

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
LAND CASE NO. 71 OF 2014**

BENEDICT SUDI PLAINTIFF

VERSUS

**PASENCE PAUL KATABALWA 1ST DEFENDANT
MWITA MARWA KISIBOYE 2ND DEFENDANT
HOSEA WAMBURA 3RD DEFENDANT
MONICA MBALE 4TH DEFENDANT
WILHELM SYLVESTER ERIO 5TH DEFENDANT
HEMED ABDALLAH KILINDO 6TH DEFENDANT**

Date of Last Order: 19/03/2021

Date of Judgment: 28/05/2021

J U D G M E N T

MGONYA, J.

The Plaintiff herein under the services of the learned Advocate Mr. Imam Daffa instituted this suit against the Defendants for the following orders:

- (i) A declaration that the Plaintiff is the lawful owner of the suit land situated at Ununio within the City of Dar es Salaam;*

- (ii) A permanent injunction to restrain the Defendants or their agents from interfering with the Plaintiff's lawful ownership and occupation of the suit land;*
- (iii) Compensation to the tune of **TZS. 120,000,000/=** being mesne profit for wrongful possession of the suit land from October, 2009 to September, 2014;*
- (iv) Compensation to the tune of **TZS. 2,000,000/=** per month being mesne profit for wrongful possession of the suit land from the date of filing the suit to the date of judgment.*
- (v) Replacement of the demolished fence worth **TZS. 6,500,000/=**;*
- (vi) Costs for installation of security system and security guards at **TZS. 2,585,000/=**;*
- (vii) Interest on (iii) above at commercial rate from the date of trespass which is 2009 to the date of judgment.*
- (viii) Interest on the decretal amount at court's rate of **12%** from the date of judgment to the date of final payment;*
- (ix) General damages to be assessed by the Court; and*
- (x) Any other relief this Honourable Court deems fit and just to grant.*

In each of the Defendant's Written Statements of Defence, all the Defendants have denied the allegations made by the Plaintiff and at different times and stages stated that, as of now, the land in dispute belongs to the 4th Defendant as she has acquired the same after the purchase which originated from the 1st Defendant herein who was the first purchaser to the disputed land. Hence the Defendants prayed for the dismissal of the suit with costs.

At the hearing, the Plaintiff was represented by Mr. Imam Daffa Advocate while 1st Defendant was represented by the learned Counsel Lusajo Wille, the 4th Defendant was represented by Advocate Mnzava while the rest of the Defendants were representing themselves. The matter was unable to be resolved at Mediation session. It is after that failure, the case file was remitted to the trial court where Parties in collaboration with the Court framed the following issues for determination:

- 1. Who is the lawful owner of the disputed land?***
- 2. Who built a house in the disputed land?***
- 3. Whether either party did unlawful act in the suit property, and***
- 4. To what reliefs are the parties entitled to.***

At the closure of the Defendants' case, I ordered the parties to file their respective final written submissions. However, upon

consulting the case file; I have managed to see only the Plaintiff's final submission and that of the 1st Defendant in that respect. I appreciate the efforts made by the Plaintiff's and the 1st Defendant's Counsel for their esteemed cooperation in filing their respective submissions of which have been of assistance in determining the matter at hand.

Despite the fact that other Parties have failed to adhere to the court's order, as the filing of the same is not a statutory requirement, in determination of this case, all parties' case will be taken into consideration even in the absence of the said submissions.

Before I proceed in determining this suit, I have to state from this very beginning that the suit land of which is the subject matter in this case is the land allocated **at Ununio within the City of Dar es Salaam** of which currently is occupied by the 4th Defendant.

In support of his case, the Plaintiff herein, **MR. BENEDICT WARISIAKA SUDI** a resident of Mbweni Kinondoni Dar es Salaam testified as **PW1**. The later testified to the effect that he bought the disputed land the rate of **Tshs. 800,000/=** from one **Kambi Mfungeni**, who also testified as **PW2**. According to his testimony, the sale was made on **11th October, 2003** at the office of the Executive Secretary of the Local Government of

Ununio Street. The Plaintiff produced the Sale Agreement which was admitted as **Exhibit P1**.

Testifying further, the Plaintiff informed the Court that before buying the disputed land, he facilitated the seller to have the area surveyed and have the plots demarcated. PW1 testified further that, initially the seller was selling pieces of 50 x 25 paces but he advised him to have it surveyed so that it becomes easier for a buyer to identify his plot.

The Plaintiff informed the court that in the year **2009**, the Seller Mr. Kambi Mfugeni informed him that there was someone invaded his plot and that the invader was constructing thereto. It is from there the Plaintiff reported the matter at Wazo Police Station and advised to institute the case with the District Land and Housing Tribunal for remedy. Decision of the Kunduchi District Land and Housing Tribunal was admitted in court as **Exhibit P2**.

It is the PW1's assertion that, after the suit land had been detected having a dispute, he decided to engage a security company to guard the plot. All that is said to have happened after the demolition of the fence which the Plaintiff has constructed. It is the Plaintiff's further testimony that it came to his knowledge that the person who was alleged to have bought the suit land as he did was the 1st Defendant who later sold the same to the 2nd

Defendant and finally to the 4th Defendant who is the one having possession of the suit land at the time of hearing of the instant case.

PW1 further expounded that, the second Defendant with the assistance of the 3rd, 5th and 6th Defendants herein went to the site and destroyed the wire fence that he constructed and in a high speed they constructed another fence despite of the fact that the plaintiff had acquired from the Ward Tribunal a stop order in respect of anyone to do anything at the suit plot.

The Plaintiff informed the court that, after he had received the 1st Defendant's Written Statement of Defence with the Sale Agreement of the suit property, he enquired on the existence of the purported Seller one Ambo Masoud, and from the Village where the suit land is located he was informed that the same is a deceased. The same to one Praygod Mshana who was one of the witnesses to the 1st Defendant's Sale Agreement who is said to be deceased as well. Further, as the Sale Agreement which was signed on 1st June 2001 was attested by one **Elias Philemon Nawera Advocate**, the Plaintiff expounded further that, he wrote a letter to the Registrar of the High Court to inquire on the year the said Advocate was admitted, where the High Court in reply, xplicitly illuminated that Mr. **Elias Philemon Nawera Advocate** was admitted in the Roll of Advocates in the year

2006. The said letter was admitted for evidence as **Exhibit P4** and form part of this court's record.

It is further the PW1's assertion that the 3rd Defendant Hosea Wambura at all material times of dispute he was a leader to the trespassers and that at all times he was there.

Describing what is at the suit plot from his efforts, the Plaintiff said to have built a small house whereas he had a plan to a fence and build a residential house. Out of the trespassers frustrations, the Plaintiff confessed to have failed to build a residential house thereto or have a tenant who would reside in that house of which he counted the same as a loss.

Concluding his testimony, PW1 prayed the court to order all the trespassers to vacate the suit land with immediate effect and declare him the lawful owner of the suit plot.

Cross examined by Advocate Lusajo Willie, the Plaintiff informed the court that both contracts that is between him and Kambi Mfugeni and that between the 1st Defendant and Ambo Masoud were administered and signed by the same Chairman at the Kunduchi Village Office. Further, when asked about the boundaries of the suit plots, Plaintiff averred that the beacons at the plots are in place while his neighbors at the East are Mr. Kambi, North West - Mr. Kambi, South East and at South West there are is the road adjacent to the suit plot.

Cross examined by the second Defendant, the Plaintiff states that, the 3rd Defendant herein is the one who demolished the wire fence he erected at the suit plot. Cross examined by the 5th Defendant, PW1 told the court that he bought the suit plots after he was assured by the Village leadership that the land was owned by Kambi Mfungeni that is why even the sale of those plots was witnessed by the Village Leadership.

MR. KAMBI MFUGENI, the Seller of the suit plots and a resident of Ununio, testified as **PW2** c to the effect that he was the owner of the disputed land and that he is the one who sold it to the Plaintiff after being assisted by the Plaintiff to survey the area and have the plots demarcated. He illustrated that, after the survey, the area had 16 plots and sold two plots to the Plaintiff which are the disputed land in this case. He further stated that the process of surveying the area did not proceed to the issuance of Title Deeds. The witness recognized the Sale Agreement **(Exhibit P1)** and agreed that the said document evidenced the Sale of the land and consideration thereto between him and the Plaintiff. PW2 also revealed before the Court that, apart from the plot in dispute, he sold other plots to other people in the locality and none of those had been involved in a land dispute like the one before the court.

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PW2 testified that the Sale Agreement between him and the Plaintiff herein (PW1) was witnessed by the Village Executive Officer one **Jalahi Kitwana**. PW2 testified further that sometimes in **2009**, he informed the Plaintiff that in the plots that he sold him there was a construction of the servant quarter and asked if he was the one who was constructing the same. However, the answer was negative in the sense that he was not the one who was constructing and instead he said those were the trespassers. PW2 revealed that the **5th** and **6th** Defendants were at the forefront in building the said house.

PW2 also testified that PW1 in the year 2014 decided to build a wire fence. However, after some time, the lady emerged and he was informed that the same was about to buy a suit plot. PW2 informed the court that he advised the lady not to buy the same before she conducts a profound enquiry to ensure herself the lawful owner of the plot before she purchases the same. PW2 testified to be informed by Bhoke who was constructing the fence that the same was demolished by the **5th** and **6th** Defendants whom he witnessed at the suit plot.

Testifying about the sale of the suit plots to **1st** Defendant by Ambo Masoud, PW2 informed the court that Mr. Ambo Masoud did not have any land to sell. However he acknowledge to know him as he is like a grandson to him and that it is true that they

had their land near salt area (Chumvini) at Ununio, about two kilometers from the suit land. PW2 told the court that the said Ambo Masoud has passed away since 2007.

Stating his ownership over the suit land, PW2 testified to the effect that he acquired the land in issue from his late father since 1993 when he was about to get married as his father had no one else to take care of the said land as he has lost his sight. The decision which was blessed with the family and that since then he was staying with his father.

Testifying further, PW2 informed the court that, currently the occupation of the suit plots are under a woman known as Monica who is a 4th Defendant herein where she has constructed frames. However, according to his knowledge the suit plots belongs to Mr. Sudi the Plaintiff as he is the one who sold him those plots.

Concluding his testimony, PW2 informed the court that the Village Executive Officer who testified the sale between him and the Plaintiff is still living at Ununio though he has lost his speech as a result of stroke.

Cross examined by Counsel Lusajo Wille for the 1st Defendant, PW2 confessed to have known the case between the Plaintiff and the 1st Defendant at the Kunduchi Ward Tribunal where he and the Village Executive Officer went to testify in favor of the Plaintiff. Further, the witness in referring to Ambo Masoud's letter

in respect of his ownership to the suit plots, informed the court that, at Ununio there is no any leader who will write a letter in respect of mentioning someone's ownership to the land through identification letter.

Cross examined by Advocate Mnzava for the 4th Defendant, PW2 confessed to have known at the Ward Tribunal that the 1st Defendant bought the suit land in the year 2001 though according to his knowledge as the original owner of the suit land, he sold the plots to Sudi, the Plaintiff herein in the year 2003.

Cross-examined by the 5th Defendant, PW2 told the court that he saw the 5th Defendant cutting down the wire fence erected by the Plaintiff at the suit plots. When asked if he knows Ambo Masoud, PW2 in response informed the court that he knows him very much as they are all natives and ethnics of Ununio.

The third Plaintiff's witness (PW3) was **ELIAS PHILEMON NAWERA** a businessman, a lawyer, a non-practicing Advocate and a Mbezi Beach resident. PW3 informed the court that in one incident there was a time he witnessed as an Advocate the signing of the document in 2001 where he was yet to become an Advocate since he was sworn in as an Advocate in the year **2006**. It is from that error he advised the parties to go and rectify the document so that he can sign the said document once again, but already he had signed the same. PW3 told the court he

remembers that the said document was a Sale Agreement was signed at Mlimani City and it was in respect of the land located at Ununio where parties came with their witnesses.

When referred to **Exhibit P4**, PW3 identified a letter being written by the High Court Registrar which confirmed that he was admitted to the Roll of Advocates as an Advocate on **15/6/2006**. The fact which he admitted to be true.

Cross-examined by the Defendants, PW3 confessed that he signed the Sale Agreement in issue before he was admitted as an Advocate and not otherwise having no any defense in that action. Further the witnesses confessed not to have written a date to the Sale Agreement he witnessed as the Parties to the Sale Agreement had their own date. PW3 also informed the court that placing a date in the Sale Agreement is not a compulsory requirement especially when witnessing signing of the parties to the contract. PW3 also insisted that **the Sale Agreement was signed at Mlimani City** where he met with the parties to the same and their respective witnesses and that he was not sure if he knew the Parties he witnessed before he met them. In cross examination PW3 also confessed that by his act of signing the Sale Agreement while he was not authorized officer as he was yet to be admitted as an Advocate, could have been a source of the instant land dispute.

When questioned by the court, PW3 confessed to have sign a Sale Agreement in issue negligently without checking on the date of the Sale Agreement placed on the same

It is after the PW3's testimony, Mr. Daffa for the Plaintiff prayed to close the Plaintiff's case; the prayer which was accordingly granted.

On the contrary, the 1st Defense witness (**DW1**) was **Mr. WILHELM SYLVESTER ERIO** the 5th Defendant and the resident of Mapinga, Bagamoyo District in Pwani Region testified as the sole witness for the 5th Defendant's case.

The DW1's testimony was to the effect that he knows the 1st Defendant **Mr. Patience Katabalwa** who is the JWTZ officer whom he was working with. Further that in the year 2001 he asked him to found a plot at Ununio where they were both working. Further in the cause of searching for the said land, it came to his knowledge that there was a land for sale and that the same belonged to Ambo Masudi who later met with him and with the 1st Defendant. It is further testified that, apparently, on 7/6/2001, the 1st Defendant and Mr. Ambo Masudi signed their Sale Agreement for the land situated at Ununio of which is the disputed land in this case; where he was made one of the witnesses thereto.

DW1 further testified that the signing of the said Sale Agreement was done at the Ununio Village Government Office before the Village Secretary one **JALAI KITWANA KAMBI**. Others were 1st Defendant who was accompanied by his relative Playgold Mshana a Police Officer who was working at the Oysterbay Police Station, while the Seller Mr. Ambo Masudi was accompanied with his twin brother Mrisho Masudi. DW1 also testified to the effect that the 1st Defendant also went to the office with another person whom he identified him as an Advocate by the name of Mr. Elias Philemon Nawera who went to witness the signing of the said Sale Agreement. It is the DW1's assertion that the sale process was concluded by the 1st Defendant Mr. Katabalwa paying the total sum of **Tshs. 2,000,000/= (Two Million Shillings only)** to Mr. Ambo Masoud, the Seller.

DW1 further testified to the effect that he was asked by Mr. Katabalwa to look after his landed property as he was a going for studies in India. The witness said it was from there then he was responsible for taking care of the said property until in the year 2009 when the 1st Defendant returned and wanted to construct a small house at the plot.

The witness informed the court that, when the said small house which was constructed had reached at the stage of linter,

then a Plaintiff herein Mr. Benedict Sudi emerged attaching a stop order from Kunduchi Ward Tribunal in respect of **Case No. 556 of 2009** between him and the 1st Defendant herein, Mr. Patience Katabalwa. It is the DW1's testimony that in the year 2010 the case came to an end and the Tribunal ordered the same be forwarded to District Land and Housing Tribunal hence it did not have jurisdiction in hearing and determining the same.

Further DW1 informed the court that, due to the fact that Mr. Sudi the Plaintiff herein did not comply with the said order, he decided to finish up construction at the plot and sell the said landed property to one **Mr. Mwita Marwa Kisiboye**, the 2nd Defendant in this case. DW1 states that he was one of the persons who witnessed the said sale at the Ununio Village Executive Officer's office, before **Mr. Mneka** the Village Executive Officer. Once again, DW1 said to have been requested to take care of the same property as he said was a person who knows the area and particularly the said property.

DW1 further illustrated that on 20th May 2014 Mr. Kisiboye decided to sell the suit land to the 4th Defendant herein one **Monica Mbale** before the Village Office where he also witnessed the sale. It is from that transaction, the witness informed the court that the current lawful owner of the suit land according to his knowledge is Monica Mbale the 4th Defendant herein. In

connection with the instant claims from the Plaintiff herein, and especially to the suit land, DW1 is of the view that he did nothing and all that was done by him was by the order of the 2nd Defendant herein Mr. Kisiboye.

Cross-examined by Mr. Daffa the learned Advocate for the Plaintiff, and Mr. Lusajo the learned Advocate for the 1st Defendant, DW1 admitted to have seen Mr. Elias Nawera during the sale of the disputed land from Ambo Masoud to Mr. Katabalwa and that he was the one who stamped and signed the Sale Agreement between the Parties. Concluding his testimony, the 4th Defendant denied the fact that the Sale Agreement between the 1st Defendant and Ambo Masoud was signed at Mlimali City but rather the same was signed at the Ununio Village Office.

DW2 was the second Defendant, **MWITA MARWA KISIBOYE**, a businessman and a resident of Mtongani Kunduchi. Testified to the effect that bought a suit land in the year 2010 from one Pasence Katabalwa for **Eighteen Million (18,000,000 Tshs.)**. The witness informed the court to have been introduced to the Seller by Mr. Erio, the 5th Defendant herein. Further that at the suit land by then there was a small two room's house which was yet to be roofed but he completed and later accommodated Mama Mariam who was taking care of the property who was at

the same time cultivating maize at the plot; as he was living in Dodoma.

DW2 further testified to the effect that, while in Dodoma, Mr. Erio the 5th Defendant herein informed him that Mama Mariam was invaded by the Plaintiff Mr. Sudi in the company of Mr. Kambi who went to the suit plot and demolished the house thereto and that they have chased Mama Mariam from that place. It is from that act, Mr. Sudi and Mr, Kambi were arrested but later were bailed out and later proceeded to erect a wire fence. It is from that development, DW2 testified to have directed some people to remove the said fence as the same was built without his consent as the was the owner of the said property.

DW3 was **HOSEA MARWA WAMBURA**, mason a resident of Kunduchi Mtongani. The witness testified to the effect that as a mason, he was employed to build at the suit plot by **MWITA MARWA KISIBOI**, the 2nd Defendant herein. However, after he started working, the Plaintiff herein went to the suit plot trying to take some photographs. It is later that the witness came to learn that some village leaders advised the Plaintiff to approach the Village Office so as to table his complains if any.

Responding to his case as one of the Defendants to this case, the witness averred that he has nothing to do with the case

as he was hired by the 2nd Defendant herein to build at the disputed land.

DW4, was **PASENCE PAULO KATABALWA** a JWTZ Employee and a resident of Salasala - Dar es Salaam.

The witness testified to the effect that he was a lawful owner to the disputed Plot at Ununio Area - Dar es Salaam as from **2001** to **2010**. The witness informed the court to have brought the suit Plot from one **Ambo Masoud** whom he was introduced by **Mr. Wilhelmin Erio**, the 5th Defendant herein who is also a resident of Ununio; but also his fellow employee worked together with the JWTZ.

The witness testified to the effect that, he was satisfied that Mr. Ambo Masoud was the owner of the suit land after the later proved to be a lawful owner of the suit Plot by a letter from the Village which introduced hi as the owner of the land in issue. The witness testified that the sale of the said land took place at the Ununio Village Office before the Local Government Leaders. Further after being confirmed by Mzee Mohamed who informed him that the suit land belonged to Ambo Masoud where the witness was satisfied with the whole process of sale, whereas the sale was concluded and witnessed at the village office. Mr. Katabalwa mentioned the witnesses to the Sale Agreement to be

among others Advocate by the name of **Elias Philemon Nawera** who was with them at that particular gathering.

The witness testified to have purchased the suit Plot at **Tshs. 2,000,000/=** which was also paid cash before the village Government office; particularly before the Village Executive Officer who was the one witnessed the sale on behalf of the Village Government.

In support of his assertion, the witness tendered a letter form the Ununio Village Local Government Chairman introducing Mr. Ambo Masoud as a lawful owner of the land near the area called "*Eneo la Kampuni ya Majani ya Chai*". The said letter was admitted as **Exhibit D1**.

As per witness testimony, the said plot is the suit plot which he brought in the year **2001** and owned it until **2010** when he decided to sell the same to Mr. Mwita Kisboye. The witness informed the court that the sale between him and Kisiboye was under Sale Agreement. Further, that the Agreement he had with Ambo Masoud was the one he handed Kisboye who also handed the same to the new buyer the 4th Defendant herein. The same being the document titled "**MKATABA WA MAUZO YA SHAMBA**" between Mr. Pasence Katabarwa and Ambo Masudi which was admitted for evidence as **Exhibit D2**.

The witness testified to the effect that the said Sale Agreement was signed before the Village Office and not at Mlimani City as it was stated by the Advocate who witnessed the Sale Agreement signing. The witness also mentioned other people who witnessed the said sale to Mr. Playgog Mshana and Mr. Wilhelm Erio the 5th Defendant herein.

The witness further testified to the effect that in 2008, he decided to build a small house with two bedrooms at the suit plot. However, after 2009 when the Plaintiff decided to institute the case against him, he decided to sell the Plot to one Mr. Mwita Kisiboye. To support his assertion, the witness tendered the Sale Agreement to that effect of which was admitted for evidence as **Exhibit D3**. The Sale Agreement showed that the suit plot was sold to Mr. Kisiboye for total sum of **Tshs. 18,000,000/=** on cash basis before the Ununio Local Government Office.

Concluding his evidence, the witness prayed the Court to declare the 4th Defendant a lawful owner to the suit plot as the same was his before and later passed hands to the 4th Defendant lawfully.

Cross-examined by Advocate Imam Daffa for the Plaintiff, the witness said the letter which identified Mr. Ambo Masoud as a lawful owner to the suit land does not specify the size of the land. He also insisted that Advocate Nawera was at the Local

Government Office and witnessed the sale between him and Ambo Masoud in the year 2001. Further, he stated that the Advocate fees of 50,000/= was paid to Advocate Nawera by his late friend Playgold who is a deceased now.

When the witness was referred to his statement of Defence, particular to his signature comparing with the one in his Sale Agreement, he admitted both to be his signatures though they differ and further admitted that they do differ; whereas no reason to that effect was offered.

DW4 was **MOHAMED SOMO** a peasant and a resident of Ununio who upon examined in chief by Advocate Lusajo testified to the effect that he is the one who confirmed to the 1st Defendant that the disputed land belonged to Ambo Masoud as he knew him.

Further, the witness informed the court that he also knows Kambi Mfugeni whose father originated from Kawe in Dar es Salaam who later shifted to Ununio.

Concluding his testimony, the witness averred that, in his best knowledge, the suit land was brought by Mr. Katabalwa in the year 2001 before it passed hands to other buyers/owners to the current occupant.

DW6 was **SIMBA HASSAN MWEMA** a mason and a resident of Ununio and a neighbor to the suit land where he was

working as a watchman and a caretaker to Mr. Londa's house adjacent to the suit land. This witness testified to the effect that, on one particular day, of which he cannot remember the date, at night around 20:00 Hrs., upon hearing some shouts outside, he moved to the disputed land and witnessed the Plaintiff herein and Mr. Kambi Mfugeni accompanied with other five persons demolishing the small house that was at the suit land. The witness testified that Mr. Sudi the Plaintiff and Mr. Mfungeni had nothing on their hands but the rest were holding heavy duty hammers while demolishing the said house. However, after some people have assembled to the premises, the Plaintiff and his associate decided to board into their car and left the place.

HEMEDI ABDULLAH KILINDO testified as DW7. This witness too is the 6th Defendant respectively. Testifying before the court, the witness averred to know the 5th Defendant herein Mr. Erio who is the one facilitated the sale of the suit land from the 1st Defendant to the 2nd Defendant.

Upon testifying the witness also informed the court that once he and the 5th Defendant herein were arrested by Mr. Sudi the Plaintiff herein where he didn't know the cause of his arrest and brought at the Wazo Police Station. Testifying further, the witness confessed to know the suit land of which he know the same belonged to the 2nd Defendant herein.

MONICA LYAYUKA MBALE a businesswoman testified as **DW8** to the effect that, she is a businesswoman who currently is an occupier to the suit plot of which she had a plan of establishing a day care center for children as a business thereto. It is from that plan upon being satisfied with the suit land and upon enquiring to the local Government office Secretary, she bought the same from the 2nd Defendant herein one Mr. Kisiboye. The witness testified to the effect that the Sale Agreement between her and Mr. Mwita Kisiboye was entered in the Ununio Village Office on 10th May 2014 for consideration of **Tshs. 45,000,000/=**, hence purporting to be the owner to the suit land.

The witness informed the court that immediate after she took possession of the suit land, she started construction the fence and five business frames thereafter. However, later while constructing, she received a court an Injunctive Order in favor of the Plaintiff herein. It is from that time, DW8 averred to have stopped construction as ordered by the court. At the site, the witness said to have managed to place a three phase electricity and place water infrastructure and one room with a toilet.

In order to prove that there was a sale of the disputed plot between him and the 2nd Defendant herein, the witness tendered for evidence a set of Sale Agreement which was admitted as

Exhibit D4. Further the witness informed the court that despite of the Injunctive Order from the court, she decided to conduct a valuation and obtain a Valuation Report in respect of the disputed land of which was admitted for evidence as **Exhibit D5**. From the said Report, the disputed plot and the development thereto is said to have value of **Ths. 290,000,000/=**.

The witness further informed the court that since she had a plan to develop a children's care center, she is still in a process of buying some building materials so as to avoid inflation. In the course of testifying, DW8 elaborated into detail how she planned to build a hostel for accommodating 50 children at the suit land and her projection to the said project. In support of what she said, the witness tendered in court her projection titled **"Particulars of Loss and Damages"** duly prepared by her of which was admitted for evidence as **Exhibit D6**.

Concluding her testimony, DW8 prayed the court too to consider her Counter Claim and declare her a lawful owner to the suit land.

DW9 was **MR. GEORGE RUPIA NDIRIMILA** a resident of Ubungo Dar es Salaam an Entrepreneur whom in the past years he served as a Mtaa Executive Officer (MEO) from 2006 to 2016 working at different work stations, Ununio kwa Kondo being his last station where he worked from 2013 to 2016 working as a

Mtaa Secretary too. The witness testified to the effect that he once was visited by Mama Monica Mbale the 4th Defendant in this matter as she wanted to buy land at Ununio. It is after he satisfied himself then he confirmed to her that the land she wanted to buy was safe. Thereafter, after the buyer decided to buy the suit land, the witness was among the people who witnessed the sale between the 4th Defendant and the 2nd Defendant herein.

Despite of the very long testimony of this witness, the gist of his testimony is that he witnessed the Sale process of the suit plot from the above parties before him and the Chairman one Jalai Kambi for consideration of **Tshs. 45,000,000/=**.

MR. IDDI MOHAMED MUSSA a resident of Ununio testified as **DW 10**. The witness testified to the effect that at the past he was working with the Ununio Local Government. Further, it is from the office record he came to know that the suit land was sold to the 1st Defendant herein and later to the 2nd Defendant. It is his assertion that Mama Monica Mbale is the lawful owner of the suit land as she bought legally from Mr. Kisiboye whose records were at the Village office unlike the records that the Plaintiff had which were not found at the Village office.

DW 11 was **SHABANI MALIMA**, a resident of Tegeta Dar es Salaam. This witness testified to the effect that he was a JWTZ Employee before he retired. After his retirement he was assigned a task of being a Secretary to the Kunduchi Land Ward Tribunal. Stating his duties said one of his main duties was to write records from the Tribunal's proceedings. That he remembers once he wrote the record in respect of the land dispute which was brought at Tribunal where the same was between the Plaintiff herein Mr. Benedict Sudi versus Mr. Pasence Katabalwa the 1st Defendant herein.

It is the witness confirmation that during hearing at the Tribunal, upon both parties tendering their respective Sale Agreements, it came to the knowledge of the Tribunal that both Agreements were witnessed and signed by the Ununio Village Secretary one **JALAI KAMBI**. The witness informed the court that upon called to testify before the Tribunal and asked as to why he witnessed and facilitated the sale of the same plot to two different persons twice, he admitted to commit the wrong of selling the plot to two different people and that though he did that, he didn't know by then at the second sale that the land was already sold to the Plaintiff. It is further the DW11's testimony that Mr. Jalai Kambi said that was a mistake and that he is the one who signed both Sale Agreements for the Plaintiff and that of

the 1st Defendant's respectively. The witness also informed the court that the matter was later referred to the District Land and Housing Tribunal as the value of the disputed land exceeded **Tsh. 3,000,000/=**.

DW 12 was **PILLY ABDALLAH** a resident of Salasala within the City of Dar es Salaam. The witness testified by identifying herself as a late Ambo Masoud's widow. She testified to the effect that the disputed land belonged to his late husband and that before his death, he sold the same to a Soldier a Haya by tribe. It is the witness averment that after his late husband sold the disputed land, they shifted to Basihaya where they rented a room.

Cross examined, the witness informed the court that she married Ambo Masoud at Mwenge mosque but they were never given a marriage certificate. Moreover, even after the death of his late husband, he didn't obtain any death certificate to that effect. Further, apart from his late husband's twin brother by the name of Mrisho Masoud, she doesn't know any other relative to his husband as he had a bad relationship with his relative because his husband and his twin brother had a lot of wealthy they inherited from their father whom is said to own a big land at Ununio.

As the court find it strange that he didn't know any other person from his late husband's family apart from his late husband's twin brother, the witness insisted that his late husband had no good relationship with other relatives as they has a lot of properties which they also wanted, hence stayed far from them.

The last Defense witness was **DW 13** was **JOSEPH IJUMBA**, a Mbezi Luis - Kimara resident and a teacher working with St. Ann's Nursery and Primary School at Makabe. This witness in principal testified to support the 4th Defendant's business projection to build a school /children's center as per the 4th Defendant's plan.

It is after the DW13th testimony, Defendants closed their case respectively whereby the court ordered parties to file their respective final submissions. It is after that order, I now determine this matter of which took almost seven years of litigation.

I have with keen attention, sensibly and significantly considered the evidence adduced by all parties, and to a great extent the reasoned final submission of learned Advocates, that is counsel for the Plaintiff **Mr. Imam Daffa** and the 1st Defendant's Counsel, **Mr. Lusajo Wille** respectively who were able to file their final written submissions as ordered by this court. I am

grateful for their respective final submissions of which have assisted in my better understanding of their cases.

In determining the case at hand, and to start with, as the matter before the case need evidence to determine, I do appreciate the parameters of the burden of proof initiated by the law of **Evidence Act Cap. 6 [R.E. 2002] in section 110 (1) and (2), 111, 112 and 13** which provides:

"110. (1) whoever desires any Court to give Judgment as to any legal rights or liability defendant on the existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person;

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;

112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person;

113. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

It follows therefore that it is a cherished principle of law that, generally in Civil cases, the burden of proof lies on the party who alleges anything in his favor.

I am familiar indeed that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in cases on balance of probabilities. The decisions by the Court of Appeal of Tanzania in which this principle of law has been enunciated are now legendary. See the case of **ANTHONY M. MASANGA VS. PENINA (MAMA NGESI) AND OTHERS, Civil Appeal No. 118 of 2014 (Unreported)**.

A synopsis by the learned Author Sarkar in **SARKAR ON EVIDENCE, 14TH EDITION 1993 at page 1339** persuasively commenting on Indian provision of the Law similar to ours on the burden of proof partly has the following:

".....that the initial onus is always on the Plaintiff and if he discharges that onus and makes out a case which entitled him to relief, the onus shifts on to the Defendant to prove those circumstances, if any which

would disentitle the Plaintiff to the same (BASIRUDDIN VS. SAAEBULLA, 32 CW No. 160)."

In the matter under scrutiny, since it is the Plaintiff who is alleging that the disputed land is his, then the onus to prove that shifts to him to prove under the circumstances. Under those parameters then, the question before the court is whether the Plaintiff has successfully discharged his duty to prove the facts he alleges in his favor.

As stated earlier in this Judgment, the issues in respect of this matter reads:

- i. Who is the lawful owner of the disputed land?***
- ii. Who built a house in the disputed land?***
- iii. Whether either party did unlawful act in the suit property, and***
- iv. To what reliefs are the parties entitled to.***

In resolving the first issue, I feel it is important to restate portions of the evidence presented to court, portions which are not disputed.

First, that the suit property / land is situated at Ununio **within Kinondoni Municipality in Dar es Salaam City;**

Second, that the suit land is un-surveyed land;

Third, that the suit land is currently occupied by the 4th Defendant who bought the suit land from the 2nd Defendant herein;

Fourth, it is after the occupation of the 1st Defendant, then later the 2nd Defendant and now the 4th Defendant's occupation to the suit land, the Plaintiff instituted the instant suit claiming the suit land to be his.

From the records and parties' testimonies in respect of this case so far adduced before this honorable court, the controversy or rather the only disputed fact in this case lies on who is the lawful owner of the suit land.

In determining this case, I will direct myself **to the major disputed fact** as mentioned in the 1st issue as to ***who is the lawful owner of the disputed land?***

As spotted above, the disputed land is currently occupied by the 4th Defendant who allegedly bought the same from the 2nd Defendant who also alleges to have bought it from the 1st Defendant.

In the cause of proving that the disputed land belongs to the Plaintiff, as the burden of proof lies on him, he submitted for evidence the Sale Agreement between him and the Seller to the said land. The said Agreement dated **11th October 2003** was admitted for evidence as **Exhibit P1** which was duly entered

between **Mr. Benedict Sudi**, the Plaintiff herein and the Seller one **Kambi Mfungeni** on the other hand. According to his testimony, the sale was made on 11th October, 2003 at the office of the Executive Secretary of the Local Government of Ununio Street.

The Plaintiff further informed the court that before buying the disputed land he facilitated the seller to have the area surveyed and have the plots demarcated. PW1 testified further that initially the seller was selling pieces of 50 x 25 paces but he advised him to have it surveyed so that it becomes easier for a buyer to identify his plot. Likewise, the Seller, Mr. Kambi Mfungeni, who testified as PW2, testified to the effect that he was the owner of the disputed land and that he is the one who sold it to the Plaintiff after being assisted by the Plaintiff to survey the area and have the plots demarcated. It is from the Seller that after the survey, he obtained 16 plots and sold two plots to the Plaintiff which is the disputed land in this case. He further stated that, the process of surveying the area did not proceed to the issuance of title deeds. Upon referred to the Sale Agreement (Exhibit P1), the Seller PW2 recognized the same and subscribed that the same is the document evidencing the transaction between him and the Plaintiff in respect of the suit plot. PW2 also told the Court that, apart from the plots in dispute, he sold other

plots to other people in the same area and none of those had been involved in a dispute.

On the other hand, the 1st Defendant when testifying as DW3, testified to the effect that he bought the disputed land from one **Ambo Masoud** in **2001** and tendered a Sale Agreement dated **7th June, 2001** to that effect of which was admitted as **Exhibit D2**. The 1st Defendant further testified that the transaction was witnessed by Advocate **Elias Philemon Nawera**. When he was asked about the whereabouts of the seller during cross examination, DW3 said that he has no idea of his whereabouts, but there are unconfirmed news that the said seller is dead.

During hearing, while the 1st Defendant who testifies as DW3 testified that the sale between him and Ambo Masoud took place at the office of the Executive Secretary of the Local Government of Ununio Street on 7th June, 2001 before Advocate Elias Philemon Nawera who testified before this Honourable Court as PW3 recognized the Sale Agreement (Exhibit D2) and informed the Court that the same was brought to him to sign at Mlimani City after he was already admitted in the Roll of Advocates. This fact was supported by the 5th Defendant Wilhelm Sylvester Erio, who purportedly witnessed the transaction and the signing of the said Agreement. DW1 confirmed before the court that, at the

office, Advocate Elias Philemon Nawera was present and that he is the one who notarized the agreement by signing and affixing his stamp.

Cementing the Sale of the disputed land to the 1st Defendant by Mr. Ambo Masoud, Advocate Nawera further informed this Honorable Court that the Seller and the Buyer signed before him after satisfying himself of their identification and that after signing the agreement witnessing the sale, he discovered discrepancies of the dates hence asked the seller and the buyer to rectify the dates and come back with a corrected agreement for signing and notarization. However, that was not the case as they didn't return to him.

In order to establish as to who is the lawful owner of the disputed land between the Plaintiff and the 1st Defendant, as said earlier, the duty of proving ownership of the disputed land lie on a party who alleges ownership of the disputed land and such duty is discharged by adducing evidence. The duty of the Court is to find out as to whose evidence is heavier than the other.

As well noted in this case, the Plaintiff on one hand and the 1st Defendant on the other hand claims to buy the land from original owners to the dispute land. So the controversy lies on the ownership of the disputed land identified to be a piece of land

situated at **Ununio within Kinondoni Municipality in Dar es Salaam City.**

In examining the above pieces of evidences on relationship to the ownership of the disputed land, I have to determine on the validity of the Sale Agreements.

It is in record that the Sale Agreement between the 1st Defendant and one Mr. Ambo Masoud, produced as **Exhibit D2**, is purportedly to be signed on **7th June, 2001** and the same was notarized by Advocate Elias Philemon Nawera. The Plaintiff when testifying as PW1 tendered a letter from the Registrar of the High Court with **Ref: No. Adv. 1710/47** dated 17th December, 2015 which was admitted as **Exhibit P4**. This letter is to the effect that Advocate Elias Philemon Nawera was admitted as Advocate on **15th June, 2006**.

On the other hand, the 1st Defendant, when testifying as DW3 testified to the effect that he signed the Sale Agreement in the presence of Advocate Elias Philemon Nawera on **7th June, 2001 at Ununio**. This point was supported by the 5th Defendant Wilhelm Sylvester Erio, who purportedly witnessed the sale and the signing of the Sale Agreement, who testifying as DW1, testified to the effect that Advocate Elias Philemon Nawera was there and that he notarized the Agreement by signing and affixing his stamp.

It is from here that I find it strange that the referred Sale Agreement is the same while the same is said to be signed at two different places on the same date. I wonder as to who between the Client being the 1st Defendant herein or his Advocate is telling the truth or otherwise. I have to say without ado that, it is here the testimonies of the 1st Defendant and that of his advocate who testified as PW3 leaves much to be desired.

As to the Plaintiff's Sale Agreement that is **Exhibit P1**, I don't see any ambiguity as the same is well supported by PW2 who is the Seller to the land in the Agreement between them. Both parties to this Agreement averred that the said Agreement was signed on **11th October, 2003** at the office of the Executive Secretary of the Local Government of Ununio Street. In this respect there is no any departure of testimonies to this effect.

As the departure to the 1st Defendant's Sale Agreement testimony with that of his Advocate left me with many questions, and in order to determine the validity of the Sale Agreement that was witnessed and signed by a Notary Public or Commissioner for Oaths without holding a practicing certificate, I had to refer to **the Advocates Act, Cap 341 [R.E. 2019]**. It is from the same I detected that **Section 41** of the said Act impedes an unqualified Advocates from practicing. The same states:

"No unqualified person shall act as an Advocate or agent for suiters or as such if issued out any summons or other process or commence or carry on or defend any action, suit or any other proceeding in the name of any other person or in his own name in any Courts of civil or criminal jurisdiction or practice as an Advocate in any matter civil or criminal."

The law is very clear that such person who holds himself out to be a Notary Public or Commissioner for oaths without holding a certificate to that effect commits an offence. This is per section 6 (1) of **the Notaries Public and Commissioners for oaths Act [Cap. 12 R. E. 2002]**. The section provides:

"Subject to the provisions of section 10, any person who holds himself out to be a notary public or commissioner for oaths or receives any fees or reward as a notary public or commissioner for oaths, unless he holds a valid certificate granted under this Act, shall be a guilty of an offence..."

It is from the above I have noted that, the entitlements of any Advocate for signing any Agreement and witness any legal document is justified by validity of his / her Practising Certificate.

More so, **Section 39 of the Advocates Act Cap. 341** provides for qualifications of a person as an Advocate. **First**, his name should be on the Roll; **second**, he should have in force Practicing Certificate and; **third**, he should have a valid business license. In this case, Advocate Elias Philemon Nawera at the time of signing the Sale Agreement in favor of the 1st Defendant and Mr. Ambo Masoud, did not have any Practicing Certificate albeit the Counsel signed the Sale Agreement without any legal entitlement.

Indeed, the object and function of **Section 41 (1) (supra)** is to protect the legal profession and the general public from Advocates whose license are not valid. In fact, **Section 41(2) of the Advocate Act** criminalize the act of practicing without valid Practicing License.

The issue before me now is; whether the Sale Agreement prepared by Mr. Nawera Advocate under those circumstances is valid or not. In a Kenyan case of **DELPHIS BANK LTD V. BEHAL AND OTHERS (2003) 2EA 412(CCK)**, the Court had this to say:

"The plaint was signed by an Advocate who had no Practicing Certificate at that time. He was therefore unqualified under Section 99 and 34 (1) (e) of the Advocates Act (Chapter 16) and not entitled to appear

*to conduct any proceeding in Court. **The Plaintiff was incompetent and had to be struck out. In this case the application was struck out with cost.*** [The emphasis is mine].

Another case is a Ugandan case of **HUQ V. ISLAMIC UNIVERSITY IN UGANDA [1995-1998] 2 EA 117 (SCU)**, the majority decision of the Supreme Court in this case was:

*"An Advocate who practiced without a valid Practicing Certificate after a grace period, practised illegally and that all proceeding taken by such Advocate and **documents signed by him were invalid because so to say otherwise would amount to a perpetuation of an illegality.**"*

In Tanzania, the position of law, in the similar situation is very clear. It is provided for under **Section 41 (1) of Advocates Act Cap 341**. It limits an unqualified person to act as an Advocate, or agent for suitors to *inter alia*: **One**, commence; **two**, carry on or; **three**, defend any action, suit or other proceedings in the name of any other person or in his own name.

Further, in the case of **ISLAM ALLY SALEH V. AKBAR HAMEER AND ANOTHER, Civil Case No. 156 of 2016, High**

Court of Tanzania, Dar es Salaam Registry (Unreported),
an Advocate was practicing without attaining a Practicing Certificate. The Court found the said Advocate guilty of an offence under *the Advocate's Act (supra)* and of contempt of Court and he was held liable to be punished accordingly. In that case, **the Court went further to nullify and reject pleadings and proceedings which had been prepared by that Advocate.**

In the present case, it is crystal clear from the record that, by the time Mr. Nawera was signing the Sale Agreement between the 1st Defendant and Mr. Ambo Masoud, he was not an Advocate. This has been clearly confirmed by the High Court Deputy Registrar in his letter to the Plaintiff herein dated 17th December 2015 (Exhibit P4) upon enquiry as to when the later was admitted to the Roll of Advocates. For ease of reference below is what was written in the said letter:

"Please kindly be informed that Elias Philemon Nawera was admitted as an Advocate on 15th day of June, 2006."

From the above, by the time Mr. Nawera as acting as an Advocate, he knew precisely that he was not allowed to do so but still did it. As an Officer of the Court, he knew very well that, it

was an offence for him to practice without a valid Practising Certificate and he had no right to witness any legal document to that effect. On the face of it, and in accordance to the law, Mr. Nawera committed the offence under **Section 41 (1) and (2) of Advocates Act, Cap 341**, while fully knowing the consequences. It is unfortunate that he was very selfish even to his client who for sure he must have paid him for services. I can term Mr. Nawera's undertaking as a **fatal** one since he was not qualified to do what he did.

I should emphasize that Advocates as Officers of the Court, should refrain themselves from carrying out illegal practices. Otherwise, it will tarnish the image of the noble profession. The image of the legal profession must be safeguarded by all of us who are entrusted in this vocation.

Furthermore, to exemplify the above words of wisdom, it was stated in the case of **RE GRUZMAN (1968)70 SR (NSW) 316, 313** that:-

"The duty requires that lawyers act with honesty, condor and competence, exercise independent judgment in the conduct of the case, and not engage in a conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be

frank in their responses and disclose to it. In short, lawyers must do what they can to ensure that the law is applied correctly to the case."

In this regard, it is important for any lawyer to understand that in the Administration of Justice he/she carries both benefits of pursuing the carrier and burden of strengthening the administration of Justice.

It is not monotonous, but I think to end this matter, I take remarks of **Lord Reid** in the case of ***RONDEL VS. WORSLEY (1969) IAC 191, 277*** where it was held thus:

"As an officer of the Court concerned in the Administration of justice (a legal practitioner) has an overriding duty to the court, to the standards of his profession, and to the public which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interest."

If this was the only problem to the Sale Agreement I could have thought otherwise weighing the Advocate's wrong to his client. However, there is a more serious matter to this Sale Agreement between the 1st Defendant and Mr. Ambo Masoud the purported Seller. And this can be seen in the Defendants' testimonies. The contradictions on necessary facts between them

are critical and extreme. It is from the record that it is the 1st Defendant's testimony that the said Sale Agreement was signed at the office of the Executive Secretary of the Local Government of Ununio Street while the so called Advocate by then Mr. Nawera on the same Sale Agreement said that he witnessed and signed the same at Mlimani City on the very same date. Under these circumstances, in the great departure such like this one, there is so much to be desired. The consequences of such contradicting testimonies under the law are obvious.

It is my duty and I am obliged to address these contradictions in order to ascertain whether the contradictions observed have gone to the root of the case or not. I get my strength from the case of **MOHAMED SAID MATULA v REPUBLIC [1994] TZCA 8; (11 April 1994); 1995 TLR 3 (TZCA)** where it was observed that:

*"Such were the inconsistencies and the contradictions involving the evidence of the two children on which the appellant's conviction was largely based. In his evaluation of the evidence the learned judge made not a single reference to these inconsistencies and contradictions. Nor did he make any mention of them in his summing up to the assessors. He merely accepted the evidence of the two children at its face value. That was clearly wrong. **He had a duty to consider***

the inconsistencies and contradictions and try to resolve them if he could. Else he had to decide whether the inconsistencies and contradictions were only minor or whether they were such as did go to the root of the matter.

Had the learned judge directed himself and the assessors on the issue as indicated, we are unable to say for certain that he would have found the two children truthful and would have accepted their evidence without any reservation as he did."

What then are the consequences of contradictory testimonies under the law?

There is no doubt that the proof of **Contradiction** is vital to destroy the credibility of the case. It is obvious that proved **contradictions** can **affect** the case and in particular when the Judge decides the fate of the controversy between the Parties by appreciating the **evidence** she/he has recorded throughout the trial. In legal terms, **a contradictory statement is an incompatibility and clear opposition to two ideas which are the subject of the same proposition.** Whether it be from neither side but on the same issue, providing insufficient information to what has been previously provided or if one or more witnesses reenact the chain of events that occurred, but do

not portray a mirrored story, contradictory statements lead **to much confusion for the judge to decide.**

Further, when a statement made has been contradicted by another in court, the remaining part is that the court is led to believe that all accounts made from that point onwards **are false.** Further, any evidence that would seem credible becomes **unreliable.** To my simple understanding is that, a contradictory statement made in court over the same issue for the same concerned people on the same issue, **signifies that the person making such statement has been untruthful at some point during their account.**

It is a public perception that the laws in place among global jurisdictions highlight the importance of witnesses, and **the witness is wanted and obliged to articulate the truth under oath in court.** It is understandable for a witness that attending court for the first time, might be under a frightening experience. However, the directions by the court is to make sure that the process for a witness is as comfortable and safe as possible.

I understand that time has elapsed since the Agreement was entered between the parties and witnessed by their respective witnesses, but still witnesses had time to recollect on the events they saw and remember at least on the most important scenarios

and facts that will connect to the matter in issue or rather before the court for this particular matter. The process of a witness providing the court with their account of the facts first starts with the witness himself in accordance to his/her knowledge on the true and accurate events that took place. If a witness is called to the stand and contradicts with the facts of the particular matter expected to be a statement on a previous act that he made by himself or by another witness with a similar account, **the testimony given is considered to be weak of which will lead the court to discredit all that court have heard which may have damaging effects for the party concerned with that particular matter.**

All that have been observed. However, still in determining this matter, I still ask myself as to why Mr. Elias Nawera had to sign the document (1st Defendant's Sale Agreement) in 2001 while he was not an Advocate by then while he was admitted in the year 2006! Above all, what is behind the big departure between the Advocate Mr. Nawera and his client, the 1st Defendant herein to the extent of contradicting and diverging even to the location which the said Sale Agreement was signed?

In the cause of determining this matter it also came to my knowledge that both Sale Agreements in this matter have been signed by the same Village Secretary. In this regard it must be in

his knowledge that the suit land was sold twice. If this is so, then the only explanation is that he must have sold the suit plots twice purposely. He cannot say that he had no idea that the said plot was sold before upon selling the same after two years; if that was the case. Referring to the witnesses testimonies in this issue, I have carefully heard and take seriously testimony of **DW 11 SHABANI MALIMA** who in fact by his own words he came to court to testify in favor of the 4th Defendant herein, Mama Monica Mbale. However, in the cause of testifying, he revealed the fact that Mr. Jalai Kambi at the Ward Tribunal confessed to facilitate the sale of the suit land to two different people, being the Plaintiff and the 1st Defendant herein. I have taken that statement out of that witness very seriously as Mr. **SHABANI MALIMA** appears in the Proceedings and Decision of the Kunduchi Ward Tribunal in the case between the Plaintiff and the 1st Defendant admitted for evidence as **Exhibit D2**. It is unfortunately that this kind of a Leader has acted in this manner. There is no any excuse to what he did as he was entrusted to oversee that the Village affairs including fair acquisition of land thereto are conducted harmoniously to avoid land disputes. Without ado, I can say, this kind of leaders are unwanted to our respective societies. If the sale was done twice to two different people, then this is what we can term the same a double deal.

From my own perception in trying to answer all these questions as to why there was a serious contradictions of the 1st Defendant and his Advocate which goes to the root of the matter and other questions which were never answered neither by the 1st Defendant being the first buyer among other Purchasers Defendants nor by the Advocate who signed the Sale Agreement illegally, it is my observation that there is a possibility of the 1st Defendant and its associates upon arose of the cause of action in 2009, and upon detection that there was an alleged Owner who is said to have bought the suit land in the year 2003, they had to see all possible ways to have a document for land acquisition before the year 2003 which the Plaintiff had bought the said land according to his Sale Agreement of which was first revealed at the Ward Tribunal when this matter was first heard. However, in the cause of engineering the document, this very fatal technical error by the Advocate occurred of which now arises a lot of questions and embarrassment particularly to the Advocate who is said to have witnessed the Sale Agreement.

On the other hand, as stated earlier, the Plaintiff testified to have assisted Mr. Kambi Mfungeni to survey and demarcated plots of which two of them were sold to him. This fact was supported by the fact which was stated by the Plaintiff when cross examined by the 1st Defendant's Counsel when identifying

his neighbors at the suit Plot when he said in page 65 of the proceedings that:

"The boundaries of the Plots were beacons which are still there. My neighbors are East - Kambi, North West - Kambi, South East -Road; and South West there are is the road adjacent to the suit plot."

From the above statement, the assertion from the Plaintiff and his seller Kambi Mfungeni that the plots were surveyed and the seller decided to sell two plots to the Plaintiff and sell others to other people of whom have not been disturbed to date; tend to have more weight and consistency by the Plaintiff's identification of the suit plots and neighbors thereto. Hence supports the Plaintiff's case. Contrary to the stated fact that Ambo Masoud's plot is near ***Majani ya Chai Area*** as evidenced by the letter by Ununio Village Chairman through **Exhibit D1**.

From my above observation and all the contradictory testimonies that had occurred and demonstrated above, it is my concern that between the two Sale Agreements which are to prove who is the lawful owner to the disputed land, the testimony that was given by the Plaintiff, the evidence adduced by PW1 and PW2 remained **unshaken** as there is no any evidence adduced by the Defendants with the effect of invalidating Exhibit P1 and testimonies by PW1 and PW2.

On the contrary, I have taken very seriously all the major contradictions and departure to the 1st Defendant's testimony against that of his Advocate which indeed shaken the testimony over the Sale Agreement by the 1st Defendant to have no weight at all, hence fabricated. I say fabricated since I find strange to some facts testified by **DW 12 PILLY ABDALLAH** as a late Ambo Masoud's wife that she was married to Ambo Masoud but they were never given the marriage certificate and even she doesn't know anything about his late husband's death certificate, something that is very strange.

On the very serious note is that apart from being married to Masoud for about four years, the witness does not know any relative to his husband apart from his late brother in law a twin brother to his husband. How strange? I have to confess that it is my conviction that, this witness had to say that since it seems that she was not even a wife to the late Ambo Masoud since she acted very strange testifying on the issues that leaves the court with many questions and came to the conclusion that by her testimony still there is so much to be desired.

All has been said but the most important matter is the fact that the said Sale Agreement was signed by the person who had no any qualification whatsoever to give the same the legal enforcement as the same was signed **fraudulently by**

unqualified Advocate. It was much better that the said Agreement was to be signed just by the parties and their respective witnesses rather than to be witnessed fraudulently by unauthorized Advocate.

In the **CRIMINAL APPEAL NO. 237 OF 2018 THE DIRECTOR OF PUBLIC PROSECUTIONS VERSUS SALUM MOHAMED SALUM and SIX OTHERS at Mtwara**, it was observed that:

*"As stated earlier, Mr. Ogunde, once again, conceded to yet another error having been made by the learned first appellate Judge this time in finding, as excerpted above, that **the contradictions in the testimonies injected serious doubts to the prosecution case.**"*

It is from all the above that **I have decided to discredit the 1st Defendant's evidence over the ownership of the disputed land as the same has encountered serious contradictions of which still demand so much explanation as to why the said contradictions existed.**

It was stated in the case of **HEMED SAIDI VS MOHAMED MBILU (1984) TLR 113 HC** that:

"In law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".

From the above, it is my firm observation that from the evidence adduced, indeed the Plaintiff has successfully proved his case and in the final analysis, the 1st issue as to ***who is the lawful owner of the disputed land*** is answered **POSITIVELY to the Plaintiff by ruling out that the Plaintiff is the lawful owner to the disputed land situated at Ununio within the City of Dar es Salaam.**

As to the 2nd issue as to **who built a house in the disputed land?** And to the 3rd issue as to **whether either party did unlawful act in the suit property,** I have decided to determine them jointly as they appear to be one having same answers.

In determining the same, I have to state clearly that, out of the above declaration that the Plaintiff herein is the lawful owner to the suit property, then let the parties be reminded that, In the **Land Disputes Courts Act Cap. 216** under the interpretation section the Legislature took efforts in defining what Land is, and defined the same as:

"Land includes the surface of the earth and the earth below the surface and all substance other than minerals and petroleum forming part of or below the surface, things naturally growing on the land,

buildings and other structures permanently affixed to land.”

It from this definition that I find the contention as to ***who built a house in the disputed land; and as to whether either party did unlawful act in the suit property,*** answered **NEGATIVELY to whoever built anything on the land that is not his.** I say so since whoever built on the land which is not his, he did not have any authority to do so hence deserves nothing as the land belongs to the Plaintiff herein. In the event therefore, whatever is on the disputed land, falls in the above definition of section **3 (1) of the Land Disputes Courts Act (Supra); that everything on the land belongs to the Plaintiff whom I have declared a lawful owner to the disputed land.**

As to the fourth and last issue as ***to what reliefs are the parties entitled to?*** The Plaintiff prayed for the following reliefs which are accordingly granted as below against the Defendants herein:

- i. The Plaintiff is hereby declared as a lawful owner of the suit land as identified herein;***
- ii. The Defendants herein are declared trespassers to the suit land;***

- iii. An order of eviction to the 4th Defendant, their assignees, or transferees to leave vacant possession to the Plaintiff on the suit land with immediate effect;***
- iv. An order for demolition of any structure developed on the suit land either by Defendants themselves, or by their assignees, and their agents;***
- v. General damages of 20 Million Tanzania Shillings to the Plaintiffs from the 1st Defendant who is said to be the 1st buyer of the suit property for inconvenience and disturbance for unlawful occupation and use of suit land by the Defendants throughout the time they were using the Plaintiff's land;***
- vi. Replacement of the demolished wire fence worth Tshs. 6,500,000/= to be effected by the 2nd Defendant ;***
- vii. Perpetual injunction to restrain the Defendants, their agents, employees and or assignees in the suit area; and***
- viii. Plaintiff is to be awarded by the 1st Defendant costs of the suit.***

Consequently, **the Case has merits and succeeds** in the manner endeavored above. Further, **the 4th Defendant's Counter Claim is hereby dismissed as the same is meritless.**

It is so ordered.

The Right of Appeal Explained.



A handwritten signature in black ink, appearing to read "L. E. Mgonya".

L. E. MGONYA
JUDGE
28/05/2021

Court: Judgment delivered in my chamber in the presence of Bora Nicholous, Advocate for the Plaintiff and Ms. Msuya Bench Clarke in my chamber today 28th May, 2021.



A handwritten signature in black ink, appearing to read "L. E. Mgonya".

L. E. MGONYA
JUDGE
28/05/2021