

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

LAND CASE NO.104 OF 2011

**PETER SWAI.....PLAINTIFF
VERSUS**

HILDER EMMANUEL MAKELEMO (As Administratrix
of Estate of the late
EMMANUEL LAZARO MAKELEMO).....**1ST DEFENDANT**

GABRIEL MPAKATAMWIU MIKWAMBA.....**2ND DEFENDANT**

Date of Last Order: 11/05/2018

Date of Judgment: 18/06/2018

EXPARTE JUDGMENT

S.A.N. WAMBURA, J:

This is an exparte judgment where by the plaintiff **Peter Swai** counter claimed on the defendants' claims and prays for Judgment and Decree against the defendants for the following orders;

- a) *For declaration order that the plaintiff is a legal owner of the suit property situated at Plot No. 8, Block C, Ununio Area, Kinondoni Municipality within the city of Dar Es Salaam.*
- b) *For declaration that the Certificate of Title issued to the 1st defendant in respect of Plaintiff's Plot No. 8 Block C, Ununio was issued contrary to the law thus null and void.*

- c) For declaration that the 1st defendant has trespassed on the Plaintiff's Plot No. 8 Block C, Ununio Area.
- d) For an order of permanent injunction against the 1st defendant to restrain him, his agents, workmen, allocating authorities or any other person from entering and interfering with the Plaintiff's ownership and development of the suit property known as Plot No. 8, Block C, Ununio Area in Kinondoni Municipality within the city of Dar Es Salaam.
- e) That the 1st defendant be ordered to pay general damages to be assessed by the court at the tune of Tshs. 50,000,000/=.
- f) That defendants be ordered to pay costs of this counter claim.
- g) Any other relief the honourable court will deem fit to grant.

On 09/06/2015 this court ordered the suit to proceed exparte against the 1st defendant.

The plaintiff was represented by Mr. Mayenje Learned Counsel whereas the 2nd defendant Gabriel Mpakatamwiu Mikwamba enjoyed the legal services of Mr. Kimaro Advocate.

The plaintiff's side called one witness namely Gabriel Mpakasemwi Mwikwambo (Pw 2) to prove its case.

According to the court record Pw 1 Peter Joseph Swai bought the disputed land on 03/12/2010 at the sum of Tshs.30,000,000/= from Gabriel Mwikwambo (PW 2), through a sale agreement tendered in Court as Exhibit P 4. Thereafter the 2nd defendant (Pw 2) handed over to him a letter of offer and payment receipts as evidenced by Exhibit P 2. It is also on record that after the execution of that agreement and handing over of the documents, he went to the Ministry of Lands to make a search and he was told that the documents were valid ones.

He also found out that the 2nd defendant was in land rent arrears as of 1997 to 2001 which was Tshs. **1,399,666.40**. He paid the rent arrears and was given a receipt which was tendered in Court as Exhibit P 3.

The plaintiff averred that when he bought the disputed land there was nothing on it hence he processed for a building permit. After he was given the permit he built a fence and servants quarter which has three rooms. He also installed water and electricity thereon. Sometime later the 1st defendant invaded into the suit

land and claimed to have interest in it though the 1st defendant did not have any document to prove his ownership.

He contended that he is still in possession of the suit premises but he could not develop it due to this dispute. That the Municipality tried to resolve the matter but failed as it was already in court. He therefore prayed to be declared the owner of the suit plot.

The plaintiff's evidence was collaborated by the testimony of Pw 2 who confirmed that he sold the disputed land to the plaintiff. He contended that he acquired the disputed land by purchasing it from one Hussein Abdul in 1985 as evidenced by a sale agreement (Exhibit P 1).

Section 2 of the Land Registration Act R.E 2002 defines owner as follows;

*“Means, in relation to any estate or interests the person **for the time being in whose name that estate or interest is registered**”*

[Emphasis is mine].

In the case of **Sarjit Singh V. Sebastian Christom** [1988] TLR 24 (HC)

Kyando, J, (as he then was) held that:-

"It is clear that land becomes legally owned or a right of occupancy is established, once an offer for it is made and the offeree pays the fees. The question of a certificate does not arise in order for a right of occupancy to be created."

It is a cardinal principal of law under the Law of Evidence Act Cap.6 R.E. 2002 that whoever desires a court to give judgment in his his/her favour; he/she must prove that those facts exist.

Section 110 (1) (2) of the Law of Evidence Act Cap. 16 R.E.2002 reads as follows, I quote;

"Section 110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Section 110 (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

The above provision places the burden of proof on whoever desires the court to give judgment as to any legal right or liability

dependent on existence of facts which he/she ascertains as it was held in the case of **ABDUL KARIM HAJI VS RAYMOND NCHIMBI ALOIS AND ANOTHER** Civil Appeal No. 99 of 2004 (unreported).

It is on record that the plaintiff legally bought the disputed land on 03/12/2010 at the sum of Tshs.30,000,000/= from Gabriel Mwikwambo (PW 2), through a sale agreement tendered in Court as Exhibit P 4.

It is my belief therefore that the plaintiff is the lawful owner of the disputed property having lawfully purchased it from the 2nd defendant on 3rd December, 2010. This has been proved by Exhibit P 4 the sale agreement between him and the 2nd defendant, a letter of offer Exhibit P 2 and receipts of the payments Exhibit P 3 as well as the sale agreement between the 2nd defendant and one Hussein Abdu.

It is trite law that once the right of occupancy is created by the approval of the party's application for the grant of the same, the party's rights over the plot continues to subsist so that the later grant of a right over the same plot to the other party become null

and void unless the said offer of the right of occupancy created was revoked.

This position of the law was also reiterated in the case of **Prof.**

Benard Kirei Vs Natalino Mwenda, Civil Appeal No. 70 of 2001 (unreported) where this court held and, I beg to quote;

*".....That a right of occupancy is created by the approval of the appellant's application for the grant of the same(i.e a right of occupancy) and the acceptance by the appellant of the granted right. **Appellant's rights over the plot continued to subsist so that the later grant of a right over the same plot to the respondent is null and void. In other words nothing was granted at all after the grant to the appellant as the Land Office could not have granted another right over a plot it had already granted to another person.** No evidence has been led to suggest and or show that the offer of the right of occupancy created was revoked prior to the purported grant of the same right to the respondent....."*

[Emphasis is mine].

Thus since there is no proof that the letter of offer granted to the plaintiff was not revoked, then the latter is null and void.

Since the Plaintiff has proved his case on a balance of probabilities, then this court orders as follows;-

- a) The plaintiff is declared as the legal owner of the suit property situated at Plot No. 8, Block C, Ununio Area, Kinondoni Municipality within the city of Dar Es Salaam.
- b) The 1st defendant is declared a trespasser on the Plaintiff's Plot No. 8 Block C, Ununio Area.
- c) The Certificate of Title issued to the 1st defendant in respect of Plaintiff's Plot No. 8 Block C, Ununio was issued contrary to the law thus null and void.
- d) The 1st defendant, his agents, workmen, allocating authorities or any other person is restrained from entering and interfering with the Plaintiff's ownership and development of the suit property known as Plot No. 8, Block C, Ununio Area in Kinondoni Municipality within the city of Dar Es Salaam.
- e) The 1st defendant to pay general damages at the sum Tshs. 10,000,000/= to the plaintiff.
- f) The defendants to pay costs of this counter claim.


S.A.N WAMBURA
JUDGE
18.06.2018