

**IN THE HIGH COURT OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**  
**AT SHINYANGA**

**LAND CASE NO. 02 OF 2022**

*(Originating from High Court of Tanzania (Original Jurisdiction))*

**RAPHAEL SHINANE ..... APPLICANT**

**VERSUS**

**SOSTENES MAGEZI ..... 1<sup>ST</sup> DEFENDANT**

**SHINYANGA MUNICIPAL COUNCIL ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

*Date of last Order: 25/10/2023*  
*Date of judgment: 06/11/2023*

**B. E. K. Mganga, J.**

On 30<sup>th</sup> March 2022, Raphael Shinane, the abovenamed plaintiff, filed this case against Sostenes Magezi, Shinyanga Municipal Council and the Attorney General, the abovenamed 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants respectively, praying the court to issue orders *inter-alia* that, he is the lawful owner of plot No. 60 Block JJ, Medium density located at Ndembezi area within Shinyanga Municipality.

It is undisputed by the parties that, on 3<sup>rd</sup> June 1996, the 2<sup>nd</sup> defendant issued one Anthony Magezi, now deceased, an offer for plot

No. 60 Block JJ, Medium density located at Ndembezi area within Shinyanga Municipality. It is also undisputed by the parties that, on 10<sup>th</sup> July 1996, after death of the said Anthony Magese, one Lydia Magese, the wife of the late Anthony Magese, sold the said plot to Raphael Shinane, the plaintiff at the price of TZS 150,000/=. It is further undisputed that, after purchase of the said plot, the 2<sup>nd</sup> defendant issued an offer to the plaintiff and that, on 18<sup>th</sup> October 2001, the 2<sup>nd</sup> defendant issued a Certificate of Title No.13558 for plot No. 60 block JJ, Ndembezi Shinyanga in favour of the plaintiff for the period of ninety-nine (99) years. It is also undisputed that, Sostenes Magezi, the 1<sup>st</sup> Defendant, is the owner of plot No. 61 block JJ Ndembezi area within Shinyanga Municipality. It is further undisputed by the parties that, in 1992, 1<sup>st</sup> defendant applied for a plot in the name of Eric Magezi, his son, and was allocated plot No. 59 Block JJ, Ndembezi within Shinyanga Municipality and an offer was issued to that effect. It is also undisputed by the parties that, in 2017 ownership of plot No. 59 changed from Eric Magezi to Sostenes Magezi, the 1<sup>st</sup> defendant, after the two had applied for transfer of ownership. It is said that, after the said change of ownership, 1<sup>st</sup> defendant constructed a house on a plot he believed is number 59/A block JJ Ndembezi Shinyanga. It is the construction of the

said house that sparked the dispute between the plaintiff and the 1<sup>st</sup> defendant hence this case.

It is alleged by the plaintiff that, the 1<sup>st</sup> defendant has erected a house on plot No. 60 block JJ Ndembezi Shinyanga that was allocated to him and which, he holds a certificate of Title. Based on the foregoing, plaintiff is praying *inter-alia* (i) the court to issue an order declaring him to be the lawful owner of plot No. 60 Block JJ Ndembezi Shinyanga, (ii) 1<sup>st</sup> defendant be evicted from plot No. 60 Block JJ Ndembezi Shinyanga and be ordered to demolish a house erected on that plot.

On the other hand, it is alleged by the 1<sup>st</sup> defendant that, he has constructed a house on plot No. 59/A he was issued by the 2<sup>nd</sup> defendant and not on plot No. 60 Block JJ Ndembezi Shinyanga.

In order to resolve the dispute between the parties, on 26<sup>th</sup> July 2022, three issues were drafted and agreed namely, (i) whether plot No.59/A Block "JJ" Ndembezi Shinyanga Municipality owned by 1<sup>st</sup> defendant exists within plot No. 60 Block "JJ" Ndembezi Shinyanga Municipality, if first issue is answered in negative, (ii) whether plot No.59/A Block "JJ" Ndembezi Shinyanga Municipality owned by the 1<sup>st</sup> defendant exists and (iii) what reliefs are parties entitled to.

In the bid to prove the aforementioned issues, Raphael Shinane (PW1), the plaintiff testified that, on 10<sup>th</sup> July 1996, he bought plot. 60 Block JJ Ndembezi Shinyanga from Lydia Magese, the wife of the late Anthony Magese, at the consideration of TZS 150,000/=. He further testified that, the said Lydia Magese also sold him unfinished house at the consideration of TZS 200,000/= and that, the said house was built on an area reserved for nursery school and not on plot No. 60 Block JJ Ndembezi Shinyanga. It was further evidence of PW1 that, after purchase of the said plot No. 60 Block JJ Ndembezi Shinyanga, he made follow up to the 2<sup>nd</sup> defendant, as a result, on 11<sup>th</sup> September 1997, he was issued with an offer (exhibit P2) and on 18<sup>th</sup> October 2001, he was issued with Certificate of Title No. 13558.

PW1 testified further that, at all times, he was paying land rent and tendered receipts (exhibit P4 collectively) to that effect. He went on that; he built a foundation of a house with four bedrooms and a living room and planted trees on plot No. 60 Block JJ Ndembezi Shinyanga. He testified further that, from 2014 to 2015, he fell sick and that, in 2018 he found the 1<sup>st</sup> defendant has built a house on the said plot. He added that, when he asked the 1<sup>st</sup> defendant as to why he has built on his plot, the later replied that he was allocated the said plot by the 2<sup>nd</sup> defendant. It was further evidence of PW1 that, when he asked the 2<sup>nd</sup> defendant,

the later denied to have allocated the said plot to the 1<sup>st</sup> defendant. PW1 also testified that, he stopped the 1<sup>st</sup> defendant from further constructing the house on the said plot but the later did not stop.

When he was cross examined by counsel for the 1<sup>st</sup> defendant, PW1 maintained that he is the owner of plot No. 60 Block JJ Ndembezi Shinyanga and described the boundaries stating that, in the west, it borders a road, in the East it borders the 1<sup>st</sup> defendant who is residing at Plot No. 62 and in south it borders a road. He testified further that, the size of plot No. 60 Block JJ Ndembezi Shinyanga is 740 square meters. On further cross examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW1 maintained that he is the rightful owner of plot No. 60 Block JJ Ndembezi Shinyanga with a 99 years Certificate of Title that was issued by the 2<sup>nd</sup> defendant.

It was evidence of John Nhiga (PW2) that, he is the one who sent PW1 to Lydia to purchase plot No. 60 Block JJ Ndembezi Shinyanga on 10<sup>th</sup> July 1996 at the price of TZS 150,000/= and the house, which, at that time, was unfinished. When PW2 was cross examined by counsel for the 1<sup>st</sup> defendant, he testified that, in north of Plot No. 60 there is a nursery school and in south there is plot No. 59. He testified further that, the unfinished built house that was bought by PW1 was on an

open space. He admitted that he does not know plot number of the 1<sup>st</sup> defendant.

Evidence of Thomas Ndalawa Kilulya (PW3) is similar to that of PW1 and PW2 on acquisition of plot No. 60 Block JJ Ndembezi Shinyanga by PW1 from Lydia Magese. PW3 testified further that, he saw 1<sup>st</sup> defendant erecting a building on the said plot and that, PW1 reported to land officers. He added that, land officers stopped the 1<sup>st</sup> defendant to erect a building on the said plot because the plot did not belong to him. When he was cross examined by counsel for the 1<sup>st</sup> defendant, PW3 stated that, he is living at plot No. 75 that is almost 15 meters from plot No. 60 and that, he witnessed sale of plot No. 60 Block JJ Ndembezi Shinyanga. He testified further that, in the north of plot No. 60 there is a road and in south there is plot No. 59. He went on that, in East there is plot No. 61 and that, 1<sup>st</sup> defendant stays at plot No. 62. When he was cross examined by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW3 stated that plot No. 59 is owned and occupied by Jane Mkajakamba.

On the other hand, it was evidence of Sostenes Magezi (DW1) that, he resides at Dome Street, Ndembezi ward within Shinyanga Municipal and that, Raphael Shinane, the plaintiff, is his neighbor and owner of plot No. 60 Block JJ at Ndembezi. DW1 testified further that,

he is the owner of plot No. 59/A block JJ at Ndembezi. DW1 testified further that, Plot No. 60 Block JJ Ndembezi is in north of plot No. 59/A block JJ Ndembezi. He also testified that initially, the said plot was No. 59 and that, an offer was issued in favour of his son called Erick Magezi, who was a minor (exhibit D1). He added that, by deed of gift, on 18<sup>th</sup> January 2018, the said Erick Magezi transferred plot No. 59 block JJ Ndembezi to him.

It was further evidence of DW1 that, in 2017, he was directed by One Lela, the Authorized Land Officer to surrender the offer for plot No. 59 block JJ (exhibit D1) and that, he complied. He went on that, the said Lela, changed plot No. 59 block JJ to plot No. 59/A and thereafter signed and stamped the said offer and returned to him. DW1 testified further that, from that time he has been paying land rent for plot No. 59/A block JJ. He testified further that, he submitted site plan and applied for building permit and that the same was issued by the 2<sup>nd</sup> defendant allowing him to construct a house on plot No. 59/A block JJ. He added that, he erected a house on plot No. 59/A block JJ after was issued with a building permit.

DW1 further testified in chief that, plaintiff is the owner of plot No. 60 and that the later has built "L" shaped house on the said plot. In describing plot No. 60, DW1 stated that, in the West side of plot No. 60

there is Kikolile road, in the North there is Mshuga road, in the South there is plot No. 59/A initially plot No. 59 and, in the East, there is plot No. 62. DW1 testified further that, in the south of plot No. 59/A there is Dr. Magezi road and that, he resides at plot No. 61 JJ.

When he was cross examined by counsel for the plaintiff, DW1 stated that, he is not aware that the "L" shaped house now assigned house No. 11 is an open space though houses on open spaces were also assigned numbers. DW1 further testified that, he is residing on plot No. 61 block JJ. He further testified that there is no order issued by the 2<sup>nd</sup> defendant stopping him from developing plot No. 59/A block.

When cross examined by State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, DW1 stated that in 2017, Lela, the land officer, informed him that there were two plots with No. 59 which is why, one of those plots were changed to No. 59/A and another retained its No. 59. He maintained that, it is the said Lela, who showed him Plot No. 59/A. DW1 also testified that plot No. 59/A cannot be found within plot No. 60 block JJ because these are two separate plots. DW1 further stated that plaintiff is claiming that plot No. 59/A is plot No. 60.

Giving evidence in support of the 1<sup>st</sup> defendant, Deusdedith Mshuga (DW2), stated that, the dispute between the parties has arisen due to their failure to read properly survey maps and boundaries of their



plots or failure to identify properly their plots. DW2 stated further that, he is residing on plot No. 64 and that plaintiff owns plot No. 60 block JJ. He went on that, 1<sup>st</sup> defendant resides on plot No. 61 but also owns plot No. 59/A that has a dispute before this Court. DW2 testified further that, plaintiff is the owner of the "L" shaped house No. 11 built on plot No. 60 now occupied by mama Upendo, plaintiff's tenant. It was further evidence of DW2 that, in North, plot No. 60 borders Mshuga road, in West it borders Jikolile road, in South it borders plot No. 59 and, in East, it borders plot No. 62 owned by Mariam Mkulo. He added that, in South of plot No. 59 there is Magezi road. It was further evidence of DW2 that Plot No. 60 is not on open space.

When he was cross examined by counsel for the plaintiff, DW2 maintained that the conflict between plaintiff and the 1<sup>st</sup> defendant is due poor reading Town Planning drawings or poor identification of boundaries of their plots. He maintained that, Mariam Nkulo's house is on plot No. 62.

Testifying in favour of both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, Samson Magere, the surveyor by profession, stated that, once an area has been planned, demarcation survey conducted, plots assigned numbers, then, a person can be issued with an offer. He added that, Block JJ Ndembezi, Shinyanga is planned, and that, demarcation survey was done and

thereafter survey was approved. He tendered Town Planning (TP) drawing No. 16/1/1820 for block JJ Ndembezi as demarcation survey (exhibit S1) that identifies plots thereat. He further testified that, plots No. 59 to 91 in exhibit S1 are for medium density. He went on that, the disputed plot No. 60 is a medium density and described its size. DW3 went on that, in North plot No. 60 borders a road, in South, it borders plot No. 59, in East, it borders plot No. 62 and in West, it borders a road. In his evidence DW3 also described the size of Plot No. 59. DW3 testified further that, plot No. 59 borders plot No. 60 in North, in South, it borders a road, in East it borders plot No. 61 and in West it borders a road. He further testified that, there is no plot No. 59/A in exhibit S1.

DW3 further testified that, approved survey of block JJ Ndembezi Shinyanga was done in 2006. He clarified that, approved survey is a continuation of demarcation survey and does not change what was done in demarcation survey (exhibit S1). He added that, in approved survey, what is added to demarcation survey is registered plan number and that plots may be reassigned numbers. Testifying to what happened at Block JJ Ndembezi Shinyanga, DW3 state that, in the approved survey for block JJ, Ndembezi Shinyanga, numbers were reassigned but that did not change size of plots. He tendered approved survey with Registered

plan No. 52250 for block JJ, Ndembezi, Shinyanga approved on 23<sup>rd</sup> May 2006 (exhibit S2). He went on that, in the approved survey (exhibit S2) Plot No. 60 in exhibit S1 was reassigned No. 720, Plot No. 59 in exhibit S1 was reassigned No. 721, Plot No. 62 in exhibit S1 was reassigned No. 722, Plot No. 64 in exhibit S1 was reassigned No. 724, and plot No. 61 in exhibit S1 was reassigned No. 723. He stated further that, apart from the said reassignment of new plot numbers, there was no any change that was done.

When he was cross examined by counsel for the plaintiff, DW3 maintained that, in both demarcation survey (exhibit S1) and approved survey (exhibit S2), there is no plot No. 59/A block JJ. He added that, no changes can be made without approval.

When cross examined by counsel for the 1<sup>st</sup> defendant, DW3 stated that, he once visited the disputed area and found that, between plot No. 59 now No. 721 and plot 60 now 720, parties have opened a road contrary to what is shown in both demarcation and approved surveys (exhibits S1 and S2). He added that, the road that has been wrongly created by the parties separating plots No. 60 to 71 now No. 720 to 731 and plots No. 59 to 69 now 721 to 731 is about 8 to 10 meters. He testified further that, there is also a road on North of plot No. 60 now No. 720 and stated that the said road is proper according to

exhibits S1 and S2. He maintained that; approved survey (exhibit S2) did not affect plots in demarcation survey (exhibit S1). He admitted that, 1<sup>st</sup> defendant was issued with building permit (exhibit D11) and that site plan (exhibit D12) was approval by responsible officers of the 2<sup>nd</sup> defendant to erect a building on plot No. 59/A block JJ. DW3 testified further that, site plan (exhibit D12) was signed by the Municipal Town Planner, Town Land Surveyor, Land officer, Health officer and Municipal Engineer and stamped their stamps as an approval in favour of the 1<sup>st</sup> defendant to construct a building on plot No. 59/A block JJ. DW3 stated testified further that, though a building permit was issued to the 1<sup>st</sup> defendant to construct a building on plot No. 59/A block JJ, there is no plot No. 59/A in either demarcation survey (exhibit S1) nor Approved Survey (exhibit S2).

While under re-examination, DW3 testified that, the site plan (exhibit D12) that was approved by the 2<sup>nd</sup> defendant shows plots 59/A, 60 etc. He added that, at the time of approving site plan, there must be document showing ownership of the plot. He went on that, the owner (1<sup>st</sup> defendant) submitted ownership of plot 59/A and that, they approved based on the offer attached showing that 1<sup>st</sup> defendant is the owner of plot 59/A block JJ, Ndembezi, Shinyanga.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants further fronted Lela Amos Chipanyanga (DW4) as their witness. In her evidence, DW4 stated that, in 2017 when she was the authorized Land Officer for Shinyanga Municipal, she had duties *inter-alia* to change ownership of land. She testified that, in 1992, an offer for plot No. 59 block JJ (exhibit D1) was issued to Eric Magezi. In her evidence in chief, DW4 testified further that, Erick Magezi did not pay for the offer issued to him as a result, in 1993 the said plot was issued to Nickson Thomas Kadasso, who, also transferred the said plot to Josephine Paulo Mkajakamba. DW4 testified further that the current owner of plot 59 block JJ, Ndembezi is Josephine Paulo Mkajakamba. She testified further that, in 2017 the said Eric Magezi prayed to transfer plot No. 59 block JJ to 1<sup>st</sup> defendant and that, she approved that transfer. She went on that; she is the one who changed plot No. 59 to 59/A after noting that there is another plot No. 59 owned by another person. She testified further that, after the prayer by the 1<sup>st</sup> defendant, she sent one Kenneth Challe, a surveyor, to locus in quo and that the said Kennedy Challe gave feedback that on plot No. 59 block JJ there is a house. She added that, she also received information from the said Challe that, the plot of 1<sup>st</sup> defendant is No. 62 but the offer that was issued to him is No. 59 and that, a mistake was committed in issuing 1<sup>st</sup> defendant plot No. 59. DW4 testified further that, she only

changed plot No. 59 to 59/A on reason that, at the time of issuing the certificate of title, the number will change. She added that, for an offer to be issued, the plot must exist.

It was further evidence of DW4 that, plot No. 60 block JJ, Ndembezi is owned by the plaintiff and not the 1<sup>st</sup> defendant. She testified further that, initially plot No. 60 was owned by Anthony Magese and tendered an offer (exhibit S3 dated 03/6/1993) to that effect but on 11<sup>th</sup> September 1997 it was transferred to the plaintiff who, on 18<sup>th</sup> October 2001, was issued with a certificate of title.

DW4 testified further that, in demarcation survey (exhibit S1) there are two plots with No. 59 that were allocated two individuals namely Josephine Paulo Mkajamba and the other plot No. 59 was allocated to Sostenes Magezi. She mentioned other plots with similar numbers as plots No. 68, 67, 66, 64, 63, 61, 62 and 60. She added that, plots in dispute are medium density and further that plot No. 59 block JJ Ndembezi Shinyanga owned by Josephine Paulo Mkajamba is also medium density.

In her evidence in chief, DW4 testified further that, the 1<sup>st</sup> defendant's house is on plot No. 62 and that plaintiff's plot is No. 60. She added that, these plots are different, and they are adjacent to each other. She added that, 1<sup>st</sup> defendant owns only one plot in block JJ

Ndembezi namely plot No. 62 now 722 as per exhibit S1 and S2. She testified further that, parties have wrongly created a road between plot No. 60 and 59 while the only roads that are legal are the one in North of plot No. 60, South of plot 59 and West of both plots 59 and 60. She went on that, site plan (exhibit D12) shows plots 59/A, 60, 61, 62, 63 and 64. DW4 testified further that, site plan normally is drawn from either approved survey or demarcation survey. She also stated that, Plot No. 59/A does not feature in exhibits S1, S2 and P3 and maintained that, there is no any other drawing or resurvey of these plots.

When she was cross examined by counsel for the plaintiff, DW4 stated that, in 2018 plaintiff complained that 1<sup>st</sup> defendant has trespassed on plot No. 60 by building a house thereon. She maintained that she is the one who renamed plot No. 59 as 59/A. She further stated that, she did not change plot No. 59 to plot to 62 because plot No. 62 block JJ Ndembezi is owned by Elias Shija. She went on that, persons who were issued with correct plot numbers for plots in block JJ Ndembezi Shinyanga are few. She maintained that, 1<sup>st</sup> defendant is staying at plot No. 62 and that, that can be reflected at the time of issuing a certificate of title. She further stated that, 1<sup>st</sup> defendant owns only one plot at block JJ Ndembezi which initially was owned by Eric Magezi. In further cross examination by counsel for the plaintiff, DW4

stated that, Plot No. 61 block, JJ Ndembezi was initially owned by Subi Petro and that, in 1998 it was transferred to the 1<sup>st</sup> defendant who is the current owner. She maintained that; 1<sup>st</sup> defendant is not residing on plot No. 61, rather, he is on plot No. 62. She added that, someone has constructed a house on plot No. 61 but does not know the name of that person.

When she was cross examined by counsel for the 1<sup>st</sup> defendant, DW4 stated that, 1<sup>st</sup> defendant resides on plot No. 62 but has trespassed on plot No. 60 owned by the plaintiff. She testified further that, according to official records, plot No. 61 is owned by the 1<sup>st</sup> defendant. She added that, there is no person who has complained that 1<sup>st</sup> defendant has built a house on plot No. 62. She maintained that on 28<sup>th</sup> July 2017, she renamed offer for plot No. 59 as plot No. 59/A (exhibit D1) and that she stamped and signed on the said offer. She added that, at the time of renaming plot No. 59 as 59/A, the said plot was still in the name of Erick Magezi and that, on 23<sup>rd</sup> February 2018, it was transferred from Erick Magezi to the 1<sup>st</sup> defendant. She went on that, ownership of plot No. 59 was never cancelled by their office and and that, nobody was allocated plot No. 59 prior to 28<sup>th</sup> July 2017. She maintained that, their official records up to now, shows that plot No. 59/A is owned by the 1<sup>st</sup> defendant.



In further cross examination by counsel for the 1<sup>st</sup> defendant, DW4, admitted that, site plan (exhibit D11) is for plot No. 59/A, the said plot 59/A does not feature in exhibits S1 and S2. She also stated that exhibits S1 and S2 were drawn in 1998 and 2006 respectively. She further admitted that, in 2017 she renamed plot No. 59 as 59/A (exhibit D1). DW4 also stated that she did not change exhibits S1 and S2 because she has no such powers because those powers are reserved to the Director of Town Planning and Director of Survey, respectively. She added that, it was not possible to make changes to include plot No. 59/A in exhibits S1 and S2 because, there was already an approved survey. She stated further that, though since 2017 office records of the 2<sup>nd</sup> defendant read plot No. 59/A block JJ, Ndembezi, the said plot No. 59/A is No. 62 which is 722 as per exhibit S1 and exhibit S2 respectively. She further stated that, a newly built house by the 1<sup>st</sup> defendant is on plot No. 60. She further admitted that, the 2<sup>nd</sup> defendant made a mistake to issue an offer of plot No. 59/A Mr. Magezi.

On further cross examination, DW4 stated that, 1<sup>st</sup> defendant does not own more than one plot at block JJ Ndembezi. Later, she stated that, an offer for plot No. 61 was issued to 1<sup>st</sup> defendant in 1988 and that plot No. 59 that was transferred from Erick Magezi to 1<sup>st</sup> defendant is different from plot. No. 61 owned by 1<sup>st</sup> defendant since 1988. She

admitted that the two plots namely, plot No. 61 and No. 59 that was renamed as 59/A both are medium density. She further stated that, an offer for plot No. 59 was issued in 1992 in favour of Eric, the son of the 1<sup>st</sup> defendant, while an offer for Plot No. 61 was issued to the 1<sup>st</sup> defendant in 1988. She also stated that, plot No. 61 now is No. 723 in exhibit S2 while a plot No. 59 that was offered to Erick Magezi in 1992 and transferred to the 1<sup>st</sup> defendant in 2017 after being renamed as plot No. 59/A now is plot No. 722 in exhibit S2.

DW4 further stated under cross examination that, plot No. 59 was automatically cancelled in 1993 and the same was issued to Nickson Thomas Kadaso who transferred it to Josephine Paulo Mkajakamba and that, the latter has built a house thereon. She further stated that, the offer for plot No. 61 that was issued to 1<sup>st</sup> defendant in 1988 was never cancelled. She added that, they did not cancel an offer for plot No. 59 that was issued to Erick Magezi on reason that the later was a minor.

Testifying under re-examination, DW4 stated that, Plot No. 59 block JJ is owned by Josephine and that, plot No. 60 block JJ is owned by the plaintiff. She added that, Plot No. 61 block JJ is owned by the 1<sup>st</sup> defendant and that she cannot recall the name of the owner of plot No. 62 block JJ. She maintained that; the initial owner of Plot No. 59/A block JJ was Eric who transferred it to the 1<sup>st</sup> defendant. She further stated

that, there is no plot No. 59/A on exhibits S1 and S2. She also stated that, she recalls at the time when recall Eric Magezi went in her office intending to transfer plot No. 59 block JJ, they went to the site and found that 1<sup>st</sup> defendant's plot is No. 62 though he was in possession of the original offer for plot No. 59. She further stated that, plot No. 59 now reads No. 59/A block JJ, medium density Ndembezi.

After closure of the case of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the parties prayed the court to visit the locus in quo. Considering the circumstances of the case, I granted their prayer. On 25<sup>th</sup> October 2023, the court, parties, and their witnesses, visited the locus in quo. When we re-assembled in court, read observations at locus in quo and parties made comments thereon. Parties having agreed with observations had no further questions to witnesses as a result they were discharged. After discharge of witnesses, the parties prayed to file closing submissions as a result, I issued an order that the parties should file final submissions on 27<sup>th</sup> October 2023 and scheduled the judgment to be delivered on 02<sup>nd</sup> November 2023. I should point out that, counsel for the 1<sup>st</sup> defendant did not file final submissions while others complied with the order. Therefore, in this judgment, there will be no reference to final submissions by counsel for the 1<sup>st</sup> defendant.

In answering the 1<sup>st</sup> and 2<sup>nd</sup> issues, counsel for the plaintiff submitted that plot No. 59/A block JJ Ndembezi Shinyanga does not exist. Counsel submitted that the said plot is within plot No. 60 owned by the plaintiff. On the 3<sup>rd</sup> issue, counsel for the plaintiff submitted that plaintiff is entitled for the reliefs he has claimed.

On the other hand, it was submitted by the State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that plot No. 59/A block JJ Ndembezi Shinyanga does not exist and that the said plot is within plot No. 60 owned by the plaintiff. On the 3<sup>rd</sup> issue, State Attorney submitted that, the 1<sup>st</sup> defendant trespassed on plot No. 60 block JJ and cited the case of ***Tenende s/o Budotela & Another v. The Attorney General***, Civil Appeal No. 27 of 2011, CAT (unreported) and ***Grace Olotu Martin v. Ami Ramadhani Mpungwe***, Civil Appeal No. 91 of 2020, CAT (unreported) and prayed 1<sup>st</sup> defendant be evicted from the said plot with costs.

At the time of composing my judgment and after scrutiny of evidence of the parties, being alert to the provisions of Rule 5 of Order XIV of the Civil Procedure Code [Cap. 33 R.E. 2019], I found it necessary to amend the issues framed and agreed by the parties on 26<sup>th</sup> July 2022. Further guided by the decisions of the Court of Appeal in the case of ***Mussa Chande Jape vs Moza Mohammed Salim*** (Civil

Appeal 141 of 2018) [2019] TZCA 490 and *Barclays Bank Tanzania Limited vs Sharaf Shipping Agency T. Limited & Others*

(Consolidated Civil Appeals 117 of 2019) [2022] TZCA 380 that, this court cannot amend or raise a new issue apart from what was drafted and agreed by the parties without affording the parties right to comment, I adjourned the case on 03<sup>rd</sup> November 2023 and ordered counsel for the parties to enter appearance. When they appeared on the later date, I re-opened the case and asked them to comment whether the first issue that was drafter was addressing the dispute between the plaintiff and the 1<sup>st</sup> defendant or not, but they all agreed that it was not. Based on their comments, I amended the first issue hence issues to be answered by this court are (i) whether the 1<sup>st</sup> defendant built a house on plot No. 60 owned by the plaintiff, (ii) whether Plot No. 59/A owned by 1<sup>st</sup> defendant exists and (iii) what reliefs are parties entitled to.

I have carefully examined evidence and submissions of the parties in this dispute and wish, in disposing this matter, start with the 1<sup>st</sup> issue namely, whether the 1<sup>st</sup> defendant built a house on plot No. 60 owned by the plaintiff. It is undisputed by the parties that plot No. 60 block JJ is owned by the plaintiff. It was evidence of the plaintiff (PW1), Thomas Ndalawa Kilulya (PW3) and Leila Amos Kipanyanga (DW4) that, 1<sup>st</sup> defendant has trespassed on plot No. 60 block JJ and built a house

thereon. It was evidence of the 1<sup>st</sup> defendant that, the house he built is on plot No. 59/A block JJ Ndembezi Shinyanga. DW1 tendered site plan (exhibit D12) showing location of plot No. 59/A block JJ. He also tendered building permit (exhibit D11) that was issued by the 2<sup>nd</sup> defendant permitting him to construct a building on plot No. 59/A initially plot No. 59 block JJ.

I have examined the site plan (exhibit D12) and find that, according to the said exhibit, plot No. 59/A block JJ Ndembezi Shinyanga borders plot No. 60 in the North, plot No. 61 in the East and roads in the South and West. In fact, that is according to evidence of DW1 in chief who testified that he resides on plot No. 61 and that, the road South of Plot No. 59/A Block JJ is called Dr. Magezi road. With that description of plot No. 59/A block JJ, with a view of ascertaining whether 1<sup>st</sup> defendant constructed his house on plot No. 59/A block JJ or on plot 60 block JJ as complained by the plaintiff, on 25<sup>th</sup> October 2023, the court visited the locus in quo. Based on evidence of the parties and observations on the locus in quo, I conclude that 1<sup>st</sup> defendant has trespassed on plot No. 60 block JJ Ndembezi Shinyanga owned by the plaintiff. My conclusion is supported by unshaken evidence of Samson Magere (DW3) who, in is evidence described the location of plot No. 60 block JJ Ndembezi Shinyanga and tendered both demarcation survey

and approved survey (exhibits S1 and S2) respectively. According to exhibit S1 and S2, plot No. 60 borders a road that separate the said plot and nursery school in the North while in the South, it borders plot No. 59. In the East, plot No. 60 borders plot No. 62 and in the West, it borders a road. On the other hand, plot No. 59 borders plot No. 60 in the North and a road in the South. In the East, it borders plot No. 61 and in the West, it borders a road. In fact, description of locations of those plots is like the site plan (exhibit D12) that was tendered by 1<sup>st</sup> defendant save that, in exhibits S1 and S2, plot No. 59/A does not feature. The only difference is that, while exhibits S1 and S2 show plot No. 59, exhibit D12 shows plot No. 59 as 59/A.

It was testified by DW4 that, 1<sup>st</sup> defendant was issued plot No. 61 in 1988 and that, the said offer for plot 61 was never cancelled. In fact, in his evidence, 1<sup>st</sup> defendant (DW1) testified that he resides on plot No. 61 block JJ. Evidence that in 1988 the 1<sup>st</sup> defendant was issued plot No. 61 is unshaken. In my view, the only issue that created confusion in this case is whether, after being granted plot No. 61 block JJ Ndembezi, 1<sup>st</sup> defendant (DW1) constructed his house on the said plot or did build his house on another plot different from the one he was allocated. It was testified by DW4 that, the house of 1<sup>st</sup> defendant is on plot No. 62 and that, it is not on plot No. 61 that he was allocated. In other words, 1<sup>st</sup>

defendant resides on plot No. 62 and not 61 he was allocated. Here is where confusion started, and this is the source of this dispute. The 1<sup>st</sup> defendant being the owner of plot No. 61 and believing that he resides on plot No. 61 that is in the Eastern side of plot No. 59/A initially plot No. 59 according to exhibits D12, S1 and S2, has built a new house No. 23 in the Western side of the plot he resides on. I have pointed out hereinabove that, on 25<sup>th</sup> October 2023 when the court made a locus in quo visit, we found, as it was agreed by the parties that, 1<sup>st</sup> defendant resides on plot No. 62 and not on plot No. 61 he was allocated. Since 1<sup>st</sup> defendant is residing on plot No. 62 block JJ believing that the said plot is 61, he built house No. 23 on plot No. 60 that is in the West of plot No. 62 believing the said plot to be 59/A initially plot No. 59. In my view, that confusion was caused by poor reading demarcation survey and approved survey (exhibits S1 and S2). I therefore agree with evidence of Deusdedith Mshuga (DW2) that, the source of this dispute is lack of knowledge on how to read and identify plots on survey maps. In addition to that, the confusion was caused by illegal creation of Dr. Magezi road between plots No. 60, 62, 64 etc. and plots No. 59, 61, 63 etc. in demarcation survey (exhibit S1) now plots No 720, 722 724 etc. and 721, 723, 725 etc. in approved survey (exhibit S2). The said road was illegally created as it was testified by both DW3 and DW4. In fact,



both demarcation and approved survey (exhibits S1 and S2) does not show presence of any road between those plots. The said road was supposed to be between plots No. 59, 61, 63 etc. and plots No. 33, 35, 37 etc. as shown by demarcation survey (exhibit S1) also shown as plots 721, 723, 725 etc. and plots No. 741, 739, 737 etc. as per by approved survey (exhibit S2). For the foregoing, I answer the first issue in the affirmative that 1<sup>st</sup> defendant has trespassed on plot No. 60 block JJ Ndembezi Shinyanga and built a house that is currently No. 23.

It was evidence of DW3 that, plot No. 59/A block JJ does not exist both on demarcation survey and approved survey (exhibits S1 and S2) respectively. It was further evidence of DW3 that, there is no any other survey that has been conducted over the area after both demarcation survey and approved survey (exhibits S1 and S2 respectively). I have examined the said exhibits and find that the said plot No. 59/A does not exist.

It was evidence of the 1<sup>st</sup> defendant (DW1) that, plot No. 59/A block JJ initially was plot No. 59 block JJ, but in 2017 it was renamed as plot No. 59/A. It is undisputed by the parties that plot No. 59 was initially owned by Eric Magezi, the son of the 1<sup>st</sup> defendant. It was evidence of Lela Amos Chipanyanga (DW4) that, Erick Magezi did not pay for the offer issued to him, as a result, in 1993 the said plot was

issued to Nickson Thomas Kadasso and that, the latter transferred the said plot to Josephine Paulo Mkajakamba who is the current owner. It was further evidence of DW4 in chief that, the said Josephine Paulo Mkajakamba is occupying plot No. 59 as she has built a house on the said plot. It was further evidence of DW4 that she was informed by Kennedy Challe who visited plot No. 59 block JJ that 1<sup>st</sup> defendant's plot is No. 62. It was also testified by DW4 that an offer for plot No. 59 was mistakenly issued to the 1<sup>st</sup> defendant.

I should point out that, if there is a person to be relied upon to lie, in the case at hand, it is Lela Amos Chipanyanga (DW4). She is not worth to be believed as a witness in this case. I am aware that, all witnesses must be believed unless there are reasons to the contrary as it was held in the case of ***Goodluck Kyando v. Republic***, [2006] T.L.R 363. In ***Kyando's case*** (supra), the Court of Appeal held *inter-alia* that:-

*"Every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In the case of ***Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008***, (unreported) the Court of Appeal discussing grounds for disbelieving a witness held: -

*"...To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc..."*

In the case at hand, DW4 has given improbable and incomprehensible evidence laden with lies with a view of concealing the truth. I am of that view because, it is the same witness who, in 2017, as she admitted in her evidence that, in her capacity as Authorized Land Officer, renamed plot No. 59 as No. 59/A block JJ. Again, it is the same witness who, on 23<sup>rd</sup> February 2018 approved transfer of plot No. 59 after being renamed as plot No. 59/A from Eric Magezi to the 1<sup>st</sup> defendant as evidenced by Landform No. 35 (exhibit D4). If at all the offer for plot No. 59 bloc JJ that was issued to Eric Magezi was automatically cancelled in 1993 and was issued to Nickson Thomas Kadasso who also transferred it to Josephine Paulo Mkajakamba, the current owner, then, there is no reason as to why in 2017 she renamed the said plot as No. 59/A and in 2018 approve transfer in favour of the 1<sup>st</sup> defendant. She further testified under cross examination that offer for plot No. 59 block JJ that was issued to Erick Magezi was not cancelled because the said Eric Magezi was a minor. That answer, in my

view, cannot be correct because, age of the owner of land cannot be a justification for not complying with the law. The law does not provide that, a plot issued in the name of minor cannot be revoked if the said minor does not comply with conditions of ownership.

DW4 stated under cross examination that, 1<sup>st</sup> defendant only owns one plot at block JJ Ndembezi namely plot No. 59/A that was initially No. 59. But later, she admitted that in 1988, 1<sup>st</sup> defendant was issued plot No. 61 block JJ. She also testified that offer for plot No. 61 was issued to 1<sup>st</sup> defendant before plot No. 59 was issued to Eric Magezi in 1992. She also testified under cross examination that, in no time, ownership of plot No. 59 was cancelled by their office, and it was never allocated to any other person other than Eric Magezi until in 2017 when it was renamed as plot No. 59/A and in 2018 transferred to the 1<sup>st</sup> defendant. I find that there are a lot of contradictions in evidence of DW4 that cannot be reconciled with other evidence on the record.

Further to that, DW4 gave improbable evidence that plot No. 59/A is No. 722 on exhibit S2. DW4 has lied that plot No. 59/A is now plot No. 722 on the approved survey (exhibit S2) because, she knows that 1<sup>st</sup> defendant resides on plot No.62 as per demarcation survey (exhibit S1). There is no evidence in this case showing that 1<sup>st</sup> defendant was issued an offer for plot No. 62. Therefore, plot No. 59/A block JJ cannot be No.

62 as per exhibit S1 or 722 as per exhibit S2. In fact, DW4 admitted in her evidence under cross examination that, though since 2017 office records of the 2<sup>nd</sup> defendant shows plot No. 59/A block JJ, Ndembezi, the said plot No. 59/A is plot No. 62 which is 722 as per exhibit S1 and exhibit S2 respectively.

I have examined demarcation survey (exhibit S1), approved survey (exhibit S2) and site plan (exhibit D12) and find that plot No. 59/A is not No. 62 as alleged by DW4. I therefore conclude that plot No. 59/A block JJ Ndembezi Shinyanga is plot No. 722 on exhibit S2 or No. 62 on exhibit S1. Be as it may, according to demarcation survey and approved survey (exhibits S1 and S2) and evidence discussed hereinabove, there is no plot No. 59/A block JJ Ndembezi Shinyanga though 1<sup>st</sup> defendant was issued building permit (exhibit D11). I therefore answer the 2<sup>nd</sup> issues in the negative.

I have reached the above conclusion based on evidence of DW3, exhibits S1 and S2 and evidence of DW4 while under cross examination. In fact, DW4 stated that she did not change plot No. 59 to 62 because plot No. 62 block JJ is owned by Elias Shija. It is my view that, evidence of DW4 under cross examination that plot No. 62 on exhibit S1 which is No. 722 on exhibit S2, is owned by Elias Shija but occupied by the 1<sup>st</sup> defendant, is a signal that, if both 2<sup>nd</sup> and 3<sup>rd</sup> defendants will not remedy

the situation without delay, many cases may be filed in court relating to ownership of plots in that area. The danger ahead of both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is clear because, plot No. 59 on exhibit S1 which is No. 721 on exhibit S2 is occupied by Josephine Paulo Mkajakamba as it was testified by the parties. To have harmony in the society living at Ndembezi Shinyanga, both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants should look into the matter carefully and objectively and find a solution otherwise, there can be a floodgate of cases and disharmony.

It can be argued by the 1<sup>st</sup> defendant that he had an offer for plot No. 59/A block JJ and a building permit and further that, he honestly believed that he constructed the said house on plot No. 59/A block JJ. It is clear from evidence of the 1<sup>st</sup> defendant that, the building permit that was given to him by the 2<sup>nd</sup> defendant has nothing to do with plot No. 60 owned by the plaintiff. The said building permit was for plot No. 59/A which, as I have pointed out hereinabove, does not exist and is not No. 60. It can also be argued that, 1<sup>st</sup> defendant built the said house on plot No. 60 due to the confusion I have pointed hereinabove. In my view, all those cannot serve him in this case. I am of that considered view guided by the decision of the Court of Appeal in the case of [Grace Olotu Martin vs Ami Ramadhani Mpungwe](#) (Civil Appeal 91 of 2020) [2023] TZCA 193 wherein it held *inter-alia* that:-

*"The law on trespass is certain and free from ambiguity. Trespass to land means interference with the possession of land without lawful justification and, on this, we agree with the definition given by Lugakingira J. in **Frank S. Mchuma vs Shaibu A. Shemdolwa**... that trespass is an unjustifiable intrusion by one person upon the land in the possession of another. Such interference entitles the one in possession of the land recourse to court for either eviction/ejection or for payment of compensation termed as mesne profit due to non-use of it during the period of his dispossession."*

In **Mpungwe's case** (supra), the Court of Appeal further quoted what R. K. Bangia said in his book: Law of TORTS, Twenty-First Edition, 2008 at page 407 that: -

*"Trespass is actionable per se and the plaintiff need not prove any damage for an action of trespass. "Every invasion of property, be it ever so minute, is trespass." Neither use of force nor showing any unlawful intention on the part of the defendant are required. **Even an honest mistake on the part of the defendant may be no excuse and a person may be liable for trespass when he enters upon the land of another person honestly believing it to be his own.** Probably inevitable accident will be a good defence as it is there in case of trespass to persons on chattels."*

Having quoted the above paragraph, the Court of Appeal added that:-

*"...We have considered the phrases an honest mistake... and honestly believing... in the above quoted extract and we entertain no doubt that they refer to absence of ill-will or intention to enter into another's land. They connote what Mr. Augusto termed as innocence on the part of the trespasser. But as shown above, in law, honest belief or innocent entry are irrelevant factors when it comes to trespass actions hence they constitute no good defence. Given such stance of law, it follows therefore that the only available defences to defendants in such suits are that the entry was with*

*authority of the owner or was in the due execution of a statutory duty or under the authority of some law...Worse still, the intention of a trespasser is of no essence in cases of trespass and cannot successfully be relied on as a defence from liability.”*

I have held hereinabove that 1<sup>st</sup> defendant trespassed on plot No. 60 block JJ Ndembezi Shinyanga owned by the plaintiff and build a house thereon. Now, what are the reliefs the parties are entitled to. In the plaint, plaintiff prayed the court, (i) to issue a declaration order that he is the lawful owner of plot No. 60 block JJ Ndembezi Shinyanga, (ii) to issue eviction and demolition order of all structures erected by the 1<sup>st</sup> defendant on plot No. 60 block JJ Ndembezi within Shinyanga Municipality, (iii) order the 1<sup>st</sup> defendant to pay Ten Million Tanzanian Shillings (TZS 10,000,000/=) being special damages plaintiff incurred in making follow up of this case, (iv) interests on the decretal amount at courts rate from the date of judgment to the date of satisfaction of the decree, (v) general damages and costs of this case.

I have held hereinabove that 1<sup>st</sup> defendant trespassed on plot No. 60 owned by the plaintiff, then, the appropriate order to be issued is vacant possession and demolition of all structures erected by the 1<sup>st</sup> defendant on the said plot as it was held in the case of [Tenende Budotela and Another vs Attorney General](#) (Civil Appeal 29 of 2012) [2012] TZCA 247 and [Mpungwe's case](#) (supra). Therefore, since



the owner of plot No. 60 is the plaintiff, then, 1<sup>st</sup> defendant must give vacant possession of the said plot and demolish all structures erected on the said plot at his own costs, immediately from the date of this judgment.

Plaintiff prayed to be paid Ten Million Tanzanian Shillings (TZS 10,000,000/=) being special damages he incurred in making follow up of this case. Apart from only pleading in his plaint, plaintiff did not adduce evidence in support thereof. There is a litany of case law that, it is a settled law that, special damages must be pleaded and proved. See the case of *Ami Tanzania Limited vs Prosper Joseph Msele* (Civil Appeal 159 of 2020) [2021] TZCA 668, *Trade Union Congress of Tanzania (tukta) vs Engineering Systems Consultants Ltd & Others* (Civil Appeal 51 of 2016) [2020] TZCA 251 and *Alferd Fundi vs Geled Mango & Others* (Civil Appeal 49 of 2017) [2019] TZCA 50. Since plaintiff did not prove the said special damages, I hereby reject that prayer.

Plaintiff prayed to be awarded general damages. I have considered evidence adduced in this case and I am satisfied that, in 2018 1<sup>st</sup> defendant was stopped to erect a dwelling house on the plot he trespassed, but he refused and continued with his mission. I have further considered that; the 1<sup>st</sup> defendant took sickness of the plaintiff

as an advantage to trespass on that plot. With all these, it seems to me that whatever was done by the 1<sup>st</sup> defendant was intentional. For the foregoing, I award plaintiff to be paid Five Million Tanzanian Shillings (TZS 5,000,000/=) as general damages. I further order that 1<sup>st</sup> defendant should pay costs of this case. I issue no order against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants because there is nothing claimed against them by either the plaintiff or the 1<sup>st</sup> defendant.

Dated at Shinyanga on this 6<sup>th</sup> November, 2023.



B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 06<sup>th</sup> November 2023 in chambers in the presence of Raphael Shinane, the Plaintiff, Sostenes Magezi, the 1<sup>st</sup> Defendant and Mussa Mpogole, State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.



B. E. K. Mganga  
**JUDGE**

