

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MTWARA)  
AT MTWARA**

**LAND CASE NO. 01 OF 2019**

**R.F. REAL ESTATE LIMITED ..... PLAINTIFF**

**VERSUS**

**COCACOLA KWANZA LIMITED.....1<sup>ST</sup> DEFENDANT**

**MOHAMED SAID KILUWA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

*Final court Order on: 28/08/2020*

*Judgement date on: 27/11/2020*

**NGWEMBE, J:**

This suit emanates from claim of ownership of a piece of land, bearing certificate of title number 33853 situated in plot No. 2 & 4, Block "A" Shangani Low Density area, within Mtwara Municipality. The disputants are in loggerheads on ownership of the suit land. While the plaintiff claims to own the suit land through purchase for value from the 2<sup>nd</sup> defendant, likewise, the 1<sup>st</sup> defendant, claims to own the same suit land through amalgamation of Mtwara Bottlers Limited and CocaCola Kwanza Ltd.

The plaintiff and 1<sup>st</sup> defendant, both claim ownership of the suit land, but the 2<sup>nd</sup> defendant stand as a seller of the same Plot of land to the plaintiff. The plaintiff is firm, that the suit land came to her ownership through purchase for value from Mohamed Said Kiluwa (2<sup>nd</sup> defendant). At the same time, the 2<sup>nd</sup> defendant claim to own the same suit land through purchase from Mbwana Abuu Bausi, a legal representative of the deceased Abuu Bausi Abuu, subsequently he sold it to the Plaintiff.

It is also alleged that, Abuu Bausi Abuu purchased the suit land from Mtwara Bottlers Limited. The transaction from Mbwana Abuu Bausi to Mohamed Said Kiluwa wa done on 15<sup>th</sup> day of March, 2013 at Dar es Salaam. Subsequently, Mohamed Said Kiluwa sold and transferred it to the plaintiff R.F. Real Estate Limited on 26<sup>th</sup> September, 2014.

On the other side of the story, the 1<sup>st</sup> defendant is firm that the suit land came to her ownership through a court declaratory order, issued on 22<sup>nd</sup> December, 2006 in Miscellaneous Commercial Case No. 45 of 2006. That even prior to that year, the suit land has a house, which was throughout occupied by employees of 1<sup>st</sup> Defendant (Cocacola Kwanza Ltd) undisturbed.

Such triple claim of ownership of the same plot of land has ended in this court for determination. All parties procured services of learned counsels. While the plaintiff was represented throughout of this suit by learned advocate Salim Mushi from Elite Attorneys, the 1<sup>st</sup> defendant was represented by learned counsel Atley Esao Thawe from NW Law Associates

and the 2<sup>nd</sup> defendant was represented by advocate George Kawemba Mwiga from Situs Attorneys at Law.

After all preliminaries related to pleadings were conclusively settled, and after failure of amicable settlement through mediation, all parties agreed on two substantive issues for court's determination namely:-

1. Who is the rightful owner of the suit property; and
2. What reliefs are the parties entitled to.

Parties directed their evidences to establish and prove on these two issues, that is, ownership of the suit land and the accompanied reliefs thereto.

In the cause of hearing, the plaintiff's case was blessed by one witness namely Mr. Francis Ruben Kimaro, identified in court as Director and Shareholder of the plaintiff. The 1<sup>st</sup> defendant was armed with five (5) witnesses and the 2<sup>nd</sup> defendant likewise, was blessed by one witness (the 2<sup>nd</sup> defendant himself) who testified as Defense Witness number six (DW6). Upon hearing all witnesses, this court *suo mottu*, invited a court witness from Mtwara regional land department. The one who appeared as court witness was Mr. Mpoki Mwalufunda, introduced in court as legal officer working in the land office Mtwara region, employed on January 2017. Though, he is a lawyer, yet he works as assistant registrar of lands in Mtwara region. He appeared as Defense Witness number seven (DW 7).

Briefly, the evidence of the disputants and their witnesses are summarized herein. PW1 as shareholder and director of the plaintiff, had full knowledge on the suit land, which was purchased from Mohamed Said



Kiluwa (2<sup>nd</sup> defendant). The process of purchasing the suit land involved one Godbess Kweka who processed the whole transactions with Mohamed Said Kiluwa, later was transferred to the plaintiff's name.

Prior to purchasing it, they made search to the registrar of lands at Mtwara and were assured that the true owner of the suit land was Mohamed Said Kiluwa. Thus, they purchased the suit land for TZS 470,000,000/= which costs involved transfer costs. Three deposit slips were tendered in court and admitted unopposed marked collectively exhibit P1. However, the witness clarified that, those payments receipts were in the name of Mtwara Balance Investment Ltd for TZS 220 million, Ramadhan A. Makondile TZS 220 million, and Ramadhani A. Makondile TZS 30 million. That the said Makondile was a relative of the 2<sup>nd</sup> defendant Mohamed Said Kiluwa.

The transfer forms were likewise, tendered in court as exhibit P2. Finally, the certificate of occupancy bearing title No. 33853 issued on 26/9/2014, by assistant registrar of titles and same was admitted in court as exhibit P3. The payment receipt of land rent for year 2015 was also tendered in court as exhibit P4.

Further, adduced that, the plaintiff obtained building permit from Mtwara – Mikindani Municipal officers to construct fence wall around the plot of land. That they paid TZS 100,000/= and were issued a payment receipt dated 9/11/2015. The payment receipt was admitted in court as exhibit P5.



Added that, when he (PW1) visited the suit land, alas, the plot was fenced and KK Security guard were deployed by the 1<sup>st</sup> defendant, thus, was prevented to enter therein. More so, the suit land had a house and a container, and was stopped by security guard to enter therein. In turn Godbless Kweka, the person who was behind the whole transactions of the suit land for the plaintiff was consulted, consequently Kweka, liaised with the 2<sup>nd</sup> defendant on the paradox of the suit land. The 2<sup>nd</sup> defendant firmly assured the purchasers that he is the true owner of the suit land.

Having such assurance, the plaintiff found her way to the District Land and Housing Tribunal for Mtwara, which tribunal decided in favour of the plaintiff. However, such decision of the District Tribunal aggrieved the 1<sup>st</sup> defendant who appealed to this court. Consequently, this court nullified the decision of the Tribunal based on lack of pecuniary jurisdiction to entertain that land dispute.


Following such nullification of the District land tribunal, they sought and obtained prior approval from the company's Board of Directors to institute this suit. That the Board of Directors of the plaintiff met on 5/12/2018 and resolved to institute this suit. The board resolution was admitted in court as exhibit P6.

PW1 rested his testimonies by praying that the court be pleased to declare the plaintiff is the true owner of the suit land. Further the defendants to pay damages for failure to develop the suit land and payment of general damages.

In cross examination, PW1 disclosed that the true value of the suit land was TZS 60 million as opposed to TZS 470, million. The amount in the stamp duty is TZS 60 million only, which is the true value of the suit land. Also the amount of TZS 60 million is recorded in the documents of the Commissioner for lands. Further clarified that, despite the fact that the first two payments receipts indicate the payments were directed to *Balance Investment Ltd and Ramadhani A. Makondile* instead of the 2<sup>nd</sup> defendant, yet the 2<sup>nd</sup> defendant never complained that he did not receive such amount of money.

Above all, in cross examination, PW1 admitted to have never notified the 1<sup>st</sup> defendant to cause vacant possession. Moreover, testified that the plaintiff's agent Godbless Kweka died some times in year 2018.

When was asked with the advocate for the 2<sup>nd</sup> defendant on whether the 2<sup>nd</sup> defendant ever showed him the suit land, he admitted that he never shown him the purchased plot of land. It is also recorded, when the court sought clarification from the witness on whether the 2<sup>nd</sup> defendant ever shown the purchaser, the alleged suit plot of land, frankly denied to have shown them the disputed suit land.

Upon closure of the plaintiff's case, the first defence witness was Mr. Gilbert Zannie, testified to be working with the 1<sup>st</sup> defendant as in house consultant. That for the first fifteen years, he worked with the 1<sup>st</sup> defendant as permanent and pensionable employee. Later on, worked as inhouse consultant to date. Testified that, the 1<sup>st</sup> defendant is Incorporated Company with Registrar of Companies according to the Companies Act. 



Likewise, Mtwara Bottles Ltd was Incorporated with Registrar of Companies in year 1976. The main business of Mtwara Bottlers Ltd was manufacturing and distribution of CocaCola soft drinks in Mtwara – Mikindani Municipality.

The two companies, that is, Mtwara Bottlers and 1<sup>st</sup> defendant were owned by the same shareholders. Added that, the 1<sup>st</sup> defendant changed her name three times; from New Company Bottlers Limited to Kwanza Bottlers Ltd and lastly in 1997 changed to CocaCola Kwanza Ltd, the name used to date.

The incorporation certificates were tendered in court and admitted as exhibits D1 (a) (b) (c) and (d) respectively. He added that the 1<sup>st</sup> defendant is an amalgamation of four companies, that is, Mtwara Bottlers Ltd; CocaCola kwanza Ltd; Afri Bottlers Ltd of Mbeya and Kilimanjaro Water Ltd of Dar es Salaam. The amalgamation were done by court order Upon being amalgamated, all assets and liabilities of those companies were transferred to CocaCola Kwanza Ltd. The Order of the High Court (Commercial Division) dated 22/12/2006 were tendered in court and admitted as exhibit D2.

He added that, the legal implication of such court order was to transfer all properties and liabilities of Mtwara Bottlers Ltd to CocaCola Kwanza Limited.

In addition, he testified that since 2006 to date, all assets and liabilities of Mtwara Bottlers Ltd were transferred to CocaCola Kwanza Ltd and in

essence upon amalgamation of Mtwara Bottlers Ltd to CocaCola Kwanza Ltd, the existence of Mtwara Bottlers Ltd extinguished with no capacity to transfer any asset to Abuu Bausi or to whoever on 22/1/2014.

Above all, he testified that Abuu Bausi, made several attempts to transfer assets of Mtwara Bottlers Ltd to himself. To justify his assertion, he tendered two letters dated 14/3/2013 and 12/7/2013 marked exhibit D3 (a) and (b). He rested his testimonies by praying to dismiss the suit and declare the plot of land owned by the 1<sup>st</sup> defendant.

In cross examination he testified that, the two plots of land had a house used as residential for employees of CocaCola Kwanza Ltd in many years.

The 2<sup>nd</sup> defence witness was Mr. Rashidi Mgonja, who testified briefly that, he is a holder of Diploma in Auto Mobile Engineering and Marketing. Among others, he worked with CocaCola Kwanza Ltd for a period of 18 years and 3 months, then he worked with Sippy Soda and now is working with Water-Com. When he was with CocaCola Kwanza Ltd, worked as area sales and marketing manager. In year 2008, he was transferred to Mtwara as representative of CocaCola Kwanza Ltd. While at Mtwara, he lived at Shangani in a house built in the suit land. The plot of land had a residential house. Above all, he was responsible to monitor all assets of the 1<sup>st</sup> defendant and payment of service levies and property tax. That he stayed in the suit house from 2008 to 2013.

All that time he never received any complaint from whoever and never paid any rental or tenancy fee to whoever and never knew the plaintiff R. F Real Estate nor the 2<sup>nd</sup> defendant. Likewise, he disputed ownership of the suit



land by Mohamed Kiluwa (2<sup>nd</sup> defendant). The suit plot has a house occupied by Managers of CocaCola Kwanza Ltd and that throughout, the suit house has never been vacant. While he was residing in the suit land, he cleared the open space and did put containers used to sale CocaCola drinks.

In cross examination, he clarified that the two plots of land are in one area owned by CocaCola Kwanza Ltd.

The 3<sup>rd</sup> defence witness, testified to the effect that, he worked with Cocacola Kwanza Ltd from 1999 – 2017 as sales Manager. From December 2004 to 2007 he was at Mtwara, responsible to take care for Company's properties including movable and immovable properties. The office, residence and workshop was at one Plot in Shangani Mtwara. The owner of the said Plot of land was CocaCola Kwanza Ltd. That the company never sold the said plot of land to whoever and has been paying all relevant levies including, water, electricity and land rent.

That in year 1996 – 1997 PW3 he worked with Elido Ltd, which was an agent of Canadian Spirit, responsible to transport products of CocaCola Kwanza Ltd and all activities were done in the suit land. Therefore, even before he was employed with CocaCola Kwanza Ltd, he knew that the suit land belongs to the 1<sup>st</sup> defendant.

He added that, all the time when he worked as a Manager of CocaCola Kwanza at Mtwara, he never heard anyone claiming ownership of the suit land. The Plot of land had a house for residential purposes, office, store and workshop for deep freezers. Further, testified that the 2<sup>nd</sup> defendant is

a stranger to him and for whatever done to the suit land by the 2<sup>nd</sup> defendant must be forgery, he concluded.

In cross examination, he boldly clarified that from December, 2004 onwards he stayed at Shangani to the suit land as area Manager. That CocaCola Kwanza was present in Mtwara in year 1996. The suit land is surveyed and the certificate of ownership is with CocaCola Kwanza at head office.

The 4<sup>th</sup> defence witness was Mr. Aman Ngowi Ngalla, worked with CocaCola Kwanza Ltd from 2008 – 2019. When he was with CocaCola Kwanza, he worked as Sales Manager at Mtwara from 2013 to 2015. The offices of the 1<sup>st</sup> defendant at Mtwara was located at Shangani area in the suit land, owned by CocaCola Kwanza Ltd. That in his knowledge the Plot is owned by CocaCola Kwanza Ltd and all relevant bills like water bills and electricity were settled by the 1<sup>st</sup> defendant. He tendered some receipts marked as exhibits D5 (a) and (b).

Also he tendered Valuation Report made on 2015 as exhibit D6. That the value of the suit Land is USD 396,000 only equal to TZS 853 Millions, not TZS 470 Million.

DW5 was Mr. Faustine Batholomeo Lyahadze, testified briefly that, he is an employee of CocaCola Kwanza Ltd as a Technician from 2005 to date. His daily duties include repair of deep freezers. Throughout the repair of those freezers were done at the suit land in Shangani area. Since 2005 to date, he knows that the suit land is owned by CocaCola Kwanza Ltd. He tendered some receipts, which were admitted as exhibits D7 (i) (ii) (iii) (iv) and (v) respectively. That since he joined CocaCola Kwanza Ltd in year

2005 to date, he never heard any complaint from whoever, demanding ownership of the suit land.

Having so testified the 1<sup>st</sup> defence case was closed, thus giving room to the 2<sup>nd</sup> defendant to adduce his evidences.

The 2<sup>nd</sup> defendant testified as DW6 who admitted that the plaintiff is known to him through his agent Godbless Kweka. That Godbless Kweka purchased his plot of land located at Shangani area in title No.33 853 Block "A", two plots in one. That the two plots came to his ownership through purchase from Abuu Bausi, though he had no sale agreement. That he purchased the suit land having two houses, one of them was vandalized, another house was still in use. He could not remember the year when he purchased it, but he sold it to the plaintiff for the price of TZS 370 million. However, the transfer form was written TZS 60 million, but he could not remember when he sold it to the plaintiff. Therefore, to his knowledge the suit land belongs to the plaintiff.

On the bank deposit receipts of exhibit P1, he denied to know them even the one who prepared them were not known to him. Exhibit P2 was known to him and bears his signature and date. The amount of money written in exhibit P2 is TZS 60 million. Likewise, exhibit P3 was also known to him and the amount involved therein was TZS 60 Million only. He firmly, told this court that he received a sale price of TZS 370 instead of TZS 470 Million, while the transfer document was written only TZS 60 million.

He denied to know Ramadhan A. Makondile and Balance Investment Ltd. He added that upon purchasing the suit land from Abuu Bausi, he did not develop it or improve it until when he sold it and had no any document

related the suit land. Further, denied to know exhibit D3 (b) and had no relationship or conduct with CocaCola Kwanza Ltd because the one who sold it to him was Abuu Bausi.

In cross examination, he clarified that, he purchased the suit land from Abuu Bausi and before purchasing it, he verified it from land office. Repeatedly, stated that he sold it to the plaintiff for TZS. 370 million only. The price of TZS 470 Million was not known to him. He rested by asking this court to confirm that the plaintiff is the owner of the suit land.

The court sought clarification from DW6 on the actual sale price between himself and the plaintiff. He confirmed that the sale price of the suit land was only TZS 370 million whose payment was through his Bank account at CRDB Bank. The one who deposited the sale price was Godbless Kweka in year 2014.

When all parties closed their evidences, this court found important to call an independent court witness from the Land department in Mtwara region. Mr. Mpoki Mwalufunda, appeared in court and testified that, he is a Legal Officer working as assistant registrar of Lands in Mtwara Region employed on January, 2017 to date.

Informed the court that, according to the record available, Plot No. 2 and 4 bearing Title No.33853 Block "A" Shangani area, at the beginning was owned by Mtwara Bottlers Ltd for the period of 99 years from 1987. However, in year 1990 Mtwara Bottlers Ltd sold the suit Plot to Abuu Bausi, who later died and his administrator Mbwana Abuu Bausi in year 2014 sold it to Mohamed Saidi Kiluwa. In the same year Mohamed Saidi Kiluwa sold 

to R.F Real Estate Ltd, which according to the record is the true owner of the suit land.

Further, testified that, in year 2014 they received caveat from CocaCola Kwanza, but was rejected because the citation was related to the suit land and the content was different.

Testified further that, according to the office record, the certificate of occupancy is in the name of R.F Real Estate, but did not know who pays the land rents annually. On cross examination, informed the court that, endorsement of transfer from Mtwara Bottlers to Abuu Bausi was made on 22/1/2014, while the purchaser Abuu Bausi died on 13/2/2013. That the records of Registrar contradict with exhibit D3 (a) and (b). The transfer from Mbwana Abuu Bausi to Mohamed Saidi Kiluwa was effected on 12/2/2014 for the consideration of TZS 25 million. In turn the transfer from Mr. Mohamed Said Kiluwa to R.F Real Estate was effected 26/9/2014 with consideration of TZS 60 Million. He closed his evidences.

Finally, the parties had opportunity to file their final written arguments. The learned advocate Salim Mushi, strongly argued quite rightly, that the fundamental issue for determination by this court is who is the lawful owner of the suit land. He answered just briefly, that according to the available records, the lawful owner is the plaintiff.

Rightly, so to speak, the defendants have every legal right to lodge a counterclaim against the plaintiff, had they have any claim on the suit land, but none of the two defendants dared to lodge clam against the plaintiff.



Upon referring this court to several precedents, he rested by urging this court to grant all reliefs contained in the plaint.

The submission by the 2<sup>nd</sup> defendant was in line with the plaintiff, but denied any compensatory claims to the plaintiff because the Plaintiff is the lawful owner of the suit land.

In turn, the written submission by the 1<sup>st</sup> defendant was likewise, very strong and rightly, so to speak, convincing. That referred this court to the admitted exhibits, that Coca Cola Kwanza Ltd used the house built in the suit land for residential purposes of her managers worked in Mtwara region. Above all, the learned advocate for the 1<sup>st</sup> defendant relied on the order of the High Court (Commercial Division) dated 22<sup>nd</sup> December, 2006, which ordered amalgamation of all assets and liabilities of Mtwara Bottlers Ltd WITH Coca Cola Kwanza Ltd.

Having summarized the parties evidences and final arguments of learned counsels, yet the question remains, who is the lawful owner of the suit land among the disputants? This is a fundamental question and once this question is answered, obvious the whole dispute will be settled. In answering this question, the court has a duty to consider with due care each and every piece of evidence adduced in court and all relevant annexures.

The plaintiff in establishing and proving her ownership, alleged quite strongly, that the suit land was purchased by the plaintiff for value from the owner Mohamed Said Kiluwa for consideration of TZS 470,000,000/=.



The mode of payment of the agreed price was through banks. To justify such transaction, PW1 tendered in court exhibit P1 indicating payment of TZS 220,000,000/- through NBC Arusha Branch to Mtwara Balance Investment Ltd; TZS 220,000,000/= through CRDB Bank of Arusha Branch to Ramadhan A. Makondile and the last payment was TZS 30,000,000/= through CRDB Bank Arusha Branch to Ramadhan A. Makondile. In similar vein, exhibit P2 was to the effect that the transfer of right of occupancy, that is, Land Form No. 35 indicated that Mohamed Said Kiluwa received consideration of TZS 60,000,000/= and transferred his ownership of the suit land to R.F. Real Estate Limited. The same to Land Form No. 29, 30, and Land Form No. 33, all indicating that Mohamed Said Kiluwa (2<sup>nd</sup> Defendant) was the one transferred ownership of the suit land to the plaintiff.

To complete that transfer of ownership, PW1 tendered in court exhibit P3, which is a certificate of title of Right of Occupancy, issued on 18<sup>th</sup> December, 1987 to Mtwara Bottlers Ltd. For the first time on 22 January, 2014 the original owner that is, Mtwara Bottlers Ltd transferred it to Abuu Bausi Abuu for consideration of TZS 8,500,000/= The transfer was effected by the legal representative of Abuu Bausi Abuu who is Mr. Mbwana Abuu Bausi. Just few days later, that is on 12 February, 2014, Mbwana Abuu Bausi transferred the ownership of the suit land to Mohamed Said Kiluwa for consideration of TZS 25,000,000/=.

The marathon of transfer, continued from Mohamed Said Kiluwa to R.F. Real Estate Ltd (plaintiff), on 26 September, 2014 for consideration of TZS 60,000,000/=. Surprisingly, the whole transfers bear one signature of the



land officer as if same was made on one day. This point will be considered in due course of this judgement.

The second issue is what was the consideration, if any, on the transaction from Mohamed Said Kiluwa to R.F. Real Estate Limited? To answer this question, the evidence of PW1 confirmed strongly that the price was TZS 470,000,000/= while DW6 testified under affirmation that the price of the suit land was TZS 370,000,000/=. Another surprise is on the documentations related to the alleged considerations. The price in the available documents indicates the price was TZS 60,000,000/= The question remains, which price, if any, was paid by the plaintiff to the 2<sup>nd</sup> defendant? Was it TZS 470 million or TZS 370 million or TZS 60 million? Who among the witnesses is reliable and tells the truth on this issue?

Moreover, the payments of the alleged consideration of whatever amount, indicates the payee were Mtwara Balance Investments Ltd, a total of TZS 220 million, the second payment of TZS 220 million was paid to Ramadhani A. Makondile and the last payment of TZS 30 million was paid to Ramadhani A. Makondile. Assuming those payments were correctly effected to the accounts of the 2<sup>nd</sup> defendant- Mohamed Said Kiluwa as per exhibit P1, yet the testimonies of Mohamed Said Kiluwa, who made under affirmation denied totally, to know exhibit P1 and the names written therein are not known to him. He confirmed to know only exhibits P2 & P3 with amount of TZS 60 million. Above all, he firmly accepted to have received from the plaintiff a total amount of TZS 370 million only and the transfer documents were written TZS 60 million. Further denied to know

neither Ramadhan A. Makondile nor Balance Investment Ltd. Above all, he denied to know the 1<sup>st</sup> defendant.

In reexamination, the 2<sup>nd</sup> defendant testified that, all payments were effected by Godbless Kweka through his account. The court asked him if he can disclose his account and in which bank? He answered boldly, that his account is at CRDB Bank, but had no documentation to verify his assertion.

The evidence of PW1 testified under oath, that all payments of purchase price were directed to Mtwara Balance Investment Ltd and two payments were directed to the account of Ramadhani A. Makondile, a relative of the 2<sup>nd</sup> defendant. But in turn, the 2<sup>nd</sup> defendant denied totally to know both Mtwara Balance Investment Ltd and Ramadhani A. Makondile.

The above pieces of evidences, do not answer the fundamental question of what was the actual consideration, if any, of the transactions between the plaintiff and the 2<sup>nd</sup> defendant? Second, whether the payments were as per testimonies of PW1 or were as per testimonies of DW6? Who is telling truth in this court? Whether at all, there was any transaction related to the suit land?

These questions may be answered by the testimonies of other witnesses of the 1<sup>st</sup> defendants. First and foremost, the exhibit D1 (A) to (D) are related to Certificates of incorporation of NewCo Bottlers Ltd; change of name of Newco Bottlers to Kwanza Bottlers Co. Ltd and later to Cocacola Kwanza Ltd; and Mtwara Bottlers Ltd. Those certificates indicate incorporations of those companies by the Registrar of Companies. More so,

D2 is a court order issued by the High Court (Commercial Division) in **Miscellaneous case No. 45 of 2006 between CocaCola Kwanza Ltd, Mtwara Bottlers Ltd, Afri – Bottlers Ltd and Kilimanjaro Water Ltd versus the Registrar of Companies.** The petitioners sought before the court of law to order dissolutions of the petitioners without being wound up.

Moreover, the petitioners sought court's order that all assets and liabilities of the former companies be taken over by CocaCola Kwanza Ltd. The Registrar of Companies was represented by Kakwezi, who did not resist the petition and the court proceeded to grant the petition as prayed. Legally, from the date when justice S.A. Massati (on 22 December, 2006) ordered dissolution of those companies and forever, unless the order is reversed, otherwise, Mtwara Bottlers Ltd; Afri – Bottlers Ltd; and Kilimanjaro Water Ltd remained dissolved.

Following such court order, the question is whether Mtwara Bottlers Ltd in year 2014 had any property to transact with either Abuu Bausi or Mbwana Abuu Bausi? Another equally important question is whether Mtwara Bottlers Ltd had any capacity of whatever nature in year 2014 to effect transfer of its assets to Abuu Bausi or through his administrator Mbwana Abuu Bausi? The answer to these questions is only one, that once the Company is dissolved, or wound up is equal to a dead person, he cannot resurrect and make business to a living person and later go back to grave.

Exhibit D3 (A) may pave additional light on this paradox of unanswered questions. The Director of Mtwara Municipality on 14<sup>th</sup> March, 2013 wrote a

comprehensive letter to Assistant Land Commissioner for Southern zone, related to the suit land. The letter expressed clearly that the suit land was granted to Mtwara Bottlers Ltd on 24<sup>th</sup> June, 1978, holding certificate of title No. 33853. The letter further explained that, the said land in year 1990 was sold to Abuu Bausi Abuu, which transaction was not blessed by Land Commissioner. In turn on 24<sup>th</sup> March, 2008 Abuu Bausi Abuu died, thus Mbwana Abuu Bausi was appointed an administrator of the deceased estate through Probate No. 77 of 2013. The Director, clarified that the administrator sought transfer from M/s Mtwara Bottlers Ltd to Mbwana Abuu Bausi. The letter was attached with original certificate of ownership number 33853, Land form Numbers 35, 30 and 29, sale agreements, valuation report, land rent receipts of 2012/2013 and citizenship of Mbwana Abuu Bausi.

The letter was responded by Assistant Commissioner of land on 12<sup>th</sup> July, 2013 (see exhibit D3 (B)). The contents of the letter is quoted herein verbatim:

- 1. Mauziano ya miliki hii yamefanyika mwaka 1990 na nyaraka za mauziano hazikuandaliwa kwa kutumia sheria ya Ardhi iliyokuwa inatumika kwa wakati huo yaani Land Ordinance ya 1923 na Land Registration Act ya Mwaka 1954.*
- 2. Nyaraka za mauziano hayo zinaonyesha kusainiwa tarehe 17/01/1990 na zimeandaliwa kwa kutumia Land Form zilizopo kwenye Sheria ya Ardhi ya 1999 ambayo ilianza kutumika mwaka 2001.*





3. *Wakurugenzi wa Kampuni ya Mtwara Bottlers Ltd ndio wanaostahili kusaini nyaraka za mauziano hayo kwa niaba ya kampuni.*

4. *Sahihi zilizopo kwenye Land Form No. 35 zimetofautiana na zile zilizopo kwenye Mkataba wa mauziano."*

Simply the letter means, the whole transactions were illegal, fraudulent and contrary to the excising land laws.

The letter was signed by F.J. Mrema Assistant Commissioner of Land. Above all, the letter has a hand written words at the bottom of the letter having the following contents:- *"Mimi Mahazam Mohamed Kiluwa nimechukua nyaraka halisi za uhamisho wa milki pamoja na hati Na. 33853 kwa ajili ya kupeleka Halmashauri ya Manispaa Mtwara"* **signed on 12/7/2013.**

Such letter was effectively written on 12/7/2013, but without answering all those queries raised by the land officer, just few months later, that is from January, 2014 up to February 2014, the whole transfer was concluded. This piece of evidence raise more questions than answers in respect to how could the same office, which refused in year 2013 to effect transfer with good reasons, but immediately thereafter, changed its minds and effected all required transfers? Whether the identified statutory misdeeds were corrected within that shortest possible time before effecting transfer from Mtwara Bottlers Ltd to Abuu Bausi, and from Abuu Bausi or Mbwana Abuu Bausi to Mohamed Said Kiluwa and from Mohamed Said Kiluwa to R.F. Real Estates Ltd?



Having asked all those unanswered questions, I would therefore, revert back to the Law of Evidence, specifically section 100 which says:-

*“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 to the contents of the section by insisting on the need to respect the documentary evidence in the following words:-

*“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 by the plaintiff from exhibits P1 do not support any lawful consideration of the alleged transaction. The documentary evidences clearly indicates that the one who received the alleged consideration is Mtwara balance Investment and

Ramadhan A. Makondile, while the seller (2<sup>nd</sup> defendant) is firm in his testimony that the consideration was deposited in his account at CRDB Bank. Above all, the alleged Ramadhani Makondile and Mtwara Balance Investment Ltd are not known to Mohamed Said Kiluwa.

Moreover, exhibits P2 (Transfer forms) are contrary to the contents of exhibit D3 (B) which letter indicated serious fraudulent transactions of Abuu Bausi Abuu and Mbwana Abuu Bausi together with Mohamed Said Kiluwa.


Even the transactions between Mohamed Said Kiluwa and R.F. Real Estates leaves a lot to be desired. From the beginning, the 2<sup>nd</sup> defendant had no land to transfer to the plaintiff. Second even the payment of the alleged consideration from the plaintiff to the 2<sup>nd</sup> defendant was effected to the accounts of persons who are not known to the seller, that is, Mtwara Balance Investment and Ramadhan A. Makondile. Above all, the alleged price of TZS 470 million is contrary to the allegation of the 2<sup>nd</sup> defendant who alleged to have received only TZS 370 million, but at the same time what was incorporated in the alleged transfer documents are only TZS 60 million. All these are nothing, but fraudulent transactions, which this court can not condone it.

I am well aware on the evidence adduced by the court witness Mr. Mpoki Mwalufunda. His evidences did not help the court to arrive to the ends of justice. The reason is obvious, that **firstly**, he was employed in year 2017, while all transactions were completed in year 2014.



**Secondly**, in year 2013, the land department at Mtwara region, wrote a very comprehensive and professional letter to Municipal Director against the whole attempt to transfer ownership of the suit land from Mtwara Bottlers Ltd to Abuu Bausi Abuu. Surprisingly and with no clear explanation earl 2014, the same office came up with clean report on the whole transfers. In any event such unexplained acrobatic change cannot be accepted in court of law.

**Thirdly**, Mtwara Bottlers, was legally dissolved in the registry of the Registrar of Companies as per court order issued in year 2006, but with no explanation the same company in year 2014 was resurrected from dissolution and effected asset transfers to Abuu Bausi Abuu. Under normal circumstances, that cannot happen, even those who purported to sign on behalf of a dissolved Mtwara Bottlers Ltd, may be baptized as conmen. It is obvious, once the company is dissolved and its assets and liabilities are transferred to another company, it means nothing remains how could then be able to effect transfer in 2014?

**Fourthly**, the witnesses of the 1<sup>st</sup> defendant, explicitly confirmed that the suit land is developed with a built fence around the two plots of land, existence of built house and containers. All along those structures were used by the 1<sup>st</sup> defendant's employees undisturbed. This piece of evidence is supported by the 2<sup>nd</sup> defendant when he said, he never developed the alleged suit land, since he purchased from Mbwana Abuu Bausi. Above all PW1 supported it when he testified that, when he ventured to visit the suit land, he found the land is developed with built fence and house therein and was under KK Security guard who prevented him from entering therein. 

**Fifthly**, neither the plaintiff nor the 2<sup>nd</sup> defendant nor any witness testified in court that Cocacola Kwanza Ltd rented the suit house and was paying rental fees to whoever, since 1990s. Not only that, but also no one produced any tenancy agreement with Cocacola Kwanza Ltd to justify and prove that the 1<sup>st</sup> defendant was a mere tenant to whoever.

**Sixthly**, the transactions between Mohamed Said Kiluwa and the plaintiff raises more questions than answers. For instance, if there was any transaction recognized by law, then what was the price of the suit land? Whether the payment was done through bank account? Who is Ramadhan A. Makundile and Mtwara Balance Investment in the transaction between Mohamed Said Kiluwa and the plaintiff? There are endless questions than answers in the whole transaction.

**Seventhly**, it is evident that the alleged plot of land, in essence is not a bare land, rather is a developed piece of land comprising all required unexhausted improvements, namely; House built therein, Containers and wall built fence along the whole plot of land. The question is whoever purported to purchase it, was he purchasing a bare plot of land or included bare land and its unexhausted improvements therein? Another question is, whether PW1 when he alleged to obtain approval from the respective authorities to build fence along the plot of land, whether he knew it prior to requesting for building permit?

In such puzzling circumstances, I think, I need to answer only one fundamental question, as I am approaching to the conclusion, the question is whether the plaintiff performed her duty to prove ownership of the suit land to the required standard of law?

Undoubtedly, it is a settled principle of law that, always, the burden of proving any existence of a fact in issue lies on one who allege its existence. The plaintiff had uncompromised duty to establish and prove it on balance of probability, that the suit land belong to her by way of purchase for value. That is a statutory duty as provided for in section 110 (1) (2) and 111 of the Evidence Act, Cap 6 R.E 2019 that:-

**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 mean exactly what they say. The plaintiff had a duty to prove her case by producing enough evidences to convince the court that indeed her rights have been unlawfully taken away by the 1<sup>st</sup> defendant. 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 therein; the applicable laws; and the prevailing circumstances. Upon conscious analyses of the parties' evidences, the court arrives to the conclusion based on which side had heavier evidences. This position was likewise, repeated in the cases 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.

Considering all those factors together, I think they all suggest into one conclusion, that the plaintiff abdicated her noble duty to establish and prove the case on a balance of probability or preponderance of probabilities: The whole transactions from defunct Mtwara Bottlers Ltd to Abuu Bausi and from Abuu Bausi to Mbwana Abuu Baudi and later from Mbwana Abuu Bausi to Mohamed Saidi Kiluwa, and finally, from Mohamed Said Kiluwa to R.F Real Estate Ltd through her agent Godbless Kweka were nothing, other than a Marathon of fraudulent transactions. Even some Regional Land Officers for Mtwara were involved, including the one who purported to sign those transfer forms.





In the upshot, the 2<sup>nd</sup> defendant had no plot of land to transfer to the Plaintiff, all what they did was nothing than fraudulent transactions which this court refrain from blessing it.

All said and for the reasons so stated, this suit cannot stand in favour of the plaintiff. The plaintiff if has any viable claim arising from the alleged transactions on the suit land, may do so against the 2<sup>nd</sup> defendant, since the 2<sup>nd</sup> defendant had no plot of land to transfer to the Plaintiff. I therefore, proceed to dismissed this suit entirely with costs.

**I accordingly order.**

**DATED at Mtwara this 27<sup>th</sup> November, 2020**



A handwritten signature in blue ink, appearing to be "P. J. Ngwembe", is written over the printed name.

**P. J. NGWEMBE**

**JUDGE**

**27/11/2020**

**Date: 27/11/2020**

**Coram: Hon. L. Kasebele, Ag.DR**

**Plaintiff: Present in person**

**For Plaintiff: Advocate Teckla Kimathi for**

**1st Defendant: Advocate Teckla Kimathi holding brief for  
Advocate Atlay Thawe for**


**2<sup>nd</sup> Defendant: Advocate Teckla Kimathi holding brief for  
Advocate George Mwesiga for**

**B/C: Zuenā – RMA**

**Advocate Teckla Kimathi:** We are ready to proceed with  
Judgement.

**Court:** Delivering today in Court as prepared by Hon. J. Ngwembe.



  
L.R. Kasebele  
**Ag. Deputy Registrar**  
**27/11/2020**

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)  
AT MTWARA**

**LAND CASE NO. 1 OF 2019**

**R. F. REAL ESTATE LTD. .... PLAINTIFF**

***VERSUS***

**COCACOLA KWANZA LTD. .... 1<sup>ST</sup> DEFENDANT  
MOHAMED SAID KILUWA ..... 2<sup>ND</sup> DEFENDANT**

**DECREE**

**WHEREAS** the Plaintiff's prays for this Honourable court the Judgment and Decree against the Defendants jointly and severally as follows:

- (a) A declaration that the Plaintiff is the legal owner of the landed property with Certificate of Title No. 33853 situated in Plot No. 2 & 4, Block "A" Shangani Low Density Area, Mtwara Township (hereinafter "the suit land").
- (b) An order ejecting the 1<sup>st</sup> Defendant from the suit land.
- (c) Perpetual injunction restraining the Defendants or their agents from interfering with the Plaintiff's possession of the landed property
- (d) General damages
- (e) Interest in (d) above at the Court's rate of 7% from the date of Judgment to the date of satisfaction thereof
- (f) Costs.
- (g) Any other orders as the Honourable Court may deem just to grant.

**Alternatively:** The Plaintiff prays for Judgment and Decree against the Defendants jointly and severally as follows: -

- (h) A declaration that the sale agreement of the suit land with Certificate of Title No. 33853 situated in Plot No. 2 & 4, Block "A" Shangani Low Density Area, Mtwara Township Plaintiff between the Plaintiff and Defendant is rescinded by the Plaintiff.
- (i) An order directing the Defendants to refund the Plaintiff Tshs. 470,000,000/= as compensation for the purchase price and other costs incurred from the date of purchase of the suit land to the date when the Plaintiff was registered as a lawful owner of the suit land
- (j) General damages.
- (k) Interest in (i) above at a commercial rate of 15% per annum from the date of filing of this suit to the date of judgment.
- (i) Interest in the decretal sum at the rate of 7% from the date judgment to the date of satisfaction.
- (j) Costs of the suit
- (k) Any other orders as the Honourable Court may deem just to grant.

Now, the Suit is coming for final disposal before Hon. **P. J. Ngwembe, Judge**, and delivered in Court before Hon L. Kasebele, Ag; Deputy Registrar, this **27<sup>th</sup>** day of **November, 2020**. In the presence of Advocate Teckla Kimath, holding brief for Mr. Salim Mushi Advocate for the Plaintiff and also Advocate Teckla Kimath, holding brief for both Mr. Atlay Thawe advocate for the 1<sup>st</sup> Defendant and Mr. George Mwiga Advocate for the 2<sup>nd</sup> Defendant.

**THE COURT DOTH HEREBY ORDER THAT**

This suit cannot stand in favour of the plaintiff. The plaintiff if has any viable claim arising from the alleged transactions on the suit land, may do so against the 2<sup>nd</sup> defendant, since the 2<sup>nd</sup> defendant had no plot of land to transfer to the plaintiff. Therefore, the suit is entirely dismissed with costs.

**IT IS SO ORDERED**

**GIVEN** under my **Hand** and **Seal** of the Court this **27<sup>th</sup>** day of **November, 2020**.



A handwritten signature in blue ink, appearing to read "P. J. Ngwembe", is written over a horizontal line.

**P. J. Ngwembe**

**JUDGE**