

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT TABORA**

DISTRICT REGISTRY

CONSOLIDATED LAND CASE No. 24, 25, 26, 27 of 2017 and 6 of 2018

SHEKI SAID KAGOMA & 20 OTHERS..... PLAINTIFFS

VERSUS

1. RELI ASSETS HOLDING COMPANY

LTD (RAHCO)

2. TABORA MUNICIPAL COUNCIL

.....DEFENDANTS

JUDGMENT

Date: 9/8/2022 & 7/10/2022

BAHATI SALEMA, J.:

The plaintiffs in this consolidated Land Case No. 24, 25, 26, 27 of 2017 and No. 6 of 2018 instituted a case against the defendants in this court. The disputes originated from RELI ASSETS HOLDING COMPANY LIMITED (RAHCO) issuing a 30 days notice and marking 'X' on the 82 plaintiffs' houses requiring the respondent to demolish the structures erected on the defendant's land. The plaintiffs believing that they are the lawful owners of the disputed land instituted a suit against the defendants seeking judgment and decree on the following;

- i. *A declaratory order that each of the Plaintiffs is the lawful owner of his/her residential house appearing in the plot against his/her name as per **annexure P1 to the Plaint.***
- ii. *A court's order restraining the Defendants' its workmen, servants, agents, assigns and whosoever will be acting through them from interfering with the Plaintiff's peaceful enjoyment of their residential houses.*
- iii. *Payment of general damages as will be assessed by the honourable Court.*
- iv. *In the alternative, the Court be pleased to order compensation to each Plaintiff upon evaluation of each respective land and estate thereon.*
- v. *Costs of this suit be provided for.*
- vi. *Any other relief (s) and/or order(s) this Court may deem just and equitable to grant.*

Upon completion of the filing of pleadings and in a bid to resolve the dispute, the following issues were agreed and framed for determination by this Court;

- i. *Whether the plaintiffs are the lawful owners of the disputed land.*
- ii. *Whether the plaintiffs lawfully developed the disputed land.*

- iii. *Whether there was a reallocation of the disputed land to the 1st defendant*
- iv. *To what other relief parties are entitled?*

At the hearing, the plaintiffs were represented by Mr. Emmanuel Musyani, Ms. Esther Mchele and Ms. Christina Jackson, learned counsels whereas the defendants were represented by Mr. Lameck Merumba, Senior State Attorney and Severine Lubamba, State Attorney.

According to the order made by this court, the plaintiffs filed a representative authority and appointed Mr. Bandora S Mirambo, Ms. Judith Humphrey Kileo, Mr. Nzali Shamsengi and Mr. Elimbizi Kimonge to appear and act for all plaintiffs in this case.

Before embarking on this matter, it is pertinent to narrate a brief factual background of the case as gathered from the pleadings; that the plaintiffs' claim against the defendants jointly is for the court declaratory order that the plaintiffs are the lawful owners of those respective residential houses on a surveyed piece of land described as Plots Nos.588, 461, 471, 483,494, 465, 490, 489, 457, 492,503, 546, 556, 582,486, 545, 555, 576, 557,577, 602 and 604 all being located at Block "D" Isevyu Majarubani area in the Municipality of Tabora region. That

the plaintiffs are the lawful owners and occupiers of the surveyed land located at Block "D" upon being lawfully allocated the said plots by the Tabora Municipal Council and having complied with all procedures of acquiring land including paying land rents, property taxes and all other necessary fees as required by law.

On the 27th August, 2017 the 1st defendant claimed to be the owner of land that piece of land comprising the plaintiffs' residential houses and issued a 30 days notice to each of the plaintiffs to demolish his/her residential house on the allegation that the said houses were built on an area belonging to the 1st defendant and alleged to be a railway strip according to the Railway Act, No 4 of 2002. Further, if failure by the plaintiffs to demolish the said houses within the given 30 days, the defendant would demolish them without further notice. That the cause of action arose at the plaintiffs' premises at Isevyu Majarubani area within Tabora and the estimated value is above two billion shillings (TZS 2,000,000,000/=) = well within the jurisdiction of this court.

Having narrated the brief facts of this matter, I will now proceed to determine and evaluate the evidence adduced by the witnesses to determine and make a decision thereof.

In what seemed to be highly contested, the plaintiffs under the representative authority called three witnesses: PW1, Bandora Salum Mirambo; PW2, Judith Humphrey Kileo and PW3, Elimbizi Kimonge to prove their claims.

PW1, Bandora Salum Mirambo informed the court that he lives at Isevya Majarubani and he represents 83 residents of Isevya. Some of them are retirees, businessmen and peasants who have been living in the disputed area for almost 20 years and have unexhausted improvements therein. He went further testifying that they are legal residents of Isevya Majarubani and they have exhibits. Some of them had an offer and some certificates of the right of occupancy. He further testified that the disputed area is Block "D" Isevya Majarubani with Plots. Nos. 450 – 602 and that Block D was surveyed by Tabora Municipal Council which granted them the said plots. He also tendered a map from the Municipal Council which was admitted as Exhibit "P1". He further testified that they have been paying land rents and the Municipal council recognizes them as lawful owners. PW1 also tendered the offer letters on behalf of the plaintiffs which were admitted for identification purposes. The certificate of title of Magoiga Nyakiha as "ID1, Joseph Kilawe, "ID2" and Chiku Shaban "ID3" respectively. Further, certificates of occupancy for other plots No. 483, 497, 583,607,562, 494, 499, 556, 610, 612, 498, 479,614,613, and 615 were collectively admitted as exhibits "P2".

PW1 further testified that having received the right of occupancy, they made a follow-up for the building permits and they received a map that was approved and paid fees at the municipal council. PW1 also tendered the building permit, land rent and property tax receipt of Bandora Mirambo; Patrick Peter Mbaga and Michael Bitakwa which were collectively admitted as exhibits "P2" and P3" respectively.

He further testified that on 12th May 2017, the plaintiffs received a 30 days notice eviction from RAHCO which was again tendered in this court and admitted as exhibit "P4". Following the said 30 days' notice, the plaintiffs gathered and nominated Shekhi Kagoma who is now deceased as the leader who could represent them to the Municipal Council. PW1 tendered a letter to the Municipal Director dated 16/3/2020 which was admitted as exhibit "P5".

Besides, PW1 testified that after receiving such notice, some people could not bear the effect and some of them died of shock and distress since many were retirees and had resided in the disputed area for almost 20 years. Following the notice, he stated that there was no new development made at Isevy Majarubani and the value of their land depreciated even at the financial institutions they could not secure loans.

PW1 advanced more that from the beginning of the acquisition of the land in dispute they all observed procedures and they have never invaded the rail strips. He also stated that the distance to the rail is far about 500 or 600 meters and there is also a road passing through the railway and they are still far from that road and the reserve. He testified that from the road it is about 200 meters to allow extension of the road. He concluded by praying for this court to declare them as lawful residents of Majarubani and beckoned the court that RAHCO should not interfere with the residents and compensation thereto.

On cross-examination, he stated that Sheki Kagoma died in May 2021 and the notice was given in 2017, however, Mama Mnene died of stress and pressure. PW1 stated that he has two plots Nos. 499 and 498 which have been affected but the certificate of titles No. 497 and 499 were not there. He presented the Right of occupancy of Mkailawe's, Bandora, Aloyce Ndamukama, Michael Bitakwa, Eliyapenda Wilberd Seif Mohamed, Agness Nyabu Gumba, Ally Kondo, Mzee Ally Kondo, Evelyn David, Mana Ally Ramadhan. Fundikira, Nzali, M. Chamsenga, Joseph Kilawe, Omary A. Mahenge and Judith Kilewo.

In re-examination, he stated that they were given a plan by Municipal Director through the land department.

PW2 Judith Humphrey Kileo, who is a teacher and an entrepreneur, testified to this court that she is representing 83 residents of Isevy

Majorubani plot No.405 - No. 620. She testified that they have lived in the disputed land for almost 20 years and what prompted her to appear in court is a notice received in May, 2017 directing them to vacate the disputed land. She further testified that after receiving the said notice, they organized a meeting and chose Sheki Kagoma who is now deceased to represent them. Sheki Kagoma made a follow-up to the Town Planning at the Municipal Director's office who contacted RAHCO. The Municipal Director inspected the land titles and after assessment, about 71 certificates of titles (CT) among 83 were seen to be lawfully acquired and advised them to institute a case. She testified that the block was surveyed by the Director of Municipal Tabora who offered them the Right of occupancy, offer letter and building permits. She further testified that they have been paying property tax for a long time and also tendered 30 Certificates of titles Rights of Occupancy and among them 26 certificates of titles were admitted as exhibit "P6" while the photocopy of the offer of Chiku Shaban was admitted for identification purposes only as "ID3". Some of the documents of Joseph Michael Ntwali, Jackeline Suwetu and Zuhura Mohamed were rejected.

In her further testimony, she stated that, once the "X" notice was placed on their houses for fear of losing their properties some of them died of pressure for instance; Mama Fatuma, Mary, Munene, Kilawe and Sheki Kagoma died of stroke also the tenants left the place at the same time

they have not been able to secure bank loans due to depreciation of the house in dispute. She testified that they are not within the railway. Moreover, she said that there was a road passing through and it is 500 meters from the railway. She then prayed to this court to declare Isevy Area Block "D" as theirs and also prayed for costs.

During cross-examination, she stated that letter offer No.606 has expired. She was not there where Block "D" was surveyed. The disputed land belonged to the railway until it was surveyed by the Municipal which is almost 83 plots. The block started at No. 450 to 620.

In re-examination, she stated that since it was a representative suit some of the documents had already been tendered by other plaintiffs and admitted in this court.

PW3 was Elimbizi Elieka Kimonge who introduced himself as a businessman and testified to this court as a representative of 81 residents of Isevy. He stated that they were given offer letters and Certificate of titles Right of occupancy by the Municipal Council for the ownership of Block "D", Isevy. The Municipal Director surveyed the disputed area and allocated the disputed land. This witness also tendered 18 exhibits which comprised of letter offer and right of occupancy of Michael Lutego, Maria Fungo Rasma, Yusuph Mwilima, Fatuma Ramadhani, Zena Feruzi, Damas Njige, Joseph Ntwale, Raymond G. Kabuguzi Felician Paschal Gindu, Dominic Kuhanga, Hasan M. Bitaliwa

Kilawe, Ally Ramadhani Fundikra, Magoija Nyahihe, Maiko M. Lutego and Maria Fungo Rasmi. Some of the documents were admitted as Exhibits "P7" collectively while the ownership documents of Halima Maziku, Wiston Eliya Byamungu and Paulo Songati were admitted for identification purposes as Exhibits "ID4".

He further testified and tendered 9 building permits related to Yusuph Mwilima, Halima Maziku Ndaki, Felician Gindu, Hassan Bitalilo, Charles Kilawe, Ally Fundikira, Agnes Nyabigumba and Wiston Byamunju which were admitted collectively as Exhibit "P8". He also tendered 14 payment receipts belonging to Yusuph Milims, Halima Mdaki, Fatuma Kayola, Zarina Feruzi, Exand Nko, Julieth Mchuruza, Paulo Songanti, Felister Mgindu, Dominic Kuhena, Joseph Kilala, Ali Fundikira, Magoiga Nyakihe, Maria Fungo and Michael Lutego which were admitted and collectively marked as Exhibit "P9".

Like the other plaintiffs, he testified that they received a notice in 2017 when TRC placed X on the houses where they were lawfully residing. He stated that they have been affected by the notice due to fear of destruction and thus they have failed to develop the area and had not been able to contract out their premises due to bad conditions; also they have been affected psychologically. He stated that they had been at Block "D" Isevyu for almost 20 years and had never built within the

railway. He prayed to the court to declare them lawfully owners of Block "D" Isevyu.

During cross-examination, he stated that he had not prepared any estimation for the properties but for him, the value is more than two hundred million and prayed for compensation as he has been psychologically affected. He stated that before being offered the disputed suit, it was owned by the Municipal Council. He did not tender his documents since his title deed was mortgaged to secure a loan in the bank. The Plaintiffs closed their case.

On the other hand, the defence was premised on the sole testimony of DW1. **DW1, Adonia Stephano Mmanya** who introduced himself as an Estate Officer from TRC. He informed the court that his duty is to manage and administer TRC properties. He testified that while TRC was inspecting its boundaries and assets noted that the plaintiffs had encroached on the TRC area. Following that, the TRC gave the plaintiffs 30 days' notice to vacate the place. He added that he is conversant with the boundaries of TRC and its area which has a map showing signs and marks. He stated that the signs and marks were removed by the plaintiffs. He stated that the boundaries at Isevyu Majarubani are well known by the Municipal Council and other institutions. He further said that there are many procedures for acquiring land either through buying

that there are many procedures for acquiring land either through buying from a person or the Municipal. He went further testifying that TRC law prohibits encroachment. He said that TRC has residential, workshops and recreation areas. These are 100 meters from where the railway is. He further testified that the railway's reserved areas used for operational purposes have neither been surrendered to the second defendant nor the plaintiffs.

He testified that the TRC owned the suit land since it constructed its railway in 1925 in Tabora. He stated that the notice was given to the plaintiffs to vacate following the invasion and he did not know how they acquired the disputed land. He further said that as TRC, the Municipal Council never asked in respect of those areas. He testified that the second defendant could not survey and re-allocate the land to the plaintiffs without consulting the first defendant the owner. The Municipal Council does not have any title of ownership. They can only grant it after getting consent from the owner (TRC). He testified that the Railway (TRC) is the rightful owner since 1925 and that the Municipal Council was supposed to notify them and pay compensation to TRC before granting it to another institution or the public. He admitted that TRC has wide areas which have no title but they have marks, signs, and boundaries for proof of identity.

He also testified that the road which cut across the rail was the property of TRC but was acquired by TANROAD after it made compensation to TRC.

During cross-examination, DW1 stated that according to the Germany Report, the area was acquired in 1925 and the natives were compensated. TRC had been there since the British and German eras. He stated that the Municipal Council recognized TRC areas through TRC Map. He stated further that the road was within the TRC but following the TANROAD arrangement compensation was made in 2016. He testified that the law requires right of way 30 meters reserve and plaintiffs are within the yard. He stated that as TRC, they do not recognize offers from the Municipal council since the TRC has its plan and TRC Map.

In re-examination, he stated that TRC was not consulted by the Municipal during the process of acquiring land and he had never seen a registered map. As TRC they do not have the certificate but now they have started drawing maps in some areas. He stated that having a certificate does not mean they are lawful owners since it was improperly procured and the area is reserved for TRC. The reserve on the railway lane is 30 meters on each side. He stated that the 60 meters do not apply to station yards, staff quarters, workshops and recreational centers. The defence case was closed after the testimony of DW1.

After closing the defence case. Both parties sought and obtained leave to file their closing submissions which were subsequently filed in accordance with the schedule as ordered by this court.

Having heard from both sides and read from the final submissions made by both counsels; this court will determine the issues agreed upon during the final Pre-Trial Conference. I shall accordingly respect and carefully consider the parties' final submissions in the course of determining each issue.

Before determining the matter at once, I have to decide on the issue raised by the defendant's counsel on his final submission that the representative authority filed on 3rd March, 2022 under Order 1 Rule 12(1)(2) of the Civil Procedure Code, Cap.33[R.E 2019] only permit a person to act and represent another person but not to sue and testify in place of another.

As correctly submitted by the learned Senior State Attorney. Order 1 Rule 12 (1) of the Civil Procedure Code, Cap.33 [R.E 2019] provides that;

"Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in the like manner, where there are more defendants than one, any one or more of them may be

authorized by any other of them to appear, plead or act for such other in any proceeding."

I understand that the section only permits a person to act and represent another person. It is indeed true on 09/02/2022 four plaintiffs namely Bandora Mirambo, Judith Kileo, Nzali Shamsengi and Elimbizi Kimonge were appointed under Order 1 Rule 12(1) and (2) of the Civil Procedure Code, Cap. 33 [R.E. 2019] to plead and appear on behalf of 83 plaintiffs.

Although the order provides so, I would not be curtailed by this issue only if the plaintiffs' evidence has established the ownership claimed to the balance of probability.

Beginning with the *first issue on whether the plaintiffs are the lawful owner of the disputed land.*

Having narrated the evidence by the parties herein and having gone through the final submissions made by counsels, I will now endeavour to consider the issues agreed upon and recorded and I shall be guided by the principle that he who alleges is the one responsible to prove his allegations in **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported). This principle has been encompassed in sections 110 (1) (2) and 112 of the Law of Evidence Act, Cap.6.

According to the oral evidence of PW1, Bandora Mirambo and the documents submitted and collectively admitted as exhibits P1 and P2, PW1 managed to tender the map from the Municipal council, certificate of title in respect of plots No.607, 494, 610, 612, 614, 583, 613,498, 556, 499, 483, 562, 479,497 and they were collectively admitted. PW1 also tendered the building permit, land rent, property tax receipt and notice to vacate as exhibits "P2", "P3", and "P4" respectively. Also, a letter dated 16/3/2020 by one plaintiff in respect of ownership was addressed to the Municipal Director as exhibit 'P5'.

The evidence of PW2 clearly shows that the plaintiffs have been paying property tax for a long time and also she tendered 26 certificates of titles which were admitted as exhibit "P6" and equally PW3, tendered 18 exhibits which comprised a letter of offer and Right of occupancies which were also admitted as Exhibit "P7" and 9 building permits which were collectively admitted as exhibit "P8". Also, payment receipts were admitted collectively as "P9".

Therefore, all exhibits admitted in this court revealed that the plaintiffs are lawful owners of the disputed land. As it is on record that a sketch map prepared by the Director of survey and mapping of the Ministry of Lands, Housing and Human Settlement Development, also P2, P3, P4, P6, P7 and P9 respectively which are the letter of offers, building permits,

property tax receipts and land rent receipts were prepared and approved by the Government.

As to the defence, the evidence of DW1 is that the 1st defendant, Reli Assets Holding Company Limited (RAHCO) is a rightful owner since 1925 during the construction of Tabora Railway line (Dar salaam -Kigoma line). Nevertheless, DW1 did not tender any document apart from his oral submissions.

I have gone through the evidence of the 1st defendant who claimed that they occupied the disputed land from 1925 unfortunately; there is no other evidence to back up their claim. In absence of any other documentary evidence to prove her ownership, how does the court believe to its satisfaction that the first defendant is the lawful owner of the disputed land?

I am alive of the cherished principle that a person whose name is registered and a certificate of title (Right of Occupancy) is issued in his or her name is the one who is the lawful owner of the land so registered whenever there is a dispute between two persons over the same property. This position has been consistently stressed in various judicial decisions. In the case of **Salum Mateyo v. Mohamed Mathayo** (1987) TLR 111 it was held inter- alia, that;

"It seems to me that in law, the appellant in whose name the suit premises were registered was the owner. I am fortified in this view by section 2 of the Land Registration Ordinance, Chapter.334 which defines "owner" in relation to any estate or interest as the person for the time being in whose name the estate or interest is registered."

Besides the decision of the Court of Appeal in **Amina Maulid Ambali & 2 Others vs. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (unreported) and **Sofia Mohamed vs. Joshua Joyboy Mungereza and Joseph Mungereza**, Land Case No. 124 of 2019 (unreported) cited by the learned counsel for the plaintiffs where this court held that,

"Any presentation of registered interest in land is prima facie evidence that the person so registered is the lawful owner. "

Equally, this was further cemented in the case of **Hemed Said vs. Mohamed Mbilu** (1984) TLR 113, it was held that;

"According to the 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."

Based on the above authorities, I am made to believe in that the plaintiffs' ownership would not be questionable or undefeated if they

procedurally obtained the certificates of titles since the 1st defendant failed to produce any document to substantiate the same. In absence of such evidence, it would entail a conclusion that the plaintiffs are the authentic holders of the disputed land.

The second issue is *whether the plaintiffs lawfully developed the disputed land.*

According to the evidence of PW1 and PW3 upon being granted the right of occupancy and offers made follow-up for building permits which were issued by Tabora Municipal Council and were admitted as exhibits "P3" and "P8" respectively.

To counter the plaintiffs' evidence, DW1 stated that since there was no re-allocation of the said land, the plaintiffs unlawfully developed the disputed land. Equally, in his final submission, the counsel for the defendants argued that PW2 and PW3 never tendered any building permit, planning consent, inspection form receipt for building permit fee, approved drawings, and occupation certificate. Hence the development made by the plaintiffs to the disputed land was not sanctioned according to Regulations 124(1)a,b,c and 130, 139(1) (a) and 141 of the Local Government (Urban Authorities (Development Control) Regulations, 2008 as stated in **Director Moshi Municipal Council V Stanlenard Mnesi**, Civil Appeal No. 246 of 2017 (unreported).

Having examined the evidence on record, as stated earlier, PW1 and PW3 tendered the building permits which were admitted by this court as "P3" and "P8" respectively. Given the testimony of the plaintiffs and legal position, it is my considered view that the plaintiffs lawfully developed the disputed land since they had all relevant documents including; a building permit, property tax receipts, and land rent receipts which were admitted as exhibits "P2", "P3", "P8" and "P9" authorized from the relevant authorities.

As contended by the defendant's counsel that no evidence that the plaintiff sought and obtained building permits to build on the disputed land as required by section 28(a) of the Urban Planning Act of 2007 read together with Regulation 124(1)(c) of the Local Government(Urban Authorities) (Development Control),2008.

I subscribe to the principle that, any erect or building activities done without sanction from the Authority, are as good as no building in law. The legal requirement is echoed from Regulations 124(1) (a), (b) and (c), 130, 139 (1) (a) and 141 of the Local Government (Urban Authorities) (Development Control) Regulations, 2008. In **Director Moshi Municipal Council v Stan Lenard Mnesi**, Civil Appeal No. 246 of 2017 CAT Arusha (unreported), the Court of Appeal confirmed the legal position provided under Regulations 124, 139 of the Local Government (Urban Authorities)

(Development Control) Regulations, 2008 and section 35 Town and County Planning Act Cap, 355 [R.E. 2019].

In a civil suit, the standard of proof is on the balance of probabilities. Considering both oral and documentary evidence adduced by the Plaintiffs I am persuaded by the testimonies adduced by the PW1 and PW3, save for the plaintiffs who tendered the building permit lawfully developed the disputed land.

I find this issue will be answered partly in the affirmative since other plaintiffs managed to tender the authorization while others did not manage to tender building permits.

As to the third issue: whether there was a re-allocation of the disputed land to the 1st defendant.

As noted from the oral testimonies of PW1, PW2 and PW3. The trio testified to this court that they have owned the land lawfully from the Municipal Council since 1992 and formalized the ownership.

On the contrary, DW1 testified that the 1st defendant owned the disputed land from 1925 ever since it has been in occupation of the disputed land and they have never allocated to any institution. The defendant through his oral evidence and final submission established to the satisfaction of this court that he acquired the disputed land which was acquired from the natives during the colonial period by then the East

African Railways and Harbours(Tanganyika section) now Tanzania Railway Corporation.

Having analyzed the evidence from both parties, the entire evidence of PW1, PW2 and PW3 has failed to discharge their duty of proving the re-allocation of the disputed land to the 1st defendant TRC.

Nevertheless, after careful perusal of the court records, it is my considered view that since the plaintiffs alleged that they were allocated the land by the Municipal Council who is the second defendant in this case and managed to prove their ownership, the second defendant, Tabora Municipal through exhibit "P5" which comprised of a letter from Municipal Director dated 16.03.2021 addressed to one of the Plaintiffs (Shecki Kagoma) and who was the leader of all the plaintiffs, a letter by plaintiff representative addressed to Municipal Director and the letter by Municipal Director addressed to Managing Director of TRC, the 1st Defendant.

I find that the burden of proof shifts to the 2nd defendant, in particular, to prove whether the land allocated and formalized was re-located or not. It is very clear that to completely and exhaustively resolve the dispute between the parties, a lot more information was needed not from the plaintiffs' side but from Tabora Municipal Council, the official land authority that granted title to the plaintiffs. Since the Attorney General represented the second defendant who is alleged to have

granted the disputed land, the Municipal was in a better place to address this issue but the 2nd defendant could not appear and testify before the court.

Hence I find that it is high time for Tabora Municipal Council which allocated the disputed land to the plaintiffs to show whether it revoked or legally acquired the disputed area and surveyed it for the public instead of disturbing the plaintiffs. Failure to call such material witnesses who were within reach, the impression is that if they were summoned they would have given evidence adverse to the 1st defendant as was well stated in the case of **Hemed Said vs. Mohamed Mbilu** (*supra*). Similarly the Court of Appeal in the case of **Lutter S. Nelson vs. Attorney General and Another** [2000] TLR. 419 on page 435, CAT. This defect, the court held, created some doubts. Likewise, as in this case, this court will draw an adverse inference from the defendant for failure to call such a witness.

It is my considered view that the plaintiffs as a third party are not bound to know whether the 2nd defendant which is a Municipal Council that falls under the same umbrella "government" ever consulted the 1st defendant (TRC) in the process of surveying and ultimately allocation.

Therefore, I hold that view in the affirmative since there was no proof from the 2nd defendant that there was a re-allocation of the disputed land to the first defendant.

As to the fourth issue the court is called upon to decide on ***what relief parties are entitled to.***

This court holds that since the court is satisfied that there is abundant evidence that plaintiffs are the lawful owner of the land in dispute, they are entitled to a declaration of the lawful owner of the land only for those plaintiffs who managed to prove after tendering the certificate of occupancy and letter offers.

In the upshot, the plaintiffs' suit partly succeeds, I hereby make the following orders;

- i. ExhibitP2:Plot483,497,583,607,562,494,499,555,556,610,612,489, 479,614,613 and 615
- ii. Exhibit.P6:Plot,606,492,475,613,576,564,579,586,463,477,570,504,471,557,473,486,498,561,605,554,496,461,577,578 and 584.
- iii. ExhibitP7Plot:459,552,495,563,467,545,488,568,585,602,582,565, 609,590,589 are declared to be lawful owners of their respective suit properties since they are substantiated.
- iv. Restraining the defendants' workmen, servants, agents, assigns and whosoever will be acting through them from interfering with the Plaintiff's peaceful enjoyment of their residential houses;
- v. As to the general damages, none of the plaintiffs adduced evidence to prove general damage besides the oral testimonies of the plaintiffs, it cannot stand.

vi. In the alternative, compensation to each Plaintiff upon evaluation of each respective land and estate thereon.

Given the circumstances of this case, each party shall bear its costs.

Order accordingly.

Court: Judgment delivered under my hand and seal of the Court in the Chamber, this 7th day of October, 2022 in presence of Esther Mchele and Christina Jackson via virtual court.



A. BAHATI SALEMA

JUDGE

7/10/2022

Right to Appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

7/10/2022