

IN THE HIGH COURT OF TANZANIA
(DAR- ES -SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 11 OF 2020

**FARSY A. MSUYA (Administrator of the Estate of the Late
Adinani Mangachi Msuya/Katera Mshanga Mangachi) PLAINTIFF**

VERSUS

JENNIFER MKAPESA CHUWA..... DEFENDANT

JUDGEMENT

Date of last order: 13th July, 2022

Date of judgment: 26th August, 2022

E.E.KAKOLAKI, J.

The plaintiff herein, the administrator of the estates of his late father Adinani Mangachi Msuya or Katera Mshanga Mangachi who also known by the names of Adinani Msuya, Katera Mshanga Mangachi and Atera Mshanga Mangachi is suing the defendant herein for encroachment of the suit land in Plot No. 149 situated at Mbezi Beach, Palm Street Kinondoni Municipality, thus praying for several reliefs. He is seeking for a declaration that the suit land described as suit land forms part of the estate of the late Katera Mshanga Mangachi; eviction of the defendant from the suit land; payment of specific

to the tune of Tshs. 121,500,000/- as mesne profit, general damages and costs of this suit.

Briefly, the plaintiff herein vide Probate Cause No. 320 of 2016, on 26/09/2019 was appointed by the Primary Court of Temeke as the administrator of the estate of his deceased father who died intestate on 10th August,2013. It transpired that, in the course of discharging his legal duties of administering the estate he discovered that, the defendant had wrongly and without any justification trespassed into the suit land in which the defendant had erected two storey building therein and leased it to one Timo Gawronski. The Plaintiff having equipped himself with all necessary documents proving ownership of the suit land, served both the defendant and the tenant with notices to vacate the suit land but the same arrogantly refused to heed to, the result of which was to sue her for her unjustified action of trespassing into the suit land the act that suffered him untold torture financial and mentally. The plaintiff is therefore claiming for the reliefs as stated above.

Being served with the plaintiff's plaint, the defendant contested the appointment of the plaintiff as the administrator of estates and other facts save for the parties' addresses. The defendant point of objection with regard

to the appointment of the Plaintiff as the administrator of estates was overruled by this court on the ground that, this being a land case is not a proper forum to question the propriety of the appointment of the plaintiff as administrator of the estate which would and still can be question vide the probate court. From the parties' pleadings a total of five issues were framed by the Court to guide it in resolving parties' dispute, going thus:

1. Who is the lawful owner of the disputed plot No.149 Mbezi Beach in Kinondoni Municipality.
2. Whether the deceased Adinani Mangachi Msuya is the same person as Kapela Mshanga Magachi.
3. Who has developed the disputed plot i.e permanent house in the plot.
4. Whether the Plaintiff has suffered specific damages to the tune of Tshs.121,500,000/=
5. What reliefs are the parties entitled to.

The learned advocates Burhan Musa and Cleoplace Manyangu represented the plaintiff and defendant respectively. In a bid to prove and disprove the claims both plaintiff and defendant paraded two witnesses each while tendering seven (7) to four (4) exhibits respectively. When the defendant closed her case, both counsels prayed for leave to prepare and file their

final submission, the prayer which was cordially granted by the Court. Hence, the said submissions were prepared and filed accordingly.

When presenting his case, through PW1 Farsy Adinani Msuya, the plaintiff informed the Court on how he was appointed as administrator of the estate of the late Adinan Mangachi Msuya or Katera Msanga Mangachi by Temeke Primary Court on 20/09/2019 before he tendered the letters of administration exhibit PE1. He said the two names named above were used both interchangeably by the deceased and he tendered exhibit PE.2 as an affidavit of names to prove that the deceased used the names of Adinani Msuya, Katera Mshanga Mangachi and Atera Mshanga Mangachi in some of his official documents which however he produced none. It was his testimony that, in the course of collecting the estate including the plot in the suit land which he knew and used to see since his childhood, it came to his knowledge that it was encroached by unknown person. In the course of establishing the unlawful possessor of the said land intervention was sought from the Temeke Primary Court which upon inquiry from the Treasury Registrar, the response by letter (exhibit P3) dated 09/01/2018 to the Court and copied to him was that, the title of the suit land in the name of Katera Mshanga Mangacha was mortgaged to NBC bank since the year 1989 to

secured loan for Adinani Mangachi Msuya, thus payment of Tshs. 18,158,981 as due loan amount was required to redeem it. It was PW1 further evidence that, he requested from NBC Bank a copy of the certificate of title which was provided to him accompanied by the letter date 22/02/2018 in which both were admitted as exhibit PE.4 collectively.

PW1 informed the Court that, after receiving Exhibit PE3 he called at the Registrar of title's office to tell him of the dispute pertaining ownership in which the Registrar reacted by writing the Commissioner for Land asking him to resolve the ownership dispute vide the letter dated 27/09/2018, exhibit PE.5 with no response. He said his father possessed the land since 1977 and therein a built servant quarters in which its picture was tendered in Court as exhibit PE6. In further proof of existence of the said structure PW1 tendered the aerial photograph Exhibit PE.7 to testify that the plot was developed by his father. When referred to Exhibit PE.7, PW1 showed to the court from the map the plot reading as 140 with a small structure therein stating that, the said Plot 140 was for his late father. PW1 ended up by praying the court to grant his prayers.

When cross examined as to whether he had registered as personal legal representative for the deceased before coming to Court PW1 responded

that, he is not aware of that procedure nor did he make a follow up of a letter of offer issued to his late father leave alone the fact that he had no any receipt indicating that a letter of offer was issued and requisite fees paid by his late father save for payments of years from 2016 to 2018. On further cross examination it was exhibited that neither had any proof of loan agreement between Adinani Mangachi Msuya and NBC Bank nor a mortgage deed by Katera Mshanga Mangachi guaranteeing the loan facility. He further confessed not to be aware whether loan was repaid to NBC by Adinani Mangachi Msuya, as he had no any default notice from NBC Bank notifying him of the intention to sale the mortgaged property for want of payment of loan. He was insistent that, his father erected the building in the suit premise which was accomplished in 1985 as it was the guard who was living in the said house. He also confessed that, after invasion of the suit premises his father did not take any action and that it was the defendant who erected one house, servant quarters, swimming pool though he didn't know as to when the developments were made. He was of the evidence that, the development made by the invader do not entitle her to ownership of the suit premises. Ownership of plots is made through allocation of land by the offices of Commissioner for Land and the Registrar of titles. On further cross

examination as to the tenure of the right of occupancy he said it was for 99 year though was orally informed by the Commissioner for Land that, the letter of offer was for 33 years so the certificate of title was wrongly issued for 99 years hence reduced to 33 years though without explanations. He said the commissioner offered him another plot at Kigamboni as an alternative remedy but he was not satisfied with the said decision. As to why he failed to sue the Commissioner for Land, PW1 said, he had no issue with him as the ownership has never been changed by him. He responded further that, he is claiming for damages as the defendant benefited from his property which she has never owned. When PW1 was referred to exhibits PE3 and P4, and asked as to why the same were issued prior to the present letter appointment issued 29/9/2019, he admitted such evidence to have preceded the present letter appointment as at first he appointed administrator by Temeke Primary Court to administer the estate of Adinani Mangachi Msuya only, which title he used to sue the defendant in this Court vide Land Case No. 11 of 2018, before he was advised to withdraw that case and go back to the probate court to secure a new letter of appointment accomodating both names of Adinani Mangachi Msuya and Katera Mshanga

Mangachi which he did. So the evidence obtained prior to the issue of second letter was lawfully secured.

The next witness for plaintiff was one Waziri Masoud Mganga (PW2), a registration officer from the Registrar of titles' office in the Ministry of Land Housing and Human settlement. This witness informed the Court of his knowledge on Plot No.149 Mbezi Beach, Palm Street with certificate title registration No.25212. He said, the disputed land was registered in their office on 29/11/1980 in the name of Katera Mshanga Mangachi, which ownership has never changed as the only encumbrance known to their office is the loan facility mortgage which is registered in their office.

When cross examined PW2, confessed to have not known physical location of the suit plot except through documentation and that he did not produce the register of title nor a copy of title deed as exhibit before the court to cement his evidence. On further cross examination he said, their records do not show the owner is Adinan Mangachi Msuya and that the plaintiff as administrator of estates has never filed an application for appointment as legal personal representative as per section 67 of the Land Registration Act. According to him it is after that registration when he becomes the lawful administrator of the plot as up to now neither the plaintiff nor defendant

has no capacity to claim personal legal representative of the said property. When asked as who allocates land he said it is the office of the Commissioner for Land which deals with the issues of allocation of land and ownership.

During re-examination this witness said when the commissioner for land was rectifying the registration from 33 years to 99 years and later on from 99 years to 33 years the owner Katera Mshanga Mangachi was not involved. That is the end of plaintiff's case.

On the defence side, Helen Philip, Senior Land Officer, Dar es salaam region from the Ministry for Land, Housing and Human Settlement Development testified as (DW1). After introduction of her main duties she informed the Court of her knowledge over Plot No.149 Mbezi Beach. She said, same was allocated from shamba la Mkonge Mbezi (Sisal Plantation Mbezi) to Katera Mshanga Mangachi for the first time on 12/8/1977 through letter offer with ref No.D/KM/H/10705/2/SSM and that, his right of occupancy started on 1/7/1977 for a term of 33 years issued for residential purposes. According to her said tenure expired in June 2010. A letter with title KIWANJA NO.149 MBEZI BEACH JIJINI DAR ES SALAAM directed to FARSY ADINANI MSUYA with Ref. No LD/880/8/95 was tendered and admitted as exhibit D1.She

went on stating that, in the said letter which was received by the Plaintiff on 11/07/2018 they were responding to the plaintiff's letter of 11/4/2018 concerning the ownership dispute on plot No.149 against Jenifer Mkapesa Chuwa, in which he was informed that the occupancy given to Katela Mangachi for 33 years and his ownership had expired as the certificate of occupancy issued to him was supposed to indicate 33 years instead of 99 years, thus the office had taken step to rectify that error. That he was further notified that, the said plot was allocated to Jennifer Mkapesa Chuwa who had developed the land and was living therein. DW1 went on testifying that, if the Plaintiff was still in need of the land /plot, the Ministry was read to issue him another plot at Pemba Mnazi within Kigamboni District as his former plot was already allocated to the defendant who was notified and issued with an invoice and effected payment of the due rents and levies. The letter of notification and its invoice were tendered and admitted as exhibit D2 collectively. DW1 testified further that, the defendant paid Tshs. 83,903,944.00 to the Ministry for lands which included land rents from 20/10/2015 to 30/06/2016, registration fees, certificate of occupancy fees, deed plan fee, survey fees, stamp duty and premium and the payment receipt was tendered and admitted as Exhibit D3. Dw1 testified further that

due to the payment made, Jennifer was lawfully allocated the plot of land in dispute and had already signed the drafted certificate of right of occupancy which process was not completed due to the ownership dispute pending in this court. According to DW1 the assertion that, there was a certificate of right of occupancy for 99 years is not true as issuance of certificate of right of occupancy is preceded by issue of letters of offer and proof of payment of the due rents. He said, when the same expires it can be extended or withheld basing on the prevailing conditions at that time and in this matter he confirmed, there was no request from Katera Mshanga Mangachi for extension of his tenure of the right of occupancy, that is why the same was allocated to Jennifer Mkapesa Chuwa.

When cross examined DW1 stated that it is true that the disputed plot was mistakenly issued to tenure of 99 years and since it was so mistakenly issued the tenure cannot be revoked but rather rectified as revocation is done on the valid ownership of the plot and not the mistakenly issued certificate or right of occupancy. When asked whether the plaintiff was notified before rectification of the error she said he was notified, and that was done through exhibit D1. She said, the defendant was granted with the right of occupancy because she had proved to have developed the plot after expiry of tenure

of the late Katera Mshanga Mangachi. On re-examination DW1 stated, no action was taken by the plaintiff after the process of rectification of tenure error and that, the position of the Ministry of Land is that, the owner of the land in dispute is one Jennifer Mkapesa Chuwa.

The next defence witness was Jennifer Mkapesa Chuwa (DW2) who is residing in Nairobi Kenya hence testified virtually. She told the Court on how she acquired Plot No. 149 after formal application to the Ministry for Lands and issued with letter of offer requested her to pay necessary fees and rent to the tune of Tshs.118,900,000/= which upon discount, she paid Tshs.83,903,000/= as exhibited in exhibit DE4. She testified after payment of necessary fees a certificate of right of occupancy draft was prepared which she signed and returned to the Ministry for Lands only to be informed through letter that, there was a person who claimed ownership over the same piece of land. She said, she never met the plaintiff before and prayed this Court to dismiss the suit with costs as she was legally issued with the plot. When cross examined she stated that, the plot was applied in 2014 or 2015 and that during that time the plot was bare before she started to developing the plot by erecting structures therein the year 2016/17 and later on leased it for rent of USD 2500 per month. She said was not informed

by the Ministry for Lands that, the plot was owned by another person before. As to whether she had the certificate of title, DW2 said, it is yet to be issued to her because the plaintiff is claiming ownership over that land.

Having captured both parties' evidence, gone through the exhibits as well as serenely perused the final submissions, my duty now is to determine the parties' dispute guided by the framed issues. And in so doing, I will be trading over the principle that, he who alleges existence of any fact or claim of right must prove existence of such fact and the onus of so proving lies on the party who would lose if no evidence is adduced at all on that particular fact or claim, as provided under section 110 and 111 of the Evidence Act, [Cap. 06 R.E 2022]. Further to that, the principle of law is settled that, the standard of proof in civil matters is on the balance of probabilities. This is well stated under section 2(3) of the Evidence Act. There are plethora of authorities in support of the above settled principles of the law such as the cases of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and **Berelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (All CAT- Unreported). The above principles were lucidly summarised by Court of Appeal in the case of **Paulina Samson Ndawavya** (supra) when the Court observed that:

“It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other...”

Similarly in **Berelia Karangirangi** (supra) on burden and standard of proof in civil proceeding the Court of Appeal had this to say:

“We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove....it is similar that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.”

Before addressing the framed issues, I find it apposite to determine first the issues raised by Mr. Manyangu seemingly tend to affect the competence of this court in entertaining this matter. It was his contention that, the plaintiff has no locus sue and lacks cause of action against the defendant for failure to register with the Registrar of titles as personal legal representative of the deceased further in contravention of section 67 and 68 of the Land Registration Act, [Cap. 334 R.E 2019]. Relying on the decision of this Court in **Grace Kajumla Vs. Minister for Land and Urban Settlement and 2**

Others, Land Case No. 100 of 2004, he says before coming to this Court the plaintiff ought to have registered himself first to acquire title over the disputed property so as to entitle him with the locus to sue the defendant. The provisions of section 67 and 68 of the Land Registration Act provide and I quote:

*67. On the death of the owner of any estate or interest, his legal personal representative, **on application to the Registrar in the prescribed form and on delivering to him an office copy of the probate of the will or letters of administration to the estate of the owner, or of his appointment** under Part VIII of the Probate and Administration of Estates Act or the Fourth Schedule to the Magistrates' Courts Act **shall be entitled to be registered as owner in the place of the deceased.** (Emphasis added)*

68.-(1) No assent to the vesting of any devise or bequest of any registered estate or interest, or disposition by a legal personal representative, shall be registered unless such estate or interest is registered in the name of such legal personal representative.

(2) Every assent to the vesting of any devise or bequest of any registered estate or interest shall be in the prescribed form.

Having considered the two above provision, I think this point need not detain this court. My firm interpretation is that, registration by the Registrar of title is mandatory when the administrator of estate is seeking to retain ownership or protect any interest over the estate or property in place of the deceased. It is only done where there is no dispute of ownership over the estate or property. In this matter since there existed dispute over ownership of the suit land, there was no any possibility for Registrar to register the plaintiff as personal legal representative of the deceased before the dispute is resolve by the proper forum. That aside, having being in office as administrator of the deceased's estate which fact is not disputed, the plaintiff was responsible to collect the estate and in so doing, I hold retained his right to sue or be sued for and on behalf of the deceased. In that regard his failure to register as personal legal representative of the deceased, I hold did not affect his locus to sue the defendant in this matter. With that stance I refrain from following the position of this Court in **Grace Kajumla** (supra) as the same is not binding on me. This point therefore fails.

On the other hand Mr. Manyangu, argued that since the plaintiff's evidence relied on exhibits P2, P3 and P4 the documents which were issued before his appointment as administrator on 26/09/2019, then his testimony is a nullity

or should not be believed as all that evidence was obtained in 2018 before he had obtained his title and assumed the office as administrator of estate. While I am in agreement with Mr. Manyangu argument that, the said evidence was obtained before the plaintiff had assumed the office, I distance myself with his proposition that, the same is a nullity for being obtained illegally before assuming his office. I so hold as the reasons as to why the said documents were obtained prior to his appointment were well explained since in his first appointment by the same probate court was issued with the letters of appointment containing names of Adinani Mangachi Msuya only and in exclusion of the names Katera Mshanga Mangachi. So he was to go back to the probate court to add the names of Katera Mshanga Mangachi in the fresh letters of administration issued to him in 2019. Since there is no dispute that, he was re-appointed on 26/09/2019 and issued with fresh letters of administration carrying two names of Adinani Mangachi Msuya and Katera Mshanga Mangachi after cancellation of the first letters of administration dully issued by the same probate court, I hold the evidence in exhibits P2, P3 and P4 was legally obtained while holding the office under the first issued letters of administration. This point fails too. Having so

concluded I move on to consider and determine the issues as framed by the Court.

To start with the first issue as to who is the lawfully owner of the disputed land, the Plaintiff claims the ownership to belong to his late father since 1977 when he was granted a right of occupancy of the said land. He relied on evidence of PW1 who tendered in court the letter from the Treasury Registrar (Exhibit PE3) showing that, the Certificate of Title No. 25212 of Plot No. 149 Mbezi Beach area- Kinondoni Municipality registered in the names of Katera Mshanga Mangachi was mortgaged to NBC Bank in which the loan due amount was Tshs. 18,158,981/-. And further exhibit P4 admitted collectively which is the letter from NBC Bank to the Plaintiff annexed with the copy of title deed indicating the tenure of right of occupancy of 99 years in respect of the suit land in the same names of Katera Mshanga Mangachi. Mr. Mussa relying on the case of **Amina Maulid Ambali and 2 Others Vs. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (CAT-unreported), submits that it is the person with certificate who will always be taken to be a lawful owner of the landed property unless it is proved to the contrary that, the same was obtained illegally. He says since it is the plaintiff's father who is the holder of the certificate of title No.25212 exhibit P4 collectively as

evidenced by PW1 corroborated by PW2, an officer from the Registrar of title, and has never been revoked then, the contention by DW1 supported by PW2 that its tenure was rectified and reduced to 33 years without notice and consent of the plaintiff and in contravention of section 32(2) of Land Act and section 99(1)(c) of Land Registration Act, is unfounded in law, hence this Court should find the lawful owner is the plaintiff though Katera Mshanga Mangachi as reallocation to the defendant was illegal. To fortify his submission on the need to notify parties with interest to the property before the intended rectification is effected Mr. Mussa cited to the Court the case of **Rajabu Mikidadi Mwilima Vs. Registrar of Titles**, Misc. Land Appeal No. 67 of 2018 (HC-unreported).

On the other hand, the defendant (DW2) claims to have legally acquired the said disputed plot after being allocated in 2015 by the Ministry for Lands and pay all the necessary fees and that she was unaware that the said plot was registered in the names of Katera Mshanga Mangachi before. It was Mr. Manyangu's argument relying on the evidence DW1 supported by PW2 and exhibit D1 that, the tenure of 99 years to Katera Mshanga Mangachi was erroneously indicted in the certificate as the same was rectified and reduced to 33 years by the Commissioner for Land to reflect the tenure of 33 years

in the letter of offer with Ref. No. D/KN/A/10705/2/SMM cited in exhibit D1 and that, it expired in 2010 before the same was reallocated to the defendant. He said, through exhibit D1 the plaintiff was notified by the Commissioner for land of rectification the error in their register book of the tenure of his land as well as the Ministry's decision to grant the right of occupancy of that plot to the defendant as developer and the one residing in the said plot. He added, the plaintiff never applied for renewal of the said tenure and if he was aggrieved with such decision of Commissioner for Lands of re-allocating the plot to the defendant ought to have appealed to this Court as provided by section 102 of the Land Registration Act, but he failed to exercise such right. Thus there is no evidence to prove the plaintiff's father was the owner of the suit land, Mr. Manyangu submitted and implored this Court to dismiss the plaintiff claim with costs.

I have dispassionately considered the fighting arguments and evidence tendered by both parties in respect of who is the lawful owner of the disputed land in Plot No. 149, Mbezi Beach, Palm Street, within Kinondoni Municipality. Now the question this Court is asking is what proves ownership in landed property. In responding to this query I agree with Mr, Mussa that, it is the settled position of the law that, only the holder of the Certificate will remain

in the ownership of the landed property unless it is proved that he obtained the same fraudulently. This position of the law was adumbrated by the Court of Appeal in the case of **Amina Maulid and Others Vs. Ramadhani Juma**, Civil Appeal No.35 of 2019, where the Court observed that:

"In our considered view, when the two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

It is the law under section 40 of the Land Registration Act, [Cap. 334 R.E 2019] that, Certificate of Title shall be admissible and therefore serve as evidence on several matters contained therein such as who is the lawful owner of the property. The said section 40 of Land Registration reads thus:

"40. A certificate of title shall be admissible as evidence of the several matter therein contained."

In this case the plaintiff through PW1 tendered in Court the copy of certificate of title No.25212 in respect of Plot No. 149 Mbezi Beach, Palm Street Kinondoni Municipality with tenure of 99 year belonging to one Katera Mshanga Mangachi for being allocated to him since 12th August 1977. It is not in dispute that the said right of occupancy for 99 years has never been

revoked leave alone Mr. Manyangu's contention relying on evidence of DW1 and PW2 that, the tenure was rectified and reduced to 33 years which expired in 2010 before the same was re-allocated to the defendant for failure of the plaintiff to renew the same. I say it is so contended by Mr. Manyangu as the law under section 32(2) of the Land Act, [Cap. 113 R.E 2019] puts it in mandatory terms that, where the right of occupancy is granted to a party for a certain term, with or without an option of renewal, no reduction of such term shall be effected by the Commissioner for Lands without the agreement with the occupier. Section 99(1)(a) of the Land Registration Act, [Cap. 334 R.E 2019], provides further that, rectification of land register by the Registrar of Title shall only be made with consent of all persons interested. Section 32(2) of Land Act reads:

"(2) Where a right of occupancy has been granted for a term certain, with or without an option for a further term or terms certain, no reduction in the length of that term certain or the term or terms certain contained in the option or options shall be made to or introduced into that right of occupancy by the Commissioner without the agreement of the occupier."

And section 99(1)(c) of the Land Registration Act, provides thus:

99.-(1) Subject to any express provisions of this Act, the land register may be rectified pursuant to an order of the High Court or by the Registrar subject to an appeal to the High Court, in any of the following cases-
(c) in any case and at any time with the consent of all persons interested;

Applying the two provisions cited above to the matter at hand, it is evident to me that, before the Commission for Land could have reduced the 99 years tenure as indicated in the certificate of title exhibit D1 to 33 years ought to have notified the holder of the title. Likewise the Registrar of Title before rectifying the register to effect the 33 years after being notified by the Commissioner for Land ought also to have sought consent of the title holder. It was held by this Court in **Rajabu Mkidadi Mwilima** (supra) on the same subject that:

"...in order for the rectification to be effective, all parties with interest to the property must be notified of the intended rectification."

In this matter neither DW1 nor PW2 testified in this court to have issued the plaintiff with any notice or seek his consent before reduction of tenure from 99 years to 33 years and rectification of the land register as mandatorily put by the law. My scrutiny of exhibit D1 asserted by Mr. Manyangu to have

contained a notice to the plaintiff has proved to this Court without any grain of doubt that, the same was issued 10/07/2018 after reduction of tenure to 33 years and rectification of land register had been effected by the Commissioner for Lands and Registrar of Titles. It is from that stance I am convince that under any stretch of imagination such letter could not have constituted a notice to the plaintiff as required by the law. I do not therefore buy Mr. Manyangu's proposition that, under the circumstances the plaintiff ought to have challenged the Registrar of Titles decision to rectify the register on the reason that, he was not involved in the rectification process. Since neither of DW1 nor PW2 tendered in Court any evidence proving that the plaintiff's father right of occupancy was granted for 33 years and since the only evidence available is the Certificate of title exhibit P4 indicating the tenure of 99 years, which as per the case of **Amina Maulid Ambali and 2 Others** (supra), is the only evidence proving ownership, this court is satisfied that the lawful owner of the suit land in Katera Mshanga Mangachi. Hence the first issue is resolved in favour of the plaintiff.

Next for consideration is the second issue as to whether the deceased Adinani Magachi Msuya is the same person as Katera Mshanga Magachi. Mr. Mussa relying on the plaintiff's letters of administration exhibit P1 issued by

the probate court after being satisfied that both names were used by the deceased interchangeably and affidavit of names exhibit P2, submitted that Adinani Magachi Msuya is the same person as Ketera Mshanga Magachi as the Magistrate Court does not provide the procedure for treatment of the petition where more than one deceased names are sought to be included in the letters of administration. In response Mr. Manyangu argued that, the defendant has challenged the use of two names in the letters of administration in Probate Cause No. 320 of 2016 that issued exhibit P1 so the defendant is reserving her stance on it pending determination of the matter in that probate Court. The question which came to my mind is whether the plaintiff discharge his burden to the required standards in proving that the two names are of the same person? I find the answer to be in positive as there is no evidence tendered by the defendant to contradict the good evidence in both exhibits P1 and P2 proving that both names were used by the same person interchangeably. I so find as the probate court which is mandate to establish that the names were used by the deceased interchangeably was so satisfied before issuing a letter of administration to the plaintiff including both names. It was held in **Paulina Samson Ndawavya** (supra) *that the Court will sustain such evidence which is more*

credible that the other. In this matter it is the plaintiff evidence which is more credible and reliable hence the Court finds in his favour in this issue.

Turning to the third issue as to who developed the disputed plot i.e permanent house in the plot. In this case both parties claim to have developed the suit land. The Plaintiff claims that, his deceased father built a servant quarter in 1985 while the defendant claims also to have developed the same. The Land case being a civil case has to be proved on the balance of probabilities. As alluded to above in **Pauline Samson Ndawavya** (supra), the position of the law is that that, he who desires any court to give judgment in his favour as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts do in fact exist. In a bid to discharge that mandatory duty in proving that, it is not the defendant who developed the suit plot, PW1 relied on exhibits P6 and P7 which show a small structure that he referred to as servant quarter built by his late father in the suit property since 1985, but when shown to the Court through exhibit P7 it turned out to be in plot No. 140 instead of Plot No. 149. On the other side DW2 claims that before her development the land was bare land without any development in it, so she is the one who built a storey house, swimming pool and servant quarters therein. DW2 testimony's is

corroborated with exhibit D1 a letter from Ministry for lands to the Plaintiff where among other things the Ministry communicated to him in writings that, *it is the defendant who developed the suit land and that she was residing therein.* Not only that, but also the testimony of the Plaintiff himself persuades this court to believe that, the plot was a bare land due to the facts that when he was referred to exhibit P6 and P7 by Mr. Manyanga advocate he proved the same to have been developed by defendant. PW1 said that:

PWI- After invasion the Plaintiff erected one storey (house), servant quarters and swimming pool but I don't know when were the developments made.

It has always been the position of law in civil cases a person whose evidence is heavier than the other, is the one who must win. See the case of **Hemed Said Vs. Mohamed Mbilu** (1984) TLR 113. With that position in mind, I find that the Plaintiff's evidence towards development made in the disputed plot which is just a picture of a small house (exhibit P6) without any other supporting evidence as to whether the same was built by his father, when compared to the defendant evidence that, she is the one who built a permanent house in the suit plot, is outweighed by defendant's evidence. This Court therefore finds that, the defence side evidence is heavier than

that of plaintiff's side on this issue henceforth, the third issue is answered favour of the defendant.

I now move to the fourth issue as to whether the Plaintiff suffered specific damages to the tune of Tshs.121,500,000/=. It is the law that specific damage must be specifically pleaded and strictly proved. See the cases of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 (CAT), **Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi**, Civil Appeal No. 39 of 2009 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (all CAT-unreported). It was stated in **Reliance Insurance Company (T) Ltd and 2 Others** (supra) that:

"The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved..."

In this matter under paragraph 16 of the plaint, the plaintiff particularised the said specific damages as follows:

Loss of mesne profit at an average rate of TZS 1,500,000/= per month from August, 2013 when the plaintiff's father died.
Thus 6 years x 12 months = 72 months x 1,500,000/=108,000,000/= plus 9 months X 1500,000/=12,000,000/=

In answering the this issue it is my firm view that, the same need not to detain this court much as there is no evidence which was adduced by the plaintiff's proving to this Court on the balance of probabilities that he is entitled to such mesne profit. Apart from the evidence that the defendant was occupying the suit land unlawfully the plaintiff lead no evidence in court proving that the defendant obtained profit out of that unlawful possession of the suit land. No evidence was tendered by him proving how much was earned by the defendant out of leasing the house built in the suit premises/land, hence lack of proof that the defendant obtained advantage or profit to the tune of claimed Tshs. Tshs.121,500,000/= as pleaded and itemised. It was stated by this court in the case **of Rex Investment Limited Vs. CF Builders Ltd**, Land Case No. 19 OF 2018 , that;

"For the plaintiff/claimant to successful claim for mesne profit two conditions must established. One, that the defendant was in wrongful occupation or possession of the immovable property under contest. Second, that unlawful occupant obtained profits with or without interests out of such wrong possession or occupation of the property."

Applying the principle in the above cited case in this matter, it is my finding that the plaintiff managed to prove the first condition only but failed to

exhibit to the court that the defendant obtained profit to the tune of Tshs. Tshs.121,500,000/=. Since under the cases of **Masolele General Agencies** (supra) and **Reliance Insurance Company (T) Ltd and 2 Others** (supra) specific damage has to be strictly proved and since the plaintiff has failed to discharge that duty, I hold the fourth issue is answered in negative. As regard to general damages, I also hold there is no material evidence adduced by the plaintiff to assist this court grant him general damages as prayed.

With the above findings, I move to the last issue as what reliefs are the parties entitled to. This issue is not difficult to answer. In view of what has been discussed and decided herein above it is obvious that, the plaintiff has managed to prove his case to the required standard which is on the balance of probabilities the first and second issues only. In the circumstances this court enters judgment in favour of the plaintiff on the following:

1. It is declared that, the suit plot No. 149, Mbezi Beach, Palm Street with Certificate of Title No. 25212 belongs to the late **Katera Mshanga Mangachi**.
2. Costs of the suit be paid by the defendant.

The rest of the plaintiff's claims are hereby dismissed.

It is so ordered.

DATED at Dar es Salaam this 26th day of August, 2022.



E. E. KAKOLAKI

JUDGE

26/08/2022.

The Judgment has been delivered at Dar es Salaam today 26th day of August, 2022 in the presence of Mr. Burhan Mussa assisted by Sakib Ahmad, advocates for the Plaintiff, Mr. Cleoplace Manyangu, advocate for the Defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

26/08/2022.