

IN THE HIGH COURT OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

LAND CASE NO. 8 OF 2020

WILSON ROLAND MMMOLE..... PLAINTIFF

VERSUS

MARION KARCHER..... DEFENDANT

JUDGMENT

K. T. Mteule, J.

12/12/2023 & 15/02/2023

The Plaintiff instituted this land case against the Defendant claiming for a declaratory decree of the Court requiring the Defendant and or her agents to vacate a leased property namely three round houses with two connecting buildings located at Kweboi division, Irete area in Lushoto District, or in the alternative, the Defendant and or her agents be evicted therefrom.

The Plaintiff further prayed that the Defendant be ordered to pay mesne profits at **TZS 8,700,000.00** monthly as from 6th October 2020 until the Defendant vacates the property, the Defendant to pay **TZS 299,074,941/=** for the period of three years which the Defendant



illegally conducted business on the premises at the Plaintiff's detriments including damages.

Moreover, the Plaintiff prayed for the Defendant to be ordered to pay general damages for causing embarrassments, stresses and inconveniences to the Plaintiff, costs of the suit and any other relief(s) the Honourable Court may deem just and fit to grant.

On the other hand, the Defendant disputed the claims by filing a Written Statement of Defence accompanied by a Counter Claim praying for this Court to declare that the land and the building belongs to the Defendant/Plaintiff in the Counter Claim. The Defendant further prayed for an order extinguishing ownership of the Defendant in the Counter Claim in the land in dispute, an order that the Plaintiff in the Counter Claim be allowed to register the land in the manner recognised by the law in Tanzania.

The Defendant further prayed that the Plaintiff be refrained from interfering with smooth operation of orphanage and other humanitarian services provided by the Plaintiff at the land in dispute, payment of general damages as shall be assessed by the Court and payment of costs of the entire suit.



In the alternative, the Defendant is praying for payment of **TZS 400,000,000/=** being moneys used to purchase the land in dispute and costs of construction of the buildings and interests thereon. The plaintiff further prayed for the payment of interests on decretal sum at the rate of 7 % from the date of judgment to the date of payment in full and any other relief that the honourable Court shall deem just and equitable to grant.

Before the commencement of the trial 2 issues were framed covering both the plaint and the counter claim. The said issues are the following:-

- (a) Who has the lawful ownership of the land in dispute in Irente Lushoto Tanga.**
- (b) What relief each party is entitled.**

In the matter both parties were under legal representation. The Plaintiff was represented by Ms. Ernesta Chuwa and Mr. Thomas Kitundu, Advocates whereas the Defendant was represented by Mr. James Bwana, Advocate.

For a proper case management and backlog clearance, this matter was assigned before Hon. Ndesamburo, J and later it was re-assigned to me (Katarina Revocati Mteule, J) and parties were fully addressed in



accordance with **Order XVIII Rule 10(1) of the Civil Procedure Code [Cap 33 RE 2019]**.

Initially, during the trial, the Plaintiff had four witnesses including himself. PW1 namely Nakaruma Ezekiel Mchopa was a witness acting under the Power of Attorney donated by the Plaintiff. However, the Plaintiff's counsel deferred him and procured the Plaintiff himself to testify due to the nature of evidence needed to be produced. Later, the plaintiff's counsel prayed to withdraw the evidence of PW1 and prayed for his evidence to be expunged from the record as it was already covered by PW4 who was the plaintiff. The prayer was granted by the Court. In that regard, the testimony of PW1 including the exhibit P1 (a Power of Attorney) were expunged. Thus, the Court cannot consider it in reaching at its decision.

The testimony of PW2, Maulid Shabani Shekolowa, was that on 26/10/2009 he sold a piece of land measured one acre at 350,000/= to the Plaintiff for the purpose of constructing a residential house. That the land is located at Kweboi Hamlet in Irente Village, Magamba Ward in Lushoto District and one teacher Anna Massawe in the West, one Mussa Rajabu North side, also a road to Yoghoi, and in the upper part there is



a land belonging to one John Justine Kimea, in the West side one Mr. Kibanga (deceased).

PW2 further tendered a sale agreement between him and the Plaintiff. The same was admitted in Court as **Exhibit P2**. He also testified that in the land that he sold to the Plaintiff there is a building used for storage and chicken keeping. He stated that he directed the Plaintiff to one John Justine Kimea so as to acquire another piece of land and that they entered into a sale agreement.

According to PW2, from the land that the Plaintiff bought from one Justine Kimea, there is a school for infants below 5 years old, there are two houses constructed therein and the other house joined and there are eucalyptus and "miwati" trees.

He further described the land as bordering one Mr. Gerald (deceased) in the Eastern side, as well as the road to Yogoi, in the North one Maulid Shabani Shekolowa and in the South one Mwanaidi Mohamed and in the West side, the seller John Justine Kimea before selling his second piece of land. He further testified that he knew the Defendant as the Plaintiff's tenant. He saw her in 2012.

PW3 was Joel Justine Kimea. He testified to be the seller of the other pieces of the land to the Plaintiff. He testified that he was introduced to



the Plaintiff by PW2. In 2009 he sold the first piece of land at **TZS 600,000/=**. In 2010 he sold the other piece of land at **TZS 2,000,000/=**.

The two pieces of land are less than one acre, they were farms and contained of eucalyptus and "miwati" trees and they are located at Kweboi area in Lushoto District. The witness tendered two sale agreements. The first sale agreement was dated 26/10/2009 and the other was dated 10/07/2010. The two sale agreements were admitted as exhibit P3 and P4 consecutively.

During cross examination, he testified that he used to see the Plaintiff and the Defendant from the time they were constructing the building though he was unaware on what the two were actually transacting, though on re-examination, he stated that it was the Plaintiff who was constructing the building.

PW4 was Wilson Roland Mmole, is the Plaintiff in this case also a businessman and a farmer and the one who previously donated a Power of Attorney to PW1 whose testimony has already been expunged following the Plaintiff's counsel's prayer to withdraw him.

His testimony is that he bought one piece of land from one John Justine Kimea (PW2) on 26/10/2009 at TZS 600,000/=, also from Maulid



Shabani Shekolowa (PW3) on the same day at TZS 350,000/= and the third plot in 2010 from John Justine Kimea at TZS 2,000,000/=.

He added that the first piece of land borders one Gerald in the West Side, a road to Yoghoi in the North, below Maulid Shekolowa and Mwanaidi Mohamed. That the second piece of land borders one Massawe in the East side one Kibanga in the West side, one Mussa in the North and the road to Yoghoi and Justine Kimea in the South. That the third piece of land, in the East one Linus Mtefu, in the West, the road to Yoghoi in the North also one Kibanga below the road and one Mwanaidi Mohamed.

He testified further that after obtaining the lands, he started constructing three residential houses, a store and a water tank reserve in one of the plots. That he managed to obtain a building permit in 2012 and he tendered it and it was admitted as **exhibit P5**. That he constructed three houses at the lintel stage and in October 2010 he asked for a loan from the Defendant to the tune of 290,000,000/= interest inclusive at 1% for the purposes of completing construction from the lintel to finishing stage. The loan agreements English and German versions dated 18, October 2010 were collectively admitted as **exhibit P6**.



PW4 further testified that after construction, the Defendant asked for a tenancy, and he rented her the houses at 8,700,000/= per year, the amount which was regarded as part of loan repayment for the duration of the tenancy which commenced from 1/1/2011 and that there was no time limit due to change of time to determine change in rate of the rent.

PW4 further stated that in the contract they agreed that the Defendant was supposed to involve him regarding all modifications in the building including change of use. That the Defendant resided in the building from January 2011 to date.

In is further testimony of **PW4** that in between 2012 to 2013 the Defendant changed the building into a hotel named "Irente Charity." until 2016. He stated that in the land there is also a school where children with parents attend there and go back home. According to him, the school has no name, it is not registered and that there is no sign board to indicate that it is a school. The Plaintiff further testified that trees were cut down, and timbers were made out of them. That he reported the matter to the Forest Department where Officers therefrom stopped it.

PW4 stated that sometimes in 2012, the Defendant travelled abroad and left other people who were foreigners to reside in the house and



look after the properties, one being Frank Feme Omere (Nigerian) and his wife Yohana (Austrian) who stayed till 2016 when they were repatriated following immigration issues for running a hotel business without a lawful permit. **PW4** also testified that he had issues with the Lushoto Town Plan Council for change of use of the building and later, when the Defendant came back from abroad, she informed him, he reported to the Immigration Department and the Defendant was held by the Immigration Department and fined to pay 600 USD.

PW4 added that on a certain day, the Plaintiff was called at the Immigration Department by the Defendant's lawyer who asked him what he wanted following the immigration incident, then he told them that all that he wanted was to clear what he owed to the Defendant and from the Defendant as well and that the Defendant was supposed to return the premises back.

Consequently, according to **PW4**, the Defendant issued a notice via a letter to terminate the loan dated 1/6/2016 and the loan balance was to be paid within six months. The Notice was admitted as **Exhibit P8**. That the Plaintiff referred the letter to his lawyer who advised him not to pay the loan since the Defendant used the premises for business charging **120 USD** and **100 EURO** amounting to **TZS 261,000** per day and that



the said lawyer replied the Defendant's letter. The letter from his lawyer to the Defendant's lawyer dated 1/08/2016 was admitted as **Exhibit P9**.

The witness further stated that from the computation made, **TZS 264,000** times 30 days times 12 months in a year times 3 years of hotel business, they got **TZS 285,120,000.00** and that by adding 9 years that the Defendant resided in the premises then that amounted to settlement of loan and some money would be due to him.

In finality, PW4 prayed the Court to dismiss the Counter Claim and declare him the lawful owner, the Defendant to vacate the premises, the Defendant to be ordered to pay rent at 8,700,000/= from 2010 to when the Defendant vacates, costs and disturbances.

The witness further disputed the claim of **TZS 400,000,000/=** stating that the loan had already been paid by the profit that the Defendant obtained from operating the business and from the rental charges for the period she used the premises as residence.

In her defence, **DW1** Marion Karcher testified that in November 2008, she was working at Irente Orphanage Centre in Lushoto where she worked for four (4) years staying in a guest house at the same time looking for someone to teach her Kiswahili language. According to her,



this was when she was introduced to a German woman called Sabine Mmole, the Plaintiff's wife.

DW1 testified further that she was looking for a house for the purpose of establishment of an orphanage centre hence Sabine introduced her to the Plaintiff, (Sabine's husband) who told her that there were no houses to buy and that she could not buy a plot since she is a foreigner and that he could buy it in his own name. That they looked for plots, and the first one was bought at **TZS 15,000,000/=**, the second plot at **TZS 7,000,000/=** and the third plot at **TZS 8,000,000/=** and that he used to pay such money to Sabine, the Plaintiff's wife.

DW1 stated that the Plaintiff built the house as a manager and she used to pay money for purchasing building materials and that the construction of the house was almost finished in 2010 except for some windows and doors but she moved therein and called some people to do the construction and paid them. She stated that the purpose of that house was to take care of the orphans.

DW1 further testified that sometimes the Plaintiff told him that he was afraid of going to jail since it was illegal to build for her so they had to enter a lease agreement showing that she is paying rent for the purpose of protection and that they all knew that the land belonged to the



Defendant. She added that they entered a lease agreement at TZS 8,7000,000/= rent per year and she never paid such rent since it was used as a mere shield to protect the Plaintiff from going to jail.

DW1 added that, recently he operates a day care and there are children from the village and that the Plaintiff's claims are not true and she owes him nothing because she paid for the building materials, work, and that everything belongs to her.

DW2 was one Blandina Faustine Chande, testified that she knew the Defendant through one Magreth who asked her to introduce her to Young Women Christian Association (YWCA) in Dar es Salaam. That some day Marion encountered a theft incident where she offered her an assistance and dispatched her to Lushoto.

He stated further that she knew the Plaintiff since she was looking for a place to live at Lushoto and happened to meet the Plaintiff who was said to be selling a house and a plot. That she communicated with him only to discover that there was a dispute over ownership between the Plaintiff and the Defendant, concerning the land which was about to be sold to her. According to her, while being shown the premises by the Plaintiff, Marion (the Defendant) appeared and questioned what were they doing at her home, something which prompted some exchange of



the words between the two indicating dispute on the ownership of the land.

That due to that dispute she left and later she got an opportunity to talk with the Plaintiff where she inquired on what happened. That the Plaintiff told her that the property belonged to Marion but he did a lot of supervisory works for the her, but she did not pay him. He said he had claims for her.

DW3 was one Michael Frank Philip. His testimony was that he was assisted in the payment of his school fees by the Defendant and that there were other children who benefited from such assistance.

After closure of the Defendant's case, the Court ordered the parties to file their final submissions. The order was complied with. In disposing this matter therefore, I have considered the pleadings, testimony along with the parties' written submissions.

I will start with what the Defendants claimed to be unopposed facts in the counter claim. According to Mr. Bwana Advocate for the Defendant the plaintiff did not oppose the assertion in the written statement of defence that the plaintiff purchased the land and built the house in trust of the Defendant. It is his further submissions that even in the counter



claim, the plaintiff in his capacity as a defendant in the counter claim never opposed the assertion.

I have gone through the pleadings and noted that the on **6th April 2021** the Plaintiff filed two documents of pleadings one being the reply to written statement of defence and a written statement of defence to the counter claim in which the fact pleaded in the Written statement of defence and in the counter claim were seriously disputed. I failed to know the basis of this argument in the final submissions by Mr. Bwana. The argument is therefore found to have no basis.

Now embarking to the first issue which is about ownership, it is on record as per the testimony of **PW2, PW3 and PW4** together with **Exhibits P2, P3 and P4** being sale agreements and **Exhibit P5** being building permit, that the land in dispute comprising three round houses with two connecting buildings at Kweboi Division, Irete Area in Lushoto District, are all in the name of the Plaintiff. The Plaintiff claims to be the lawful owner of this property since everything concerning it is in his own name and he claimed to have spent his own money to purchase and construct the premises. On the other hand, the defendant claims that they had a separate unwritten agreement that being a foreigner, and incapable to own a property in Tanzania according to the law, he



transmitted that purchase money to the plaintiff for purchase of the said properties in her trust and for her ownership. Therefore, it is not disputed that the properties are all in the name of the plaintiff.

From what I learn from the parties, there are some other undisclosed transactions which calls for careful consideration of this matter in ascertaining the nature of contract between them. The evidence that the plaintiff purchased the land and constructed the premises in his name but on behalf on the defendant who is not allowed to own a land in Tanzania was supported by the evidence of **DW2** who testified to have been involved in resolving a dispute amongst the parties. According to **DW2**, the plaintiff wanted to sell her the property and while discussing on the deal, they faced a stiff resistance from the Defendant who appeared abruptly claiming to be the owner of the premises something which prompted bitter exchange of words between the parties. **DW2's** testimony revealed further that, later she got a private conversation with the plaintiff who told her the real genesis of the story that the property belonged to Marion, but he was claiming supervision costs from her for the work he did to supervise the construction of the said premises.



What made things intriguing is the loan contract which is **(exhibit P6)** as well as the lease contract **(Exhibit P7)**. According to the Plaintiff, the defendant advanced a loan to the plaintiff to the tune of **TZS 290,000,000/-** for the purpose of constructing the house. However, there is a rental agreement with indefinite duration with rental payment of **TZS 8,700,000/-** per year which was payable from the loaned amount of **TZS 290,000,000/-**. This is according to the evidence of PW4 who is the plaintiff.

The above scenario indicate that, the entire saga seems to be clouded with undisclosed facts which were operating behind the curtains amongst the parties in trying to conceal something. According to DW1, they were shielding the legal consequences which could have happened to her in owning a land being a foreigner. This complicated situation placed all the properties under the ownership of the Plaintiff by document which included purchase agreements and building permits which made the situation very complicated to resolve. Since the Defendant volunteered in causing these complication by allowing all these to happen, then nothing can be done to change the situation since the existing status has been caused by both parties. The status is that the properties are in the name of the Plaintiff by documentation.



This being the case, I will base on what is on documents. All documents appear to be in the name of the plaintiff. However, the evidence makes is apparent that such ownership is subjected to other agreements including the loan agreement (**Exhibit P6**) which was advanced to the plaintiff for the purposes of constructing the same premises and the rental agreement (**Exhibit P7**) in which payment of rent was to be deducted from the said loan of **TZS 290,000,000.00**. According to the evidence of DW1 all these contracts were meant to secure the interests of the defendant in the property. The above analysis therefore answers the first issue thus, the ownership of the suit property is in the plaintiff subject to the loan and rental agreements.

Regarding the **second issue** which is about the reliefs that the parties are entitled to, in the plaint, the Plaintiff prays for the eviction of the Defendants and or their agents, the Defendants to pay mesne profits of **TZS 8,700,000/=** monthly as from the 6th October 2020 until the Defendant vacates the property, payment of **TZS 299,074,941/=** for the period of three years which the Defendant illegally conducted business on the premises plus general damages.

Starting with mesne profit, from the testimony, there is no substantial proof of the mesne profits, since there was a tenancy agreement and at

all the time the Plaintiff was aware that the rental payments were to be recovered from the loan advanced to him. This has been in their common knowledge taking into account that the Defendant has been residing in the premises since 2011 without any dispute. The claim of mesne profit is therefore baseless.

Concerning the claim of general damages, it is the legal requirement that general damages lies on the court's discretion which should be exercised upon reasons being established. In **Anthony Ngoo & Another vs Kitinda Kimaro (Civil Appeal 25 of 2014) [2015] TZCA 269 (25 February 2015)**, the Court of Appeal stated:

"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages."

The Plaintiff did not state how he suffered such general damages. It is on his own evidence that the defendant is in the premises as a tenant. Explanation was needed to state how the general damages were occasioned. It is therefore my finding that the claim for general damages is not founded.



Concerning payment of **TZS 299,074,941.00**, the Plaintiff claimed that this is the amount the defendant obtained due to the hotel business she run in the premises for three years. The defendant denied having conducted any hotel business in the premises. In his evidence, PW4 did not tender any document to support the allegation of a hotel business other than the mere oral allegation which is denied by the defendant. Even the amount claimed to have been earned from that alleged hotel business was based on the lawyer's advice without any explanation on the source of that information and the calculations. In my view, there was no sufficient proof on the existence of such hotel business and the amount alleged to have been earned therefrom. Therefore, the plaintiff cannot claim such amount. Based on the above analysis, the Plaintiff's claim of **TZS 299,074,941.00** is hereby dismissed.

The plaintiff further prayed for the court to order the defendant to give vacant possession of the suit premises to the Defendant or alternative the Defendant to be evicted from the suit premises. As already found above, the plaintiff's ownership to the premises is subjected to loan agreement as well as the rental agreement. It is on evidence that the rent is being recovered from the loan of **TZS 290,000,000** advanced by the defendant to the plaintiff. This being the case, I agree with the



submission of Mr. Bwana Advocate that the tenancy should continue with rental payments being annually deducted from the loan advanced plus the interest thereon. Therefore, since there is a tenancy agreement amongst the parties with indefinite term whose rent is annually payable from the advanced loan of **TZS 290,000,000.00**, this court cannot order vacant possession or eviction against the defendant while parties are bound by their own rental agreement.

Before I consider the issue of costs of the suit as prayed by the plaintiff, I should firstly resolve the prayers sought in the counter claim.

It is prayed in the counter claim, that the court makes a declaration that the land and the building thereof legitimately and equitably belong to the plaintiff in the counter claim. From what is already found above, the plaintiff in the counter claim could not prove ownership since all the documentations are in the name of the defendant in the counter claim. Ownership of a property is being done by documentation and all the documents indicate the defendant in the counter claim to be the owner. This prayer in the counter claim is therefore not proved.

The plaintiff in the counter claim prayed for an order to extinguish the ownership of the plaintiff to the suit property. Equally, there was no justification given by the Plaintiff in the counter claim to justify an order



to extinguish the defendant's ownership over the suit land. Neither can this court be able to order the land to be registered in the name of the Plaintiff in the counter claim.

The Plaintiff in the counter claim further prayed for an order to restrain the defendant in the counter claim from interfering with the smooth operation of the orphanage and other humanitarian services at the land in dispute. Since the plaintiff is a lawful tenant in the premises with indefinite term, I find this prayer to be valid. The plaintiff in the counter claim is to be left undisturbed to operate the orphanage and the other humanitarian activities until the loan advanced depletes due to rental deductions unless the parties resolve to agree otherwise.

The plaintiff in the counter claim is further praying for the payment of **TZS 400,000,000.00** claimed to have been advanced to the Defendant in the counter claim for the purchase of land and construction of the suit premises. From the evidence, the only tangible evidence is the loan agreement of **TZS 290,000,000.00** as exhibited by **Exhibit P6** which is agreed to be used to make the annual rentals. In this regard, I see no sufficient evidence of **TZS 400,000,000.00** advanced to the defendant in the counter claim. This claim is therefore unfounded.



On general damages in the counter claim, I found that it not stated how the said general damages were occasioned. As said earlier, there must be reasons to support that the party claiming general damages sustained such damages. (See **Anthony Ngoo & Another vs Kitinda Kimaro supra**). In this regard, the court cannot allow this claim in the counter claim.

On interest, due to the nature of the contract between the parties, I see no good basis for granting interests. The loan contract itself provides for interest. This prayer of interest therefore cannot be granted in the counter claim.

On the issue of costs for both parties, I see that both the plaint and counter claim succeeded partially. This being the case, each party should bear its own costs.

From the above analysis, and in the finality, I find both the plaint and the counter claim to have partially succeeded. Therefore, all the Plaintiff's claims are dismissed save for the issue of ownership. All the claims of the Plaintiff in the counter claim are dismissed save for the issue of being left undisturbed to operate her orphanage and other humanitarian activities in the suit property basing on the existing tenancy. I add that the tenancy between the plaintiff and the defendant



should not be disturbed until the loan of **TZS 290,000,000.00** advanced to the plaintiff plus the interest thereon as per the loan agreement depletes due to annual deduction of **TZS 8,700,000.00** which forms the rent for the said tenancy, unless parties resolve otherwise. No order as to costs. It is so ordered.

Dated at Tanga this 15th day of February 2024.




KATARINA REVOCATI MTEULE

JUDGE

15/2/2024

Judgment delivered this 15th day of February 2024 in the presence of the Mr. Thoms Kitundu Advocate for the Plaintiff, also holding brief for Mr. Bwana Advocate for the Defendant and in the absence of the Plaintiff and the Defendant.




KATARINA REVOCATI MTEULE

JUDGE

15/2/2024