

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY
[AT MOROGORO]

LAND CASE NO. 34 OF 2022

BERNARD KASIMILA PLAINTIFF

VERSUS

JANET URIO DEFENDANT

JUDGEMENT

23/04/2024 & 29/05/2024

KINYAKA, J.:

In his plaint lodged in this Court on 18th November 2022, the plaintiff sued the defendant for trespassing a piece of land situated on Plots No. 44 and 45, Block "H", Bigwa Barabarani, Morogoro Municipality with Certificates of Title No. 37195-DLR and 36315-DLR, respectively, hereinafter collectively referred to as the "suit land" which he alleged to belong to him. The plaintiff claimed for the Court's declaration that he is the lawful owner of the suit land; for declaration that the defendant is a trespasser in the suit land; for orders of eviction against the defendant; general damages; and costs of the suit.

The defendant vigorously contested the suit. She contended that the plaintiff is not the owner of the suit land which she purchased from one Bavon G.

Msacky on 22nd April 2007. She pleaded that the plaintiff was not entitled to any relief he sought.

Before hearing of the suit, the following issues were agreed and recorded by the Court:

1. Who is the lawful owner of the land in dispute; and
2. To what reliefs are the parties entitled.

During the hearing of the suit, the plaintiff was represented by Mr. Alphonse Nachipyangu, learned Advocate while the defendant enjoyed the services of Mr. Ignas Punge, learned Advocate.

In substantiating his claims, the plaintiff, Bernard Kasimila who testified as PW1, informed the Court that he bought the suit land on 6th August 1995 from Mzee Ramadhani Samadani (PW2) after he received information from Mwalimu Ruben Mpeka that Mr. Samadani was selling his land and upon conducting due diligence on the ownership of the same. He added that Mr. Samadani was given the land by the parents of the girl whom he married who were residents of the area. That he was shown the boundaries of the suit land by Mr. Samadani and his in laws where he found on the land, coconut trees, banana trees and mango trees but there was no any building in the suit land. He testified further that he executed the land purchase

agreement dated 8th June 1995 with the seller, Mr. Samadani which was admitted in evidence as **Exhibit P1**.

PW1 stated that the striking off of the name 'Mgolole' and its replacement by the name Bigwa in Exhibit P1 was done after the government divided the lands demarcated by the river where the upper part was called Mgolole and the lower part was called Bigwa where the suit land is located. That after he bought the plot he cultivated maize on the suit land for a period of not less than four or five years. Thereafter, he surveyed the land and included his wife, Mary Protas Kasimila as a co-owner. He stated that there was no any building on the land when he surveyed the land in the year 2005. The plaintiff tendered receipts acknowledging payment of government fees on Plot No. 44 and 45 dated 31/07/2017 which were admitted in evidence as **Exhibit P2A** and **P2B**, respectively.

PW1 proceeded that later on, when awaiting for issuance of certificate of titles to the suit land, he found a house of two rooms and a veranda built on the land. When he asked the person who he found outside the house, she responded that she bought the plot from Mr. Bavon. That two days after the incident, the defendant and his brother, Mr. Mushi and Mr. Ngoo went to the plaintiff's home and informed him that they were defrauded by Mr. Bavon who sold the portion of land which is the plaintiff's land. Three days after,

the team went to the plaintiff's home with Mzee Jaka who was then the Chairperson of Bigwa Ward and requested him to sell or give the piece of land to the defendant but the plaintiff refused. PW1 expected the defendant to vacate the plot but she did not. He referred the dispute to the District Land and Housing Tribunal. In between the land disputes, the certificates of title for Plots No. 44 and 45 No. 36315-DLR and 37195-DLR were issued by the government in his and his wife's names which he tendered them in Court and admitted in evidence as **Exhibits P3A** and **3B**, respectively. He prayed to be pronounced the lawful owner of the suit land.

PW1 testified that the names Bernard Kasimila in the Complaint and Dr. Bernard Kasimila are different because when he executed Exhibit P1, he was working at the University of Dar es Salaam where he earned a 'Dr.' title but he did not use the title after he retired from the University. He stated that the names B.J. Kasimila and Bernard Kasimila are not different and that it was not important to use the middle names Julius as it is the first and the clan name which are important. He stated that the deletion of the name Mgolole was done by the Ward Land Committee of Bigwa after it divided Mgolole and Bigwa which was legally constituted. He contended that is not always a requirement for a person to sign when he deletes a word.



He claimed that the neighbours were not indicated in Exhibit P1 because there was no neighbour apart from the road on three sides, and on the remaining fourth side, the seller had planted trees. That the land was not surveyed when he bought, and that there was only one neighbour who was not named in the land purchase agreement. He stated that the persons named in the agreement and involved in the sale were the residents of the place but their pieces of land were not bordering the disputed land. He testified further that the government leaders, including Mr. Lyimo were involved in the sale but Mr. Lyimo denied to sign as a witness because he was a government leader.

He proceeded that his wife was sick, suffering from an impairment associated with the loss of memory commonly known as dementia. That his wife knew the existence of the case but failed to attend to Court due to sickness. That he found the trespass by the Defendant when he went to supply construction materials on the land though he did not remember exactly the period she trespassed. He contended that the Defendant built her house on Plot No. 44 trespassing more than half of Plot No. 44. That there was a land case at the Ward Tribunal when Bavon was alive but the defendant stated not to have known the whereabouts of Bavon though the plaintiff's seller attended the visitation at the *locus in quo* to show boundaries.

He added that when he was surveying the land, the house of the Defendant was not there as if there was any, the surveyors would show that building. He testified that he did not remember when the defendant built the house but he didn't involve her when surveying the land. He proceeded that he paid for the survey in 2017 and prior to 2017, he was preparing for construction of the house on the land. That he did not know if the defendant was on the land since 2007 but in since 2018 as he saw the house around the years 2017 and 2018.

PW1 testified further that he started the process of survey in order to get certificates of title in 2005 and that there was no building in the plot that is why he did not involve the defendant during survey process. That due to his old age, he could not remember exactly when the Defendant trespassed his land. That he bought the land as a farm.

PW2, Mr. Samadani Suedi informed the Court that he sold the farm to the plaintiff on 8th June 1995 which he was given for free by his in-laws after he lived with their daughter. Prior to sale to the plaintiff, he used the land until when he was transferred to Dar es Salaam. He planted coconut trees, orange trees and mango trees on the land. When he was not around, his in-laws were burning the farm and destroying the permanent crops that he planted. His in-laws asked him to pay them TZS 400,000 after he prohibited them to

burn the farm. He found a customer who was the plaintiff and concluded a sale agreement. He proceeded that the witnesses to the sale agreement were Mr. Mpeka and his wife and that the farm was at Bigwa beside river Mgolole. He identified the sale agreement which he stated to contain his name, signature and the name and signature of the witnesses. He contended that after the sale of the farm, the plaintiff was cultivating the farm, and hired a person known as Bavon to oversee the farm. That he knew Bavon and heard that he sold a piece of land owned by the plaintiff and went back to his home in Moshi. That it was wrong for Bavon to sell the land which he was handed to look after.

He stated to have been given the farm measuring 2 acres by his in-laws in 1980 but there was no written evidence and witnesses. That the farm had some corners. That he knew the boundaries but not the neighbours as time passed. That after he sold the land to Kasimila, he saw Bavon cultivating the farm as he was entrusted to look after the same. He added that he lives near the farm but on the road side, a distance of approximately one kilometre. He stated that the word Mgolole was deleted because the farm was besides river Mgolole which divided Bigwa and Mgolole. He contended that the sale was not witnessed by street government leaders. He added that the farm was not surveyed and he was not involved in the process of surveying the land.

PW3, Nesto Alphonse Mpeka informed the Court that the plaintiff acquired the farm through him after the plaintiff requested him to find a farm at Bigwa where he was residing. After being aware that Mr. Samadani was selling his farm, he connected him with the plaintiff and agreed to the sale of the farm. He witnessed the land purchase agreement at an agreed price of TZS 400,000. He identified the sale agreement which he stated to contain his name, signature, the name and signature of his wife, and the writing of Mr. Samadani. He added that after the sale, the plaintiff cultivated the land. That he heard of people who built on the land but he knew that the land belonged to the plaintiff. He was informed that there were people from court who went to see the land but he did not go.

He stated that he knew Mr. Samadani long time ago before 1990 as their houses face each other. He lived in Bigwa long time ago but he acquired his land in 1982. That he did not remember the year Mr. Samadani acquired the land but he knew that he was given 2 acres of land by his in-laws. He stated further that he did not remember the neighbours by their names but he knew Bavoni who had no land but the land was his brother's, Mwalimu Steven Makala which bordered Samadani's land. That he did not remember Asheri who witnessed the land purchase agreement but all witnesses were not government leaders. He added that the farm is beside River Mgolole and the

deletion of the word Mgolole was done after the expansion by the government. He added that he did not remember about the process of surveying the land in dispute.

PW4, Clemence Mwire Mkude, testified that on 22/04/2007 around 8:00 and 9:00 o'clock in the morning, when he was a ten cell leader, Mushi, Janet, and Bavon went to his home for handing over a piece of land located at Bigwa or Mholole Darajani between Bavon and Mushi and Janet. That they showed him the piece of land which was in front of his house but separated by a street road. He contended that Bavon assured him that the piece of land belonged to him and thereafter, the family of Janet and Mushi started to own the piece of land and built a house on the land. He claimed that the handing over of the plot emanated from an alleged sale by Bavon to Janeth though he did not participate in the sale. That he was the first person to sign a new printed piece of paper after he asked Bavon who confirmed to him that he was paid TZS 500,000. Thereafter, the parties signed the paper in front of him.

PW4 proceeded that later on a dispute arose after the plaintiff's daughter went to cultivate the land but found a building on it. That the dispute escalated to the local government office where after the proceedings they went to the suit land and Mr. Samadani showed the boundaries of the land.

The local government advised the parties to resolve the dispute amicably including selling the piece of land to one another, though one of the members of the local government office, Mama Kigondeza said that Janet bought the land in contravention of the required procedures. PW4 identified annexure JU-1 which was later on admitted in evidence as **Exhibit D1**. He identified his signature where he signed at the space of the street chairperson though there was a street chairperson. He stated to have signed handing over of the land 'makabidhiano'.

He testified that he lived in Bigwa since 2005 and so he knew the land since 2005 when he arrived at the place. He knew the plaintiff when they were called at the local government office. He said, he was one of the neighbours bordered by the road where on his side, there was Swai, the opposite side, there was Selina who sold her small piece of land to another person, and the other person was Maneno. That he knew Bavon who was living approximately 100 meters from the disputed land and who before 22/04/2007, he owned the disputed land and was cultivating black eyed peas and cassava that is why he did not have doubt when he was selling the land. He testified that, the house was built in 2007 in the same year that Janet purchased the land. He added that he doubted the Hati ya Makabidhiano

that he signed in that it showed that the land was owned by Janet but was not.

The defence paraded three witnesses. DW1, Janet Urio also known as Joane Ludovick Urio, testified that the siut land measuring 40x32 metres is at Bigwa which is her home and borders with Swai at the east, west with Maneno, north with Mwaluko and south with Bernard Kasimila which they are bordered by one tree. She told the court that, her land has not been surveyed and has no beacons and that She acquired the land from Bavon Msacky on 22nd April 2007 at a price of TZS 500,000 but Bavon died later on. She went on telling the court that she bought the land when it was a farm with two coconut trees, two oranges trees and one lemon tree in front of her witnesses Swai, and the local government office. She contended to have a title for purchase of the land which was admitted in evidence as **Exhibit D1**. That she built a residential house with two bedrooms and sitting room and shifted to the house and lived there where she has engaged herself in poultry, livestock keeping and farming.

She proceeded that the dispute arose over the land where at Bigwa Local Government office, the plaintiff was advised to find Bavon to whom he entrusted the land. At the Ward Tribunal of Bigwa, she was ordered to find Bavon. The District Land and Housing Tribunal of Morogoro ordered the

Ward Tribunal to rehear the dispute. That later on, the dispute escalated to the High Court where the dispute was going back and forth. She contended that in the proceedings before the Court, her name was Janet Urio. The six decisions of the Tribunals and the High Courts were admitted in evidence as **Exhibit D2A, D2B, D2C, D2D, D2E and D2F**. That she did not know about the plaintiff's certificates of title as she was on safari when the survey was conducted. She was told that there was a person who came to survey her land when she returned from her journey. She added that she wrote the letter to the Land Tribunal requesting for recognition that the land is hers but they did not respond. She prayed for dismissal of the suit with costs.

During cross examination, DW1 further testified that she did not have the letter that she wrote to the Land Tribunal. She admitted that the heading in Exhibit D1 read "Makabadhiano ya shamba/eneo" but she did not know if there was a difference between handing over 'makabidhiano' and purchase 'manunuzi' and she found the two words were the same. She added that, she also did not know if there was a difference between words compensation 'fidia' and payment 'malipo'. She proceeded that according to Exhibit D1, the 500,000 that was paid was for compensation. That when she bought the land, he did not know if she bordered the plaintiff at the southern side but only after the plaintiff went to his house and informed her that the land is

his. She testified further that she did not know well the names of the witnesses to the sale agreement but she knew their signatures. She also knew Clemence Mkude was not the local government Chairperson but ten cell leader. She told the court that at the time she signed the agreement, she was already the owner of the suit land. She prayed to the Court to use Exhibit D1 as it is. She added that, when she bought the land, Bavon did not show her any document to prove his previous ownership of the same. She did not make any efforts or due diligence to know Bavon's previous ownership. She however told the court that when the plaintiff was surveying the land, she had already built her house. She prayed for dismissal of the suit with costs.

DW2, Richard Marcel Swai, testified that he lived at Bigwa since the year 2000. That Janet Urio is his neighbour since 2007 and are bordered at the eastern side. He said, previously, Janet's land was owned by another person known as Bavon who died. He knew that Bavon was owning the land after he found him on the land. He participated in the sale as neighbour. He told the court that, after Janet bought the land, she built a house and shifted to the house thereafter and that he did not know Bernard Kasimila. He added that he was a neighbour of Bavon and thereafter Janet but he did not know Janet before she bought the land. He knew that her name was Janet in the

process of purchasing land but she introduced herself to him as Joane Urio. He continued telling the court that he did not know if there was a document signifying sale of the land between Bavon and Janet as he had never seen such a document or witnessed any contract of sale between Bavon and Janet and that he did not know Clemence Mkude since he shifted to the place but he knew the leaders of the local government office of the place.

DW3, Gladstone Stanley Lyimo testified that he lived at Bigwa Barabarani since the year 1995. He identified himself as being the Mtaa Chairman for 10 years through Chama cha Mapinduzi. He contended to have known Janet Urio as she bought land located in Bigwa from Bavon Msacky in April 2007 and that he participated in the sale as local government chairperson by signing the sale but did not remember the size of the land. He recognized Exhibit D1. He said that he knew Bavon was owning the land as he used to cultivate the same and was involved when the road from Makuti to Sabbath Church to the main road was established and when an electric pole was to be allocated. He stated that Bavon left the place but died. He explained to have known Bernard Kasimila after he referred a compliant when he found the house was built on the land but he did not know him before. At the local government office, they dealt with the complaint and informed Mr. Kasimila

that the land was sold to Janet but he promised that the dispute shall be dealt with by the High Court. He added that the sale document was prepared by Bavon and he was present when others were signing the document. He did not know if the words 'makabidhiano' and 'mauziano' are the same. He admitted that he did not know how Bavon got the land but it is sufficient to know ownership of Bavon by his cultivation and his involvement in the road passage project.

Upon hearing the evidence of the parties and their respective witnesses, I now proceed to determine the issues in the present suit. I will start with the first issue as to who is the lawful owner of the land in dispute.

The oral and documentary evidence of the prosecution witnesses reveal that the plaintiff purchased the suit land measuring two acres from PW2 in 2005. This was well articulated by PW1, the plaintiff, PW2 the person who sold the suit land to the plaintiff, PW3 the witness to the sale as well as Exhibit P1, the written land purchase agreement dated 8th June 1995. PW1 and PW2 testified on the history of ownership that the suit land was owned by PW2's in-laws which they gave the same to PW2 and which PW2 sold to the plaintiff. Throughout their respective testimonies, the evidence of PW1, PW2 and PW3 on how the plaintiff acquired the suit land was consistent and not shaken. On the other hand, the evidence of the defence was that the defendant

purchased the land in 2007. This was duly evidenced by the testimonies of DW1, DW2, and DW3 as well as Exhibit D1, "Makabidhiano ya Shamba/Eneo" which the defence claimed to be the land purchase agreement.

Analyzing the two contesting parties' evidence, it is clear that the plaintiff bought the suit land in 1995 prior to the defendant who acquired the land in 2007, 12 years after the plaintiff's ownership of the land. On part of the defence, none of the witnesses, including the defendant was able to testify how Bavon came to own the land or whether Bavon was actually the owner of the suit land. DW2 and DW3 all testified that they knew Bavon was the owner because they saw him cultivating the land. DW1, the defendant informed the Court when she was cross examined that Bavon did not show her any document to prove his previous ownership of the suit land and she did not make any efforts or due diligence to know Bavon's previous ownership. **In Mohamed Kanji v. MAC Croup Ltd Civil Appeal 391 of 2022** on page 16, the Court of Appeal emphasized on what it now appears to be a settled principle of law that the purchase of a possession from someone who has no title, denies the purchaser any ownership of title (*Nemo dat quad non habet*). In the present matter, Bavon's ownership of the suit land was neither established nor traceable, as such it cannot be

said that he had a better title to the suit land for him to pass to the defendant herein.

I have further observed that, not only that the plaintiff bought the land prior to the defendant but also, Exhibit D1 prove a different version of evidence contrary to the defence oral evidence. While Exhibit P1 duly evidences that there was a purchase of suit land by the plaintiff from PW2, supported by oral testimonies of PW1, PW2, and PW3, Exhibit D1 establish that there was handing over of the property in consideration of compensation contrary to the oral testimonies of DW1, DW2 and DW3 who informed the Court that the defendant acquired the suit land through purchase from Bavon. Again, DW1 informed the Court that she owned the land before she signed the purchase agreement.

Although the defense witnesses, DW1 and DW2 testified that there was no difference between sale 'mauziano' and handing over 'makabidhiano' on the one hand, and sale 'mauzo' and compensation 'fidia', I find that the words are different and cannot be the same. Handing over upon payment of compensation is different from handing over the same upon sale. In ordinary meaning, compensation is an award of money or some other thing to someone in recognition of loss, injury or suffering or payment of damages or any other act that should be done by a person who has caused injury to

another. The term "compensation" has not been defined in our statutes. However, according to the Black's Law Dictionary, 8th Edition published by Thomson Reuters at page 301 compensation has been defined to mean;

- 1. Remuneration and other benefits received in return for service rendered especially salary or wages;*
- 2. Payment of damages or any other act that a court order to be done by a person who has caused injury to another.*

All the same, the Law of Contract Act, Cap 345 R.E 2019 has provided for compensation as an entitlement to a person who has suffered loss or damage as a result of breach of contract. Section 73(1) of the Act provides:-

"Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

On the other hand, the sale of land is the transfer of ownership of a piece of land from one person to another whose consideration is a sale or purchase price.

I have thoroughly scanned Exhibit D1 in light of the definitions above. The questions that arise from Exhibit D1 are that; if Bavon was the owner of the



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In substantiating his claims, the plaintiff, Bernard Kasimila who testified as PW1, informed the Court that he bought the suit land on 6th August 1995 from Mzee Ramadhani Samadani (PW2) after he received information from Mwalimu Ruben Mpeka that Mr. Samadani was selling his land and upon conducting due diligence on the ownership of the same. He added that Mr. Samadani was given the land by the parents of the girl whom he married who were residents of the area. That he was shown the boundaries of the suit land by Mr. Samadani and his in laws where he found on the land, coconut trees, banana trees and mango trees but there was no any building in the suit land. He testified further that he executed the land purchase

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He stated that he knew Mr. Samadani long time ago before 1990 as their houses face each other. He lived in Bigwa long time ago but he acquired his land in 1982. That he did not remember the year Mr. Samadani acquired the land but he knew that he was given 2 acres of land by his in-laws. He stated further that he did not remember the neighbours by their names but he knew Bavoni who had no land but the land was his brother's, Mwalimu Steven Makala which bordered Samadani's land. That he did not remember Asheri who witnessed the land purchase agreement but all witnesses were not government leaders. He added that the farm is beside River Mgolole and the

deletion of the word Mgolole was done after the expansion by the government. He added that he did not remember about the process of surveying the land in dispute.

PW4, Clemence Mwire Mkude, testified that on 22/04/2007 around 8:00 and 9:00 o'clock in the morning, when he was a ten cell leader, Mushi, Janet, and Bavon went to his home for handing over a piece of land located at Bigwa or Mholole Darajani between Bavon and Mushi and Janet. That they showed him the piece of land which was in front of his house but separated by a street road. He contended that Bavon assured him that the piece of land belonged to him and thereafter, the family of Janet and Mushi started to own the piece of land and built a house on the land. He claimed that the handing over of the plot emanated from an alleged sale by Bavon to Janeth though he did not participate in the sale. That he was the first person to sign a new printed piece of paper after he asked Bavon who confirmed to him that he was paid TZS 500,000. Thereafter, the parties signed the paper in front of him.

PW4 proceeded that later on a dispute arose after the plaintiff's daughter went to cultivate the land but found a building on it. That the dispute escalated to the local government office where after the proceedings they went to the suit land and Mr. Samadani showed the boundaries of the land.

The local government advised the parties to resolve the dispute amicably including selling the piece of land to one another, though one of the members of the local government office, Mama Kigondeza said that Janet bought the land in contravention of the required procedures. PW4 identified annexure JU-1 which was later on admitted in evidence as **Exhibit D1**. He identified his signature where he signed at the space of the street chairperson though there was a street chairperson. He stated to have signed handing over of the land 'makabidhiano'.

He testified that he lived in Bigwa since 2005 and so he knew the land since 2005 when he arrived at the place. He knew the plaintiff when they were called at the local government office. He said, he was one of the neighbours bordered by the road where on his side, there was Swai, the opposite side, there was Selina who sold her small piece of land to another person, and the other person was Maneno. That he knew Bavon who was living approximately 100 meters from the disputed land and who before 22/04/2007, he owned the disputed land and was cultivating black eyed peas and cassava that is why he did not have doubt when he was selling the land. He testified that, the house was built in 2007 in the same year that Janet purchased the land. He added that he doubted the Hati ya Makabidhiano

that he signed in that it showed that the land was owned by Janet but was not.

The defence paraded three witnesses. DW1, Janet Urio also known as Joane Ludovick Urio, testified that the siut land measuring 40x32 metres is at Bigwa which is her home and borders with Swai at the east, west with Maneno, north with Mwaluko and south with Bernard Kasimila which they are bordered by one tree. She told the court that, her land has not been surveyed and has no beacons and that She acquired the land from Bavon Msacky on 22nd April 2007 at a price of TZS 500,000 but Bavon died later on. She went on telling the court that she bought the land when it was a farm with two coconut trees, two oranges trees and one lemon tree in front of her witnesses Swai, and the local government office. She contended to have a title for purchase of the land which was admitted in evidence as **Exhibit D1**. That she built a residential house with two bedrooms and sitting room and shifted to the house and lived there where she has engaged herself in poultry, livestock keeping and farming.

She proceeded that the dispute arose over the land where at Bigwa Local Government office, the plaintiff was advised to find Bavon to whom he entrusted the land. At the Ward Tribunal of Bigwa, she was ordered to find Bavon. The District Land and Housing Tribunal of Morogoro ordered the

Ward Tribunal to rehear the dispute. That later on, the dispute escalated to the High Court where the dispute was going back and forth. She contended that in the proceedings before the Court, her name was Janet Urio. The six decisions of the Tribunals and the High Courts were admitted in evidence as **Exhibit D2A, D2B, D2C, D2D, D2E and D2F**. That she did not know about the plaintiff's certificates of title as she was on safari when the survey was conducted. She was told that there was a person who came to survey her land when she returned from her journey. She added that she wrote the letter to the Land Tribunal requesting for recognition that the land is hers but they did not respond. She prayed for dismissal of the suit with costs.

During cross examination, DW1 further testified that she did not have the letter that she wrote to the Land Tribunal. She admitted that the heading in Exhibit D1 read "Makabadhiano ya shamba/eneo" but she did not know if there was a difference between handing over 'makabidhiano' and purchase 'manunuzi' and she found the two words were the same. She added that, she also did not know if there was a difference between words compensation 'fidia' and payment 'malipo'. She proceeded that according to Exhibit D1, the 500,000 that was paid was for compensation. That when she bought the land, he did not know if she bordered the plaintiff at the southern side but only after the plaintiff went to his house and informed her that the land is

his. She testified further that she did not know well the names of the witnesses to the sale agreement but she knew their signatures. She also knew Clemence Mkude was not the local government Chairperson but ten cell leader. She told the court that at the time she signed the agreement, she was already the owner of the suit land. She prayed to the Court to use Exhibit D1 as it is. She added that, when she bought the land, Bavon did not show her any document to prove his previous ownership of the same. She did not make any efforts or due diligence to know Bavon's previous ownership. She however told the court that when the plaintiff was surveying the land, she had already built her house. She prayed for dismissal of the suit with costs.

DW2, Richard Marcel Swai, testified that he lived at Bigwa since the year 2000. That Janet Urio is his neighbour since 2007 and are bordered at the eastern side. He said, previously, Janet's land was owned by another person known as Bavon who died. He knew that Bavon was owning the land after he found him on the land. He participated in the sale as neighbour. He told the court that, after Janet bought the land, she built a house and shifted to the house thereafter and that he did not know Bernard Kasimila. He added that he was a neighbour of Bavon and thereafter Janet but he did not know Janet before she bought the land. He knew that her name was Janet in the

process of purchasing land but she introduced herself to him as Joane Urio. He continued telling the court that he did not know if there was a document signifying sale of the land between Bavon and Janet as he had never seen such a document or witnessed any contract of sale between Bavon and Janet and that he did not know Clemence Mkude since he shifted to the place but he knew the leaders of the local government office of the place.

DW3, Gladstone Stanley Lyimo testified that he lived at Bigwa Barabarani since the year 1995. He identified himself as being the Mtaa Chairman for 10 years through Chama cha Mapinduzi. He contended to have known Janet Urio as she bought land located in Bigwa from Bavon Msacky in April 2007 and that he participated in the sale as local government chairperson by signing the sale but did not remember the size of the land. He recognized Exhibit D1. He said that he knew Bavon was owning the land as he used to cultivate the same and was involved when the road from Makuti to Sabbath Church to the main road was established and when an electric pole was to be allocated. He stated that Bavon left the place but died. He explained to have known Bernard Kasimila after he referred a complaint when he found the house was built on the land but he did not know him before. At the local government office, they dealt with the complaint and informed Mr. Kasimila

that the land was sold to Janet but he promised that the dispute shall be dealt with by the High Court. He added that the sale document was prepared by Bavon and he was present when others were signing the document. He did not know if the words 'makabidhiano' and 'mauziano' are the same. He admitted that he did not know how Bavon got the land but it is sufficient to know ownership of Bavon by his cultivation and his involvement in the road passage project.

Upon hearing the evidence of the parties and their respective witnesses, I now proceed to determine the issues in the present suit. I will start with the first issue as to who is the lawful owner of the land in dispute.

The oral and documentary evidence of the prosecution witnesses reveal that the plaintiff purchased the suit land measuring two acres from PW2 in 2005. This was well articulated by PW1, the plaintiff, PW2 the person who sold the suit land to the plaintiff, PW3 the witness to the sale as well as Exhibit P1, the written land purchase agreement dated 8th June 1995. PW1 and PW2 testified on the history of ownership that the suit land was owned by PW2's in-laws which they gave the same to PW2 and which PW2 sold to the plaintiff. Throughout their respective testimonies, the evidence of PW1, PW2 and PW3 on how the plaintiff acquired the suit land was consistent and not shaken. On the other hand, the evidence of the defence was that the defendant

purchased the land in 2007. This was duly evidenced by the testimonies of DW1, DW2, and DW3 as well as Exhibit D1, "Makabidhiano ya Shamba/Eneo" which the defence claimed to be the land purchase agreement.

Analyzing the two contesting parties' evidence, it is clear that the plaintiff bought the suit land in 1995 prior to the defendant who acquired the land in 2007, 12 years after the plaintiff's ownership of the land. On part of the defence, none of the witnesses, including the defendant was able to testify how Bavon came to own the land or whether Bavon was actually the owner of the suit land. DW2 and DW3 all testified that they knew Bavon was the owner because they saw him cultivating the land. DW1, the defendant informed the Court when she was cross examined that Bavon did not show her any document to prove his previous ownership of the suit land and she did not make any efforts or due diligence to know Bavon's previous ownership. **In Mohamed Kanji v. MAC Croup Ltd Civil Appeal 391 of 2022** on page 16, the Court of Appeal emphasized on what it now appears to be a settled principle of law that the purchase of a possession from someone who has no title, denies the purchaser any ownership of title (*Nemo dat quad non habet*). In the present matter, Bavon's ownership of the suit land was neither established nor traceable, as such it cannot be

said that he had a better title to the suit land for him to pass to the defendant herein.

I have further observed that, not only that the plaintiff bought the land prior to the defendant but also, Exhibit D1 prove a different version of evidence contrary to the defence oral evidence. While Exhibit P1 duly evidences that there was a purchase of suit land by the plaintiff from PW2, supported by oral testimonies of PW1, PW2, and PW3, Exhibit D1 establish that there was handing over of the property in consideration of compensation contrary to the oral testimonies of DW1, DW2 and DW3 who informed the Court that the defendant acquired the suit land through purchase from Bavon. Again, DW1 informed the Court that she owned the land before she signed the purchase agreement.

Although the defense witnesses, DW1 and DW2 testified that there was no difference between sale 'mauziano' and handing over 'makabidhiano' on the one hand, and sale 'mauzo' and compensation 'fidia', I find that the words are different and cannot be the same. Handing over upon payment of compensation is different from handing over the same upon sale. In ordinary meaning, compensation is an award of money or some other thing to someone in recognition of loss, injury or suffering or payment of damages or any other act that should be done by a person who has caused injury to

another. The term "compensation" has not been defined in our statutes. However, according to the Black's Law Dictionary, 8th Edition published by Thomson Reuters at page 301 compensation has been defined to mean;

- 1. Remuneration and other benefits received in return for service rendered especially salary or wages;*
- 2. Payment of damages or any other act that a court order to be done by a person who has caused injury to another.*

All the same, the Law of Contract Act, Cap 345 R.E 2019 has provided for compensation as an entitlement to a person who has suffered loss or damage as a result of breach of contract. Section 73(1) of the Act provides:-

"Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

On the other hand, the sale of land is the transfer of ownership of a piece of land from one person to another whose consideration is a sale or purchase price.

I have thoroughly scanned Exhibit D1 in light of the definitions above. The questions that arise from Exhibit D1 are that; if Bavon was the owner of the

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suit land, why would he hand over the suit land to the defendant in consideration of compensation from the defendant? Why was Bavon compensated for by the defendant? How would the defendant own land before he signed Exhibit D1? In view of the foregoing questions, it is clear that the purported purchase of the suit land alleged by the defendant was not proven. Exhibit D1 does not prove that there was purchase of the suit land from Bavon to the defendant, instead the same has established that the defendant paid compensation of TZS 500,000 to Bavon whose basis was not disclosed to the court by any of the defence witnesses. It is therefore my considered finding that there was no proper sale of the suit land from Bavon to the defendant that would pass title from the purported seller to the defendant.

Again, both oral and documentary evidence reveal that it was the plaintiff who initiated complaints over the suit land to the local government office and the Ward Tribunal of Bigwa and not the defendant. Despite her testimony that the plaintiff went to the defendant's house and claimed that the suit land is his, the defendant did not take any action. Despite the defendant being informed that there were surveyors who surveyed her land when she returned from her journey, she did not bother to report the matter to the relevant authorities or to sue the plaintiff apart from alleging that she

wrote a letter to the land tribunal which she also failed to prove. In my considered opinion, the same demonstrate that the defendant was not diligent in fighting for her rights over the suit land as she was not self-assured of her ownership of the suit land.

In addition to the above, the fact that the plaintiff and his wife are the holder of the certificates of title over the suit land admitted as Exhibit 3A and 3B, after being duly registered, is sufficient proof that they are lawful owners of the suit land. Although in paragraph 6 of her written statement of defence, the defendant alleged the certificates of title were procured fraudulently and clandestinely, but she miserably failed to prove the allegations. As it was stated by the Court Appeal in the case of **Bilali Ally Kinguti v. Ahadi Lulela Said Others, Civil Appeal No. 500 of 2021** on page 16, the allegation of fraud in civil matters like the present one must not only be specifically pleaded but also proved on a higher degree of probability than that which is required in ordinary civil cases. In that case, the Court of Appeal adopted the decision in the case of **City Coffee Ltd v. The Registered Trustee of Iloilo Coffee Group [2019] 1 TLR 182**, where it was stated categorically that:-

"....it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being serious allegation; must be specifically

pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."

Nonetheless, it has been established that despite the certificates of title being issued during the pendency of the suit, the defendant was aware of the plaintiff's survey of the suit land before the certificates were issued, the process which the plaintiff began since 2005.

The defendant had all the time to take steps against the plaintiff if she had a right over the land including filing a caveat before the land registry or sue the plaintiff and obtain an injunction against the plaintiff from tempering with suit land to protect her interest. In holding that the plaintiff has superior title, I am fortified by the decision in the case of **Amina Maulid Ambali and Others v. Ramadhani Juma, Civil Appeal No. 35/2019** where on page 6 to 7 of the decision the Court of Appeal held:-

"It is our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

In the above decision, the Court of Appeal cited the case of **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of**



Lands, Housing & Urban Development and the Attorney General, Civil Appeal No. 57 of 2017 (unreported), where the Court cited 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 at page 330 in which the learned authors observed: -

".....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 confer, 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."

From my above observations, I find the plaintiff to have discharged his burden to prove his and his wife's ownership of the suit land on balance of probability, the standard required by the law. The evidence of the defendant and her witnesses failed to demonstrate that the suit land is not the plaintiff's but hers.

It is a settled law under section 110 of the Evidence Act and through numerous decided cases that the one who alleges existence of certain fact must prove the existence of such facts. In **Paulina Samson Ndawavya v.**

Theresia Thomasi Madaha Civil Appeal No. 45 of 2017(unreported)

on page 14, the Court of Appeal amplified section 110 and reiterated that:-

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."

Upon his successful proof of ownership of the suit land, it follows that the actions of the defendant to enter, build, stay and conduct economic activities on the land amounts to trespass of the same. The defendant, DW1 testified and Exhibit D1 revealed that the defendant's land measured 40x32 metres. The plaintiff, PW1, PW2 and PW3 as well as Exhibit P1 revealed that the suit land was 2 acres within the plaintiff's land.

It is clear to me from the evidence of PW1, PW2, PW3, PW4, DW1, DW2 and DW3 that the defendant intruded into the said land without the plaintiff's permission. It was held in the case of **Frank Safari Mchuma v. Shaibu Ally Shemndolwa [1998] TLR 280** quoted with approval in **Salim Said Mtomekela v. Mohamed Abdallah Mohamed, Land Case No. 78 of 2015** (unreported) on page 15 that:



"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 a trespass as if he had walked half a mile in it " (Ellis vs Loftis Iron Co. (2) per Coleridge C.J. at Page 12) ..."

In view of the above findings, I resolve the first issue in favour of the plaintiff that the plaintiff is the lawful owner of the land in dispute.

The above conclusion takes me to the second issue as to the reliefs each party is entitled to. Following my finding that the plaintiff managed to prove his ownership of the suit land on balance of probability, he is entitled to all the reliefs claimed in his plaint and those he articulated during his testimony in Court. It means that the defendant is not entitled to her prayers made in her written statement of defence and during her testimony in court.

In the final analysis, I declare the plaintiff as the lawful owner of suit land and that the defendant is a trespasser on the suit land. I also order eviction of the defendant from the suit land and demolition of all structures built by the defendant on the suit land.

The plaintiff has been struggling to recover his land for years. He first approached the defendant and informed her of the trespass. Then he referred a complaint to the local government office. Then to the Ward



Tribunal, the dispute which escalated to the District Land and Housing Tribunal and the High Court through several proceedings as evidenced by Exhibit D2A, D2B, D2C, D2D, D2E and D2F. Considering the above, I find that the plaintiff is entitled to general damages for both physical and psychological disturbance arising from the defendant's trespass over his suit land which resulted to deprivation of his right to peaceful enjoyment of the suit land. Considering the stated factors, I award the plaintiff general damages to the tune of TZS 10,000,000 (Say, Tanzania Shillings Ten Million) Only.

Costs shall follow the course.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 29th day of May 2024.



H. A. Kinyaka
H. A. KINYAKA

JUDGE

29/05/2024