

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

LAND CASE NO. 11 OF 2017

HAYBE AHMED DUDEH (Suing as administrator of
the Estate of the late AHMED HAJI MOHAMED) ...**PLAINTIFF/DEFENDANT**

VERSUS

HUSSEIN ALLY WARSAMA (As administrator of
the Estate of the late ALI WARSAMA)..... **DEFENDANT/PLAINTIFF**

JUDGMENT

5/5/2020& 19/05/2020

GWAE, J

The plaintiff, **Haybe Ahmed Dubeh**, through legal services of **JJM & Co. Advocates**, instituted a land dispute in the capacity of the administrator of the estate of his late father, Ahmed Haji Mohamed against the defendant, **Hussein Ali Warsama** as administrator of his late father, Warsama Ally. The plaintiff is praying for the following reliefs against the defendant;

- (i) A declaration that ½ share of the ownership of the parcel of the land measuring a total of 2137 acres registered as Farm No. 4, Title No. 13556, Land Office (LO) No.14176 Essimingor, Maasai District in Arusha Region (hereinafter

suit land) legally belongs to the estate of the late Ahmed Haji Mohamed (1st deceased)

- (ii) A declaration that, the defendant is illegally and unlawfully depriving sole benefit from emanating from the sale of gravel from the suit land
- (iii) An order of permanent injunction restraining the defendant, his agent, families and or any other persons from temporarily transferring any interest in the suit land to any third party without involving the plaintiff
- (iv) An order for the defendant to pay the plaintiff general damages to be assessed by this court
- (v) A declaration that, the heirs and beneficiaries of the estate Ahmed Haji Mohamed have a 50% ownership interest in the suit land
- (vi) That, the defendant to be condemned to pay costs of the suit
- (vii) Any other reliefs deemed by the court to be just and equitable to grant

Upon service of a copy of the plaintiff's plaint, the defendant through the legal service of **Ms. Maro and Company Advocates**, filed his written statement of defence seriously refuting the sought declaration of 50 % shares by the plaintiff's late father in the suit land. His written statement of defence was accompanied by his counter claims in which he seeks the following orders against the plaintiff, for the purpose of the counter claim defendant;

- (a) A declaration that purported transfer of half share in the suit land was illegal and that the same be nullified
- (b) An order to delete the Memorial in the Land Register to wit the document number 6678 which has registered acquisition of the purported half share by the late Ahmed Haji Mohamed on the 5th May 1993
- (c) Costs of this suit
- (d) Any other relief (s) which the court may deem fit to grant

In his written statement of defence to the defendant/plaintiff, the plaintiff/Defendant who hereinafter for the purpose of brevity shall be referred to as "the plaintiff" vigorously disputed the counter claims by the defendant/plaintiff ("the defendant") by averring that counter claims are of no legal basis or scintilla of truth and that the same are frivolously designed to deprive the 1st deceased's heirs and beneficiaries of their share (50 %) in the suit land.

Brief background of the dispute between the parties is as follows, the plaintiff's late father (1st deceased person) and defendant's late father (2nd deceased) were closely related, both deceased persons were married to biological sisters. Both started living as close relatives with their wives as well as with their families at Kakesyo village within Ngorongor District in Arusha Region. Thereafter sometimes, they shifted to Arusha at the suit land which was initially registered in the name of the 2nd deceased. The suit land together with houses were purchased in 1970s from National Development Agency. The suit farm was however being used for farming and animal

keeping by both deceased persons and up today the deceased persons' heirs are using the same for the same activities.

The parties' deceased persons during their life time also happened to exchange their right of occupancies, namely; Plot No. 10 Block "H" at Bondeni originally owned by the 1st deceased person was transferred to the 2nd deceased and Plot No. 12 at Bondeni-Arusha remained with the 1st deceased. However both the deceased persons later shifted their residence from the suit farm to Bondeni area in Arusha City.

The evidence and documents tendered and received by the court during trial undisputedly establish that, sometimes in 1995, the 1st and 2nd deceased persons were jointly sued in the Resident Magistrate's Court of Arusha at Arusha by Ms. Rift Valley Seeds Ltd (plaintiff) vide Civil Case No. 41 of 1995, the decision of the RM's court in favour of Rift Valley was successfully challenged to the High Court.

Seemingly, the dispute between the parties arose in 2016 after the plaintiff (PW1) had noted that the defendant was in process of being compensated by the Tanzania Electrical Supply Company Ltd (TANESCO) through its project known as "Mradi Umeme" KV 400 following purchase of the gravel in a part of the suit land by the said TANESCO. While TANESCO was on process to pay compensation for the part of the suit deprived from the owner, the plaintiff perceived or came to learn the defendant's intended denial to entitlement of half share of the compensation to the heirs of the 1st deceased person. Hence institution of this suit.

After the statutory mediation had failed, the parties' advocates were involved in the framing of issues and the following were the issues framed immediately before commencement of the trial;

1. Whether the half share interest in the suit land legally belongs to the estate of the late Ahmed Haji Mohamed.
2. If the 1st issue is in the affirmative then, whether the Plaintiff is entitled to half share of the benefit derived from the suit property.
3. To what reliefs are the parties entitled to?

Throughout the trial of the case, **Mr. Andrew Maganga** from JJM & Co. Advocates, the learned advocate appeared for the plaintiff whereas **Mr. Elvaison E. Maro** from Ms. Maro & Company Advocates represented the defendant.

The plaintiff made his endeavors to prove and substantiate his case against the defendant and to accordingly disprove the defendant's counter claims aforementioned. He was then able to summons three (3) witnesses on his behalf namely; Haybe Ahmed Dudeh (PW1-1st deceased's son), Abugani Ahmed Mohamed (PW2) and Zilhija Ramadhani (PW3-former land officer). The plaintiff also tendered a total four (4) of exhibits to, letters of administration (P1), Official Search Report dated 13th September 2016 and copy of certificate of title in respect of the suit land (P2), search report dated 15th September 2016 in respect of Plot No. **10 Block 'H'** indicating the owner of the said plot to be the 1st deceased **Ahmed Haji** and Plot No. 12 Block "H" Arusha Township also indicating to be owned by **Ahmed Mohamed**,

these official search reports were tendered and the same were collectively admitted as P3.

The defendant further produced a decision of the Resident Magistrate's Court and that of the High Court on appeal (Civil Appeal No. 31 of 1997) filed by the deceased persons which turned down the trial court decision where this Court (**Mkwawa, J-rtd**), reversed decision of the Resident Magistrate's Court by declaring the deceased persons lawful to be owners of the suit land (P4 collectively).

In brief, the plaintiff's witnesses and exhibits tendered and admitted for evidential value were to the effect, that the suit land is jointly owned by the parties' late fathers, 50 % share each following the transfer of half share by the defendant's late father to the plaintiff's late father duly signed on 3rd May 1993 and registered on 5th May 1993 as well as witnessed by Advocate Mirambo (DW2). The PW1 also testified that, the 1st deceased was the holder of the right of occupancy on Plot 10 and 12 at Bondeni area in Arusha and that he voluntarily and lovely transferred his right of occupancy on 30.7.1993 to the 2nd deceased (DE1).

The plaintiff's evidence is further to the effect that, the defendant is unjustifiably and unlawfully pretending himself that the 2nd deceased was a sole owner of the suit land and therefore a rightful person to be paid compensation being payment of part of the suit land to be affected by the TANESCO's Project.

On the other hand, the defendant had been able to bring five (5) witnesses, these were; Hussein Ally Warsama (DW1, 2nd deceased's son),

Wilfred Lucas Milambo (DW2-commissioner for oaths alleged by the plaintiff to have drafted/filled and witnessed the transfer of the half shares of the suit land), Hodho Suleiman, a widow and the plaintiff's mother as well as the little 'sister to the plaintiff's mother (DW3), Abdi Saad (DW4-one who was familiar to both deceased persons since when they were at Kakesyo-Ngorongoro District, suit land and here in Arusha) and Emmanuel Stephen (DW5-land officer and custodian of transfer deed of Plot No. 10 to the defendant's late father-DE3 produced by PW2 and DE7 produced by the DW5 and witnessed by advocate Mirambo on 16.07. 1993, the transfer of Plot No. 10 by the plaintiff's late father to the defendant's late father registered by the Assistant Registrar on 30th July 1993 and the consideration for the transfer was said due to love and affection.

The defendant further produced various rents payment receipts all bearing the name of the defendant's late father (DE4), a letter from Assistant Land Commissioner dated 29.12.2016 addressed to DED-Monduli and complaint letter from the defendant addressed to DED Monduli District (DE6).

As earlier intimated, the DW1 and DW3 made serious strife to persuade the court that the suit land was solely owned purchased and legally owned by the 2nd deceased person, in exclusion of the plaintiff's late father. The defence by the defendant was also to the effect that the signature of the 2nd deceased purportedly appearing on the transfer of 50 % of the suit land to the plaintiff's late father (DE2) was forged equally the signature of advocate Mirambo appearing thereto was forged (DW2).

After closure of the parties' case, the advocates for the parties sought and were granted leave to file their respective closing submissions. I shall consider the parties' final submissions when determining issues as eluded herein above.

In the **first issue** which reads "whether the half share interest in the suit land legally belongs to the estate of the late Ahmed Haji Mohamed", the parties are in a serious contentious as to whether the defendant's late father, in his accord, transferred his ½ share of the suit land to his close friend, the late Ahmed Haji Mohamed. The documentary evidence so far tendered in court and admitted (DE2) establishes that, the 50 % share of the suit farm was transferred by the defendant's late father to the plaintiff's late father however the authenticity of the document is disputed by the commissioner who is said to have witnessed the transfer document. It is trite law that proof in civil cases is in the balance of probabilities as was correctly illustrated the defunct Eastern African Court in **Siraj Din v. Ali Mohamed Khan** [1957] 1 EA 25, where standard of proof in civil cases was interpreted to be and I quote:

"The quantum of proof ordinarily required in civil litigation is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other".

Assessing the witnesses of the alleged making of transfer of ½ share particularly the evidence adduced by PW3 and corroborated by PW2, I am of the considered view that the evidence adduced by them was credible and therefore worth of belief. PW3 clearly testified that, he knew both deceased persons and he used to assist the defendant's late father in land matters and

he specifically said that in the year 1993, the defendant's late father went to him (PW3) with three CTs on Plot No.10, 12 and farm and his evidence is sufficiently corroborated by that of PW2 who said to have gone to Moshi for processing the transfer and related matters, for sake of clarity parts of their testimonies are quoted herein under;

PW3

"Ex. In....From 1991 – 97. Ally Warsama (deceased) I know. He was my neighbor. I used to assist him in his land matters. We lived at Kaloleni. I happened in 1993 to help him in transferring his titles. He came with Ahmed Haji (his brother) and Abdallah his son. He had 3 title deeds. One was in respect of a farm and two property in town. The farm was called Ismangole. It is within Makuyuni Monduli – Arusha. I advised him to have advice from a Land Officer. We went with them to a Land Officer and handed him to him....He was advised to go to an advocate for preparation of contracts....."

PW2

"Ex-in: My father requested me to pay for land rents. He told me that they wanted to transfer shares in the farm, plot No. 10 and 12. I was with my father and Ali Warsama. We called Zilihija chairman and the neighbor of Mr. Zilhija, he was working with land registry. We went with him to Municipal Council. We were advised to seek legal advocate. We went at clock Tower in a law firm.

My father and the late Ali entered into the office. They then instructed me to pay the advocate fees and I paid. We went with the documents to land office for submission on the next day I went to pay the fees. I cannot recall the exact figure it could be Tsh 2000. The late Ali availed the papers to me and Zilhija. We went to Moshi for registration....."

Carefully looking at the above quoted pieces of evidence adduced by the plaintiff's witnesses (PW2 & PW3) and other pieces of evidence namely, judgment of the RM's court and this court vide Civil Case No. 41 of 1995 which was finally determined in this Court, both decisions were adjudicated after the alleged transfer of the half share of the farm in dispute as well as the evidence by the Certificate of Occupancy regarding the suit farm (PE2) visa viz the testimonies given by the defendant and his witnesses that, the transfer of share is illusively and fraudulently done.

The denial by the DW2 who was paraded on behalf of the defendant sounds to be an afterthought simply because he merely or disguisedly disputed the signature to be not his he admitted to have been familiar with both deceased person, surprisingly, when cross examined, his reply was in a dilemma position as he merely conceded to the specimen of his signature tendered in DE2 which he was actually shown and he was able to see it. My observation can easily be reflected in the evidence adduced by DW2 herein below;

"EX-in... I know Ally Warsama equally so Ahmed Haji. D-2: This signature is not mine. I did not witness execution of the document. They are not my signature at all. Though a certified copy, I do not have any problem, I know my signature".

Sgd: I. Maige

Judge

21/03/2019

"Xx by Maganga: Shown D-1: This is a certified copy of the original it has a seal, yet my name appears over there. I know there are specimens of my signature tendered shown D-2 Yes, I can see the signature. That's all".

Sgd: I. Maige
Judge
21/03/2019

Looking at the testimony of DW2, the credibility of his evidence is highly questionable taking into account that **DE7** (the transfer document said by the PW3 and PW2 to have been sent to the office of Assistant Registrar of Titles –Moshi) is depicting to have been signed by him and it glaringly bears his official seal thereto. I am quite aware of the requirement of having the attesting officer summoned to support the execution of a document allegedly witnessed by him as was rightly stressed in **the case of Asia Rashid Mohamed v. Mgeni Seif**, Civil Appeal No. 128 of 2011 where Court of Appeal of Tanzania sitting at Mwanza Registry held inter alia that:

“It is well settled law in our jurisdiction that the doctrine of estoppel cannot be invoked to defeat the performance of a statutory duty.....Since the other evidence depended on proper proof of the execution of Exhibit ‘P1’ once the later piece of evidence is discounted, the appellant’s claim of ownership over the suit house is left with no leg

In our present dispute, the attesting officer was summoned and he appeared as DW2, the DW2’s denial to have executed the DE2, to my considered view, is designed to evade from truth of his involvement in the execution for reasons best known by himself.

I am however alive of the essence of the provisions under section 73 of the Law of the Evidence Act, Cap 6 Revised Edition, 2002 where an attesting officer may deny or may not have recollection of the execution of a document in question or in ascertainment of a contentious document or

signature or writing or seal may be made by comparing it with the one which is not produced. In our case, there is DE7 which has been produced and the same is bearing a seal and signature of advocate Mirambo (DW2) and his writings in DE7 which look alike to those in DE3 (Produced by the PW3 after the defence had prayed so). The evidence of Advocate Mirambo is quite wanting of credibility and by simple analogy, seal signatures and writings appearing in the transfer form of ½ share of the suit property to the plaintiff's late father witnessed by Mr. Mirambo (DE3) and transfer form of right of occupancy on Plot No.10 Title No. 05514/123 (DE7) to the defendant's late father clearly look alike.

Even if the evidence of DW2 was not contradictory yet the evidence of the plaintiff's witnesses is credible which would suffice to hold that, there was transfer of share to the plaintiff's late father. More so, the allegation that the plaintiff's late father or plaintiff committed a forgery or fraud that ought to have seriously been proved and preferably in criminal court forum where there is a higher degree of proof as was rightly demonstrated 22 in **Omari Yusufuv. Rahma Ahmed Abdulkadr** (1987) T.L.R 169. Furthermore the authenticity of the Certificate of Right of Occupancy produced and admitted as PE2 has not been challenged in any way for instance bringing a material witness from the office of Assistant Registrar of Tiles or and posing necessary questions to DW5, an officer from the Office ARTs as to its legality or validity.

There is another question to be asked, how was it possible for the Assistant Registrar of Title to endorse transfer of ½ share of the suit farm without being shown the certificate of title? The PE2 is duly endorsed to the

effect that the transfer was registered on 5.5. 1993 transferring ½ share from the farm originally owned by the defendant's late father to the plaintiff's late father. The DWI when testifying in chief told the court that the original certificate of title in respect of the suit farm was in the possession of his mother who appeared as DW3 nevertheless the DW3 produced none.

Basing on the evidence so adduced by both sides, it is therefore my settled view that, it is more probable that there was transfer of ½ share from the defendant's late father to the plaintiff's late father than not.

In the **2nd issue**, "If the 1st issue is in the affirmative then whether the Plaintiff is entitled to half share of the benefit derived from the suit property". Perhaps in this issue it is convenient if issues of consideration for the transfer of share, value and spousal consent may vitiate the transfer at hand. It is the assertions from the defendant and his mother that the late Ali Warsama did involve his family particularly his wife (DW3) in the transfer. I am not unsound of the provisions of the law and judicial principle envisaging the requirement of a consent of spouses in order the transfer to be valid as urged by the defendant's counsel to consider (section 59 (1) of the Law of Marriage Act, Cap 89 Revised Edition, 2002 and judicial decisions in **NBC Holding Corporation v. Agness Masumbuko** and 2 others, Civil Appeal No. 51 of 2000 and **Idd Mwakalindile vs. NBC Holding Corporation and Sam Saijon Mwakalindile**, Civil Appeal No. 59 of 2000 where a matrimonial house owned by wife and husband ought not to be alienated by way of either sale or mortgage, lease or gift without the consent of other spouse)

In our case, I have taken into consideration of the close relations that existed between the deceased persons, the biological relations between the parties mothers and the motive behind that led the 1st deceased to give the 2nd deceased a plot No. 10 under love and affection and prior to that transfer of ownership on Plot No. 10 he (2ND was also given 50 % of the share in the farm which they were using together as one family since 1970s to date and inaction by the defendant since registration of transfer (1993) to the date of instituting his counter claim (2017). In these grounds, the consent were not mandatory requirement.

More so the consent of the DW3, the widow was not pleaded at all by the defendant in his written statement of defence as under paragraph 3 of the defendant's WSD no such particulars of the alleged illegality. By such omission the defendant and his witnesses cannot afterwards raise issue of lack of spousal consent for the transfer of the ½ share. This is wrong as it constitutes breach of fundamental right of a fair hearing since the plaintiff is deemed to be taken into surprise, without being availed an opportunity of making his defence. The evidence adduced by the defendant and his witness which is in variance with the defendant's WSD accords not weight. I wholly subscribe my finding in **Makori Wassaga v. Joshua Mwaikambo and Another** (1987) TLR 88 (CAT)

"In general, and this is I think elementary, party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; he is not permitted to set up a new case. And in reference to appeals, it is also trite to observe that this Court cannot entertain a new ground of

appeal if no supplementary record of appeal has been lodged or no application for leave to amend the memorandum has been made and granted”.

4 See also **National Insurance Company V Sekulu Construction, Civil Appeal No. 31 of 1984 reported** in (1984) TLR 157 and **Lilian Onael Kileo v. Fauzia Jamal Mohamed**, Commercial Case No. 135 of 2013 (Unreported-Mwambegele, J as he then now JA).

I have also considered the issue of value of the land indicated in the PE1 on 5/5/1993, I think I should not be curtailed by the same since the defendant has not proved otherwise except mere assertions the value of the suit farm was in the 1986 worth Tshs. 15 Million pursuant to 1986’s valuation report without documentary poof. If the Parties’ late fathers reduced the value of the land in question for the purpose of evading tax, that alone does invalidate the parties agreement since if the same is proved the may be held responsible to pay the requisite tax and or be charged with a criminal case.


Regarding the 3rd issue, reliefs that parties are entitled, the prayers in item I, ii, iii and v are grantable as prayed due to the above findings in favour of the plaintiff, considering the existence of the relationship between the parties, their late fathers as well as their mothers, I am not equitably persuaded make to order either payment of damages or costs of this suit. Following the fact the counter claims were proved, the same are entirely dismissed.

In the end result, the plaintiff /defendant is hereby awarded the following reliefs;

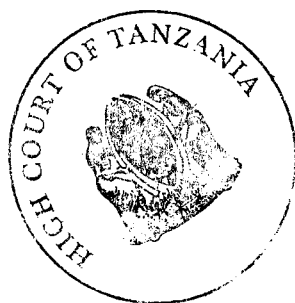
- (i) A declaration that ½ share of the ownership of the parcel of the land measuring a total of 2137 acres registered as Farm No. 4, Title No. 13556, Land Office (LO) No.14176 Essimingor, Maasai District in Arusha Region (hereinafter suit land) legally belongs to the estate of the late Ahmed Haji Mohamed (1st deceased)
- (ii) An order of permanent injunction restraining the defendant, his agent, families and or any other persons from transferring any interest in the suit land to any third party without involving the plaintiff
- (iii) A declaration that, the heirs and beneficiaries of the estate Ahmed Haji Mohamed have a 50% ownership interest in the suit land


The defendant/ plaintiff's count claim fails and I make no order as to costs of this suit.

It is so ordered.


M. R. GWAE
JUDGE
19/05/2020

Right of appeal fully explained.




M. R. GWAE
JUDGE
19/05/2020