

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 197 OF 2021

JABIR HASSAN NDUMBALO

(The Administrator of the Estate of the late,

HASSAN NOOR NDUMBALO).....PLAINTIFF

VERSUS

HASSY BESEN KITINEDEFENDANT

J U D G M E N T

Date of Last Order: 09/3/2023

Date of Judgment: 24/4/2023

T. N. MWENEGOHA, J.

The plaintiff lodged this suit claiming against the defendant for the following relief;

- a) declaration that the plaintiff is a lawful owner of all that piece of Land including a residential building measuring 5122 square meters known as Plot No. 2012 Block C Kunduchi Mtongani Kinondoni District within the city of Dar es salaam
- b) this honourable Court be pleased to order the defendant to surrender the Title Deed No. 106437 to the Plaintiff.
- c) Payment of Tshs. 350 Million (Three Hundred Fifty Million) being a compensation for unlawful possession of the plaintiff's title deed.

- d) Interest of on paragraph (c) above at 12% from the date of filing the suit to the date of judgment.
- e) Costs of the suit.
- f) Any other relief as deemed fit by the court.

On the other hand, the defendant, in response to the Plaintiff's claim, filed his Written Statement of Defense contesting the whole claim.

Upon conclusion of the pleadings and mediation having failed, the following issues were framed for determination:

1. *who is the lawful owner of the disputed property.*
2. *To what reliefs the parties entitled.*

During the hearing plaintiff was represented by Burton Mayage and Bernadetha Fabian, Advocates while the defendant was represented by advocate Lydia Susuma.

The plaintiff presented 2 witnesses who are Jabir Hassan Noor Ndumbalo (PW1), and Biashara Rashid Waziri (PW2). They also tendered six exhibits which are death certificate(P1), Form no. IV (P2), Lock out Agreement (P3), Copy of Title Deed (P4), Official search and summary of the property (P5) and the letter regarding compensation(P6).

During the hearing **PW1** Jabil Hassan Noor Ndumbalo testified that he is the administrator of the estate of the late Hassan Noor Ndumbalo who is his father and that he was the only son. He tendered death certificate which was admitted as Exhibit P1 and tendered Form No. IV as a proof that he was appointed as administrator of the estate of his late father which was admitted as Exhibit P2.

He further testified that when collecting the assets of his deceased father he discovered that one of the Certificates of Title was not there. That, he searched in one of his father's bags where he kept his documents and he found a Lock out Agreement between his father and the defendant. He tendered the Lock out Agreement which was admitted as Exhibit P3.

He testified that in the said Lockout Agreement it shows that parties are agreeing to lock in a property sale with the purchasing price of USD 501,500 and a condition that it was to be paid in 180 days before the property is to be sold. He testified that after he found that information, he called the defendant so as to find the truth. That, he placed the defendant on speaker before his family so that they could all hear. That the defendant admitted to having the Title Deed and claimed further that he bought the house.

He testified that in attempt to find solutions they went to Street Chairman at Mtongani where even the said local leaders were surprised and had no information that the house was sold. It was his narration that the Street Chairman called both parties so as to confirm on the sale of the house. He told this Court that the defendant attended one of the meeting however he did not tender any evidence to prove that he bought the house but instead he tendered the Title Deed as his proof. The plaintiff further claimed that the Title Deed tendered by the defendant was still in his father's name. The plaintiff (PW1) tendered a copy of Certificate of Title which was admitted as Exhibit P4.

It was PW1's submission that he had doubt on the sale transaction of his father's house as his deceased father involved him in everything pertaining his properties. He informed Court that in year 2020 his

deceased father wanted to take a loan but the process failed due to the fact that he had no business and the bank needed one to own a business. He testified that his father also had intention of selling his house and at one time he had informed him that he had a buyer but the sale did not materialize as the buyer did not fulfil the conditions for sale.

He continued to narrate what had transpired by providing that he went to the Ministry of Land to conduct official search where he discovered that his deceased father is still the owner of disputed property to date. He tendered official search and summary of the property which was admitted as Exhibit P5 collectively.

PW1 testified that the defendant alleged to have bought the house in 2015 but in 2017 the deceased was compensated by Kinondoni Municipal for part of his land which has been taken during road expansion. He tendered compensation letter which was admitted as Exhibit P6.

The second witness, **PW2-** Bishara Rashid Waziri testified that she was raised by Mzee Ndumbalo as his daughter. She claimed that she was also present when PW1 called the defendant and held the conversation on a loudspeaker. That she got involved in helping PW1 search for answers. That she also attended the meeting before the Street Chairman and went to Ministry of Land for official search of the property. Her testimony backed up the testimony of PW1. In cross examination she testified that she was living nearby, about a fifth house from Mzee Ndumbalo's house. She also testified that she did not know about Lockout Agreement.

On the other hand, the defense had 4 witnesses, Said Rajab Omary (DW1), Rashid Issa Salum (DW2), Emmanuel Luis Kainga (DW3) and Khaletsy Hassuma Kitine (DW4). They tendered no evidence to prove their case.

The first defense witness, **DW1**- Said Rajab Omary testified that he knew the deceased since 1989 but in 1995 he was employed by him as a gardener. He testified that in 2014 the deceased and his wife called him and told him that they faced some financial difficulties. That he was informed by them that they wanted to sell their house and asked him to find a customer to buy the house. He testified that they owed him 1,600,000/= from his monthly salary of 200,000/= and they could not pay him.

He testified further that later on he was informed by Mzee Ndumbalo that he sold the house to Mzee Kitine. He testified that at one time one of the fence wall collapsed and he informed Mzee Ndumbalo however Mzee Ndumbalo told him to call Mzee Kitine, the defendant, who came and fixed it. He testified that he was further instructed to allow Mzee Kitine access to the house as he had bought the same.

The second defense witness, **DW2**- Rashid Issa Salum testified that he is a private driver of a defendant since 2012. That the defendant bought the suit land in 2015 and he was present when the defendant was shown the house. He informed the Court that the payment of that sale was done in three instalments where during the first two instalments the two parties went to the bank for payment and that the third instalment was done at Mzee Kitine's home. He further testified that during the third instalment

Mzee Ndumbalo produced documents to the defendant and two months thereafter the defendant was given keys to the house.

In cross examination he testified that he is not sure of the amount which was paid to the deceased and that he did not witness any sale agreement.

The third defense witness, **DW3**- Emmanuel Luis Kainga testified that Mzee Ndumbalo informed him of his intention to sell his land as he intended to buy an apartment. He testified that he was also informed by the defendant that he wanted a large area to invest in apartment business. That he took the defendant to the suit land and the defendant was satisfied to buy the same. That they agreed on the sell price of the house to be USD 500,000/= and that later on he was informed that there was a down payment of USD 15000 and that there will be a total of three down payments.

It was DW3's testimony that he witnessed when they agreed over payment at NDC Bank and that on the last payment they called him and told him that the business was completed. That they paid him 10,000,000/= as a gratitude. He testified that, thereafter the Title Deed was handled to the defendant but they let the gardener remain in the suit land. That, following the sale the deceased went to buy two apartments at Upanga.

He also testified to be called at the street government meeting where they were deliberating on the land dispute before the matter was filed in this Court. During cross examination he testified that he is working with Kaya Co. Limited in property management however his transactions with the defendant was personal. He testified that he was paid commission for the sale of the suit property.

The defendant was to testify as DW4 but due to ill health he was unable to do so. Consequently, his son, Khaletsy Hassuma Kitine, obtained power of Attorney to testify on his behalf as DW4.

DW4 testified that the defendant, who is his father informed him about a business conducted in 2015 with Mzee Ndumbalo who is now deceased where they agreed for a property sale with purchasing price of USD 514000/=. That, the same was agreed to be paid in three instalments where USD 250000/= was paid in the first instalment, USD 20000/= in the second installment and USD 55000/= was paid on the last installment. That, as a result the defendant was given a Certificate of Title and keys to the house. That, the defendant was also introduced to the guard at the suit property known as Saidi.

His testimony was the same to DW2's testimony. He added that Mzee Ndumbalo was given three months to move out his belongings before handing in the keys. He testified that they had an assistance of an advocate who helped in the sale transactions, known as Mohamed Ismail but unfortunately, he passed away during Covid 19 pandemic. He informed the Court that the defendant was not in a hurry to transfer the property in his name as he had property keys and Certificate of Title. After DW4 concluded his testimony the defendant's counsel closed the defendant's case.

Having highlighted the testimonies and evidence given by both parties, I now have to determine the two issues raised in this case. Starting with the first issue as to *who is the lawful owner of the disputed property*, my analysis will begin from the pleadings filed by both parties. The plaintiff prayed for declaration that the he is the lawful owner of the suit land

under his capacity of administrator of estate of the late Hassan Noor Ndumbalo and the defendant to surrender the Title Deed which is under his possession. The plaintiff's plaint stated the details of the claim and the prayer thereon.

As for the defendant he disputed the claim however without any evidence to answer the point of substance. The written statement of defense is hereby reproduced for clarity.

- 1. That the contents of paragraph 1 and 2 of the plaints are noted save for the address of the Defendant that shall be in the care of:*

*T&N Attorney at Law,
2nd Floor, Muccadam Building,
Ali Hassan Mwinyi Road,
P.O.Box 4096.*

DAR ES SALAAM.

- 2. That the Defendant totally disputes the contents of paragraph 3 of the plaint and puts the plaintiff to strict proof thereof.*
- 3. The contents of paragraph 4 are partly admitted. The defendant avers that the deceased never had issue of the marriage and/ or at all.*
- 4. The contents of paragraphs 5 is noted.*
- 5. The content of paragraph 6,7,8 ad 9 is vehemently disputed and the plaintiff is put to strict proof of his allegations.*
- 6. The contents of paragraph 10 and 11 are denied.*
- 7. The contents of paragraph 12 are noted.*
- 8. The contents of paragraph 13 are denied.*

9. The contents of paragraph (sic) 14 are partly noted and the defendant puts the plaintiff to strict proof.

From the quoted part of this written statement of defence this Court noted the evasive denial. Order VIII Rule 4 of the Civil Procedure Code, Cap 33 R. E. 2019 Provides the following on evasive denial.

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Rule 3 reads that;

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Rule 5 states that;

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that, the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

In the case of **Amir Sundeerji v J.W Ladwa (1977) Limited**, Misc. Civil Application No. 820 of 2016, HC at Dar es Salaam (unreported). In this case, Mlacha J stated that:

[Order XII rule 4 of the CPC] gives the court power to enter judgment on admitted facts without waiting for the determination of other questions. It means that the court, in its discretion, may enter judgment by admission on the amount admitted and leave what is not admitted to be resolved during trial.

The plaintiff's claim as stated under paragraph 3 to 14 with exception of paragraph 4 were evasively denied by the defendant. As far as the above authority highlighted is concerned, if the defendant was denying contents of the claim he was supposed to deny specifically and if partly he was supposed to state extent of his denial, he was also supposed to give part of his case.

Paragraph 3 of the plaintiff states that;

"The plaintiff being the administrator of the estate of the late Hassan Noor Ndumbalo claim against the defendant is for declaration that Plaintiff is a lawful owner of all that piece of Land including a residential building measuring 5122 square meters known as Plot No. 2012, Block "C" Kunduchi Mtongani Kinondoni District within the city of Dar es salaam, the defendant to surrender the Title Deed No. 106437 which

is under his possession, payment of Tzs. 350 Million (Three Hundred Fifty Million) being compensation for unlawful possession of the plaintiff's title Deed."

It was replied that;

2. *That the Defendant totally disputes the contents of paragraph 3 of the plaint and puts the plaintiff to strict proof thereof.*

This paragraph which is the cause of action of the plaintiff was not disputed by the defendant, rather he entered evasive denial. General rule is that parties are bound by their pleading as stated in the case of **YARA Tanzania Limited vs. Charles Aloyce Msemwa and 2 others; Commercial case No.5 of 2015 High Court Commercial Division DSM** (unreported), where it was held that

"it is a cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings. That is, it is settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings".

From the above case the defendant is bound by his pleadings and the fact that he entered evasive denial that means he cannot depart from it. From that admission the defendant does not dispute the fact that the land belongs to the deceased and the same be returned to the owner.

If that was not enough even during the hearing the defendant presented witnesses that had no direct knowledge on what transpired between the parties. The defendant presented a witness who was the gardener (DW1)

of the deceased and did not take any part in the said sale. Moreover, even the second witness, DW2, who was the defendant's driver just testified on how he drove the defendant to different places including on the disputed property and to the bank. However, he agreed to not witnessing anything. He did not even know the amount paid for the suit land. The defendant also presented DW3 who equally was not sure of the amount paid and had not witnessed any amount being paid nor the sale. DW4 who came in place of the defendant due to sickness also had no direct knowledge on the series of event, and no evidence at all to back the defendant's story.

Their testimony is contrary to Section 62 (1) of the Evidence Act, Cap 6 R. E. 2019 which states that,

Oral evidence must, in all cases whatever, be direct; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds.

Moreover, the defendant did not bring to Court any document to support their story. They did not tender any sale agreements, nor proof of payment of the said property sale. Considering that the payments were said to have been done through two different bank institutes, the defendant has failed to provide even a bank proof that such large amount of cash was withdrawn on the said time.

On the other hand, the plaintiff presented several exhibits including Exhibit P5 and Exhibit P4 that shows the suit land is still in the name of the deceased and Exhibit P6 which shows that the deceased was compensated by Kinondoni Municipal in 2017 for part of his land which was acquired by the Government.

The plaintiff also tendered Lock out Agreement (Exhibit P3) that was entered between the deceased and the defendant which was intended to dispose the suit property after expiry of 180 days. DW4 also provided in his testimony that there was a Lock Out Agreement. However, the same was strongly contested by the advocate for the defendant, Lydia Susuma, for the same not to be admitted due to the fact that it was a copy of a lost document with no receipt to evidence that it was lost. This Court agreed with Advocate Susuma's objection and the document is not considered as evidence for this case. I expected the defendant to have tendered the other contracts/ sale agreements showing that the amount his witnesses testified to have been agreed by the parties were paid and that the defendant is the owner; or they should have tendered the bank slip/ receipt proving that the agreed amount was paid as agreed.

Unfortunately, the defendants did not tender any document or any witness who were present on signing of the same. In the case of **Hemedi Saidi v Mohamed Mbilu [1984] TLR 113 (HC)** the Court observed that;

"Where for undisclosed reasons, a party fails to call material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests"

Therefore, failure to present the said witness or documents proving the sell was conducted it implies that if those evidence or witness were called, they would give evidence contrary to their interests.

Again, DW4 gave testimony that they hired an advocate to conduct transfer but unfortunately upon his death they did not locate the documents that were prepared. This testimony was alleged during the hearing, it was a new fact not pleaded. In fact, most of the defendant's testimony were not pleaded and therefore they have nowhere to stand as I pointed earlier in the case of **YARA Tanzania Limited vs. Charles Aloyce Msemwa (supra)**.

From the above analysis it is clear that the plaintiff has presented a stronger evidence than that of the defendant's. It is my conclusion that the first issue is answered in favor of the plaintiff.

- a) The plaintiff is declared the lawful owner of all that piece of Land including a residential building measuring 5122 square meters known as Plot No. 2012 Block C Kunduchi Mtongani Kinondoni District within the city of Dar es salaam under his capacity as Administrator of Estate.

- b) The defendant is ordered to surrender the Title Deed No. 106437 to the Plaintiff.
- c) Costs of the suit be borne by the defendant.

It is so Ordered.




T. N. MWENEGOHA

JUDGE

24/4/2023