

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
LAND CASE NO. 97 OF 2011**

AHIYA ELIAU LUKUMAYI.....PLAINTIFF

Versus

- 1. THE REGISTRAR OF TITLES.....1ST DEFENDANT
2. DIRECTOR OF SURVEY AND MAPPING.....2ND DEFENDANT
3. THE ATTORNEY GENERAL.....3RD DEFENDANT**

JUDGMENT

B.R. MUTUNGI, J:

AHIYA ELIAU LUKUMAYI (herein shall be referred as the plaintiff) is seeking for declaratory orders against the defendants as hereunder: -

‘That the plaintiff’s claim against the Defendant is for a declaratory order that the plaintiff is the legal owner of Farm (sic) No. 3797 Bonyokwa Area Dar es Salaam”,

In line with the above, the plaintiff is herein praying for the following reliefs;

- a) A declaratory order that the Second Defendant's withdrawal of the Survey Plan No 'E' 257/108 in respect of Farm No. 3797 Bonyokwa area Dar es Salaam is unlawful.
- b) A declaratory order that the Second Defendant reinstate Survey Plan No. 'E' 257/108 in respect of Farm No. 3797 Bonyokwa area Dar es Salaam.
- c) An order of permanent injunction to restrain the first defendant from rectifying the land register in respect of Farm No. 3797 Bonyokwa area Dar es Salaam held under Certificate of Title No. 56371 registered in the name of AHIYA ELIAU LUKUMAY.
- d) Costs of this suit.
- e) Any other relief (s) this Honourable Court may deem just and fit to grant.

On the other side of the coin, the defendants in their joint Written Statement of Defense strongly objected the plaintiff's claims. Basically, they alleged the survey plan No. 'E' 257/108 was made unlawfully and fraudulently, hence there is a need for rectification of the land register.

The following issues were framed and agreed for the easy determination of the matter. These are as hereunder: -

1. *Whether the plaintiff is the lawful owner of Farm No. 3797 situated at Bonyokwa Area, Dar es Salaam held under Certificate of Title No. 56371.*
2. *Whether the 2nd defendant's act of withdrawing the survey plot No." E" 257/58 situated at Bonyokwa (sic) Area, Dar es Salaam held with certificate of Title No. 56371 was lawful/ justifiable.*
3. *Whether the 1st defendant's intent of rectifying the land register in respect of Farm No. 3797 situated at Bonyokwa (sic) Area, Dar es Salaam held with Certificate of Title No. 56371 was properly justifiable or lawful.*
4. *What relief (s) if any are the parties entitled to.*

In his (plaintiff) endeavor to prove ownership over the suit land, a number of three witnesses were called in evidence. These are **ALPHONCE JOHN SANGA (PW1)**, **LT COL (RETIRED) STANLEY MOTTO MAGULI (PW2)** and **AHIYA ELIAU LUKUMAY (PW3)** or in other words the plaintiff. Whereas the

defendants brought a number of three witnesses to challenge the claims at hand. These are **HADIJA MULULU (DW1)**, **PAUL JULIUS (DW2)** and **KAJESA MINGA (DW3)**. It is also important to point out herein that, during the entire hearing of the case, Mr. Josiah Dismas and Lydia Thomas (learned Advocate and learned State Attorney) appeared for the plaintiff and the defendants respectively.

Before going into the merits of the above stated issues, it is now an opportune time to trace the facts which had led to the dispute at hand or in other words its genesis.

PW1 and PW2 in their testimonies alleged the plaintiff (PW3) had bought the farm in dispute after the original owner one Botham Ndunguru had mortgaged the same to PW1 in 2006, thereafter had defaulted payment. The said farm was subsequently sold in a public auction on 26/7/2009 as per the District Land and Housing Tribunal's order in execution of Application No. 288 of 2007. PW2 who works

for Tambaza Auction Mart was responsible for selling the said farm. The plaintiff bought the disputed farm for Tshs. 30,000,000/=. PW1 thereafter was responsible for transferring the ownership to legalize the plaintiff's ownership. The said transfer form under the power of sale dated 26/11/2009 was admitted as Exhibit P.1. PW1 latter got confirmation from PW3 that, he had already effected the transfer. The proclamation of sale dated 14/7/2009 from the said Tribunal was admitted as Exhibit P.2. PW1 and PW2 explained further that before the auction was conducted, the public was dully notified via the Mtanzania News Paper advert dated 17/7/2009 which was admitted as Exhibit P.3 collectively.

PW2 alleged PW3 was the highest bidder in the said auction for Tshs. 30,000,000/=. PW3 successfully paid 25% of the purchase price on 26/7/2009 and the remaining amount was paid on 29/7/2009. The paying receipts were admitted as Exhibit P.4 collectively. PW2 having informed the said

Tribunal that the plaintiff had paid the entire purchase price there on, the said tribunal issued a sale certificate (Exhibit P.6) which was given to PW3 (the plaintiff). After a while, the title deed of the said farm was dully handed over to PW3 (Exhibit P.5)

The plaintiff thereafter proceeded with the transfer process. He thus paid for the registration via a receipt which was admitted as Exhibit P.7 to the Lands Office. The transfer was subsequently effected hence the certificate of Occupancy No. 56371 dated 1/10/2004 (Exhibit P.8) was included the plaintiff's name. He further alleged to have been paying the land rent from 2005, 2006 and 2007. The payment receipts were admitted as Exhibit P.9 Collectively.

However, on 9/9/2010 (in relation to a mortgage) and 18/10/2011. The plaintiff alleged to have been served with notices of rectification of the said title which were admitted as Exhibit P. 10. He then applied for an official

search on the said farm on 24/10/2011(Exhibit P.11) to ascertain whether the said land was subject of a mortgage or otherwise. The truth of the matter was that, the suit farm had no such incumbrance as alleged by the first defendant in the first notice.

Meanwhile the Government informed the plaintiff that, they had no intention to effect the rectification. Thereafter the plaintiff consulted his lawyer Mkongwa Advocate who wrote two letters to the Government dated 13/6/2011 and 28/7/2011 (Exhibit P. 12 collectively). The plaintiff had also been informed the registered survey plan No. E 257/ 186 in respect of the suit plot had been withdrawn by the Director of Survey and Mapping. Unfortunately, as per PW3(the plaintiff) the Government never responded to these letters.

The plaintiff alleged due to the rectification threats he could not develop the farm in dispute. He had recently conducted another official search (on 7/12/2017) which

makes a total of three searches on 2013, 2014 and 2017 (Exhibit P. 13 collectively). These revealed the farm still belonged to the plaintiff.

In the event, the plaintiff has sued the defendants seeking for the earlier stated reliefs, since the withdrawal of the survey plan was unlawful and not communicated to the plaintiff. The rectification itself has no legal justification.

On the other side of the opposing camp, DW1 who is the Legal Officer from the Ministry of Lands, Housing and Settlement admitted to have known the dispute at hand between the plaintiff and the 1st defendant. He alleged to have been given directives from the Acting Land Commissioner for Lands to rectify Exhibit P.8. Thereafter, the notice of rectification dated 9/11/2011 was issued to the plaintiff though it was not admitted in court as evidence. The reason for doing so was the fraud surrounding the survey of the suit farm committed by one Gotham Ndunguru.

DW2 who works with the Ministry of Lands as a Surveyor alleged his office had received a complaint from MARIA and ADELINA KASINGIRO that, their farm had been registered to another person. DW2 went to the scene and realized there was fraud in the way the application and survey was done. To this survey application had been channeled through the wrong authority. It was processed at Magurunza while the land was situate at Bonyokwa. Having realizing such circumstances, DW2 advised the Commissioner to cancel the said survey plan and the 1st defendant to withdraw the registration of the title. In that regard the suit land could remain un-surveyed.

DW3 who works in the Land's Ministry on behalf of the Commissioner, insisted the farm in dispute was unlawful surveyed and the title was unlawful prepared. He further clarified, the plaintiff's claims have no legs to stand on since

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he was wrongly registered hence the rectification is inevitable.

Basically, this is what had transpired as far as the testimonies from the conflicting sides are concerned.

Starting with the first issue as to *whether the plaintiff is the lawful owner of Farm No. 3797 situated at Bonyokwa Area, Dar es Salaam held under Certificate of Title No. 56371.* Upon my objective perusal of the court records as well as the testimonies from both camps, it would appear the plaintiff had acquired the farm in dispute through a public auction on 26/7/2009. This is evidenced from Exhibit P.4 Collectively and P.6. The evidence goes further by revealing PW3 (plaintiff) successfully proceeded with the registration and Exhibit P. 8 (Certificate of Title) was subsequently issued in his name from the original owner. He followed all formalities before effecting the transfer of the suit farm and declared the legal owner way back in 2009.

More so, the evidence clearly reveal the plaintiff has been subsequently paying the land rents via Exhibit P. 9 collectively. That is why upon being issued with the notice of rectification from the defendants (Exhibit P. 10), The plaintiff successfully conducted three different official searches (Exhibit P. 13 collectively) which indicate the farm in dispute belonged to him. The question now is if really the defendants had genuine reasons to rectify the plaintiff's right of Occupancy, why then didn't the Government respond thereto (different letters Exhibit P.12) from PW3's lawyer who was seeking for clarifications on the intended move.

For reasons known to the defendants, they have now come to this court during their defense alleging the survey plan of the suit land was obtained by fraud. DW2 further alleged there was a complaint from MARIA and ADELINA suggesting their farm was registered in another person's

name. Further, DW2 and DW3 upon their inquiry found the application and survey of the said farm was processed through the wrong authority. However, going through the entire evidence on the defendants' side, neither MARIA nor ADELINA was called as a witness to testify herein to support what was alleged by DW2. This court is entitled to draw an adverse inference against the defendants for failure to call these material witnesses.

In the case of **MAGAMBO J. MASATO AND 3 OTHERS VERSUS EASTER AMOS BULAYA AND 2 OTHERS, CIVIL APPEAL NO. 199 OF 2016 (CAT-MWZ) (UNREPORTED)** the Court of Appeal of Tanzania at page 17 cited the case of **Hemedi Saidi Versus Mohamed Mbilu [1984] T.L.R 113** where it was held;

*'Where for undisclosed reasons, any party fails to call a material witness on his side, **the Court is entitled to draw an inference that if the witnesses***

were called they would have given evidence contrary to the party's interests.' [Emphasis is mine]

In view of the foregoing reasons, I find the first issue is answered in the affirmative. The sale was by a public auction dully advertised in public places and in the newspaper. In that regard due diligence was effectively done, and there was no objection from the original owner or any other person.

I now turn to the second issue on whether the 2nd defendant's act of withdrawing the survey plot No. "E" 257/58 situated at Bonyokwa (sic) Area, Dar es Salaam held under certificate of Title No. 56371 was lawful/ justifiable. From the outset I find this issue is answered negatively. The reason being, in line with the analysis and the outcome of the first issue, the farm in dispute belongs to the plaintiff as per Exhibit P.8 (by virtue of registration) which was subject of the survey plan in issue. The same as per DW2 had gone

through the requisite survey procedures. The doubt raised that the survey application was tainted with fraud leaves a lot to be desired, since there is no credible evidence to this effect.

More so, as I have demonstrated earlier, the defendants never replied to the plaintiff's letters (Exhibit P.12 collectively) who was seeking for clarifications on the intended withdrawal. In that regard the withdrawal was being done behind the plaintiff's back. Considering the foregoing, there is no any justification demonstrated by the second defendant of the said withdrawal.

Consequently, the second issue is answered negatively.

Regarding the third issue, *whether the 1st defendant's intent of rectifying the land register in respect of Farm No. 3797 situated Bonyokwa (sic) Area, Dar es Salaam held under Certificate of Title No. 56371 was properly justifiable or*

lawful. Again, the issue is answered negatively. It is on record, the defendants merely alleged their intention for rectification in the register which was not backed by any documentary evidence, DW1 had failed to tender in court the alleged rectification notice to rectify Exhibit P. 8.

Given the above scenario, I find the testimonies of DW1, DW2 and DW3 being merely hearsay evidence to justify the 1st defendant's action. Be as it may be, the first notice as explained by the defendants' witnesses was to effect of cancelling a registered mortgage yet still a second notice issued had no mention of the said incumbrance. One would ask then what was the 1st defendant's motive. There were other reasons raised which I have already referred to **One**, was the fact that the first owner had unlawfully and fraudently procured the land. **Two**, survey plan was channeled through a wrong authority. The defendant's witnesses had contradicted themselves to the

extent that one could not tell the intention of rectifying the land register.

Had it been there was fraud as alleged by the defendants, the question is why Exhibit P. 8 was successfully issued by the defendants without detecting the alleged fraud? To add salt to the wound, the question is why the official searches as per Exhibit P. 13 collectively still reflected the plaintiff as the lawful owner of the said farm in dispute? In my settled view, these questions were not answered by the defendants' side. In other words, the said allegations remain as mere speculations or allegations which have not been proved.

In the upshot, the third issue is answered negatively.

Lastly, on the fourth issue as to what relief (s) are parties entitled to. From the outcome of the first, second and third issues as demonstrated above, I am of the settled view the

plaintiff's suit must succeed. The effect that, the plaintiff is hereby awarded the following reliefs;

1. *It is hereby declared that the 2nd defendant's withdrawal of the Survey Plan No. 'E' 257/108 of Farm No. 3797 Bonyokwa area Dar es Salaam is unlawful.*
2. *The 2nd defendant is hereby ordered to reinstate Survey Plan No. 'E' 257/ 108 in respect of Farm No. 3797 Bonyokwa area Dar es Salaam.*
3. *The 1st defendant is restrained from rectifying the land register in respect of Farm No. 3797 Bonyokwa area Dar es Salaam held under Certificate of Title No. 56371 registered in the name of AHIYA ELIAU LUKUMAY.*
4. *Each party to bear own costs.*

It is so ordered.




B.R. MUTUNGI

JUDGE

22/6/2018

Read this day of 22/6/2018 in presence of Baraka Nyamkela (S.A) for the Defendants and Mr. Nyamhela Baraka holding Mr. Josiah's brief for the plaintiff.

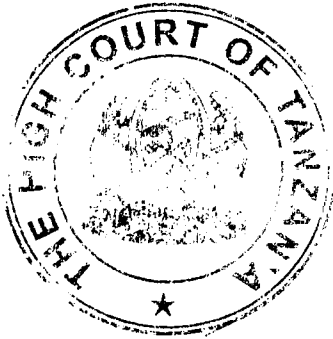



B.R. MUTUNGI

JUDGE

22/6/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

22/6/2018