

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LAND APPEAL NO. 7 OF 2018

HABIBA AHMADI NANGULUKUTA 1ST PLAINTIFF

HAWANA HAMISI 2ND PLAINTIFF

HAMISI SALUMU MALIMUSI (*Administrator of the estate of the late Habiba Ahmadi*) **3RD PLAINTIFF**

VERSUS

HASSAN AUSI MCHOPA (*Administrator of the estate of the late Hassani Nalino*) **1ST DEFENDANT**

ISSACK ISSACK MTENDA..... 2ND DEFENDANT

JUDGEMENT

Final court Order on: 19/09/2020

Judgement date on: 16/10/2020

NGWEMBE, J:

This suit emanates from a sale of landed properties, located at Plot No. 4 Masasi Urban area. Hassan Nalino (now deceased) as a seller and Issack Issack Mtenda jointly executed a sale agreement and thereafter proceeded

to effect transfer from the original owner Hassan Abdallah Nalino to the purchaser Issack Issack Mtenda. According to the evidence adduced in this court, the sale agreement was executed on 3rd June, 2011. It is on record that, Hassan Nalino demised on 15th January, 2017. Thus, evidencing that since he sold the suit house in year 2011 to his death in year 2017 was about six (6) years. In other words, the purchaser Issack Issack Mtenda enjoyed ownership of the suit house for six years before demise of the original owner.

As a matter of procedure, upon death of the Hassan Abdallah Nalino, his family rightly appointed Mr. Hassan Ausi Mchopa an administrator of the deceased estate, which appointment was confirmed by Lisekese Primary Court of Masasi District on 13th February, 2017. In the cause of execution of his statutory duties as an administrator, Mr. Hassan Ausi Mchopa rightly, made an official search to the registrar of titles on the status of ownership of the suit house. Such official search was made on 15th February, 2017. The outcome of such search was to the effect that the suit land located at Masasi Urban area, described as LO. No. 85897, plot No. 4 Masasi Urban area is owned by Issack Issack Mtenda with no encumbrance.

Such outcome, triggered the plaintiffs to seek redress from this court by suing both the administrator of the deceased estate and the owner by virtual of purchaser, that is, Issack Issack Mtenda. The plaintiffs, through the services of learned advocate Ali Kassian Mkali of M & LAMTANE ADVOCATES filed a plaint on 7th November, 2018. The 1st Defendant had no legal representation, but the 2nd Defendant enjoyed the services of

learned advocate Roman Selasini Lamwai of M.R. M. Lamwai & Co, Advocates.

Having briefly, narrated the genesis of this suit, now is the digest of the evidences adduced in this court by the parties. In proving their case, parties agreed on four disputable issues namely:-

1. Whether that property known as Plot No.4 Block B Mkuti street Masasi urban area is Matrimonial Property of the Plaintiffs and the late Hassani Nalino;
2. Whether the sale of the disputed property to the 2nd Defendant was with consent of the plaintiffs;
3. Whether the 2nd Defendant is a bona fide purchaser for value of the disputed property; and
4. What reliefs are the Parties entitled to.

In proving or disproving these issues, the plaintiffs case was blessed by five (5) witnesses, while the defendants had four (4) witnesses.

The first prosecution witness (PW1) Hawana Hamisi aged 70 years, praying Islamic faith, briefly testified that, herself and the deceased Hassan Abdallah Nalino, were married in June 1970 under Islamic faith before Sheikh Hausi, who is also deceased. Out of their marriage they were blessed six (6) issues. She added that in their life time with her husband, they jointly built a house at plot No. 4 Mkuti within Masai township. To enhance her assertion of their marriage, she produced an original marriage




certificate issued on June, 1970, same was admitted as exhibit P1 forming part of this proceedings.

That at the beginning they were living at Nanguruwe village in Newala District. Thereafter, they sold their landed properties at Nanguruwe and purchased a suit land from Chihonda. Finally, they built a house in dispute from their own resources. Upon having such house, they started residing therein with their children and two other wives. Thereafter, the suit house was changed from residential house into a business. They rented it to the businessmen including Abdallah Massudi.

She admitted that the suit house had a title deed in the name of the deceased Hassan Abdallah Nalino. Thus, she is in this court claiming ownership of the suit house. She admitted that as of today, the house is in the name of the 2nd Defendant as current owner.

She added, upon death of the deceased Hassan Abdallah Nalino, the family appointed Mr. Hassan Ausi Mchopa to be an administrator of the deceased estate. In the cause of administering the deceased estate, he found Plot No.4 Mkuti Masasi was sold by the deceased Hassan Abdallah Nalino to Issack Issack Mtenda. However, she challenged that sell as irregular because the seller did not involve his wives and children. Finally, asked this court to order the suit house be reverted back to the family of Hassan Abdallah Nalino.



On cross examination, she admitted not knowing the year when the husband purchased the suit plot of land, even its size. Further, she could

On the selling of the suit house, she testified that it was illegal for they were not involved. The administrator was the one who told them that the suit house belongs to the 2nd Defendant. Even the title deed is in the name of the 2nd defendant. Finally, she asked this court to nullify the sale transactions made between Hassan Abdallah Nalino and the 2nd Defendant, and declare the suit house a family property.

In cross examination she admitted to have been informed that the suit house was built in year 1985, but she participated at the level of finishing it soon after her marriage. Further testified that, she decided to join the 1st Defendant in this suit because he is representing the deceased estate.

She disclosed further that all wives, husband and children left the suit house to another place in year 2012. Since then, they had no activity on that house, instead it was rented to businessmen whose number is not known to her. She admitted that the current owner has renovated toilets and has modernized the suit house. That she knew the suit house was sold to the 2nd defendant after the administrator made a search to the registrar of titles. She rested by saying, she was ready to compensate the present owner on unexhausted improvement he made in the suit house.

Issa Abdallah Nalino (PW3), of 59 years, Muslim, affirmed and stated that in year 1984, he shifted from Newala to Masai where he found his brother Hassan Abdallah Nalino was tenting a house owned by the late Kitosa. That his brother was a businessman having two wives, who all were agriculturalist. The 1st wife is Hawana Hamisi, while the 2nd wife was Habiba Ahmad who is now deceased. However, in year 1987, his brother

married a third wife called Habiba Ahmad Nangurukuta. That he was informed by his brother on the intention to purchase a plot of land at KAUMU Masasi, around one acre and a half. Upon measuring it had square meters 13, 250 in Plot No.4. The house was built by his brother's family in 1985 up to 1986, when the family started living therein. Himself, lived in that house for a period of one year before, shifting to his own house. That he witnessed two children being borne therein namely; Rehema Hassan Nalino and Zahara Hassan Nalino.

The family lived in the suit house up to sometime in year 2010/2011 when they shifted to another house built at Plot No. 234 at Kisiwani area. The suit house was transformed into a business house, which was rented to businessmen. The land lord was Hassan Abdallah Nalino who was renting it to businessmen. After demise of Hassan Abdallah Nalino and upon appointment of an administrator, it was revealed that the house at Plot No.4 is no longer family property. The shift of ownership from the original owner to the present owner was neither known to himself nor to the deceased family.

In cross examination, PW3 testified that the suit house had 6 rooms, and in the rear side had huts, kitchen and store. The deceased did not involve him in construction of the suit land. He did not know if the purchase price of the suit house was contributed with his wives and he did not know anything related to title deed or certificate of titles.

Further disclosed that, the deceased took loan three times from NMB bank and the suit house was put as security. That the deceased was the one who was running the tenancy business at the suit house until his death. He

testified that recently he passed over the suit house in plot No.4 Masasi and observed that the Plot had 26 rooms from the original six (6) rooms.

Rehema Hassan Abdallah Nalino (PW4), of 34 years, Muslim, affirmed and stated that she is the tenth child among 16 children of the deceased Hassan Abdallah Nalino, who was born on 23 March, 1986 at plot No. 4 in Mkuti Masasi. That she lived in the suit house for the period of 24 years. The last time to live in the suit house was 2010, when as a family, decided to shift from Mkuti Masasi to Kisiwani at plot No. 234. The suit house was turned into a business center rented to businessmen.


That upon demise of her father, the family met and appointed the 1st defendant as their administrator of the deceased estate together with all properties of the deceased. The information that the suit house is no longer family property, she received it from the Administrator. The Administrator informed them that the said house was sold to Issack Issack Mtenda and the title deed is in the name of the 2nd Defendant. Thus, this suit.

The last prosecution witness is Hamisi Salum Malimus (PW5), 53 years old, Muslim, affirmed and stated, he is an administrator of the deceased Habiba Ahmadi, a wife of Hasani Abdallah Nalino, who died on 28th January, 2018. To justify his assertion, he tendered in court letters of administration, which was admitted as exhibit P2 forming part of this proceedings. Further, testified that Hassan Nalino died in year 2017, and suit is related to the house built at Plot No. 4 Mkuti Masasi, which house is a property of Hassan Abdallah Nalino and his wives, including the deceased Habiba Ahmadi.

However, in cross examination, PW5 failed to justify his assertion that Habiba Ahmadi was among wives of the deceased, for lack of marriage certificate or other similar documentations.

Upon closure of the prosecution case, the defence case was blessed by four witnesses. The first defence witness was Mr. **Hassan Ausi Mchopa (DW1)** who is the 1st defendant, aged 66 years, Muslim, affirmed and stated that, he is an administrator of the deceased estate, who died on 15th January, 2017 and buried at Nanguruwe Village on 16th January, 2017. That he was appointed by the court as an administrator on 13 February, 2017. The letters of administration were tendered and admitted in court as exhibit D1 forming part of the defence case.


He testified that upon being appointed, he dutifully identified all properties of the deceased with a view of settling debts if any and finally, intending to distribute them to heirs. The properties of the deceased were listed including five houses, one farm of one hundred acres, and the heirs were three wives and 16 children. This piece of evidence is a bit different from what is recorded in the judgement of the primary Court which appointed him as an administrator. Page one of the primary court judgement in Probate No. 13 of 2017, listed four houses, two of them being at Masasi township at Mkuti street, another one at Chikukwe and one at Nanguruwe in Newala District. However, I take reference to five (5) houses left by the deceased was a mere slip of tongue.



On 15 February, 2017, DW1 made a search of ownership of the suit house and found the owner is Issack Issack Mtenda of Masasi. He tendered a search form, which was admitted in court as exhibit D2.

The 2nd defence witness is Mr. Issack Issack Mtenda (DW2) of 59 years old, Christian, sworn and stated that he is a businessman dealing with transportation, own and running guest houses and shops. That the two plaintiffs are known to him after suing him at the District Land and Housing Tribunal. However, the 1st Plaintiff is known to him after being in this court. Explained that the 2nd and 3rd Plaintiffs, sued him in respect to a house built at Mkuti. The claims at District Land and Housing Tribunal and in this case are the same the only difference is the 1st Plaintiffs who was not a party to the Tribunal.

He denied all claims of the Plaintiffs related to Plot No.4 Masasi. What he knew was that Hassan Abdallah Nalino was the true owner of the suit house, which ownership was transferred to him by way of purchase. That the sale agreement of the suit house was entered on 3rd June, 2011. Copy of the sale agreement was tendered in court instead of the original contract for the reason that the original one was attached with application forms for transfer of ownership from Hassan Abdallah Nalino to him as true owner of the suit house. Copy of sale agreement was tendered in court as exhibit D4, whose contents were read over in court.



He prayed to tender the original title deed of the suit land No.31243 which prayer was granted and same was admitted marked exhibit D3. The title

deed was read over in court, which indicates that the transfer of the suit land was effected on 24 January, 2012 having value of TZS.36 Million.

Exhibit D3 comprised an affidavit affirmed by Hassan Nalino affirming that he was the original owner of the suit land and that he sold it to the 2nd Defendant. The affidavit was made on 13th January, 2012. In the affidavit Hassan Nalino never disclosed that the suit house is owned jointly with his wives and children. He added that he continued to own the suit house from 3rd June, 2011 to 15th January 2017 equal to almost six (6) years before demise of the original owner and all that time he never saw the plaintiffs.

He added that according to the valuation report made on year 2018, the suit house has a value of TZS 380 million because he built a house with 22 rooms which has caused the value to raise up to TZS 380 million. Also he renovated the old building to a standard required. All that time, when he was renovating and building those rooms, none of the plaintiffs asked him any question.

The valuation report of the suit house made on 2018 was admitted in court as exhibit D6, which report was read over loudly in court in the presence of all parties. He added that the suit house is not part of the deceased estate.

In cross examination, the 2nd Defendant testified that he has been in business for almost thirty (30) years now. According to the title deed and affidavit of the original owner, the suit land was owned by the deceased alone.

The duty to inform the Plaintiffs in respect to sale agreement was purely vested to the seller (deceased) not to the purchaser since he did not know if the deceased had family. Even in his search to the bank and alike before entering into the sale agreement the suit house was owned by the deceased only. Thus rested by a prayer that the suit be dismissed with costs.

Lighten Anold Masimba (DW3) was another witness who is 33 years old, Christian, Sworn and stated that, she is a Resident Magistrate incharge of Lisekese Primary Court, since September, 2015. She testified that she knew the existence of probate case No.13 of 2017 that was opened for appointment of an administrator of the deceased estate. Above all, in year 2019, advocate Lamwai perused the court file and found exhibit D1, which is a letter of administration of the deceased estate Hassan Abdallah Nalino. The administrator was pointed Mr. Hassan Ausi Mchopa. However, the beneficiaries identified in the Probate, PW4 was not among them. She is not known in the probate filed in her court. Further added that the administrator was directed by the court to administer the deceased estate not otherwise. The administrator to date has not appeared in court to add other properties or names of beneficiaries of the deceased estate.

The last defence witness was **Suleiman Mfaume (DW4)** of 57 years old, Muslim, affirmed and testified that he is a business man rented a room for business from Issack Issack Mtenda as a Landlord. The business house is at Mkuti KAUMU. The Landlord has been renting him such business room since 2012 to date. Prior to it, the Landlord was Hassan Abdallah Nalino. That he was issued a notice and another copy of notice was put on the

door, which notice was issued by Hassan Abdallah Nalino. However, he did not know where Nalino was living. What he knew is that the deceased never lived in the suit house. The new landlord, allowed him to continue renting the said room, but he renovated it first.

In cross examination he adduced that he has been at Mkuti Masasi for about ten (10) years. He knew the deceased for quite long time before he died and at one time they conducted business of beans at Songea together. However, all plaintiffs were not known to him.

After closing the parties case as summarized herein above, parties were granted leave to prepare and file their final submissions, which they complied with. Now it is the considered view of this court in respect to the issues for determination by this court.

Much as I appreciate the parties' final submissions and the evidences adduced in this court, yet I find important to summarize undisputable facts. To begin with, I think the suit house was founded by the deceased Hassan Abdallah Nalino. Second, during his life time as rightly demonstrated by the sale agreement dated 3rd June, 2011 (exhibit D4), when read together with certificate of occupancy (exhibit D3) leave no doubt, the original owner was Hassan Abdallah Nalino who sold and transferred the suit house to the 2nd Defendant on 3rd June, 2011. Third, the deceased Hassan Abdallah Nalino had families, including three wives and 16 children as rightly provided for in Probate Case No. 13 of 2017, before Lisekese Primary Court at Masasi. Four, up on demise of Hassan Abdallah Nalino, the 1st defendant was appointed as an administrator of the deceased estate in the

aforementioned Probate Case. Fifth, the plaintiffs are in this court seeking to reclaim ownership of the suit house, which was sold by the deceased to the 2nd defendant.

Having clarified on undisputable facts, the first issue for consideration is on the involvement of the 1st defendant in this suit. The testimony of DW1 was to the effect that, he was appointed an administrator of the deceased estate in Probate Case No. 13 of 2017 by Lisekese Primary Court. Thereafter he made an official search to the Registrar of Titles on the ownership of the suit house and found the suit house belong to the 2nd defendant.

Legally, section 100 of the Probate and Administration of Estates Act Cap 352 R.E. 2002 confer powers to the administrator upon being appoint to take charge and control of all properties left by the deceased as if he himself is present. For ease of reference the section is quoted hereunder:-

“An executor or administrator has the same power to sue in respect of all cause of action that survive the deceased, and may exercise the same powers for the recovery of debt due to him at the time of his death, as the deceased had when living”

When this section is read together with section 33 of the Act, which same is quoted hereunder:-

*“Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of an interstate applicable in the case of such deceased, **would be entitled to the whole or any part of such deceased estate**” (emphasis is mine).*



The two sections, leaves no doubt that the administrator assumes responsibilities of the deceased as if, he himself was alive. Now the question is whether an administrator may assume responsibility of recovery of properties, which was sold by the deceased during his livelihood? The answer will be provided in due course of this judgement.

In regard to this suit, the parties agreed on four issues as rightly quoted above, the first issue is *whether that property known as Plot No.4 Block B Mkuti street Masasi urban area is Matrimonial Property of the Plaintiffs and the late Hassani Abdallah Nalino*. This issue is answered not only by evidences adduced during trial, but analyzing documentary evidences admitted during trial.

In essence all three plaintiffs and their witnesses testified firmly in this court that, the suit house was among the family properties. They justified their assertion by referring to the suit preferred in the District Land and Housing Tribunal for Mtwara, sometimes in year 2006 against their husband Hassan Abdallah Nalino. The outcome of the said suit, the plaintiffs alleged to have won the case. PW2 concluded in her testimony, that the said house remained under their control until the demise of their husband Hassan Abdallah Nalino.

Further, testified that the said house had only six (6) rooms. Thus, the selling of same to the 2nd defendant was illegal, therefore, the whole transactions should be nullified. Similar evidences were testified by PW1 and partly by PW3.

The evidence of PW4 Rehema Hassan Abdallah Nalino, identified as a tenth child among sixteen children of the deceased, is highly questionable, because according to the list of 16 children of the deceased listed in Probate No. 13 of 2017, there is no similar name of the deceased. The tenth child is Zahara Hassan Nalino as opposed to Rehema Hassan Abdallah Nalino. The same piece of verification was made by DW3, Resident Magistrate Lightness Anold Masimba from Lisekese Primary Court, having the original file of Probate Case No. 13 of 2017 verified that the names of the deceased children are:

1. Juma Hassan Nalino
2. Moshi Hassan Nalino
3. Ashura Hassan Nalino
4. Musa Hassan Nalino
5. Shabani Hassani Nalino
6. Abdallah Hassan Nalino
7. Ibrahim Hassan Nalino
8. Faraji Hassan Nalino
9. Omary Hassan Nalino
10. Zahara Hassan Nalino
11. Hamisi Hassani Nalino
12. Karim Hassan Nalino
13. Sofia Hassan Nalino
14. Ramla Hassan Nalino
15. Nalino Hassan Nalino
16. Asha Hassan Nalino



In all these names, the name of Rehema Hassan Abdallah Nalino is not among them. Therefore, this court refrain from considering her evidence for telling lies in this court.

Apart from the oral testimonies of witnesses in this court, the documentary evidences, referred above leave no doubt that the suit land was sold by the deceased to the 2nd defendant, on 3rd June, 2011. The sale agreement was attested by M.R.M. Lamwai Advocate on 14th September, 2011. In transferring his ownership to the purchaser, Issack Issack Mtenda, the deceased prepared an affidavit affirmed on 13th January, 2012, filled Land Form No. 29; Land Form No. 30; and Land Form No. 35 all forms were made under section 36 of the Land Act as legal requirements provided for under the Land Act No. 4 of 1999.

The original certificate of occupancy with title No. 31243, Plot No. 4 Masasi Urban Area, for the period of thirty-three years, was issued to Hassan Abdallah Nalino (see Exhibit D3). These documentary evidences, carry strong weight as provided for under section 100 of the Evidence Act. For ease of reference the section is quoted hereunder:-

"When the term of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or



secondary evidence of its contents in cases in which a secondary evidence is admissible under the provision of this Act”

This section is *impari material* with Indian Code of Evidence whereby **Sarkar on Evidence Fifteenth Edition at page 1269** gave breath by insisting on the need to respect the documentary evidence as it is when he said:-

“It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them”.

In brief, the best evidence is the contents of a written instrument itself. In respect to this case the documents tendered in court left no doubt on the transaction conducted between the deceased Hassan Abdallah Nalino and Issack Issack Mtenda.

Prior to the conclusion on the first issue, let me point another important factual issue. While the evidences of the prosecution throughout referred to Plot No. 4 of Block B Mkuti street in Masasi urban area. However, the defendants were throughout their evidences, referred to a house situated at Plot No. 4 Masasi Urban Area, as opposed to Plot No. 4 of Block B Mkuti Street in Masasi Urban area. Legally, the two are different pieces of land,

however, I take it as a sleep of a pen or sleep of tongue. I accordingly rule that both were referring to one and the same house built at Plot No. 4 Masasi Urban area as rightly referred in the certificate of Occupancy bearing title No. 31243.

I would therefore, conclusion the first issue, by pointing out that the answer is found on both oral evidences adduced in this court and the documentary evidences. While the prosecution evidences alleged the suit house had six rooms, the reality in the ground as per DW2 and DW4, read together with exhibit D6, the house as of now has 26 rooms including toilets. All that development was made by the current occupier, prior to demise of the deceased.

Moreover, the evidence in this court leaves no doubt suggest that the suit house was owned by the deceased in persona. The documentary evidences tendered in this court, including the sale agreement, transfer documents and affidavit of the transferor to the transferee leaves no doubt the house was individually owned by the deceased.

Such evidences, concludes the first issue that the suit house has never been a family or matrimonial property, rather has been, throughout, a property of the deceased individually.

Now before, considering the second issue, let me answer the question raised prior on the status of the 1st defendant in respect to this case. Obvious the 1st defendant has statutory responsible over properties owned



by the deceased prior to his demise. The administrator cannot in anyway be responsible over the properties, which were not owned by the deceased immediately prior to his demise. In other words, the administrator cannot be responsible over properties sold by the deceased many years ago, before his death. This, I think is a legal position governing administration of the deceased estate.


In respect to this case, undoubtedly, the deceased sold the suit house six (6) years before his death, thus logically and evidences adduced in this court confirms that the suit house cannot be part of the deceased properties subject to the administration by the 1st defendant. Frankly, and without wastage of time, the 1st defendant was wrongly sued in this case.

Having so concluded on the status of the 1st defendant, yet the question remains, whether the plaintiffs had any viable action against the 2nd defendant in the absence of the deceased Hassan Abdallah Nalino? Assuming, it is true that the deceased sold wrongly sold the suit house to the 2nd defendant, whether the plaintiffs can succeed in suing the purchaser alone without affording right to be heard of the seller? The rights of the plaintiffs to question the transaction made between the deceased (Husband) and the 2nd defendant is basically acceptable, if strongly belief that such transaction infringed part of their rights. The question is whether they can succeed by suing only the purchaser in the absence of the seller? The deceased cannot be sued and he is incapable to defend himself. Can this suit therefore, stand without presence of the seller Hassan Abdallah Nalino? I think not, the presence of Hassan Abdallah

Nalino was inevitable for the plaintiffs to succeed in this suit. The fact that the administrator of the deceased estate stands in a position of the deceased, is correct but in the circumstances of this suit he cannot because the suit was not in possession of the deceased upon his demise. The suit house was sold six (6) years prior to his death. Thus the administrator is irresponsible and wrongly sued in this case.

This court therefore, concludes that the plaintiffs slept over their rights for all that time, since 2011 to 2017, when their husband Hassan Abdallah Nalino died. Once you sleep over your right, you may sleep forever and this court cannot do otherwise, but to follow the letters of law, based on facts, and circumstance of each case.

From the above understanding, the second issue of whether the sale of the disputed property to the 2nd Defendant was with consent of the plaintiffs is answered in negative. As I have already concluded that the suit house was owned by the deceased in persona, as opposed to the family properties. Thus, had all rights to do whatever he thought was right at that particular time including disposition to the 2nd Defendant.

The third issue of whether the 2nd Defendant is a bona fide purchaser for value of the disputed property is likewise, answered in affirmative for he purchased as they agreed by the owner and as vividly shown in the executed contracts and transfer documents, the 2nd defendant is a rightful owner of the suit house through purchase from the owner. 

The last issue is on parties' reliefs. Obvious in civil cases, the proof is on balance of probabilities and the one with strong evidences, always the court will decide in his favour. Section 110(1) (2) and 111 of the Evidence Act, Cap 6 R.E 2019, are clear on this point as I hereby quote verbatim:-

Section 110 (1) *"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that facts exist"*

(2) *"When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person".*

Section 111 *"the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".*

These sections they mean exactly what they say. It is a well-known legal principle of law that whoever alleges that his rights have been infringed by another person, such allegations must be proved by producing enough evidences to convince the court that indeed his rights have been unlawfully taken away by the defendant. In civil proceedings, the party with legal burden also bears the evidential burden to the balance of probabilities. This position has been repeated in many cases including in the case of **Ezekiel Magessa Vs. Geita Gold Mining Limited, Land Case No.13 of 2018** (unreported) at Mwanza, where the court held:-

"The said burden in civil cases is on the balance of probabilities or preponderance of the evidence. In the case at hand, the plaintiff is the one who bears the burden of proving his case on the balance of probabilities"



The same position was repeated in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph [2006], TLR 419**, where the court held:-

"It is an elementary principle that he who alleges is the one responsible to prove his allegations"

The one who alleges has a duty to bring evidences to build his case to the satisfaction of the court. Always courts determine disputes before it in accordance to the evidences adduced in court; the applicable laws; and the prevailing circumstances. Upon consciously analyzing the parties' evidences, the court arrives to the conclusion based on which side had heavier evidences. This position was likewise stated in the case of **Khalfan Abdallah Hemed Vs. Juma Mahende Wang'anyi, Civil Case No 25 of 2017** (unreported) and in the case of **Hemed Said Vs. Mohamed Mbilu [1984] TLR 113**, that the person whose evidence is heavier than that of the other is the one who must win.

In respect to this case, the plaintiffs have abdicated their noble duty to prove their case on a balance of probability or preponderance of probabilities. In the contrary the 2nd defendant has proved with oral and documentary evidences that the suit house belongs to his for about six (6) years prior to demise of the original owner Hassan Abdallah Nalino.

In totality and for the reasons so stated, this suit cannot stand in favour of the plaintiffs, I therefore, proceed to dismissed it with costs.

I accordingly order.

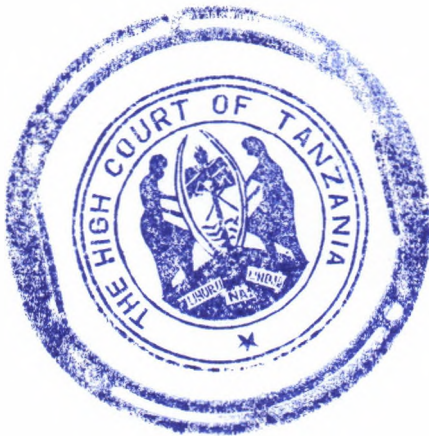
DATED at Mtwara this 16th October, 2020



**P. J. NGWEMBE
JUDGE
16/10/2020**

Court: Judgement is delivered at Mtwara in Chambers this 16th day of October, 2020 in the presence of Mr. Ali Kassian Mkali, Advocate for plaintiffs, the first defendant in person and Mary Lamwai, Advovate for the second defendant.

Right to appeal to the Court of Appeal explained.



**P. J. NGWEMBE
JUDGE
16/10/2020**