

**IN THE HIGH COURT OF TANZANIA
(IN THE SUB-REGISTRY OF MWANZA)**

AT MWANZA

MISC. LAND CAUSE NO. 04 OF 2023

OMBENI SHILEENDWA SWAI.....APPLICANT

VERSUS

ABDULKHIM ALLY SAID.....RESPONDENT

RULING

Date of Last Order 16/03/2023

Date of Ruling: 31/03/2023

Kamana, J:

Ombeni Shileendwa Swai, the Applicant has approached this Court under section 37(2) of the Land Registration Act, Cap.334 [RE.2019] and sections 68(e) and 95 of the Civil Procedure Code, Cap. 33 [RE.2019]. In the application, the Applicant beseeches this Court to summon Abdulkhim Ally Said, the Respondent, to show cause why Certificate of Title No. 033027/5 should not be produced to the Assistant Registrar of Titles in the Mwanza Registry. The application is supported by an affidavit sworn by the Applicant.

The facts that led to this Cause, albeit briefly, were that the Respondent was a party to a PC Matrimonial Appeal No. 21 of 2020 which was decided by this Court as a second appellate Court. In the said

appeal, it was ordered that the matrimonial house under the above-mentioned Certificate of Title be divided at the ratio of eighty percent to twenty percent whereby the Respondent was to get eighty percent. Following that decision, Mwanza Urban Primary Court which was the trial Court in the matrimonial case organized a public auction over the said house. The Applicant emerged as the highest bidder and paid the purchase price to the court's accounts.

Consequently, the said trial Court ordered the Assistant Registrar of Titles to effect the transfer of the said property from the Respondent to the Applicant. To cut the long story short, the said transfer could not be effected due to the alleged refusal of the Respondent to surrender the Certificate of Title, hence this application.

The Applicant in his affidavit averred to have been informed by the Assistant Registrar through a letter with Reference No. LR/MWZ/T/033027/5/26 that he ordered the Respondent to produce to her the Certificate of Title No. 033027/5 but the Respondent did not comply with the order. The Applicant stated that through that letter, he was directed by the Assistant Registrar to seek the intervention of this Court under section 37(2) of the Land Registration Act.

Countering in his affidavit, the Respondent denied having received the letter from the Assistant Registrar of Titles directing him to produce the Certificate of Title. He contended further that he is not in possession of the Certificate in question as the same was lost. He averred that the said loss was reported to the Police on the 8th December, 2022.

The application was disposed of by way of written submission. The Applicant was advocated by Mr. Silas John, learned Counsel. Mr. Anthony Nasimire, learned Counsel represented the Respondent.

For the purpose of this Ruling, I will focus to determine whether the provisions of section 37(2) of the Land Registration Act were properly invoked by the Applicant. Subsection (2) of section 37 provides:

'(2) Where any person refuses or neglects to comply with any such notice as aforesaid, the Registrar or any interested person may apply to the High Court, for an order summoning such person to show cause why the certificate of title should not be produced to the Registrar and upon the appearance before the High Court of any person so summoned, the High Court may make such order as it thinks fit.'

For the provisions of subsection (2) of section 37 to be invoked, as a precondition, the provisions of subsection (1) of that section must be complied with. Subsection (1) vests in the Registrar of Titles powers to

require any person in possession of the Certificate of Title to produce it to him for endorsement or cancellation. The subsection reads:

'(1) The Registrar may, at any time, give notice in writing to any person whom he believes to be in possession of a certificate of title requiring such person to produce the same for endorsement of or cancellation within the period named in such notice, not being less than fourteen days from the date thereof, and any such notice shall state the reason why the production of such certificate of title is required.'

That being the position of the law, for the Applicant to invoke the provisions of section 37(2), he is under an obligation to prove that the Registrar of Titles has already exercised his powers under section 37(1) by requiring the Respondent to produce to him the Certificate of Title in question and that the Respondent had refused to produce.

In his affidavit, the Applicant contended that he had been informed by the Assistant Registrar of Titles that the Respondent, by virtue of section 37(1) of the Land Registration Act, was ordered to produce the Certificate to him but he had refused. Further, during his submission, Mr. John, learned Counsel for the Applicant contended that the order of the Assistant Registrar was sent to the Respondent through

his registered post address. The learned Counsel reasoned that since section 110(1)(c) of the Land Registration Act provides that the proof of service of a notice under the Act is established when the notice is sent by registered post to the last known address, the Respondent is bound by such notice despite his allegation that he did not receive the notice to produce the Certificate.

In his reply, Mr. Nasimire contended that the Respondent was not served with a notice to produce the Certificate as contended by the Applicant. The learned Counsel submitted that the Applicant did not adduce any evidence relating to the posting of that order to the address of the Respondent. He further submitted that the alleged notice of the Registrar was not part of the annexures to the affidavit deposed by the Applicant.

Rejoining, Mr. John, learned Counsel was brief. He reiterated his position that the notice issued by the Registrar was sent to the Respondent and by virtue of section 110(1)(c) of the Land Registration Act, the same is considered to have reached the Respondent.

Having gone through the rival arguments, affidavits of both parties and their submissions, it is my considered view that this application is

premature before me. In other words, the provisions of section 37(2) were invoked without complying with the requirements of section 37(1). I hold so for some reason.

One, despite the letter with Ref. LR/MWZ/T/033027/5/26 to state that the Respondent was issued with a notice to produce, no evidence convinces me that the said notice was issued to the Respondent. In the circumstances of this case, I would expect the Applicant to annex a copy of the issued notice. In the absence of the said copy, I draw an adverse inference against the Applicant that the said notice was not issued.

Two, in his submission, the learned Counsel for the Respondent tried to impress me with the provisions of section 110(1) (c) of the Land Registration Act that the notice was served to the last address of the Respondent and that the same is considered to have been received by the Respondent. I do not agree with exposition. Again, in the circumstances of this case, proof of service was supposed to be annexed to the affidavit for this contention to hold water. Similarly, I draw an adverse inference against the Applicant that the said notice was not posted to the Respondent.

It is a cardinal principle in civil proceedings enshrined in section 110 of the Tanzania Evidence Act, Cap.6 [RE.2019] that whoever alleges must prove his allegations. The standard of proof required in a case like this one is on the balance of probability. See **Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020.

Since, the Applicant was under the obligation to prove that the notice to produce the Certificate of Title was issued to the Respondent and considering that I have formed an opinion that he has failed to prove that the notice was issued to the Respondent in terms of section 37(1) of the Land Registration Act, it my conviction that the Applicant has failed considerably to prove his case on the balance of probability. Given that, I dismiss this application with costs. Order accordingly.

Right to Appeal Explained.

DATED at **MWANZA** this 31st day of March, 2023.



A handwritten signature in blue ink, appearing to read "KS Kamana". The signature is fluid and cursive, with a large initial "K" and a long horizontal stroke at the end.

KS KAMANA

JUDGE