evidence to establish or show how the plaintiff was inconvenienced by the conducts of the defendant's refusal to honour exhibit P4. That document was a mere meeting minutes with some resolutions. The cardinal principle in awarding damages is "*restitution in integrum*," that is, the law with endeavour, so far as money can do it, to place the injured party in the same situation as if the contract had been performed - See the case of **A.S. SAJAN vs COOPERATIVE AND RURAL DEVELOPMENT BANK (1991) TLR 44 (CA)**.

According to the evidence on record the plaintiff allowed the defendant to use the school buildings "*in gratis*" for quite a long time. He changed his soul when the defendant claimed the ownership of the plot and premises. There is no evidence to show that there was any beneficiary relationship between the parties prior to the filing of the suit. The plaintiff was not in expectation of any sum of payments and division of school business proceeds was introduced when the defendant attempted to acquire the plot and buildings. Therefore I have failed to understand how the plaintiff have suffered from the conducts of the defendant to the extent of demanding general damages to the tune of TShs.200,000,000/=. To say the least, the plaintiff have only claimed the general damages but failed to proof the same on the balance of probability. The claim is therefore refused.

Likewise the prayer for an order that the school business income of the year from 2004 to 2007 be divided among the parties has no leg to stand. In the first place the alleged generated income per year is not known, let along for three years. It is not clear if the said school business was actually generating profit or was deteriorating due to the poor administration as alleged by the plaintiff. In his plaint the plaintiff categorically stated how the quality of education has fallen drastically due to the poor management and

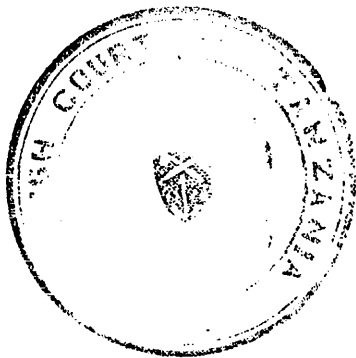
how the school administration has failed to pay income tax and social security fund contribution for its employees, yet the plaintiff is craving to divide profit from the school operation. All in all, I am satisfied that the claim is equally untenable.

Turning to the counter claim and its sought reliefs, I am afraid the defendant have totally and completely failed to prove his claims. From what I have stated above, which is based on evidence and law, the defendants counter claims have no merits. In short, all reliefs sought thereof are rejected for lack of evidence.

In conclusion therefore, this judgement is pronounced in favour of the plaintiff that, the plaintiff is the rightful owner of the piece of land namely title deed No. 15391 together with all school buildings and structures attached to the said piece of land.

If the defendant is interested to continue with his school business operation running in the name of Jamhuri Secondary School on those buildings/premises, he is advised to compromise with its lawful owner, the plaintiff and abide by the tenancy conditions which may be imposed thereto: Otherwise the defendant is required to vacate the premises and operate his school business elsewhere.

The defendant is condemned to pay the costs of this suit.



  
(M.S. SHANGALI)

JUDGE

30/10/2009

Judgement delivered to date 30<sup>th</sup> October, 2009 in /the presence of Mr. Kingu and Mr. Ngairi for the plaintiff and Mr. Charles and Mr. Masoud Ally for defendant.

  
(M.S. SHANGALI)

JUDGE

30/10/2009