

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LAND CASE NO. 24 OF 2021

MWITA RAPHAEL MASAGA PLAINTIFF

VERSUS

PETER ELIAS MWITA1ST DEFENDANT

DAUDI CHIMANI SAMWEL.....2ND DEFENDANT

ILEMELA MUNICIPAL COUNCIL.....3RD DEFENDANT

COMMISSIONER FOR LANDS.....4TH DEFENDANT

REGISTRAR OF TITLES.....5TH DEFENDANT

THE ATTORNEY GENERAL..... 6TH DEFENDANT

JUDGMENT

18/04/2023 &17/07/2023

M.MNYUKWA, J.

This suit was filed before this Court by the plaintiff, Mwita Raphael Masaga against the defendants herein. The plaintiff's claim against the defendants jointly is for the declaration that he is the lawful owner of the Plot No. 1080 Block A at Kashishi Area, Ilemela Municipality.

The facts of the case as gathered from the plaintiff's plaint goes that; on 24th June 2017, the plaintiff bought the suit premises from the 1st defendant vide a sale agreement attached as part of the annexure in the



Plaint and he was in possession of the suit land and built a house therein. That sometimes in 2017, the plaintiff paid fees for the survey of the suit premises to the participatory land survey committee commonly known as *upimaji shirikishi* and Plot No 1080 Block A, Kashishi arose.

According to the plaint, there was a dispute in the suit premises in which he was not party to the suit and the case was in the execution stage and he came to realize the same in 2019. As he became aware of the case, he successfully filed an application for temporary injunction restraining the respondents namely; Flavia Joseph and Timon J Sango t/a Tisa Auction Mart and General Court Broker to deal with the suit premises which was subject to attachment. That, later on the case was decided on his favour after the decision of the ward tribunal and the Misc. Land Application before District Land and Housing Tribunal to be nullified and quashed.

It is on the plaintiff's plaint that on November 2020, the 2nd defendant interfered and trespassed into the suit land claimed to be the owner. That the plaintiff made follow up to the 3rd, 4th and 5th defendants only to know that the suit premises is allocated to the 2nd defendant who is also given a certificate of title. This prompt the plaintiff to file caveat on 8th December 2020 to the 5th defendant to register his interest on a suit land.



Following the alleged wrong allocation of the suit premises to the 2nd defendant, the plaintiff is now before the court praying for judgment and decree against the defendants jointly and severally in the following terms;

- i. The Declaration that the plaintiff is the lawful owner of the Plot No 1080 Block A at Kashishi Area Ilemela Municipality.*
- ii. An Order of this Honourable Court directing the 4th defendant to revoke the right of occupancy granted to the 2nd defendant over the suit premise.*
- iii. An Order of this Honourable Court directing the 5th defendant to rectify the land register of the suit premises from the 2nd defendant to the plaintiff.*
- iv. Payment of the general damages to the tune of Tsh 30,000,000/-*
- v. The defendants be condemned to be responsible to pay costs of this suit.*
- vi. Any other reliefs this Court may deem just to grant*

On the other hand, the 3rd up to 6th defendants herein through their joint written statement of defence denied the plaintiff's claims by averring that, there is no proof that has been annexed to link Plot 1080 Block A Kashishi with the area allegedly owned by the plaintiff and that no formal application was made by the plaintiff for allocation of the suit land. On his part, the 1st defendant written statement of defence mainly acknowledge to

recognize the disputed land and that he was the original owner before selling it to plaintiff.

Nonetheless, in this suit the 2nd defendant to whom the plaintiff claimed the suit land to be wrongly allocated to him did not enter appearance to defend his interest despite the fact that he was served through substituted service in Mwananchi Newspaper dated 16th February, 2022.

By virtue of Order VIII D Rule 40 (1) of the Civil Procedure Code, **[Cap 33 R.E 2019]** (the CPC) the following issues were consensually framed immediately before commencement of trial and adopted by the Court as the issue for consideration and determination in this suit, which are;

- 1. Whether the plaintiff had previously owned the disputed land before it was allocated to the second defendant*
- 2. If the answer for issue number one is answered in affirmative, whether the allocation of the suit land done by the 3rd, 4th and 5th defendants to the 2nd defendant was unlawful*
- 3. To what reliefs are the parties entitled to*

In proving his case, the plaintiff paraded three witnesses namely; Mwita Raphael Masaga, John Dominic Amede and William Kaji Subi who shall be referred to as PW1, PW2 and PW3 respectively. In essence, the evidence



adduced by the PW1 is to the effect that; the dispute arose when the 3rd, 4th, 5th and 6th defendants unlawfully granted the right of occupancy to the 2nd defendant while he was in possession of it after he had bought from the 1st defendant which was sold to him as a farm. To exhibit the same, PW1 tendered sale agreement between him and the 1st defendant which was admitted as Exhibit P1.

PW1 testified that, he ascertained the suit land by confirming from the Chairman of *Kashishi* Street if the same belonged to the 1st defendant before he bought it. He added that, he paid all the necessary fees to the regularization committee (*kamati ya urasimishaji*) through a CRDB account given to him by the said committee for the disputed land to be surveyed. PW1 tendered the bank receipt which was admitted as Exhibit P2. He testified that, the regularization committee recognized him as the lawful owner of the disputed land as he was required to pay the survey fees and in October 2017 his farm was surveyed and it was described as Plot No 1080 Block A at Kashishi.

He further testified that, the dispute arose in 2019 between him and one Flavia Joseph when he was making follow up to the 3rd defendant's office. He said that, he filed a case against Flavia Joseph and Timon Sango



t/a Tisa Auction Mart and General Court Broker to which he succeeded to quash the decision of Igoma ward tribunal and the decision of the District Land and Housing Tribunal which ordered the interested party to file a fresh suit in accordance to the law. PW1 tendered the said decision which was admitted as Exhibit P3.

PW1 testified that, he continued to enjoy the suit land until 2020 when the dispute arose between him and the 2nd defendant who claimed to have bought it from Salvatory Mwandilindi and that he had the certificate of title which bears his name. To prove his assertion, PW1 tendered the said certificate of title. The same was objected by the 3rd, 4th, 5th and 6th defendant. After hearing both parties, the objection was overruled and the same was admitted as Exhibit P4. PW1 testified further to the effect that, he filed a caveat to 5th defendant against the 2nd defendant in respect of Plot No 1080 Block A, Kashishi. The said caveat was tendered and it was not objected and the same was admitted as Exhibit P5.

He added that, he wrote a letter to the office of the 3rd defendant complaining about granting a certificate of title to the 2nd defendant and the same was admitted as Exhibit P6. PW1 testified that, the Chairman of Kashishi Street wrote a letter to the 3rd defendant which recognized him as



the lawful owner of Plot No 1080 Block A. Kashishi and prayed to tender the same as part of exhibit. As it was not objected the same was admitted as Exhibit P7.

PW1 was cross examined by the 1st defendant to whom he claimed to have purchased land from him. In his response, he testified that after he had purchased the suit land from him, he did not sell the suit land to any person and the suit land is situated at Kashishi Street within Ilemela Municipal Council.

The evidence of PW1 was also cross examined by the 3rd up to 6th defendants. He testified that, when the disputed land was sold to him by the 1st defendant it was a farm with a measurement of 50 meters by 35 meters. On Exhibit P2, the plaintiff averred that, he paid necessary fees to the survey committee and that the said exhibit does not bear his name but has his signature and that he had no dispatch book to show that he had served the letters wrote to 3rd defendant.

When he was further cross examined he testified that, the measurement of Exhibit P4 shows that the size of the disputed land is 1645 square metres which is different measurement with the sale agreement between him and the 1st defendant. PW1 further testified that, he developed



the disputed land by planting trees and building a house which was destroyed by the 2nd defendant.

In re-examination, PW1 testified that, he just signed exhibit P2 because he was not instructed how to fill it and that he did not ask the certificate of title of the disputed land because there was a dispute.

Plaintiff's case was built up by the testimonies of the plaintiff's witnesses, PW2 and PW3 who was the secretary of Kashishi Street and the Chairman of Kashishi Street respectively. PW2 testified to the effect that, he knows the plaintiff as the owner of the suit land who bought it from the 1st defendant. PW2 identified Exhibit P1 because he put his signature on behalf of the chairman who was absent.

On his part PW3 testified that, he knows the plaintiff as a person who own land at Kashishi Street after he had bought it from the 1st defendant. He identified Exhibit P1 as a contract of sale which was prepared by his office.

On the other hand, the defendants entered their defenses. The 1st defendant testified himself under oath as DW1 and called another witness, Tumaini Daudi Mwandirindi, DW2. On their part, the 3rd up to 6th defendants



called one witness only who is Iddson Mhela Isangi, a land officer who testified as DW3.

In his testimony, DW1, Mr. Peter Elias Mwita who is the 1st defendant testified that, he was the lawful owner of the suit land as he bought it from Thedosa Boniphace Mwandirindi. He testified that he was shown the disputed land before he bought it by the children of the seller, one Tumaini Daudi Mwandirindi and Agripina Daudi Mwandirindi. He testified that he bought the suited land when it was a farm where in the North it has a measurement of 24 walking steps and demarcated by Mr. Swai, on the East has 40 walking steps demarcated by road, on West it is demarcated by Herman and has 47 walking steps and on South it is demarcated by river and it has 26 steps. He went on that he entered into sale agreement with the seller in front of the chairman of Kashishi Street. He tendered the sale agreement between him and Theodesia Mwandilindi signed in front of the Chairman of Kashsishi Street. The same was not objected and it was admitted as Exhibit D1. He also tendered the sale agreement between himself and Theodesia Mwandirindi witnessed by the state attorney as a commissioner of oath. Again, the same was also not objected and admitted as Exhibit D2. DW1 testified to have sold the disputed land to the plaintiff on 04/06/2017.



When cross examined by the plaintiff, he testified that, the land he bought from Theodosia Mwandirindi is the same land he sold to plaintiff. He further stated that, the land he sold to plaintiff its measurement increased because it included the area that was planted sisal that was not cleared when he was bought from Theodosia Mwandirindi.

When he was further cross examined by the counsel of the 3rd up to 6th defendants he maintained that, he bought the disputed land from Theodesia Mwandirindi and prior they have entered into sale agreement, he was shown the disputed land by the children of the seller on her behalf. He further maintained that he sold the disputed land to plaintiff. He testified that, the measurement of piece of land increased when he sold it to plaintiff because they used foot to measure the area instead of walking steps as they did when he bought it and also he cleared the place where it was planted sisal which was not measured at the time when he bought it.

DW2, Tumaini Daudi Mwandirindi was another witness who testified before the court in favour of the 1st defendant. He testified to the effect that, her mother who is now a deceased sold a farm to 1st defendant for Tsh 5,000,000/-. He testified that the farm that her mother sold to 1st defendant,



they had inherited it from their father. DW2 identified Exhibit D1 as he was a witness.

When he was further cross examined by the 3rd up to 6th defendant, he maintained that her mother sold the farm to 1st defendant and he was a witness. He testified that, he gave the 1st defendant an extra small piece of land free of charge since it was a small area that could not be used for farming or building.

The 3rd to 6th defendants entered their defenses by calling one witness who is a land officer. He testified as DW3. He testified on the business process on how they prepared title deeds starting with the initial stage when the applicant filled in Form No 19. DW3 testified that, the 2nd defendant filled in Form No 19 as well as there is a receipt to acknowledge payment for preparing the title in respect of Plot No 1080 Block A at Kashishi. He testified that, the land in which the 2nd defendant applied to get the title there was a project of squatter upgrading known as *upimaji shirikishi* which was managed by *serikali za mitaa* who supervised the squatter upgrading by finding the company which will work closely with them in *upimaji shirikishi*. He said that, the invoice is issued to the owner of the plot who is required



to pay the survey fees and the applicant who is also the owner paid the necessary fees so as to get the title deed.

He further testified that, the 2nd defendant was given an invoice on the payment of title deeds to the Ilemela Municipal Council and to the Ministry of Land and Human Settlement to make payment. The said invoice was tendered and admitted as Exhibit D3. The DW3 said that, they issued the control number for making payment of Tsh 83,447.80 and the same was admitted as Exhibit D4. He added that the 2nd defendant was given exchequer receipt to acknowledge receipt of payment and the same was admitted as Exhibit D5. DW3 said that they prepared offer document which shows the description of the plot number like the location of the plot, size and the name of the owner. The letter of offer or acknowledgment of payment was admitted as Exhibit D6. He also tendered the general receipt which was issued to the 2nd defendant requiring him to pay Tsh 140,000/- as payment of building permit and deed plan which was admitted as Exhibit D7. He also tendered Land Form No 19 which was admitted as Exhibit D8 which is the application form to get the certificate of title which has the details of the plot of the 2nd defendant. He added that the land form No 19 shows that the 2nd defendant is an applicant and he made application on 5/7/2019 and the measurement of his land is 1181 square meter.



He went on that, their office, Ilemela Municipal council received a complaint from the plaintiff who applied to be granted a certificate of title on the same land and that they responded to him that the said plot is owned by the 2nd defendant. DW3 sought to tender response letter written to the plaintiff, it was objected by the 1st defendant as the same describe the area as Kashishi B and not Kashishi A which is the suit area. For purpose of admissibility the same was admitted as Exhibit D9. DW3 concluded his submission in chief by stating that, the 2nd defendant owned a disputed land since in 2018.

When DW3 was cross examined by the counsel of the plaintiff, he testified that, before they granted the certificate of title they must have satisfied themselves that the applicant is the owner through sale agreement and the invoice from *Kamati ya upimaji shirikishi*. And that they satisfied that the 2nd defendant was the owner as he bought the suit land from Salvatory Mwandilindi and that he did not tender the sale agreement because he is not the custodian. DW3 stated that, he does not know the measurement of the area which the 2nd defendant bought from Salvatory Mwandilindi. DW3 admitted that it is the company which is entrusted by the citizen to conduct survey that provides information about the plot and block number of a



particular land, which ultimately submitted to the Municipal council and that information are kept in the master plan.

DW3 also admitted that the information brought by the applicant about the location of the land, its plot number and block number were the ones that were used to prepare the certificate of title to the 2nd defendant. DW3 also said that, the information submitted by the applicant when requesting the grant of the certificate of title must tally with the measurement of land in which he applied for. He further admitted that, the information supplied to the office shows that the measurement of land is 1181 square meter but exhibit P4 which is the certificate of title given to the 2nd defendant shows that the measurement of land was 1645 square meter.

DW3 testimony was also cross examined by the 1st defendant. He testified that, the 2nd defendant prayed to be granted certificate of title on the land which was surveyed through *upimaji shirikishi*. He added that, their record does not show if they communicated with *serikali ya mtaa* to ascertain who own the disputed land.

Having briefly outlined the parties' pleadings and the parties' respective evidence, I am now obliged to determine issues framed above as herein under;



Whether the plaintiff had previously owned the disputed land before it was allocated to the 2nd defendant.

In determining the above issue I have to consider the evidence gathered carefully. It is the plaintiff's evidence that he bought the farm from the 1st defendant located at Kashishi Street as evidenced by Exhibit P1. On his evidence, the 1st defendant supported the narration of the plaintiff by admitting that he sold the suit land to plaintiff and tendered evidence to prove before the court that he was the original owner of the disputed land. That he bought the suit land from Theodosia Mwandirindi as exhibited by Exhibit D1 and D2 respectively. The evidence on record shows that the measurement of the piece of land which the 1st defendant bought from Theodosia Mwandirindi and the one sold to plaintiff is somehow different. However, that difference is cleared out by DW2 who witnessed the sale transaction between the 1st defendant and Theodosia Mwandirindi as he clearly testified that, they gave the 1st defendant an extra piece of land which was not included before because it was small and the same could not be used either for building or for farming.

Again, in his evidence, DW1 testified that, the area also increased because when the farm was sold to him, some part of the farm which has



rice field and sisal were not measured but was sold to him and after clearing that area, the size increased. That is the measurement increased when he sold the disputed land to plaintiff. It is the DW1 evidence that he sold the same land to plaintiff that he bought it from Theodesia Mwandirindi.

It is the settled position of the law that the one who alleges must prove his allegation. As a general principle, a party who bears legal burden to prove also bears evidential burden to substantiate his claim. It is a trite law that a party in legal proceeding must prove the existence of such facts as it is provided for under section 110 of the Law of Evidence Act, **[Cap 6 R.E 2019]**. The Court of Appeal of Tanzania stressing the same in **Godfrey Sayi vs. Anna Siame** (as legal representative of the late Mary Mndolwa) Civil Appeal No. 112 (unreported) had this to say;

“It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities.”

To prove his case, the plaintiff called two witness who are the secretary and the chairman of Kashishi Street who testified as PW2 and PW3 respectively. In examining carefully the evidence tendered by the plaintiff and his witness which was corroborated with the evidence of the 1st



defendant, I am convinced that, the suit land belong to the plaintiff. I say so because of the following reason

First, PW2 and PW3 who are the leader of Kashishi Street testified to recognize the plaintiff as the owner of the suit land who bought it from the 1st defendant. PW1 witnessed the sale transaction between the plaintiff and the 1st defendant who signed it as the chairman was absent and PW2 as a chairman of the street is the custodian of the document and he identified Exhibit P1 as a document originated from his office.

Second, the plaintiff evidence shows that he was recognized as the owner of the suit land by the leaders of Kashishi Street and he paid the necessary fees to the regularization committee i.e *kamati ya upimaji shirikishi* as exhibited by Exhibit P2. His evidence is corroborated with the evidence of DW3, a land officer who testified that it is *serikali ya mtaa* and the company which was consulted by *serikali ya mtaa* which initiated the survey process and they usually received invoice from *serikali ya mtaa* to initiate the process of granting right of occupancy to applicant. Contrary to this, nothing has been exhibited in court to evidence that the 2nd defendant was recognized by *serikali ya mtaa* and paid necessary fees for survey and to regularization committee.



Third, the plaintiff evidence is to the effect that, his land was surveyed and after the survey his land was described as Plot No 1080 Block A Kashishi Street with measurement of 1645 square meter. This is contrary to what was applied and granted to the 2nd defendant who applied to be granted a certificate of title on the land described as Plot No 1080 Block A Kashishi with a measurement of 1181 square meter though exhibit P4 shows that the measurement of land that the certificate of title was granted to 2nd defendant was 1645 square meter.

Fourth, in his evidence, DW3 who is the land officer testified that, before the certificate of title is granted to the applicant, they have to ascertain that the applicant is the owner of the disputed land by sale agreement and the invoice from the regularization committee (*kamati ya upimaji shirikishi*) which originated from *serikali ya mtaa*. However, they failed to tender evidence to show that the 2nd defendant was given an invoice and he paid the necessary fees for survey. Even in his testimony, DW3 testified to have seen the sale agreement of the 2nd defendant which he failed to exhibit it in court to show that the 2nd defendant was the owner of the suit land before he initiated the processes of getting the certificate of title. Moreover, he still failed to tender the same because he alleged that he was not a custodian. However, I am of the view that the same could have



been tendered by DW3 even in a photocopy of it after following the due process of the law since it is obvious that the same must be in the applicant's file kept in their office.

The plaintiff has also tendered evidence to show that he acquired the disputed land by way of sale since 2017 whereas as per the evidence of DW3, it shows that the 2nd defendant initiated the processes of being granted a right of occupancy in the year 2019 and he was granted the same in the year 2020. The evidence does not show as to when he owned the disputed land. Therefore, as the plaintiff had acquired it earlier, a party who acquired it earlier on is deemed to have a better or superior interest over the 2nd defendant. In the case of **Ombeni Kimaro v Joseph Mishili t/a Catholic Charismatic Renewal**, Civil Appeal No. 33 of 2017 it was held that

"The priority is to the effect that where there are two or more parties competing over the same interest especially in land each claiming to have titled over it, a party who acquired it earlier in point of time will be deemed to have a better or superior interest over the other"

At this point I wish to refer to the case of **Hemed Said Vs Mohamed Mbilu** 1984 TLR 113, where this Court said:



"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"

In the case at hand, it is not hard to determine who has heavier evidence, convincing the Court that what they are presenting is true. The witnesses of the plaintiff have narrated before this Court on how the plaintiff had obtained the suit land and the 1st defendant with his witnesses supported that evidence. Thus, considering the rival evidence adduced by the parties in its totality, it is my conviction that the first issue is answered in the affirmative that the plaintiff was previous the owner of the disputed land.

The next issue for consideration and determination as framed by the parties and adopted by the court is reproduced herein under.

If the answer in issue number one is in affirmative whether the allocation of of the suit land done by the 3^d, 4th and 5th defendants to the 2nd defendant was unlawful

The evidence adduced above made this court come into conclusion that the plaintiff is the owner of a suit land. I highlight further the testimony by DW3 who failed to show how the 2nd defendant came to acquire the land as the record is silent as to who surveyed the suit land and when he was given the same and to what extent the regularization committee was involved. Consequently, they failed to establish the basis of granting the



certificate of title to the 2nd defendant. It is clear that the suit land did not belong to him, and therefore he had nothing to be granted certificate of title over. By giving him a certificate of title of a possession of a land he had no ownership right to it denied the true owner the ownership of that title.

In the instant suit, according to the evidence tendered by the plaintiff's witnesses and the defendants and for the reasons adduced above, I am convinced to hold that the suit land was wrongly allocated to the 2nd defendant by the 3rd, 4th and 5th defendants.

Thus, the second issue is also answered in the affirmative that the 3rd, 4th and 5th defendants unlawfully allocated the suit land to the 2nd defendant.

To what reliefs are the parties entitled to. This is the third issue for determination. It is common ground that, the reliefs follow after a party has been declared a winner in a civil litigation. In our case, the plaintiff managed to prove his case on the required standard that is on the balance of probability that is the one with heavier evidence become the winner.

As per the reliefs prayed by the plaintiff in his plaint, this Court declares the plaintiff to be the lawful owner of the suit land described as Plot No 1080 Block A Kashishi at Ilemela Municipality, Mwanza. I hereby order the 4th defendant to revoke the certificate of title given to the 2nd defendant as it was given unrightfully.



Concerning the prayer of general damages, I refrain from using my discretionary power to order the same since the evidence on record does not show if the plaintiff suffered substantial loss to entitle him to get general damages.

Consequently, the plaintiff's suit is allowed. No order as to costs.

Right of appeal explained to the parties.

It is so ordered.



M. MNYUKWA.
JUDGE
17/07/2023

Court: Judgment delivered in the presence of the plaintiff's counsel, the 1st defendant in person and the counsel of the 3rd, 4th, 5th and 6th defendants

M. MNYUKWA.
JUDGE
17/07/2023