

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**LAND CASE NO. 22 OF 2021**

**AMBASSADOR MUSINGA  
TIMOTHY BANDORA.....PLAINTIFF**

***VERSUS***


**SULEIMAN SALUM SULEIMAN.....1<sup>ST</sup> DEFENDANT  
SALUM MUZONGERA.....2<sup>ND</sup> DEFENDANT  
MOHAMED SULEIMAN ALLY.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**Mansoor, J:**

**Date of JUDGEMENT- 01/09/2023**

The plaintiff, Ambassador Musinga Timothy Bandora, herein shall be referred to as "the plaintiff" claims for vacant possession of the premises designated as plot No. 2157 and No. 2158, Block D, Tangi Bovu Area, in Mbezi Beach within the Kinondoni Municipality. He also claims for mesne profit, interests, general damages and costs of the suit.

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The plaintiff case is that on 8<sup>th</sup> July 1986, the then Dar es Salaam City Council allocated to the plaintiff Plot No. 237, Block D, Tangi Bovu, Mbezi Beach within the Kinondoni Municipality. The plaintiff was given the Letter of Offer with Ref No. D/KN/A/265514/1/SMK. Then, in the year 1991, there was a re-survey, and following the re-survey exercise, the Plot no 237 was divided into two plots, and these two plots were renumbered, there was now Plot No 2157 and 2158, Block D, Tangi Bovu, Mbezi Beach, and the plaintiff was given a new Letter of Offer, dated 22/08/1991 in which Plot No. 237, Block D, was cancelled and new Plot Numbers 2157 and 2158 were inserted. The second Letter of Offer was again issued by the Dar es Salaam City Council. The plaintiff claims that in the year 2000, the defendants herein trespassed into these plots, and the plaintiff complained about the trespass to the Dar es Salaam City Commission, and on 09<sup>th</sup> March 2000, the Dar es Salaam City Commission issued a stop order to the defendants stopping them from developing the land. Then, on 24<sup>th</sup> March 2000, the Commissioner for Lands wrote a letter to the Director of Kinondoni Municipality requiring the Municipality to investigate and give an explanation regarding the validity of the two Letters of Offer for Plot

No. 622 and Plot No. 624 Block D Mbezi, issued to the defendants, which appears to be on the same areas as plots No 2157 and 2158 Block D Tangi Bovu Mbezi Beach. The Commissioner also wanted to know as to why the Municipality issued the building permits to build boundary walls on Plot No. 622 and 624 Block D Mbezi. On 06<sup>th</sup> June 2000, the Land Officer of the Kinondoni Municipality wrote to the Commissioner for Lands confirming that the Letter of Offer issued to the plaintiff for Plot no. 237 Block D, Mbezi Beach was a genuine Letter of Offer. The Land Officer also confirmed that the land was re-surveyed and the plot was renumbered as Plots No 2157 and 2158 as shown in Survey Plan No. 255/322. The Land Officer also said Plots No. 622 and 624 are not the same as Plots No. 2157 and 2158, and they do not co-exist. After this confirmation from the Land Officer of the Kinondoni Municipal Council, the Commissioner for Lands proceeded to issue to the plaintiff a Certificate of Title for Plots No 2157 and 2158 Block D Mbezi Beach, this was the Certificate of Title No. 50376 issued in the plaintiff's name on 29<sup>th</sup> June 2000. The plaintiff continued to pay land rents for these plots but he could not have the vacant possession.

The plaintiff continues to aver that on 17<sup>th</sup> November 2000, the defendants herein instituted a suit against the Commissioner for Lands and the plaintiff, it was Civil Case No. 215 of 2000 instituted at the High Court, Dar es Salam District Registry. The suit was dismissed on 12.03 2009 for want of prosecution, the file could not be traced where the counterclaim filed by the plaintiff against the defendants could have proceeded, then the plaintiff decided to file a fresh suit for vacant possession.

In the plaint, the plaintiff claims for mesne profit claiming that he would have earned THz 5 million per month as rent if the suit premises were under his possession, thus in total the plaintiff claims from the defendants THz 720,000,000 as accrued rent counting from the date the defendants' suit was dismissed in 2009. The plaintiff also claims for interests. The plaintiff thus, claims for the reliefs as follows:

1. To order the defendants to vacate from the premises designated as Plot No 2157 and 2158, Block D Tangi Bovu, Mbezi Beach Dar es Salaam;

2. To order a permanent injunction against the defendants restraining them from trespassing into the suit premises;
3. To order the defendants to pay the plaintiff mesne profits amounting to THz 720,000,000;
4. To order the defendants to pay the plaintiff interest on mesne profit amounting to THz 984,800,000;
5. General damages;
6. Costs of the suit
7. Any other relief deems fit and just to grant.

The 1<sup>st</sup> and 3<sup>rd</sup> defendants resisted the suit, they filed their joint written statement of defence in which they state that the land in dispute was a farm, it was un-surveyed land and the property of their late grandfather namely Suleiman Suleiman who owned the farm under customary title. Then the land was surveyed, and there was created two plots which were allocated to the Late Suleiman Suleiman. The Late Suleiman Suleiman gave one plot to his son who is the 3<sup>rd</sup> defendant, and one plot to his grandson who is the 1<sup>st</sup> defendant. The

Letters of Offer were issued to the 1<sup>st</sup> and 3<sup>rd</sup> defendants as these two plots created after the survey of their father's farm-land were designated as Plots No 622 and 634 Block D Mbezi. The defendants' claim that the numbers of the plots changed to 2157 and 2158 Block D Mbezi after the re-survey exercise. The 1<sup>st</sup> and 3<sup>rd</sup> defendants have said in their defence that they are not aware of the existence of Plot No. 237 Block B, and any communications made by the plaintiff and the Ministry of Lands or Dar es Salaam City Council. The 1<sup>st</sup> and 3<sup>rd</sup> defendants' states that they continued to make follow up with the Ministry of Lands for the Certificates of Title for Plots No 2157 and 2158 Block B Mbezi, which before the re-survey they were known as Plot Nos 622 and 624, and the 1<sup>st</sup> and 3<sup>rd</sup> defendants say that they continue paying land rents for Plots No 2157 and 2158. The 1<sup>st</sup> and 3<sup>rd</sup> defendants denied each and every allegation contained in the plaint, and required strict proof.

The 2<sup>nd</sup> defendant did not file his defence, and did not enter appearance, thus the court on 6<sup>th</sup> December, 2022 ordered that hearing against the 2<sup>nd</sup> defendant shall proceed exparte.

Now, after the parties tried to mediate, the mediation failed, and during the final Pre Trial Conference, the following issues were framed:

1. Who is the rightful owner of the suit premises:
2. To what reliefs are the parties entitled.

The hearing of this case started on 8<sup>th</sup> June 2023 presided over by Honourable Judge Lilian Mongella who recorded the evidence of the plaintiff i.e. the evidence of PW1 and PW2, but since she was handling the case in a special session of clearance of backlog cases for a specified period of time, the time allocated to her expired before finalizing the defence case. The file was thereafter assigned to Honorable Nkwabi J, but before Honourable Judge started hearing of the defence case, the case was again placed in a special session, and assigned to myself. I therefore recorded the evidence of DW1 (the first defendant), and DW2, the 3<sup>rd</sup> defendant, and I decided to continue from where the predecessor Judge had ended as empowered by Order XVIII Rule 10 of the Civil Procedure Code, Cap 33 R: E 2022.

Order XVIII Rule 10 of the CPC refers to powers to deal with evidence taken before another judge or magistrate. It provides thus:

*"10. Power to deal with evidence taken before another judge or magistrate*

*(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it '.*

It is obvious that the trial Judge I.e. Judge Lilian Mongela who handled the hearing of the case and who had finalised recording the evidence of the plaintiff and his witness (PW1 and PW2) was prevented from continuing with the proceedings as her allotted time on a special



session had lapsed; under the circumstances the rest of the proceedings were to be concluded by either the judge in station at Dar es Salaam Registry or another Judge on a Special Clearance Session, and the later applied. As the successor judge and as said in the case of **M/S. Georges Centre Limited Vs. The Honourable Attorney General, Civil Appeal No. 29 of 2016 (CAT) (unreported)**, **I have assigned reasons why I have taken over the case**, and that I will continue from where the predecessor Judge has ended, this decision of the Court was of the following words and the Court had this to say:

*"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable*

*to do so. For one thing, ...the one who sees and hears the 10 witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."*

I have therefore assigned the reasons why I have taken over the hearing of the case, and have started from where the predecessor Judge has ended. I shall therefore evaluate the evidence recorded by the predecessor Judge, and those recorded by me in reaching to a decision.

As for the first issue, **who is the rightful owner of the suit property**, the evidence of PW1 Musinga Timothy Bandora produced in court an exhibit (Exhibit P1), the copy of the original Letter of Offer with Ref No. D/KN/A/26154/1/SMK dated 08/07/1986 issued in the name of the plaintiff by the Kinondoni Municipal Council. This Letter of

Offer was for Plot no. 231 Block D, Mbezi Medium Density issued by the Dar es Salaam City Council to Musinga T Bandora, the plaintiff herein. According to the testimony of DW1 Shabani Omari Msisi- who testified on behalf of the 1<sup>st</sup> defendant under the Power of Attorney, said, the same Dar es Salaam City Council issued to Suleiman Salum Suleiman, the 1<sup>st</sup> defendant herein, a Letter of Offer with Reference No. D/KN/A28526/1/DDM dated 23.3.1987, this letter of offer was for Plot No. 624 Block D, Mbezi MD. The evidence of DW2, Mohamed Suleiman Ali was to the effect that he was issued with the Letter of Offer for Plot No. 262 Block D Mbezi M.D on 23 September 1986 by the Dar es Salaam City Council, the Letter of Offer with Ref No. D/KN/28509/1/DDM. On 13 December 1999, Suleiman Salum Suleiman was given a permit by the Dar es Salaam City Commission to build a boundary wall on Plot No. 2157 Block D Mbezi M.D through a letter with Ref No. ZEK/VIVD/UJ/VOL.1/76, and Mohamed Suleiman Ali was given a permit to build a boundary wall on plot No. 622 Block D Mbezi M.D on 30<sup>th</sup> June 1999 via a letter with Ref No ZEK/VVID/UJ/VOL.1/76.

The issue that needs serious determination is whether Plots No. 622 and 624 Block D Mbezi M.D is the same plot as Plot No.237 Block D Mbezi Medium Density. The defendants simply said without giving any proof that the late Mzee Suleiman Suleiman was owning a farm under customary title and then the farm was surveyed and there created two plots which is Plots No, 622 and 624 Block D Mbezi M.D, then the Letters of Offers were prepared and issued to Suleiman Salum Suleiman for Plot no. 624, and to Mohamed Suleiman Ali for Plot No. 622. There was no proof whatsoever produced by the defendants in court to prove that indeed before the land was surveyed, the same land was a farmland, and that the farm land belonged to their late father or grandfather. These were mere words lacking proof. A party, who asserts a claim, must prove it. It stated that when a person is bound to prove the existence of any fact, it is said the burden of proof lies on that person. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side and in this case the 1<sup>st</sup> and 3<sup>rd</sup> defendants asserts that before the land was surveyed and plots created, the land belonged to their grandfather or father and that it was a farm. There was no such proof

of the existence of the farm before the land was surveyed, there was no proof that the Late Suleiman Suleiman who the defendants' claim that was the original owner of the farmland indeed owned the farm in that area, and for how long. I understand that the Village Land Act recognises those who have occupied lands for many years are entitled to customary rights of occupancy, but there must be proof that their late grandfather or father had occupied the land for many years and thus entitled to customary right of occupancy under the Village Land Act. The defendants' grandfather or father ought to have registered the right and obtain a Certificate of Customary Right of Occupancy, and this would have proved that before the land was surveyed the defendants' grandfather or father was the owner of the land under customary tenure, thus entitled to allocation of the land after survey.

The defendants were duty bound to give proof that the land in question fell under a certain village and that the Village Council and Village Adjudication Committees, which also maintain the village land registries recognised the long occupancy of the land in question by their grandfather or father. There ought to have been proof that it was

their late grandfather or father that had requested to the Ministry of Land for the survey of his farmland, and that after the survey these two plots i.e. plot No 624 and 622 Block D were created. None of these was proved by either the 1<sup>st</sup> defendant who testified as DW1 or the 3<sup>rd</sup> defendants who testified as DW2. All what was brought to court was the communications and exchange of letters between them and the Commissioner for Lands in which they demanded to be issued with the Certificate of Titles for plots No 2157 and 2158. The Court is also not furnished with any proof from the defendants that plots 622 and plot 624 were renumbered to read plots No 2157 and plot no 2158. The Court cannot give right to any person in the absence of proof.

On the other hand, the plaintiff was able to furnish to Court not only the Letter of Offer for Plot No. 237 Block D Mbezi Medium Density but also a Certificate of Title No 50376 for plots No 2157 and 2158 Block D Mbezi Area, Dar es Salaam City, which was received by Court as evidence and marked as Exhibit P8, the plaintiff also produced in Court a letter from the Municipal Director of Kinondoni Municipality dated 06 June 2000 with Ref No. D/KN/A/26514/19/TNP, the letter which was

addressed to the Commissioner for Lands (Exhibit P6), in which it was stated that the Letter of Offer with Ref No. D/KN/A/26514/1/SMK of 8/7/1986 issued to Musinda T Bandora for Plot No 237 Block D Mbezi is a genuine Letter of Offer, and that the letter confirms that Plots No 2157 and 2158 were created out of plot no 237 through the Survey Plan No. S'255/322, and that plot No 237 and plots no 2157 and 2158 are on the same land. The letter reads and I quote:

*'.....ni kweli kiwanja namba 237 Kitalu D Mbezi kimetolewa kwa ndugu MUSINDA T BANDORA wa SLP 9000 Dar es Salaam kwa barua ya toleo Kumb. No D/KN/A/26514/1/SMK ya tarehe 8/7/1986. Nathibitisha kwamba viwanja namba 2157 na 2158 ambavyo vimepimwa na kuidhinishwa na Mkurugenzi wa Upimaji na Ramani vinavyopatikana kwenye Ramani No. S'255/322 ni halali kwa mantiki ya Upimaji na Ramani. Aidha Site Plan ya Kiwanja namba 237 iliyosainiwa na Mpima wa Jiji.... vina uhusiano na viwanja namba 2157 na 2158 na ni eneo moja.*

*Ramani (Site Plan) inayoonyesha namba 622 na 624 havoani na namba 2157 na 2158 na haitambuliki kitaalamu kwa kuwa ni mchoro wa viwanja tu na haviingliani, na viwanja hivyo, site plan ya viwanja namba 2157 na 2158 vilitolewa kwa mujibu wa Ramani S'255/322 na havihusiani na viwanja namba 6222 na 624 Kitalu D Mbezi."*

This letter Written by the office of the Director of Kinondoni Municipal Council, the successor authority to Dar es Salaam City Council and the custodian of the registries of all the Letter of Offers and the Site Plans for all lands in Kinondoni Municipality confirms that Plot No 237 was allocated to the plaintiff, they further confirm that Plot No 237 Block D Mbezi Medium Density was re-surveyed and plots numbers 2157 and 2158 were created, and that the Site Plan used for the former plot No 237 and the new plots No 2157 and 2158 is the same which is Site Plan No S'255/322, and this Site Plan is the one recognised by the Survey and Mapping Department of the Kinondoni Municipality. The Letter further confirms that Plot No 237 and 2157 and 2158 are on the same area. The Letter also confirms that plots no 622 and 624 are not



on the same area as plots no 2157 and 2158, and on top of that the Site Plan which was used to create Plots No 622 and 624 is not recognised by the Mapping and Survey Department (hautambuliki kitaalamu)- as the Site Plan is only the drawings and not the Site Plan prepared and issued by the Mapping and Survey Department.

In a simple language, the Dar es Salaam City Council which issued the Letters of Offer to the 1<sup>st</sup> and 3<sup>rd</sup> defendants are denying that there was never a Site Plan for creation of Plots No 622 and 624, and that these plots do not exist in the same area as plots no 2157 and 2158. The issuer or allocation authority is denying the existence of the Site Plan which gave birth to these two plots i.e. Plot No. 622 and 624 Block D Mbezi M.D, which were allocated to the 1<sup>st</sup> and 3<sup>rd</sup> defendants. No wonder to date, the 1<sup>st</sup> and 3<sup>rd</sup> defendants could not be issued with the Certificate of Title to Plots No 2157 and 2158 which they claim to own since those two plots were already allocated to the plaintiff.

From the above analysis of the evidence, it is crystal clear that the plaintiff case is proved on the required standards in civil proceedings,

and to answer issue No 1, indeed the suit premises belongs to the plaintiff.

As to whether the plaintiff is entitled to mesne profits, the first mini issue in this issue is whether the plaintiff is entitled to mesne profits. In so far as the plaintiff was given the Letter of Offer since 1986 was proved to be true, the plaintiff was never in actual occupation of the suit premises, the suit premises was occupied by the 1<sup>st</sup> and the 3<sup>rd</sup> defendants. The 1<sup>st</sup> and 3<sup>rd</sup> defendants were in occupation of the suit property believing that it was their property since they were issued with the Letter of Offers and Building Permits by the Dar es Salaam City Council. Mesne Profits are only recoverable from a person who has been in wrongful occupation, and mesne profits is compensation from a person who has occupied the land of another unlawfully. This was discussed in detail by the Court of Appeal in the case of **Eligius Kazimbaya vs Pili Prisca Mutani @Pili Prisca Yangwe Mutani and Peter Paul Kazimbaya, Civil Appeal No. 163 of 2019**, in which the Court of Appeal cited with approval the Kenyan Decision in **the High Court of Kenya's decision in Rajan Shan T/A Rajan S.**

**Shah and Partners v. Bipin P. Shah, Civil Appeal No. 209 of 2011** (unreported) in which, the term "mesne profit" was defined as follows: -

*The term "mesne profit" relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property; The mesne profits are nothing but compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession in the very essence of claim for mesne profits and the very foundation of the unlawful possessor's liability therefor. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits." The plaintiff would only have been entitled to mesne profit if the defendants herein were in unlawful occupation of the suit premises, but they were in the occupation and possession of the suit premise believing that the premises were lawfully allocated*

*to them by the competent authority, and they were in belief that the land is their own property and not the property of another. The plaintiff is therefore not entitled to recover mesne profits from the defendants.*

In any case, even if it is ruled that the plaintiff is entitled to recover mesne profits from the defendants, (which is denied) there was no proof of the fact that had the plaintiff been in occupation of the property he would have earned such claimed amount of rent. The plaintiff only pleaded the amount of mesne profits in the plaint without substantiating it. This again was discussed in the above cited case, the case **of Eligius Kazimbaya (supra)** in which the Court of Appeal, the Justices said and I quote:

*"The issue which is still unresolved is whether such assertion was sufficient to appreciate the amount of mesne profit to be awarded. This Court had an occasion of dealing with an akin situation in the case of Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd, Civil Appeal No.*

*15 of 2016 (unreported) in which it was observed as follows: -*

*"We think in fairness to trial judge, DW2s tenuous figures of money which was collected as rent can hardly provide the basis for the determination of definite amounts of mesne profits to cover the period of six to seven years when the respondent was in occupation of the suit property. We take judicial notice of the fact that in a Municipality like Arusha, payments of rents are evidenced by receipts and rents attract municipal taxes and fees which should have been evidenced by documents. We similarly take it that tenants occupying rooms in the suit property had rent agreements... These agreements were not exhibited before the 15 trial court. This Court has on an occasion provided in the case of Abdul Ham ad Mohamed Kassam and A b d u l a t i f f L. Murukder v. Ahmed Mbaraka, Civil Appeal No. 42 of 2010 (unreported) commented that proof of mesne profits needs evidence because it is not a question of pure law: - "... There is no*

*dispute that in law mesne profits is calculated on the basis of the rent payable at the material time. But it occurs to us that in the justice of this case, the basis and terms of the leased agreements had to be established first before determining the amount of mesne profits payable in the circumstances. Yet again, this was a matter which needed evidence. It was not a question of pure law,"*

Similarly, in this case, and as guided by the decision of the Court of Appeal, the plaintiff could not establish by cogent evidence that he is entitled to mesne profits at the rate or amount he has claimed, since the amounts of mesne profits must be proved by evidence. Entitlement to mesne profits and the amount of mesne profits requires proof by evidence since it is not a question of pure point of law.

That said, this Court declares that the property known as Plot No 2157 and 2158 Block D Mbezi Medium Density (formerly known as Plot No 237 Block D Mbezi Medium Density) comprised in the Certificate of Title No. 50376 is the property of Ambassador Musinga Timothy

Bandora, the plaintiff herein. The defendants are ordered to yield vacant possession of the suit premises immediately. The defendants are also permanently restrained from interfering with the plaintiff peaceful enjoyment of the suit premises.

The plaintiff is not entitled to recover mesne profits from the defendants since the defendants were not in wrongful occupation of the suit premises; and since the defendants were dragged to court for mistaken belief that they own the demised premises, I shall not condemn them to costs, and I order that each party shall bear his/her own costs of the suit.

It is so ordered.

**DATED and DELIVERED at DAR ES SALAAM this 1<sup>ST</sup> day of  
SEPTEMBER, 2023**



*L. Mansoor*  
**L. MANSOOR  
JUDGE  
1<sup>ST</sup> SEPTEMBER 2023**