

**THE UNITED REPUBLIC OF TANZANIA**  
**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**LAND CASE NO. 10 OF 2020**

**1. IZADINI J. KALOKOLA**  
**2. ROBERT ELISHA MAJANJARA ----- PLAINTIFFS**

**VERSUS**

<b>1. JOSEPH KAMSUTI</b> <b>2. JOSEPH MPANDA</b> <b>3. JOSEPH ASENGA</b> <b>4. ANASTUS NGONYANI</b> <b>5. JAMES ASENGA</b> <b>6. MARTHA MBATTA</b> <b>7. RESPICIUS BARUTI</b> <b>8. MARIUS KATUNZI</b> <b>9. JOHN C. NKUBA</b> <b>10. PHILOMENA ERNEST TULAGANGE</b> <b>(as a successor administratrix of the estate</b> <b>of the late ERNEST TULAGANGE)</b>	<b>-----</b>	<b>DEFENDANTS</b>
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**EXPARTE JUDGEMENT**

*Date of last order: 31.05.2023*

*Date of Judgement: 21.07.2023*

**EBRAHIM, J.:**

The Plaintiffs herein i.e., Izadini J. Kalokola and Robert Elisha Majanjara pray for judgement and decree against the 1<sup>st</sup> to 10<sup>th</sup> Defendants jointly and severally as follows:

- i. The declaration that the landed Properties which are two pieces of un-surveyed land covering four acres of land situated at Msakuzi area in Ubungo District within the City of Dar Es Salaam (Hereinafter referred to as the "Suit Properties") are lawfully owned by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
- ii. The declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants are trespassers to the suit Properties.
- iii. Eviction order against the Defendants and/or their agents, assignees or unlawful occupiers occupying from the directions of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants.
- iv. Perpetual injunction order to restrain the Defendants and/or their agents, assignees or unlawful occupiers occupying from the 1<sup>st</sup> to 9<sup>th</sup> Defendants direction from further trespassing into the suit properties.

The two pieces of land are the suit properties measuring a total 4 acres of un-surveyed land located at Msakuzi area in Ubungo District within the City of Dar Es Salaam.

The Plaintiffs averred in their plaint that they lawfully purchased the two pieces of land year 2009 from Halima Tulagange who was an

administratrix of the estates of the late Ernest Tulagange (her father). They explained the historical ownership of the ownership of the said land that initially the suit land was owned late Ernest Tulagange who owned the same in the year 1977. In 2008, a case on ownership of the disputed land (Complaint No. 147 of 2008 - **exhibit PE5**) was successfully instituted at Mbezi Ward Tribunal against John Cannon Nkuba, the 9<sup>th</sup> Defendant herein and he was vacated from the suit property through execution proceedings (**exhibit PE6**).

It was on 24<sup>th</sup> April 2009 that Halima Tulagange as an administratrix of the estate of the late Ernest Tulagange sold 1 1/2 acres to the 2<sup>nd</sup> Plaintiff for Tshs. 14,000,000/-; and on 28<sup>th</sup> June 2009 she sold approximately 2 acres to the 1<sup>st</sup> Plaintiff for Tshs. 24,000,000/- only.

The Plaintiffs averred further in their plaint that on 07<sup>th</sup> October 2018 the 1<sup>st</sup> to the 9<sup>th</sup> Defendants claiming to act under the directives of Ubungo District Commissioner by then one Makori Kisare, trespassed into the suit properties on allegation that they have been declared the owners of the suit property by the said Ubungo District Commissioner and District Executive Director.

This case proceeded ex parte. The Defendants despite being served

via publication in Uhuru Newspaper of 28<sup>th</sup> July 2021 they neither entered appearance nor filed their Written Statement of Defence. This court therefore, on 15.02.2022 ordered for this case to proceed *exparte* against the Defendants.

When this case came for hearing, the Plaintiffs were represented by Mr. Gabriel Kunju, learned Counsel.

The framed issues for determination by the court were as follows:

1. *Whether the Plaintiffs are the lawful owners of the suit property;*
2. *Whether the Defendants are trespassers to the suit property;*  
*and*
3. *Relief (s) if any parties are entitled to.*

To prove their case Plaintiffs called three witness.

In proving his claim of ownership of the suit property, Izadin Jumabadru Kalokola (PW1) testified before this court that he purchased the portion of the disputed property from the Administratrix of the Estate of the late Ernest Tulagange named Halima Ernest Tulagange (**exhibit PE3**). He said before purchasing the land he made due diligence by asking the “Mtendaji wa Mtaa” and the Ten cell leader of the area and he discovered that the farm was

the property of the late Ernest Tulagange whose heirs were Halima Ernest Tulagange and Philomena Ernest Tulagange. Halima was appointed as an administratrix of the estate.

He testified that the witnesses for the purchase were Halima Tulagange and her young sister Philomena Tulagange (10<sup>th</sup> Defendant) and that Philomena allowed her sister to sell the same **(Exhibit PE1 sale agreement and PE4 – Idhini ya Warithi Wenza)**. PW1 testified further that he purchased the disputed property for Tshs. 24,000,000/- of which he deposited Tshs. 15,000,000/= in the Bank. Akiba Commercial Bank Limited Internal Funds Transfer Slip of 28.06.2010 for Tshs 15,000,000/- and a letter of 31.05.2022 were collectively admitted as **exhibit PE2**. When he was handed over the suit property, the Defendants violently invaded his farm, complained PW1.

He explained that after the purchase, the Defendants unsuccessfully filed a case at the Ward Tribunal against Halima Tulagange and John C. Nkuba (**exhibit PE7- Ruling and Drawn Order in respect of the objection proceedings filed by the Defendants against execution**).

As for Mr. Robert Elisha Majanjara (**PW2**), his testimony was similar to that of PW1 and he acknowledged knowing PW1 as the person whom they purchased a piece of land from the same person. He also said that before purchasing the suit property, he performed due diligence by making investigation from Ten Cell Leader and Street Executive Officer where he discovered that the disputed Land was the property of the late Ernest Tulagange who had two daughters. He said he met with the daughters and they entered into a purchase agreement (**exhibit PE8**). He purchased the property for Tshs. 14,000,000/- which he first paid Tshs. 10,000,000/- upfront and the remaining balance of Tshs. 4,000,000/- later. As he started to develop the farm, the defendants emerged and prohibited him to continue doing so. Hence, the instant case.

The Plaintiffs' testimonies were collaborated by the testimony of Ms. Philomena Ernest Tulagange (**PW3**) (the 10<sup>th</sup> Defendant) who confirmed to know both Mr. Kalokola (**PW1**) and Mr. Robert Elisha Majanjara (PW2) as persons whom they sold their farm through her sister who was an administratrix of the estate of their late father Ernest Tulagange. PW3 said they inherited the suit property from their father being the only two daughters. She testified further that the

whole farm was about 3½ acres and she consented for her sister to sell the same. She recognised **exhibit PE4** as the consent letter and **exhibit PE1 and PE8**, the purchase agreements they entered with **PW1 and PW2** respectively. She added that they do not owe the Plaintiffs anything and the suit properties belong to them. She added also that they had documents of where their late father obtained the disputed land.

As alluded earlier, this case proceeded ex parte.

Now coming to the first issue of *Whether the Plaintiffs are the lawful owners of the suit properties*, this case being a civil claim, the law dictates the standards of proof to be on the balance of probabilities as well settled in the case of **Scania Tanzania Limited vs. Gilbert Wilson Mapanda, Commercial Case No. 180 of 2002 (unreported)** where 'balance of probabilities' was defined to mean:

*'court is satisfied an event occurred if it considers that on evidence, the occurrence of the event is more likely than not.'*

It is also a settled principle of law in Civil suits that "whoever alleges must prove". Many cases have ascribed to this principle including the case of **Kwiga Masa vs. Samwel Mtubatwa [1989] TLR 103**.

Moreover, the provisions of **Section 110(1) and (2) of the Evidence Act, [CAP 6 R. E 2022]** puts the burden of proof of the allegations to the Plaintiffs. The law states that;

*'Section 110*

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.'* [Emphasis is mine]

The burden of proof to the person who alleges any fact is not extinct in a case where the matter is heard ex parte. The Court clearly set such principle in the case of **Roseleen Kombe Vs Attorney General (2003) TLR 347** where it held that;

*'Even where the defendant files no Written Statement of Defence at all or does not appear, let alone where he files "an evasive or general denial", the plaintiff still has to prove his case for*



*the relief sought **even if ex-parte**'.* [Emphasis is mine].

The evidence produced in this case tells it all that the Plaintiffs obtained the suit property by purchasing it from the heirs of the said land. PW3 being one the heir expressly told the court that together with her late elder sister who was the Administratrix of their late father's estate sold almost 3½ acres of the suit property to the Plaintiffs. To date, there is no revocation of such ownership of the late Ernest Tulagange either from the court or any other relevant authority with the legal mandate to do so. More so, indisputably is the fact that the late Halima Ernest Tulagange was appointed as an administratrix of the late Ernest Tulagange (**exhibit PE3**).

In their evidence, the Plaintiffs deposed that they bought the disputed land from Halima Ernest Tulagange (administratrix of the estate of the late Ernest Tulagange) and Philomena Ernest Tulagange (as a successor administratrix of the estate of the late Ernest Tulagange) and tendered the sale agreements which were admitted as **exhibit PE1 and PE8**. I have observed from the exhibit PE1 and PE8 that the vendor did sale the disputed land, which in fact was the property of the late Ernest Tulagange.

After an eye bird scrutiny of the Plaintiffs' evidence and the documentary evidence tendered in court, it shows that in **exhibit PE5** the Tribunal declared Halima Ernest Tulagange (administratrix of the estate of the late Ernest Tulagange) to have the right to inherent the farm of her late father, hence the lawful owner. Basing on that finding, the District Land and Housing Tribunal for Kinondoni District at Magomeni in the Misc. Land Application No. 210 of 2009 (**Exhibit PE6 and PE7**), held thus:

*'Since the judgement debtor has already vacated the disputed land and has already handed over the same to the Decree Holder. I close this matter and the Decree Holder should go and take possession of her land.'*

In view of what I have narrated herein above, I answer the first issue in affirmative that the Plaintiffs are the lawful owners of the two disputed pieces of land (owning separately) situated at Msakuzi area in Ubungo District within the City of Dar Es Salaam.

The 2<sup>nd</sup> Issue is Whether the Defendants are trespassers to the suit property.

It should be borne in mind that the first issue has been answered positively in favour of Plaintiffs.

To start with I am persuaded by the meaning of the phrase "**trespass**" as propounded by Lugakingira, J. in the case of **Frank Safara Mchuna Vs Shaibu Ally Shemdolwa, High Court of Tanzania, [1998] TLR No. 279** defined as;

*"Intrusion upon land in the possession of another and the Defendant did intrude upon the land of the Plaintiffs who under common law was in possession of the land. At common law there is a presumption that possession is always attendant to title and as the Plaintiff had title to the land it is presumed that he was in possession."*

Also, in another persuasive case which I seek inspiration from, the case of **Ellis Vs Loftus Iron CO. (1874) LR 10 CP**, the concept of trespass was prescribed in the following manner;

*'If the Defendant place a part of his foot on the Plaintiff's land unlawfully it is in law as much as trespass as if he had walked half a mile on it.'*

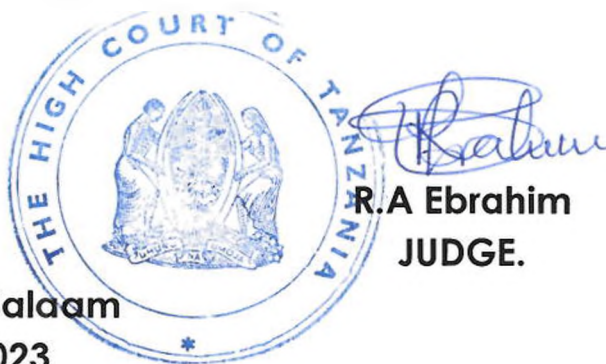
In the instant case, the 1<sup>st</sup> Plaintiff is asserting that 2 acres belongs to him via **Exhibit PE1** and the 2<sup>nd</sup> Plaintiff is asserting that 1½ acres belongs to him via **Exhibit PE8**. Basing on the circumstances and available cogent and credible evidence adduced during the trial and admitted in court, the question as to who has a better title of ownership of 3½ acres and who is a trespasser, its answer is very straight. As the 1<sup>st</sup> issue has been answered affirmatively that the Plaintiffs are the lawful owner of 3½ acres (suit properties) separately situated at Msakuzi area in Ubungo District within the City of Dar Es Salaam as per **Exhibits PE1 and PE8** I proceed to find the Defendants to have trespassed the Land in dispute owned by the Plaintiffs.

Finally, as to the reliefs, the findings of the 1<sup>st</sup> and 2<sup>nd</sup> issues of this judgment sufficiently demonstrate that the Plaintiffs have managed to prove their ownership of the suit properties as per the dictates of the law. This court hereby grant the following reliefs:

1. That, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are declared as lawful owners of 3½ acres of the un-surveyed pieces of land situated at Msakuzi area in Ubungo District within the City of Dar Es Salaam (owning separately).

2. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants are trespassers to the suit Properties described at 1 above.
3. An eviction order is hereby granted. All Defendants must evict from the suit properties at their own costs within the period of one month from the date of this judgement.
4. A permanent injunction is hereby issued to all the defendants and/or their agents restraining them from interfering with the Plaintiffs' occupation, enjoyment and ownership of the unsurveyed suit properties.
5. Save for the 10<sup>th</sup> Defendant, all other Defendants in this suit shall jointly and severally pay costs of this suit.

Accordingly Ordered.



**Dar Es Salaam**  
**21.07.2023**