

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

LAND CASE NO. 4 OF 2022

GERALD WILSON KESSY.....1ST PLAINTIFF

BAHATI WILSON KESSY.....2ND PLAINTIFF

VERSUS

FADHILA A. SAGASAGA.....1ST DEFENDANT

MOROGORO MUNICIPAL COUNCIL2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

Hearing date on: 20/6/2023

Judgement date on: 28/7/2023

NGWEMBE, J:

The plaintiffs through the service of learned advocate Benjamin Jonas instituted this land case against three defendants. The plaintiffs' complaints are centered on the ownership of plot No. 615 Block "A" Tungi Area bearing title No. 48471 estimated worth of Tsh. 45,000,000/=. The reliefs claimed by the plaintiffs includes; a declaration that, the plaintiffs are the lawful owners of Plot No. 615 Block "A" Tungi, Morogoro Municipality; an order that the 1st defendant yield vacant possession of the suit property to the plaintiffs and an order for forceful eviction against the 1st defendant; general damages to be

assessed by the court, costs of the suit and any other relief(s) as this court may deem fit and just to grant.

Both parties were represented by learned advocates, Mr. Benjamin Jonas represented the Plaintiffs, 1st Respondent procured the service of Mr. Derick Vicent, while the learned State Attorney Hemedi Mkomwa represented the 2nd and 3rd defendants. After all pleadings were complete, parties went through statutory mediation, which was marked failed; hence agreed on two legal issues for final determination namely:

1. Who is the lawful owner of the suit land; and
2. What reliefs are the parties entitled.

In determining these issues, the plaintiffs lined up two key witnesses whereas the defendants had three witnesses.

In brief, the circumstances lead to the core of this dispute as stated herein earlier is none than the ownership of plot No. 615 Block "A" Tungi Area with Title No. 48471 between the plaintiffs and 1st respondent. Plaintiffs are claiming that they are lawful joint owners of disputed land by virtue of purchase from the previous owner one Andrew Mlelwa Shitindi way back to year 2010. Meanwhile the 1st defendant claimed same was allocated to him by Morogoro Municipal. It is worth noting that that land is surveyed and has certificate of title issued way back in year 1999.


The plaintiffs' case was blessed by Mr. Gerald Wilson Kessy, (PW 1), who testified as the owner of the suit land together with Bahati Wilson Kessy (the 2nd Plaintiff) and that they purchased the plot from one Andrew Mwanji Mlewa Shitindi in year 2010, he continued that such land is surveyed and has certificate of title issued in year 1999. PW1 further testified that, they changed the ownership from the previous

owner to themselves in year 2015 and since then to date, the plot is theirs. PW1 tendered certificate of title No. 48471, building permit issued by Municipal Director on 3/9/2009 to Andrew Mlewa Shitindi, which both were admitted and marked exhibit P1 and P2 respectively.

Further testified that, the squabbles arose when Fadhila A. Sagasaga, the 1st respondent trespassed into the plot and built a house in 2008, when the land was still owned by the previous owner who reported the matter to the street leaders and the matter was resolved in favour of Mr. Shitindi. Meanwhile the 1st respondent confirmed to vacate the suit land in writing. Not only that but also, PW 1 testified that, the Director of Municipal Council wrote a letter to 1st defendant to vacate the suit land in year 2014 and that letter was admitted marked as an exhibit P3. However, PW1 added that, 1st respondent refused to vacate and he has built business frames therein. In the end PW1 prayed this court to declare him as true owner; an order for immediate vacation of the suit land and costs.

During cross examination, PW1 testified that plot No. 635 Block A was the one issued to the 1st defendant by the 2nd defendant, but the same was called back and re-allocated to another person after the 1st defendant failed to adhere to the terms and conditions attached to the allocation.

Bahati Gerald Kessy, (PW2) testified that, she is the co-owner of the disputed land and a wife to PW1, she also identified exhibit P1 and pray the same be part of her evidence. I did not recite much of what have been testified by her because her evidence resembled what was already testified by PW1.



Such brief plaintiffs' evidence was enough to convince Mr. Benjamin that, his clients build solid evidence to prove the case on balance of probability. Thus rested his case.

The defence case was also blessed by two witnesses beginning with Fadhila A. Sagasaga (DW1) who opened the curtain by testifying that in year 2004, he was informed that, there are plots offered by Morogoro Municipal (2nd Defendant) and he applied for one, in due course the 2nd Defendant allocated him a plot in dispute and a document (offer) was tendered which was dated 14/12/2009 same was admitted as exhibit marked D1. Moreover, he testified that, he has built a house and is living therein with his family. Further testified that, he doesn't know the plaintiffs but he is aware that 1st plaintiff was a street chairman in year 2004 whereas on 5/2/2008 he wrote a letter to him demanding to return the disputed land to one Shitindi. He further told this court that, he went to Shitindi and together they went to land office of Morogoro Municipality where it was decided that, Shitindi should be given another plot of land while the suit land should remain with him. Added the conflict between him and the Plaintiffs commenced in year 2014 whereby the plaintiffs took him to the Municipal Director then to District Land and Housing Tribunal of Morogoro claiming that, the suit plot is theirs by purchase. Such dispute persisted to date in this court. Rested by a prayer that the suit be dismissed forthwith and costs be provided for. Further, stated that his house on the suit plot was deliberately destroyed by the plaintiffs and all his properties were lost.


During cross examination he testified that, he has never received revocation letter or any letter changing his ownership over the disputed land, thus the disputed land is his and he has developed it by building a

residential and business structures although the offer was for residential purpose only. He also testified that he paid all requisite fees and obtained a building permit, but he did not tender them in court, he also testified that in year 1997 an offer was issued in regard to plot No. 635 Block "A" Tungi to Fadhila I. Sagasaga which is also his name, but he has a daughter who has a similar name.

Said Iddi Kinyogoli (DW2) testified that, DW1 is his cousin, and the suit Plot No. 635 was issued to Fadhila mistakenly, but it was rectified by giving him the disputed plot. What followed was the replica of DW1 testimony which is duly noted.

After the evidence of DW2, the defence case of the 1st defendant was closed. Thus, giving room to the State Attorney to invite his witness, Huruma Valence (DW3), a land officer of Morogoro Municipality with experience of 18 years who testified that, the suit plot was first owned by Andrew Mwanji Mlewa Shitindi from 1/7/1995. In year 1999, certificate of occupancy was issued to him with tittle No. 474871. In year 2009 Mr. Shitindi was given a building permit, likewise in year 2010 he sold the suit land to the Plaintiffs and by year 2015 the Morogoro Municipal effected the transfer of ownership. Therefore, to his knowledge, the suit land is owned by the plaintiffs.

Added that, DW1 was granted plot No 635 Block "A" Tungi on 1/7/1997, that in year 2008 DW1 took the land officer to recognize his plot only to find that, he has mistakenly developed plot No. 615 Block "A" Tungi (disputed plot) instead of his plot No. 635 as a result, the land office Morogoro, prepared a letter of offer for the 1st respondent to the disputed plot, which was already developed, but after verification it was observed that, the disputed land was mistakenly issued to DW1



because it was already owned by Mr. Shitindi. To clarify the mistake in 2010, Morogoro Municipal wrote a letter bearing reference No. MMC/LD/615/7 of 14/12/2009 to DW1 demanding him to demolish developments done on the disputed land and called back the letter of offer, the letter was admitted and marked exhibit D2. Nevertheless, DW1 did not comply with the contents of that letter, while insisting the plot in dispute is his.

DW3 further testified that, **Mortgage Financing Act No. 17 of 2008** prohibited issuance of letters of offer, and that the end of offer was on 1/12/2008, meanwhile DW1 was given such letter of offer in December 2009, therefore the offer was nullity abinitio. For the development made by DW1 are also not known because he had no permit. As others did, Mr. Mkomwa prayed to close his defence case.

Counsels were allowed to file their final submissions on 26/6/2023, all complied by filing their final arguments in time, this court appreciates their well-researched and reasoned arguments accompanied with authorities relevant to the subject matter.

In determining this dispute, the fundamental question is who is the lawful owner of the suit plot? It is a cardinal principle of fair hearing that he who alleges must prove the allegations by producing relevant evidences proving the matter in issue. This principle is founded under sections **110 and 111 of the Law of Evidence Act [Cap 6 R.E, 2002]** which among other things state as follows: -


Section 110, *"Whoever desires any court to give judgement as to any legal right dependent on existence of facts which he asserts must prove that those facts exist."*



Section 111. *"The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side"*

These two sections infer that if there are existing legal right(s), which has been infringed by another person, the one who has that legal right should seek assistance of court to enforce against the other party who without colour of right, infringed his/her right. Therefore, the burden of proof lies on that person who would fail if no evidence at all were given on either side. It is equally elementary law that standard of proof, in civil cases is on balance of probabilities, and that burden of proof never shifts to an adverse party until the party on whom the onus lies discharge it, it cannot be diluted on account of weakness of the opposite party. As in the case of **Habiba Ahmadi Nangulukuta & others vs Hassani Ausi Mchopa, Civil appeal no 10 of 2022 (CAT - Mtwara)**.

It is I think, undisputed that the original owner of the suit land is Andrew Mwanji Shitindi, all documents confirm the same fact. Having that right of occupancy, obvious Shitindi had every right to sale it to whoever interested. Thus, according to the evidences adduced in this court, the plaintiffs were among the interested persons to purchase that piece of land. Rightly so, the testimonies of PW1 and PW2 confirmed to have purchased the suit plot of land in year 2010 from one Andrew Mwanji Mlewa Shitindi. Following that purchase, in year 2015 the certificate of ownership was effectively shifted from Shitindi to the plaintiffs. The certificate of occupancy was changed from the original owner to the present owners.



The certificate of ownership was exhibited in court marked exhibit P1 and the building permit was also tendered to marked exhibit P2 together with a letter from Director of Morogoro Municipal addressed to the 1st Defendant with instructions to vacate the disputed plot marked exhibit P3.

Equally important is the fact that DW1 was allocated a different plot of land No. 635 Block "A" Tungi, but it was called back and allocated to another person for the reason that DW1 failed to adhere to the terms and conditions accompanied with allocation of that plot of land.

The fact that the suit land still owned by DW1 has no legal basis. Notably, Morogoro municipality committed excusable mistakes by giving him an offer of right of occupancy contrary to law and common sense. The reason is, such document called offer was issued without legal basis. Second, offer of right of occupancy could not have been issued in a plot already having certificate of ownership as discussed above. However, it seems when the Municipality realized the mistakes they made, successfully recalled back. This point cannot be disputed neither by the 1st defendant nor by the Municipality. Thus, legally, one plot cannot have certificate of occupancy as well as offer of right of occupancy. In fact, two plots were issued to the two key disputants, the 1st defendant was issued plot No.635 Block A Tungi, while Shitindi was issued plot No. 615 Block A Tungi. The 1st defendant had every right over his plot of land that is Plot No. 635, what he did in plot of Shitindi that is plot No. 615 was purely unacceptable in fact and in law.

Undoubtedly, with all documentary evidences, plot No. 615 Block A Tungi was owned by Shitindi and now is owned by the plaintiffs. The

evidences adduced in this court speak themselves, that the 1st defendant owned plot No. 635 Block A Tungi. Whatever development he made in the suit land was in fact supposed to be developed in his plot of land.

I find no difficulty to recognize who is the owner of a landed property. In the case of **Amina Maulid Ambali and Two Others Vs. Ramadhani Juma (CAT), Civil appeal No 35 of 2019 RE 2019** discussed and provided guidance as per section 2 of **the Land Registration Act [CAP 33]**, which defines who is the owner of a landed property. For clarity the section is quoted hereunder: -

S.2 "owner" means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered;

The provision is self-explanatory, exhibit P1 is documentary evidence which was admitted during trial unopposed proofs who is the rightful owner of the suit land. The fact that DW1 built a residential and business structures in a plot he does not own cannot stand because he lacked any colour of right of ownership over the suit land. Instead, he had every right to do same in his plot No. 635 Block A Tungi.

In our jurisdiction, the law is settled that, a person whose evidence is heavier than that of the other is the one who stands to win, as in the case of **Hemedi Said Vs. Mohamed Mbilu (1984) TLR 113**. The final submissions of the 1st defendant argued that he adduced strong evidence on how he became the owner of the disputed land, he also tendered exhibit D1, but taking into consideration the whole evidences with critical evaluation of same, it is obvious the plaintiffs' evidence overweigh the 1st defendant's evidences. The fact of calling back the

offer issued to the 1st defendant is likewise undisputed. DW3 testified quite strongly that the offer was in fact, admitted that same was issued contrary to **Mortgage Financing Act No. 17 of 2008** which prohibited issuance of letters of offer, and that the end of issuance of offer was on 1/12/2008 while such offer to the 1st defendant issued on 2009.

The issue of damages was not argued satisfactory, therefore, I find no justification to grant.

For the foregoing reasons I proceed to declare that, the plaintiffs are the lawful owners of the Plot No. 615 Block "A" Tungi, Morogoro Municipality therefore I order that 1st defendant to yield vacant possession with immediate effect. Equally the 1st defendant should pay costs of this case.

I accordingly Order.

Dated at Morogoro this 28th day of July 2023.



P. J. NGWEMBE

JUDGE

28/07/2023

Court: Judgement delivered at Morogoro in Chambers this 28th day of July, 2023, in the presence of plaintiffs and their Advocate, Mr. Benjamin Jonas, in the presence of Ms. Charity Mzingi, Advocate for 1st Defendant and in the presence of Ms. Lightness Tarimo and Emma Ambokisye, Learned State Attorney for the 2nd and 3rd Defendants.

A.W. Mmbando, DR

28/07/2023

Court: Right to appeal fully explained.




A.W. Mmbando, DR

28/07/2023