

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

CIVIL CASE NO. 4 OF 2012

AHMAD MUTUNGI..... PLAINTIFF

(Administrator of the estates of Abdul
Ibdu Ibrahim Mutungi)

VERSUS

1. TANZANIA BUILDING AGENCY
2. ATTORNEY GENERAL
3. ROSE MWENEZI }DEFENDANTS

JUDGMENT

27.02 & 16.03.2018

BONGOLE, J.

In the plaint filed in this court on 15.03.2012, the plaintiff Ahmad Mutungi, the Administrator of the estates of the late Ibrahim Mutungi, sued the defendants in order to recover the suit land which his late father Ibrahim Mutungi, alleged to have been given by one Ms. Halima. He claimed Tshs. 80,000,000/= being the value of the suit land, general damages and costs of this suit.

The plaintiff's allegation is that in 1980 the plaintiff's father one Ibrahim Mutungi (deceased) and others, who were neighbours of the land in dispute at Buyekera within Bukoba Municipality, invited and authorized the government to erect houses for its

employees on condition that the house be returned to the owners. In January 2012 the plaintiff learned that the house in his plot had been sold to the third defendant and that the first defendant in collaboration with the Director of Bukoba Municipal Council continued to evict and or threaten the plaintiff to demolish his structure on the suit land resulting into this suit.

Basing on this allegation the plaintiff filed this suit praying for the following reliefs:-

- i. Declaration that the land in dispute is among the estate of the late Abdu Ibrahim Mutungi.*
- ii. Vacant possession with an order against the defendants (sic) to demolish the said structure there on;*
- iii. General damages,*
- iv. Any other and further relief this court may deem just to grant.*

The defendants filed a joint written statement of defence disputing the plaintiff's claim on the ownership of the suit land.

Parties conceded and framed the following issues:-

- 1. Whether the disputed plot is among the estates of the late Abdu Ibrahim Mutungi whose administrator is the plaintiff*
- 2. If issue No.1 is answered in the affirmative whether the title there of in any manner passed to the 1st defendant who in turn sold it to the 3rd defendant.*
- 3. To what relief(s) are the parties entitled.*

The first plaintiff's witness was Ahmed Abdu Mutungi who featured as PW1. He stated that he was a resident of Buyekera Street within Bukoba Municipality and that he acts as the administrator of the estates of the late Abdu Ibrahimu Mutungi his father. He testified that the land in dispute was the property of his father and that the first defendant, Tanzania Building Agency (TBA) allocated the same to the third defendant, Rose Mwemezi. That the land in question was given to his father by one Ms. Halima his guardian, in 1970s. He described the suit land that on the North it borders Raiza Chama, on the South one Edmund as well as Nyakanyasi Road and on the West one Kadona.

He went on testifying that during her life time, Ms. Halima had given a certain portion to TBA to build houses to its employees and they agreed that the said portion would revert to her after the accomplishment of the building. That contrary to the agreement the first defendant sold a house in the suit plot to the third defendant who was an employee of the government in the Police Department.

He testified that as he told the third defendant to vacate she refused arguing that the suit land was the property of TBA before it was disposed to her. The plaintiff thus issued 90 days demand notice to TBA. The same was admitted as exhibit "P1".

He insisted that the defendants were invitees on the suit land and that being the case; they had no right to occupy it permanently.

When he was cross-examined by Mr. Haruna Shomari learned State Attorney on whether the plaintiff had any evidence to prove that the suit land had been given to his late father by one Ms. Halima and the latter authorizing the government to erect a house in the suit plot; he stated that he was told this fact by his late father and that he did not witness any agreement between one Halima and TBA.

Another witness was Charles Rwezaura who featured as PW2. He testified that in 2011 he was a Primary court Magistrate stationed at Bukoba Urban Primary court. The essence of his evidence was that he heard the case in Probate and Administration of Estates Cause No.73/2010 in which the plaintiff was appointed the Administrator of the estates of Abdu Mutungi.

The last witness was Abubakari Abdu Mutungi who featured as PW3. He testified that he is the elder brother of Pw1 and that the late Ibrahimu Mutungi was their father who died in 1991.

It was his evidence that he was aware that his father acquired the suit land the same being given to him by one Ms. Halima in 1970 and that he and one Edmund Nyangute and Bashweka were present. He testified that the suit land was given to his father by Halima because she was childless and that she used to be taken care of by the said Ibrahim Mutungi.

He went on testifying that in 1973, Halima and Ibrahim Mutungi were approached by the leaders of the government and asked for a plot in which they would build houses for employees. That the due permitted the first defendant (TBA) to build the said house on condition that it would be returned to the owner of the plot. He was emphatic that he witnessed all what was taking place.

On cross examination by Haruna, Pw1 stated that he knew that Ms. Halima acquired the suit land by purchasing it but when she disposed it to his father there was no any written contract to that effect. This was also the case when it was subsequently given to Tanzania Building Agency.

That marked the end of the plaintiff case.

In defence, Mr. Yahaya Omari Papala testified as Dw1. He stated that he was an Estate Officer of Tanzania Building Agency and a technician stationed at Bukoba. That his duties are to take care of all buildings of the government of Tanzania as well as keeping records of tenants contracts.

He testified that plot No.1 Block 'C' was once the property of the Government of Tanzania after it had acquired the whole area and erected houses in 1960. That, thereafter in 1993, the third defendant started living there as a Government servant working in the Ministry of Home Affairs under the Police Department as a typist at Bukoba Police.

He went on testifying that on the 29.09. 2001 he received a letter from the third defendant complaining that the plaintiff had invaded her plot so she wanted to know the exact owner of that area. That after receiving that complaint they informed the Street

Chairman of Buyekera and Bukoba Municipal Director to stop anybody who wanted to invade the area in dispute as it belongs to the Government.

It was the evidence of Dw1 that on the 19.06.2002 they informed the third defendant that she was eligible to buy the house in dispute by way of a letter. That there after they handed her the said house by contract. He prayed this court to declare the third defendant the owner of the suit area.

On cross –examination by Mr. Chamani, Dw1 stated that he did not tender any evidence to show that the suit area belonged to the government however, he was quick to state that he knows that the Government through the President has power to acquire any land subject to consultation with the owner and follow procedure and pay compensation accordingly.

The second witness was Rose Edward Mwemezi who featured as DW2. She stated that she is a resident of Buyekela in plot No.1 Block 'C'. That she has been living in that house (area) since 1996.

She stated that she was once a Secretary in the Department of Police in the OCD's office. That after residing in the suit house as a Government employee, she was given a letter proposing her to

purchase but that house on 19.06.2002. She tendered the said letter and the same was admitted as exhibit 'D1'. That another letter was given to her by TBA having sale contract documents to purchase the suit property. She tendered the said letter and sale contract/agreement and they were admitted as exhibits 'D2' and 'D3' respectively.

She went on testifying that on the 20.09.2002 she was given another letter by the Region Commissioner House Committee allocation of Kagera authorizing her as the owner of the suit house with effect from 1999. She tendered the letter which was admitted as exhibit 'D4'. She prayed this court to order the plaintiff to remove his structure (kiosk) and pay her disturbance costs of this suit.

That marked the end of the case on both sides.

With the permission of the court Mr. Chamani filed final submission in clarifying or building his case. On their party, the defendants did not file final submission.

I will state with the first issue that is, whether the disputed plot is among of the estates of the late Abdul Ibrahim Mutungi. Submitting on this issue, Mr. Chamani argued that the plaintiff has burden to prove that he has title over the suit land. On this,

he referred to **section 112 of the Evidence Act [Cap.6 R.E.2002]** which requires that whenever a party has a burden to prove a particular fact lies on that person who wishes the court to believe in its existence. He submitted that according to the evidence of PW3 Charles Rwezaura a Primary Court Magistrate, the plaintiff proved that he was appointed administrator of the estates of his father Ibrahim Mutungi the suit land inclusive. Further that PW4 one of the sons of the late Ibrahim Mutungi proved that the suit land was the property of one Ms. Halima who later on granted the same to the plaintiff's father and the two authorized the government to erect a house on the suit land.

In as far as the evidence of the plaintiff's case side is concerned; I have not seen any written evidence (document) to prove how the alleged Ms. Halima acquired the suit land. Equally, there is no written document to prove the two alleged transactions namely, between Ms. Halima and the late Ibrahimu Mutungi on one hand and on the other, between the duo and the Government in the process to authorize the latter to erect the alleged house as contended by PW³₄. It is the requirement of the law that an agreement for disposition of right of occupancy cannot be enforceable without a written contract to that effect. This is

provided for under **section 64 (1)(2) of the Land Act Cap.113 R.E.2002** which provides as follows:-

“(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if-

(a) the contract is in writing or there is a written memorandum of its terms;

(b) the contract or the written memorandum is signed by the party against whom the contract is sought to be enforced.

(2) A contract for a disposition referred to in subsection (1) may be made using a prescribed form.” [Emphasis is mine]

I am mindful that the Land Act is not applicable to un surveyed land such as the land in the suit at hand which is governed by the **Village Land Act Cap.114 R.E. 2002**], but I am settled that the principle on the requirement of written contract for disposition of right of occupancy applies to both customary and granted right of occupancy. This is because the definition of disposition of right

of occupancy envisaged in section 64 (supra) covers both customary and granted right of occupancy. For the sake of clarity, **section 2 of the Land Act** defines disposition thus:-

*"disposition" means any sale, mortgage, transfer, **grant**, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, a **usufructuary right**, or other servitude or any other interest in a right of occupancy or a lease and any other act by an occupier of a right of occupancy or under a lease whereby his rights over that right of occupancy or lease are affected and an agreement to undertake any of the dispositions so defined;*

Regarding what a right of occupancy entails section 2 (supra) defines:-

"Right of occupancy" means a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law;"
[Emphasis supplied]

My understanding of the provisions and definitions portrayed above therefore, the requirements of a written contract to

transfer land whether customary or granted right of occupancy from one person to another are the same. Albeit PW3 testified that his father, Ibrahim Mutungi (deceased) was given the suit land by one Ms. Halima, yet he did not tender any contract to substantiate that fact. Likewise, the assertion that the late Mutungi and Halima permitted the government to erect a house on the suit land is not supported in evidence.

On the other hand, the first and third defendants that is, Tanzania Building Agency and Rose Mwemezi respectively, proved in evidence that at one point in time had written agreement on occupation and use of the house on the suit land Plot 1 Block 'C' in particular, situated at Buyekera area. According to exhibit 'D1', 'D2', 'D3' and 'D4' which are the letter of intention to create legal relation, approval letter of purchasing the suit house, sale agreement and the contract proving that the first defendant disposed the suit house to the third defendant respectively; there is no doubt that the suit property belonged to the first defendant and that the same was indeed disposed to the third defendant, Rose Mwemezi.

It is inconceivable that the government could have just agreed to build the house in the suit land without any recognized contractual legal relationship between it, the plaintiff's father and

Halima then revert the house to them. This assertion is unattainable in law and I am far from being persuaded by the same. To this end the first issue is answered in negative.

I now return to the second issue, whether the title there of passed in any manner to the first defendant who in turn sold it to the 3rd defendant. According to DW1- Yahaya Papala the Estates Officer of TBA, the first defendant as the name suggests it is responsible with government buildings including but not limited to leasing and selling those buildings. According to the letter of the first defendant addressed to the 3rd defendant dated 19.06.2002 exhibit 'D1;' with the heading: "*KUUZIWA NYUMBA YA SERIKALI ILIYOPO MTAA WA BUYEKELA NO.1C – KAGERA.*" I have no doubt that the suit land was the Government property which property was going to be sold to the government servant, the 3rd defendant in particular. In the subsequent letter of TBA dated 12.09.2002 the 3rd defendant was approved as the buyer of the suit land/house and was directed to effect payment through the account name **Tanzania Building Agency** CRDB Bank NO.01J1042989802 Bukoba. Since the owner, has not complained against the third defendant it is to be taken that the two completed their transaction. In short, the first and third defendants have

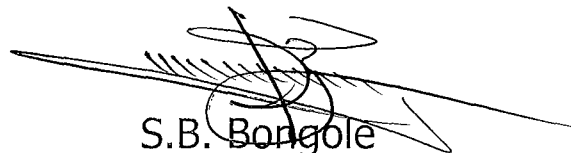
managed to prove ownership of the suit land on the balance of probabilities. The second issue is thus answered in affirmative.

The gist of the third issue is about reliefs which each party to this suit is entitled. It is my holding that the plaintiff has failed to prove that the suit land was his property; consequently, the alleged general damages resulting out of the alleged illegal occupation cannot stand. Besides that, the value of the suit land which the plaintiff claimed was never proved.

In the upshot the third defendants succeeds as follows:-

- i) The third defendant is hereby declared the lawful owner of the suit land/house.*
- ii) The third defendant shall have her costs for this suit.*

Order accordingly.



S.B. Bongole

Judge

16/03/2018

Date: 16/3/2018

Coram: Hon. S. B. Bongole, J.

Plaintiff: Present in person

1st Defendant: Mr. Yahaya Papala

2nd Defendant: Absent

3rd Defendant: Present

Court:

The suit comes for judgment and the same is hereby delivered in the presence of the Plaintiff in person, the 1st defendant's principal officer, the 3rd defendant in person and in the absence of the 2nd defendant in my presence this 16th March, 2018.



S.B. Bongole

Judge

16/03/2018

Right of Appeal explained.



S.B. Bongole

Judge

16/03/2018

