

**THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
LAND CASE NO. 12 OF 2020**

**JAMES MARWA MAHANDO ----- PLAINTIFF**

**VERSUS**

**BEN M. NGEREZA -----DEFENDANT**

**EXPARTE JUDGEMENT**

*Date of last order: 02.06.2023*

*Date of Judgement: 14.07.2023*

**EBRAHIM, J.:**

James Marwa Mahando, the Plaintiff in this suit has instituted this case raising a claim against the Defendant namely Ben M. Ngereza that he has unlawfully trespassed into his land the act that causes him inconveniences and being unable to peacefully enjoy his land. The disputed land comprises of three surveyed Plots No. P4591, P4592 and P4593 located at Mabwepande area within Kinondoni

Municipality at Dar Es Salaam ("the disputed land"). The Plaintiff averred in the plaint that he purchased the disputed land in the mid of year 2000 and on 10<sup>th</sup> January 2019 the said land was surveyed. He managed to process and obtain Certificates of Title for the above mentioned Plots which are No. DSMT1001397, DSMT1001398 and DSMT1001399 respectively **(Exhibit PE9 collectively)**. He averred further that sometimes in March 2021, the Defendant emerged claiming ownership of the disputed land and on several occasions he used the Police and the office of Kinondoni District Commissioner to intimidate him to vacate the disputed land. The Plaintiff has therefore filed the instant suit praying for this court to issue the following orders against the Defendant;

- i. Declaratory order that the Plaintiff is the lawful owner of the Land in dispute described as Plots No. (P4591, P4592 and P4593) located at Mabwepande Area, Kinondoni Municipality;
- ii. A declaratory order that, the Defendant is the trespasser into the Land in dispute in (a.) above;
- iii. A permanent restraining order, restraining the Defendant

and/or his agent(s) or assignee(s) or any other person from trespassing to the Land in dispute in (i) above;

- iv. General damages be awarded to the Plaintiff against the Defendant as may be assessed by the Court for trespassing and preventing the Plaintiff from enjoying use of his Land peacefully;
- v. Costs of the suit;
- vi. Any other relief that this honourable court may deem just and fit to grant.

The Defendant in his written statement of defence vigorously refuted the claim by the Plaintiff and contended that it is the Plaintiff who has illegally trespassed into his land having acquired it sometimes in 1982. He challenged almost all the documents attached by the Plaintiff as being forged or fraudulently obtained hence the summons from the District Commissioner. Save for the contents of the plaint that the Defendant specifically noted, he denied each and every allegation mounted by the Plaintiff and put the Plaintiff to strict proof thereof.

On 19.10.2022, the following issues were agreed and framed by the court for determination:

1. Whether the Plaintiff is the lawful owner of the suit land;
2. If the 1<sup>st</sup> issue is in affirmative, whether the defendant trespassed over the suit land; and
3. To what reliefs are the parties entitled to.

This case was scheduled for hearing on a special session between 01.06.2023 and 02.06.2023. On 30<sup>th</sup> May 2023, Counsel for the Defendant unsuccessfully filed notice of preliminary objection which was heard and determined by this court. After the ruling of the preliminary objection, counsel for the Defendant unsuccessfully prayed for the court to adjourn the hearing of the case.

Following the refusal of the court to adjourn the hearing of the case, counsel for the Defendant informed the court that he would not proceed with the case and left.

Following such a situation, this court proceeded with the hearing of Plaintiffs witnesses on 01.06.2023 in terms of **Order XVII Rule 1 (3)(d) and (e) of the Civil Procedure Code Cap 33 RE 2019.**

When the case proceeded for hearing again on 02.06.2023, neither the Defendant nor his advocate entered appearance and no

information was availed to the court on their absence. In that circumstance and in consideration of the fact that it was a backlog case scheduled on a special session, this court granted the prayer to proceed with *ex parte* proof of the remaining Plaintiff's witness against the defendant.

Before me, the Plaintiff was represented by advocate Charles Lugaila assisted by advocate Alfred Swai. The Defendant had the representation of advocate Henry Kitambwa.

In proving his case, the Plaintiff called a total of five witnesses.

*Whether the Plaintiff is the lawful owner of the suit land.*

In adjudicating this case and being a civil matter, I shall be guided by the cardinal principle of the law that "*he who alleges must prove*".

In the present case, the Plaintiff seeks to be declared as the lawful owner of the disputed land. Therefore, the onus of proving his ownership of the suit land is upon him. This position was stated in **Godfrey Sayi vs Anna Siame as Legal Representative of the Late Mary Mndolwa**, Civil Appeal No. 114 of 2014 (CAT) (unreported) and

**Salum Mateyo vs. Mohamed Mateyo** [1987] T.L.R 111. In

**Godfrey Sayi (supra)** the Court of Appeal said that:

*"It is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002] which among other things states:*

*110. Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist*

*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."*

It is therefore clear that the duty to prove the case is placed on the Plaintiff even when the case is heard *ex parte*. This view was expressed by this Court in **The Manager, NBC, Tarime v Enock M. Chacha** [1993] TZHC 8; (02 November 1993 TANZLII) where Masanche, J (as he then was) stated:

*"Assuming that the respondent was properly allowed to prove his case ex-parte, he did not prove his case on the balance of*

*probability as required by law. It does not follow that since a party has been allowed to prove his case ex-parte, he can just casually go through his claims, in the hope that the Court will readily grant the prayer. A party who proceeds to prove his case ex-parte must prove his case on the required standard of the law. Where the proof falls short of the required standard, the court must dismiss the case... " [Emphasis added].*

In a bid to abide to the set principle of the law, the Plaintiff testified first as **PW1**. He explained to the court that he obtained the suit land after buying almost 3 acres from one Mzee Ismail Issa Rina (deceased) way back on 12.03.2005. He testified that he heard about the sale of the disputed property from his father's friend Mr. Josephat Matakala Mbiso (**PW3**) and he conducted due diligence by asking the Ten cell leader Akili Maliyesi (**PW4**) who confirmed to him that the disputed land is the property of Ismail Issa Rina (now deceased). Thereafter, the sale agreement (**exhibit PE1**) was prepared by the Chairman of Serikali za Mtaa one Abdallah Omary Kunja (**PW2**) and witnessed by PW2 and PW4 of which he purchased for the price of Tshs. 4,000,000/-. He named other witnesses one of them Omar Sultan Mbenda, **Josephat Mbiso (PW3)**.

After purchasing the land in the area, he was joined as a resident of Mabwepande Street **(exhibit PE2)**.

PW1 testified further that on 02.04.2018 he applied for a permit to survey the area from the Director of Kinondoni Municipal through Ward Executive Officer of Mabwepande and Street Executive Officer, both of Mabwepande **(exhibit "PE3")**. He was issued with a survey permit and instruction to Survey (SF – 37) **(exhibit "PE4")** as well as the location plan **(exhibit "PE5")**. The survey was conducted where beacons were inserted and the disputed land was divided into three (3) plots. PW1 also explained that the map was taken to the Ministry of Land and he was availed with approval survey map **(exhibit "PE7")**.

Testifying further on the route he took to obtain Certificate of Titles of the respective pieces of land, PW1 testified that after the survey plan of Plots No. P4591, P4502 and P4593 located at Mabwepande Street, Mabwepande Ward, Kinondoni District which is the disputed land, he applied for the Certificates of Title by paying the relevant fees **(exhibit PE8)**. He was availed with Certificates of Title Nos. DSM T1001397 – Plot P4591 with sqm 5229 for Industrial Usage;



DSMT1001398 – Plot P4593 with sqm 5534 for Industrial Usage; and DSMT1001399 – Plot P4592 with sqm 2454 for a Petrol Station - (**exhibit "PE9" Collectively**).

**PW2, Mr. Abdallah Omari Kunja** supported the Plaintiff testimony that he was involved in the preparation of the sale agreement on 12.03.2005 of the disputed land between the deceased Ismail Issa Rina and James Marwa Mahando located at Mabwepande Street, Mabwepande Ward in Kinondoni District. He said he was Mwenyekiti wa Mtaa of Mabwepande from 2004 to 2019. He confirmed the PW1's assertion that before the purchase arrangement the Ten cell leader of the respective area one Akili Athumani Maliyesi (**PW4**) was called in order to confirm if the disputed land is owned by Ismail Issa Rina. He said the sale agreement was signed in his office and it was witnessed by the Ten Cell Leader Akili Athumani Maliyesi (**PW4**), Omary Sultani Beda and him. PW2 recognized **Exhibit PE1** as the Sale Agreement that he witnessed. He also confirmed that he informed the Plaintiff about joining Mabwepande Residence where PW1 filled the form, paid the requisite fees and became a member.

He spoke about the Defendant that he knew him in 2019 when he went to his office to seek for introduction letter so as to prove that he has a piece of land at Mabwepande. He said he told the Defendant to bring an agreement first so as to attach with the introduction letter. The Defendant did not have any so he went out and never returned.

He explained thoroughly the history of Mabwepande that it started as village in 1974 until 1999 during the election of Serikali za Vijiji na Mitaa. Serikali za Mitaa were dissolved and remained with Serikali za Vijiji for Dar Es Salaam Region only. He said, in year 2004, Serikali za Vijiji were made obsolete for Dar Es Salaam and resumed Serikali za Mitaa. Thus, in essence he responded to the Defendant's argument in his Written Statement of Defence that in the year 2005, Mabwepande had not attained the status of "Mtaa".

**PW3, Mr. Josephat Matakala** testified to know the late Ismail Issa Rina as he has been living at Mabwepande since 1998. He said Ismail Issa Rina was his neighbor and a lawfully owner of the disputed land. He told him that he wants to sale the disputed land and it was him who relayed such information to the Plaintiff and the Plaintiff purchased

the land. He confirmed to be the witness of the Plaintiff in the sale agreement which was signed in 2005 and named other witnesses to be PW2 and the Ten cell leader Akili Athuman Maliyesi (PW4). He said the agreement was signed in 2005. PW3 recognized exhibit "PE1". He said the late Ismail Issa Rina died year 2010 onwards.

**PW4, Mr. Akili Athumani Maliyesi** testified that he has been living at Mabwepande since Independence. He was a Ten cell leader from Kikwete to Magufuli eras. He was involved in the sale of the disputed land and he witnessed the sale agreement as a Ten cell leader. He confirmed that the disputed land was of the property of the late Ismail of which the late Ismail obtained it when he was there. **PW4** recognized **exhibit "PE1" and "PE2"**.

**Mr. Selemani Saidi Nachombe (PW5)** came to confirm to the court that the late Ismail Issa Rina was his uncle being his mother's young brother who has been living in Mabwepande since 1987 and died year 2012. He tendered in court "Kadi ya Kupigia Kura" of the late Ismail Issa Rina of 2005 (**exhibit PE10**) in showing that in 2005 his uncle was still alive. He testified further that he was not around when his

uncle sold the dispute land to the Plaintiff but when he went back from Lindi in 2009, the late Ismail Issa Rina told him that he has sold his land about 3 acres to James Mahando.

The law i.e., **Section 2 of the Land Registration Act, Cap 334 RE 2019** defines "owner" to mean, *in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered.*

It follows therefore that when two persons are claiming interest over the same piece of land, it is taken that a person with certificate of title thereon, is a lawful owner unless it is proved otherwise.

This position has been well discussed in the Court of Appeal case of **Leopold Mutembei Vs Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and the Attorney General**, Civil Appeal No. 57 of 2017 quoted with approval the following excerpt from the book titled **Conveyancing and Disposition of Land in Tanzania** by Dr. R.W.Tenga and Dr. S.J. Mramba, Law Africa, Dar Es Salaam, 2017 pg 330:

*" The registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of, or a*

*legal interest in, a parcel of land. The act of registration confirms transaction that confers, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, **for the register itself is conclusive proof of the title.**" (Bold emphasis added).*

In light of the above testimonies by the Plaintiff's witnesses, this court has been availed with overwhelming evidence from when the Plaintiff purchased the disputed land from the late Ismail Issa Rina in 2005(**exhibit PE1**), to due diligence conducted ((**PW2, PW3 and PW4**) and involvement of the relevant local authority leaders (**PW2 and PW3**). The application (**exhibit PE8 collectively**) and grant of the certificates of title of the disputed land (**exhibit PE9 collectively**) are part and parcel of such evidence.

A statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 340 suffice to emphasize on the point as I reproduce hereunder;

*"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is*

*so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not... "*

In essence, the above testimonies, proves the fact that it can be traced as to how the Plaintiff obtained the legal title of the disputed land.

That being said and in the absence of any other cogent proof of ownership to prove otherwise, I find that the presence of Certificates of Title by the Plaintiff is a prima facie proof of ownership of the

disputed land coupled with the testimonies and evidentiary proof propounded above on how he acquired the said land.

Therefore, I am satisfied on the balance of probabilities that the Plaintiff managed to prove that he is the lawful owner of the disputed land. In that respect, the first issue is answered in the affirmative.

In the second issue, this court is being called to **answer as to whether the Defendant trespassed over the suit land.**

Trespass was defined in **Frank Safari Mchuma vs Shaibu Ally Shemdolwa** [1998] TLR 280 at page 288 where the High Court, (Lugakingira, J. as he then was) stated: -

*"By definition trespass to land is unjustifiable intrusion by one person upon the land in the possession of another. It has therefore been stated with a light touch that:*

***"If the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much as a trespass as if he had walked half a mile on it" (Ellis v. Loftus Iron Co. (2) per Coleridge C.J. at P. 12) ..."* [Emphasis added].**

In his testimony, PW1 averred that the Defendant claimed to be the owner of the disputed land in March, 2021 (see also para 2 of the

Defendant Written Statement of Defence). PW1 testimony was supported by PW2, PW3 and PW4 who testified to be the ones who witnessed the sale agreement and other legal formalities in order for PWT to obtain Certificate of Titles. PW2 testified that in 2019 the Defendant went to his office to seek for introduction letter. The Defendant wanted that letter to prove he has a piece of land at Mabwepande. However, the Defendant could not bring the required agreement which as a pre-requisite set by the local authority.

Basing on **exhibit "PE9"** Collectively and the evidence adduced by PW2, I find that the claim of ownership by the Defendant in his WSD is ought-weighed by the concrete proof of ownership of the disputed land by the Plaintiff. It follows that the Defendant is a trespasser on the disputed land. The second issued is equally answered in affirmative.

The third issue is **on the reliefs if any parties are entitled to.**

It is the function of the Court, through an assessment of testimony and evidence to determine and quantify the damages to be awarded to the injured party. See **Zuberi Augustino v. Anicet**



**Mugabe**, [1992] TLR 137. Nevertheless, it is obvious that the Defendant's claim of the disputed land, had put the Plaintiff in the pedestal and quagmire of court litigations since 2021.. The Plaintiff was in the verge of developing the disputed land as per his testimony and averments in the plaint when the Defendant appeared and legal wrangling began including the involvement of police and or the office of the District Commissioner. Surely, the inconveniences caused to the Plaintiff cannot be left without general reparation.

Conversely, it is the general position of the law that general damages are such as the law will presume to be the direct, natural or probable consequence of the complained act or the defendant's wrongdoing has caused either a sole or a particularly significant cause of damage – see **Tanzania Sanyi Corporation vs. African Marble Company Ltd** [2004] TLR 155. A similar approach was taken in **P. M. Jonathan vs Athuman Khalfan** [1980] TLR 175, where at page 190 it was stated that: -

*"The position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as a solarium for mental pain and suffering."*

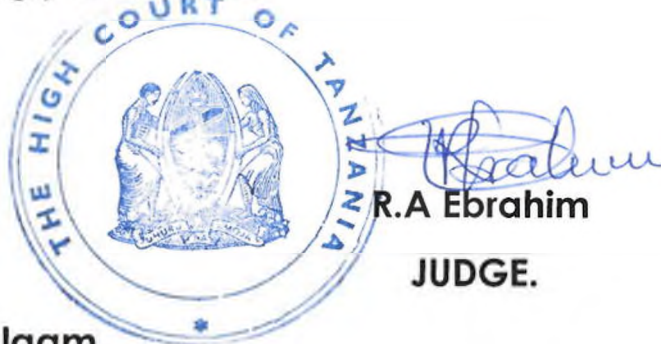
As alluded above, the act of the Defendant has denied the Plaintiff his right to use, develop and enjoy his land. The Plaintiff deserves some compensation for the inconveniences caused. In the circumstances therefore, I find the grant of Tshs. 20,000,000/- (Say Twenty Millions Tanzania Shillings as general damages to the Plaintiff shall serve as a solace to the inconveniences caused.

In the end, Plaintiff's suit succeeds with the following orders being made:

- i. The Plaintiff is hereby declared as the lawful owner of all three plots in the disputed land i.e., Plot No. P4591, P4592, P4593 with Certificate of Titles No. DSMT1001397, DSMT1001399 and DSMT1001398 respectively situated at Mabwepande Area, Kinondoni Municipality in Dar Es Salaam Region;
- ii. The Defendant is declared as a trespasser to the land belonging to the Plaintiff as described in item (i) above;

- iii. A permanent injunction is hereby issued to the Defendant and/or his agent(s) or assignee(s) or any other person restraining them from interfering with the Plaintiff's occupation and ownership of all three plots of the disputed land i.e., Plot No. P4591, P4592, P4593 with Certificate of Titles No. DSMT1001397, DSMT1001399 and DSMT1001398 situated at Mabwepande Area, Kinondoni Municipality in Dar Es salaam Region;
- iv. The Defendant to pay the Plaintiff a total of TZS. 20,000,000/= (say Tanzania Shillings Twenty Million) only as general damages; and
- v. The Defendant shall pay costs of this suit.

Accordingly Ordered.



**Dar Es Salaam**  
**14.07.2023.**