

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

**AT KIGOMA
LAND DIVISION
(ORIGINAL JURISDICTION)
LAND CASE NO. 07 OF 2021**

IDD S/O HASSAN RUSOVU.....PLAINTIFF

VERSUS

OMARY S/O MWAILWA @ CHUBWA.....1st DEFENDANT

UMANDE MRISHO SUDI (Administrator of the

Estate of the late MRISHO S/O SUDI WIMBILWA2nd DEFENDANT

KIGOMA UJIJI MUNICIPAL COUNCIL.....3RD DEFENDANT

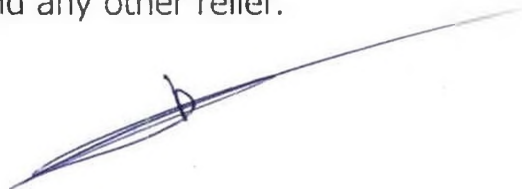
ATTORNEY GENERAL4th DEFENDANT

J U D G M E N T

18th & 20th October, 2021

A. MATUMA, J.

The Plaintiff Idd Hassan Rusovu is suing the Defendants for orders and decree that; he is the lawful owner of the suit plot which was previously known as plot No. 76 MD Kamala but now referred to as Plot No. 1239 Block "B" Kamala within Kigoma Ujiji Municipality, declaration that the 1st and 2nd defendants are trespassers thereat and an order against them to demolish the structure they have built in it, general damages against them, costs of the suit and any other relief.

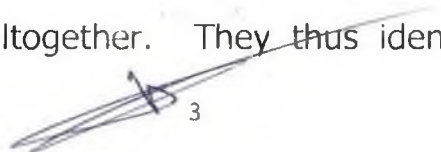


The brief history of the matter is that sometime in the year 1990s (1996) the 3rd Defendant surveyed Magera-Kamala area which was un-surveyed land. Various plots were born including the suit plot No. 76 MD Kamala. She then made announcement to the general public for those interested to apply for allocations of plots in the area. One Abdallah Mussa Abdallah now the deceased, applied and was successfully allocated the suit plot. He obtained a letter of offer dated 28/03/1996 exhibit P1. He then on the 10th day of June, 2013 sold the plot to the plaintiff herein as exhibited by the sale agreement exhibit P3.

The plaintiff processed and successfully obtained a building permit in the name of his vendor Abdallah Mussa Abdallah (Exhibit P4) because the transfer was still in the process. As per condition precedent in the offer no construction even if a building permit has been obtained unless the relevant surveyors physically visit the plot, satisfy themselves with the boundaries of the plot and show such boundaries to the person intending the construction prior to any starting of the construction. In that regard, the plaintiff processed to have those surveyors which took him sometime. When he obtained them and visited the plot, it was found that the 1st Defendant has already erected a building thereon.



On being inquired, the 1st Defendant stated that he bought that plot from the 2nd defendant. The 2nd defendant Mr. Umande Mrisho Sudi also stated that his late father Mr. Mrisho Sudi Wimbilwa had given him an acre of land as a shamba in the year 1984 after he had married in 1983. That he used the area as a farm cultivating it until in the year 2015 when he pieced it and sold to the 1st Defendant a piece thereat now the suit plot No. 76 MD Kamala. It is however in some other evidence stated that Umande sold such suit land in 2010, also 2014 (Refer exhibits D2 and D3). Mr. Umande laments that the 3rd Defendant surveyed Kamala area in 1996 secretly without involving the indigenous who owned the area and allocated some plots to strangers without any compensation. They made several complaints and it was settled that the 1990s survey was a nullity and the areas be returned to their previous owners including him. He thus lawfully sold the suit plot to the 1st Defendant. On their party the 3rd and 4th Defendants maintained that the suit plot was a bared land owned by no body and after its survey the late Abdallah Mussa Abdallah was allocated it. That, there was no any re-survey nor that the 1990s survey was nullified. They contended that what was done in 2015 and continuing to date was just to regularize (Kurasimisha makazi), so that those who were allocated the plots by offers are given certificate of occupancies. It was not a re-survey altogether. They thus identify Abdallah Mussa



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Abdallah as the lawful original owner who subsequently sold it to the plaintiff and presented transfer documents which they retained pending this suit.

Three issues were drawn and accepted by the parties for determination of the dispute between them. The issues are;

- i. Who between the plaintiff and the 1st defendant has the better title over the suit plot.*
- ii. Whether plot numbers 76 MD and 76 LD at Kamala refers to the same suit plot or are two different plots.*
- iii. To what reliefs are the parties entitled to*

The suit was then scheduled for consecutive hearing as from 11th October to 18th October, 2021.

On the first two days of the hearing of this suit, the plaintiff was present in person and was also represented by advocate Silvester Damas Sogomba. The 1st defendant was absent while the 2nd defendant was present. Mr. Thomas Msasa learned advocate was present representing both the 1st and 2nd defendants. M/S Beatrice Mongi learned counsel appeared for the 3rd and 4th Defendants.



After the closure of the plaintiff's case, three defence witnesses gave their evidence in the presence of the parties as herein. But when we adjourned for continuation of the defense case for a third day, the plaintiff and his advocate, the 1st defendant and his advocate defaulted appearance. I thus decided to proceed with the defense case on the party of the 3rd and 4th defendants who were present with their witnesses and to proceed ex parte against the 1st defendant who was yet entered his defense but absence without notice. This was made under the provisions of Order IX rule 8 of the Civil Procedure Code, Cap 33 R.E 2019 which empowers this Court to proceed with the case where one or more of the defendants appears and one or more others does not appear in a suit involving more than one defendant. After hearing the Defendants who were present, the case for both sides were closed and I scheduled this case for judgment.

On the date fixed for judgment, the 1st Defendant appeared and prayed to be accorded opportunity to enter his defence before the Judgment is entered. After hearing the parties for and against the prayer to re-open the Defence case so that the 1st Defendant is heard before the judgment is pronounced, I granted the prayer and received his defence evidence. This judgment is therefore delivered in consideration of the evidence of both parties.

I will now start with the 2nd issues on whether plot No. 76 MD and 76 LD at Kamala area is the same plot which is in dispute in the instant matter or they are two different plots.

It is in evidence by DW4 Mr. Steven Ambrose who is the acting head of department Urban Planning and Municipal Valuer together with DW5 Kiza Almasi Mkoko the Municipal Engineer that plots No. 76 MD Kamala and 76 LD Kamala are two different plots.

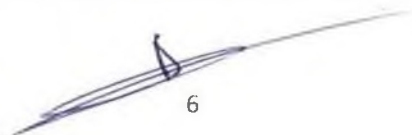
They testified that at Kamala area there are both blocks for the Medium Density (MD) and Low Density (LD), and therefore the plots on MD Block are different from those on LD Block even if they bear the same numbers.

DW4 for instance testified;

'MD is Medium Density and LD is Low Density. Therefore plot No. 76 MD and Plot No. 76 LD are different plots. This is because MD bears square meters 600 up to 1000 while LD bears square meters 1000 to 4000'.

This witness further testified that the suit plot in the instant case has only 755 Sqm which is on the Medium Density Block. He categorically stated in evidence that it is not possible for plots with different densities to be in the same Block and concluded;

'Therefore, Block MD and Block LD cannot be a single Block'

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This evidence was not contravened anyhow by either party. DW4 and DW5 are officers from the Land Management Authority. I therefore have no good reasons for not trusting them that at Kamala there are both blocks MD and LD and that the current plot which is in dispute is on block MD.

I therefore rule out that for the purposes of this suit plot No. 76 MD Kamala and plot no. 76 LD Kamala are two different plots. Plot No. 76 MD is located at the Medium Density area at Kamala while that of 76 LD is located at the Low-Density area at Kamala. I further rule out that the suit plot in the instant case is plot No. 76 MD Kamala and not 76 LD Kamala.

I will now go back to the 1st issue as to who between the plaintiff and 1st Defendant bears a better title over the suit plot No. 76 MD Kamala.

On this issue the plaintiff's evidence is that he acquired title from Abdallah Mussa Abdallah who was the registered owner of the plot. His evidence was supported by PW2 Khadija Juma Miyanga the mother of the late Abdallah Mussa Abdallah, PW3 Mussa Abdallah, the surviving child of the late Abdallah Mussa Abdallah, and DW4 supra. All these witnesses testified that plot No. 76 MD Kamala was lawfully owned by Abdallah Mussa Abdallah who later sold it to the plaintiff. Various documents were



tendered in evidence to support this claim. The tendered documents were exhibit P1 the letter of offer; issued way back in 1996, exhibit P2; various Land rental receipts since 1996 to 2018, exhibit P3; the Sale Agreement between Abdallah Mussa Abdallah and the Plaintiff and exhibit D1; the Land Registration file in respect of plot No. 76 MD Kamala by the 3rd Defendant.

On the other hand, the 1st defendant who entered his defence as DW6, DW1 Umade Mrisho Sudi, DW2 Wilbroad Steven Kazumbe, and DW3 Omari Majaliwa gave evidence in favour of the 1st defendant. These witnesses testified to the effect that previously the late father of the 2nd Defendant (DW1) customarily possessed the area (a big shamba) including the piece of land in dispute. Later in 1984 after DW1 got married in 1983, he gave his son DW1 a piece of land which covered the suit area as a shamba. That, later DW1 sold the suit area to the 1st defendant (DW6).

The evidence of these defence witnesses went further lamenting that the 3rd defendant when surveyed Kamala area in 1996 did not involve the indigenous. The said survey led to allocations of plots to third parties which brought about land conflicts between the indigenous and strangers. That the government intervened and it was settled that the 1990s survey

was unlawful and the plots given to third parties be returned to their previous owners.

Going through the evidence of these defence witnesses, I find that they became aware of the 1990s survey and struggled administratively to have it nullified and the Letter of Offers given to strangers cancelled. Thus for instance the 1st Defendant (DW6) testified;

"Wenyeji walikuwa wanawapiga mawe wapima na kuwafukuza ndo ukaja waraka wa kufuta title zote, michoro yote, na kuondolewa bicon zote. Watu wenye maeneo ya asili warudishiwe maeneo yao ndipo ichorwe ramani upya".

There is however no documentary evidence or even oral evidence from the relevant authority to the effect that such survey was indeed nullified nor that the Letters of Offers given to other parties were cancelled by any relevant authority. In fact, DW4 the relevant officer from the Land Authority disputed the allegations that such survey was nullified;

'It is not true that the survey done at Kamala in 1996 was nullified but what was done was to regularize (Kurasimishwa).'

He went further stating in Swahili language;

'Lengo la kurasimisha lilikuwa ni kuwezesha wananchi kupata hati miliki wale wale ambao walikuwa wameshapimiwa'.

In the circumstances the 1996 survey was not nullified at all and therefore any allocation of plots from it ought to have been challenged in the normal due legal process. Otherwise, the same remained intact and legal up to date.

The 2nd Defendant Umande Mrisho Sudi, instead of suing the Municipal Council who surveyed and allocated the suit land to Abdallah Mussa Abdallah to have the survey nullified and the plot restored to him or have the title of the plot given to him, decided arbitrarily to sale it to the 1st defendant. The 1st defendant also without search from the Land Register to ascertain ownership of the plot arbitrarily bought it in disregard to the survey and allocation made thereat. During his defence, he was asked by Mr. Silvester Damas Sogomba the learned counsel for the Plaintiff on whether he made any legal search whether or not the area was a surveyed land so that to determine whether it is owned by someone else. He categorically answered that he did not;

"When I wanted to buy the area, I did not go to the land authority to inspect whether the area was surveyed or not".

When the same learned advocate cross examined him whether he went to the land authority to inquiry the ownership of the plot after the Plaintiff

had approached him claiming the suit plot as his lawfully plot and shown him the offer, the 1st Defendant (DW6) categorically answered;

"When Iddi shown me his Offer, I did not go to the Municipal Council to inquire, I decided to face who sold me Mr. Umande".

Also when M/S Josephine Chilongozi learned counsel for the 3rd and 4th Defendants cross examined him on whether his Vendor the 2nd Defendant had sued the Municipal Council over the suit land to claim rights thereof, the 1st defendant answered;

"I have not asked Umande whether he had sued the Municipal Council for re-allocation of his land without consent and compensation".

With all these quotations, it is clear that both the 1st and 2nd Defendants did not want to bother with any legal remedy against the 3rd Defendant if at all they claimed any interest in the suit land which was already allocated to a third party who subsequently sold it to the Plaintiff. They decided to take revenge actions contrary to the law.

The law is settled that once an area is declared **an Urban Planning area** and **the land surveyed**, previous occupation under customary law seizes or is extinguished. This was stated in the case of **Mwalimu**

Omari and Another versus Omari A. Bilali (1990) TLR 9. That case, had similar facts to this one at Land. Mwalimu Omari possessed unsurveyed land at Magomeni area. Mwalimu Omari divided that land and gave a piece of it to his in-law who also sold it to Ahmed Banguo. Later the Land was surveyed and two plots born out (Plot No. 60 and 61 Block E). After the survey a piece of land given to Mwalimu Omari's in-law which he had also sold to Ahmed Banguo as stated herein happened to be plot No. 61 and was allocated to a third-party Omari A. Bilali. Mwalimu Omari just like Umande Mrisho in this suit sought to have the land, plot No. 61 declared the lawful property of Ahmed Banguo who bought it prior to the survey from his in-law who also had obtained it from him, the land which he had customarily owned. The Court dismissed Mwalimu Omari's claims and held;

'(i) Title under customary law and a granted right of occupancy in an area declared township or minor settlement cannot co-exist. Title to Urban Land depends on grant.

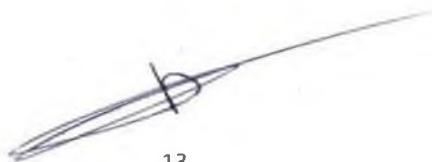
(ii) Squatters in the eyes of the law cannot equate themselves to any person holding a title under right of Occupancy even where the squatter occupies land under customary law'

The Court went on stating what should a person holding land under customary law do when his land is surveyed and plots thereat are born out and the consequences thereto upon failure so to do;

*'Once an area is declared an urban planning area and land surveyed and plot demarcated whoever occupies land under customary law **has to be quick to apply for rights of occupancy.** If such person sleeps on such right and the plot is given to another, he becomes a squatter in law and would have to move away; he strictly would not be entitled to anything'.*

In the lights of such decision, when Umande Mrisho's land was surveyed and plot No. 76 MB born among others, he ought to have applied to be allocated such plot before it was allocated to Abdallah Mussa Abdallah. DW4 testified that the survey was not secret, it was made public and advertisements made accordingly. After the survey according to this witness, the general public was invited to apply for allocations of plots in that area;

'After the survey in 1996, there was an oral advertisement through motor vehicle on various places to invite the citizens to apply for allocations of plots'.



According to him only Abdallah Mussa Abdallah applied for allocation of plot No. 76 MD Kamala;

*'Apart from Abdallah Mussa no any citizen applied for Plot No.
76 MD Kamala'*

Therefore, Abdallah Mussa Abdallah was lawfully allocated plot No. 76 MD Kamala. In the circumstances that there is no any decision from a competent court nullifying the survey and allocation of the suit plot to Abdallah Mussa Abdallah, his ownership thereof remained valid until when he decided to sale it to the plaintiff. The plaintiff's title over plot No. 76 MD Kamala is thus valid by way of purchase from the person who had a better tittle to pass.

I am aware that DW1 complained that they were not involved in the 1996's survey. But at least he acknowledges that by 2006 they were aware of the survey and the allocations of their respective areas to third parties. That is why they complained to various authorities as it was stated by other defence witnesses such as DW2, DW3 and even DW6 the 1st Defendant herein. If that is the case, then it was open to the 2nd Defendant (DW1), to start a suit against the 3rd defendant and Abdallah Mussa Abdallah to have either the survey nullified or the allocation of the suit land to Abdallah Mussa Abdallah cancelled in his favour. He did not

do so and instead as I have said decided to sale it to the 1st Defendant knowing for sure that someone else was given and is in possession of the title thereof. That was an act of anarchy in disobedience of the due legal processes which are in place for one to fight on whatever asserted rights. I remember and borrow the wisdom of Justice Katiti as he then was, when he held in the case of ***Joseph Mazunzu v. Republic, Criminal Appeal No. 3 of 1991 (HC)*** at Tabora;

'We cannot peaceful make our journey through life without law telling us the right direction to follow, and sometimes even the time to follow and when to start our journey and through which route'.

The 1st and 2nd Defendants thus decided on their own; the journey towards justice, the route to take towards it and the direction to follow in getting it in total disregard to what the law was telling them at the time. Among their decided move was to illegally fight against the 3rd Defendant and title holders in the locality by throwing stones to them wherever they visited the plots. This is not accepted altogether in our lovely Country Tanzania which is governed under the rule of law.

During defence case, it was stated that the 1st defendant has already built a residential house in the dispute plot and installed electricity. In my view, such evidence intended to get mercy of the court for the developments

the 1st Defendant has already made on the suit plot. The 1st defendant (DW6) tendered the building permit exhibit D4 and building plan exhibit D5 to show that he lawfully erected such building in the suit plot. Exhibit D4 is self-explanator that he was permitted to construct a residential house on plot No. 76 LD Kamala. DW4 and DW5 however contested the genuineness of such exhibit on various grounds such as; a building permit cannot be given unless to a person who has in possession title document of the plot in which the construction is intended, the person who issued it was not legally empowered to issue it, the same is in respect of plot no. 76 Block LD and not Block MD which is in dispute among others. I agree with the 3rd and 4th Defendants that the 1st defendant had no any lawful or valid authority to construct a house on plot No. 76 MD Kamala. If he had any authority then it was on plot No. 76 LD Kamala which is a different plot altogether as determined in the previous issue herein. The building plan is annotated, a phrase LD is clearly seen to have been altered to read MD. The 1st Defendant averred that it is his drawer of the building plan who annotated it after he was told by the 2nd Defendant that the plot is on block MD. But the said drawer was not brought to give evidence as to whether it is true, he was the one who altered the document nor his affidavit to that effect was filed. In the case of **John Chuwa versus Anthony Ciza (1992) TLR 233** the Court of Appeal held for the need

of an affidavit of a person so material to be filed to authenticate the material fact. In this case the alleged drawer was a material witness. Otherwise, it is not clear as to who altered the document, when and why. Its value is thus lowered. The same remains to read Block LD as it appears in the building permit which resulted from it.

Therefore the 1st Defendant's construction on Plot No. 76 MD Kamala was unlawfully and illegal.

Also, the 1st defendant testified that at the time he bought the suit plot, it was un-surveyed. It was a mere shamba and through the 2nd defendant he initiated the survey thereon and paid some money for its survey the result of which such plot was surveyed as Plot no. 1239 Block "B" Kamala.

If real the plot was un-surveyed, it was unexpected for the 1st defendant to bring into his evidence the building permit and a building plan. This is due to the fact that building plan can only be approved on a surveyed land, and building permit can only be issued to persons holding title on the surveyed land. The two documents have nothing to do with a squatter area. The 1st defendant thus was aware of the survey and registration of the title thereof.

With the herein observations and analysis of the evidence on record, the first issue is determined that it is the plaintiff Idd Hassan Rusovu who

has a better title over the suit plot No. 76 MD Kamala as against the 1st Defendant Omary Mwailwa @ Chubwa who has also identified himself as Omari Moshi Mahamudu.

The Plaintiff acquired title thereof on 10th June, 2013 from Abdallah Mussa Abdallah who owned it under the right of occupancy since 28/03/1996. Had the 1st Defendant made a thorough search from the relevant land authority, he could not have bought such plot as un-surveyed. He could also have found that the suit land was not free from encumbrances. He would have found that the land was surveyed and allocated to another person other than his intended vendor. He could have thus avoided to purchase it or purchase the same from its registered owner.' That is the legal principal that ***'buyer be aware'***.

The 1st and 2nd Defendants are thus declared trespassers on the suit plot and ordered to give vacant possession to the plaintiff forthwith.

In respect of the last issue on the reliefs the parties are entitled to, I find that the plaintiff is entitled to ownership of the suit plot against the 1st defendant and I accordingly declare him as the lawful owner of the suit plot No. 76 MD Kamala which has also been sometime referred to as plot No. 1239 Block "B". The 1st and 2nd defendants are trespassers thereat and are ordered to give an immediate vacant possession to the plaintiff.



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The 3rd Defendant is ordered to effect the transfer of the suit plot from the name of Abdallah Mussa Abdallah into the names of the Plaintiff Idd Hassan Rusovu. This is because I am satisfied that prior to his death Abdallah Mussa Abdallah executed all the necessary legal documents for the transfer he intended in favour of the plaintiff (exhibit D4).

It is in evidence that the plaintiff since 12/12/2013 obtained a building permit and his building plan approved by the relevant authority in which he intended to develop his plot but the 1st Defendant hindered him by trespassing thereat, erecting his house thereon contrary to the building plan of the plaintiff. The 1st defendant has agreed in evidence that when he started the construction, the Plaintiff approached him and alerted him of his ownership thereof. They even talked on the possibility of finding an alternative plot for the plaintiff but when he consulted the 2nd Defendant, he was assured that the Plaintiff would have a very weak case;

"Umande told me that hii kesi kwako itakuwa haina nguvu sana kwa sababu mimi ndiye nilikuuzia na sijakukana. Ntatoa Ushahidi namna gani napamiliki pale. Ntakiri kuwa mimi ndiye muhusika mkuu pale"

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In my view it was these words of the 2nd Defendant which misled the 1st Defendant and caused him not to resort into an alternative amicable settlement of the matter between him and the Plaintiff. That necessitated a land suit between them at the District Land and Housing Tribunal and subsequently this suit before me. In that regard the Plaintiff is entitled to general damages as pleaded. I award him **Tshs. 1,000,000/=** against the 1st Defendant as general damages for the inconveniences he encountered from developing his lawful plot since then to date.

As it was held in the case of Mwalimu Omari supra, the first defendant is not entitled to any compensation for the development he has made on the suit land. This is because he made so knowing or ought to have known that the plot belonged to another person (the Plaintiff). He has even testified during his defence that when the Plaintiff approached him, he was only at the initial stages of his construction;

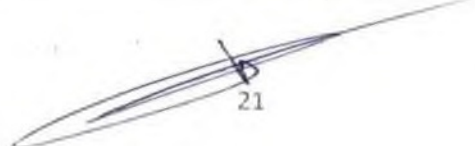
*"When Iddi approached me, the house was on the window stage
(usawa wa madirisha)"*

He decided to stop continuing and reported the matter to Police against Umande Mrisho the 2nd defendant. Police after scrutiny did not find a criminal issue and advised them to settle. When they came from Police the 1st and 2nd defendant instead of tracing the solution they started to

scrutiny their allegedly evidence of ownership of the suit land (minutes of the family in which Umande was allocated the area) although they were not tendered in Court as exhibit. After they satisfied themselves, the 1st Defendant decided to continue and complete the construction.

Also, the developments thereat were made contrary to the plaintiff's own building plan. Therefore, the 1st defendant is ordered to demolish his structure on the suit plot at his own costs within one month from the date of this judgment, if he wants to rescue anything therefrom. Failure so to do and after the expiry of one months from today, the structure together with all its fittings shall belong to the Plaintiff under the legal principle that whatever is affixed to the soil belongs to it, (**Quicquid Plantatur solo solo cedit**).

I am aware that the Plaintiff stated that he would be ready to surrender the suit plot to the 1st Defendant if the 1st Defendant pays him Tshs. 12,000,000/=. On the other hand, the 1st Defendant (DW6) stated that if it is found that the Plaintiff is the lawful owner of the suit plot he would be ready to pay him only Tshs. 4,000,000/= which is the market price of plots in that area. DW1 also stated in evidence that the market value of plots similar to the one in dispute at the locality cannot exceed Tshs. 4,000,000/=. I cannot decree on this prayer because it was neither



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specifically pleaded. Therefore, the Plaintiff and the 1st Defendant are at liberty to enter into a sale agreement between them at their own absolute discretion and their free will. The Plaintiff is at liberty to sell the suit plot to the 1st Defendant without being forced, and the 1st Defendant is at liberty to buy the suit plot from the Plaintiff without being forced. The sale and purchase price shall be agreed between them under their own free will. This judgment is confined to who is the lawful owner of the suit plot and the remedies thereof as decreed in this judgment.

The plaintiff is also awarded costs of this suit against the 1st and 2nd Defendants.

The Plaintiff's suit is therefore allowed to the extent as herein above decreed. Whoever aggrieved by this decision is at liberty to appeal to the court of Appeal of Tanzania subject to the relevant laws and Rules governing appeals thereto.

It is so ordered.




A. Matuma

Judge

18/10/2021

Court: Judgment delivered in the presence of the plaintiff in person and his advocate Mr. Silvester Damas Sogomba, the 1st and 2nd Defendants in person and in the presence of Mr. Allan Shija learned State Attorney for the 3rd and 4th Defendants.

Right of Appeal is explained to whoever aggrieved.

It is so ordered.

Sgd: A. Matuma

Judge

20/10/2021