

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

LAND CASE NO. 65 OF 2015

MACMILLAN MOSHY..... PLAINTIFF

VERSUS

JACKLINE MAGNUS SANGA.....1ST DEFENDANT

ANNA LANGISI SANGA.....2ND DEFENDANT

JUDGEMENT

OPIYO. J.

The arrival of the **Land Dispute Courts Act, Cap 216 R.E 2019**, herein after referred to as the Act, conferred an exclusive jurisdiction of resolving or otherwise entertaining land disputes to the institutions it established. These are The Village Land Council, The Ward Tribunal, The District Land and Housing Tribunal, The High Court of the United Republic of Tanzania, and the Court of Appeal of Tanzania **{s.3 (1) and (2(a)-(e)) of the Land Dispute Courts Act, Cap 216 R.E 2020}**. The Act came to implement one of the underlying principles of the **Land Act, Cap 113 R.E 2020** and the **Village Land Act Cap 114 R.E. 2020**; which is *to ensure the establishment of an independent, expeditious, and just system for adjudication of land disputes* **{s.3 (1) (m) of the Land Act, Cap 113, R.E 2019 and s. 3 (1) (n) of the Village Land Act Cap 114 R.E 2019}**. The land courts system established by the Act have a duty entertaining land

disputes and making declarations of the rights of parties, to ensure that land disputes are adjudicated in a just and expeditious way.

It is unfortunate, disputes arising out of non-compliance with the Acts continue to stream in our courts of law and the present case is one of them. For better understanding of its gist, the following is the brief factual background. It is pleaded that, on 12th May 2010, one Lameck Mugalura, the original owner of the suit land, Plot No.91 Block D, located at Msamvu area within Morogoro Municipality, sold the same to the plaintiff here in above, Macmillan Moshy, at a price of 1,500,000/= (Tanzanian Shillings, one million, five hundred thousand only). The seller thereby handed over to the plaintiff the offer latter (title deed). The plaintiff thereafter made some development on the suit land where he built a concrete foundation on it. However, the plaintiff did not complete the transfer process; he remained holding the title deed of the suit land which he acquired from the seller believing the land was already his property. He is now claiming that the two defendants hereinabove, Jackline Magnus Sanga and Anna Langisi Sanga, jointly have trespassed over the suit land and constructed a building over it. Worse enough they did use the materials which were left by the plaintiff on the site after he constructed a concrete foundation.

The defendants jointly have denied the claims against them. The 2nd defendant insisted that, she bought the suit land for her daughter (1st defendant) who was a minor by that time, from one Hamida Mohamed Idd on 23rd December 2011. The said Hamida Mohamed also is said to have bought the same land from Lameck Mugalura.

It is against this background, the plaintiff has lodged the case at hand seeking among other reliefs, a declaration that he is a lawful owner of the suit land and the defendants are trespassers liable to be evicted from it and their structures erected on the suit land be demolished.

The plaintiff appeared in person while Mr. Lojiso Ndelwa and Herry Sanga Learned Counsels appeared for the 1st and 2nd defendants. The following issues were framed and agreed upon for determination of the suit are only two. These are determination of the lawful owner of the disputed property and reliefs the parties are entitled to.

The plaintiff had three witnesses and two exhibits to support his averments contained in the plaint. The defendants on the other hand also had three witnesses and nine exhibits. The case for the plaintiff was to the effect that, Macmillan Simon Moshy (PW1) on 12/5/2010, as he was in his land, adjacent to the disputed property, Plot No. 90 at Msamvu, Morogoro, a person named Lameck Mugalura approached him telling him that he was selling his piece of land, Plot No. 91 at a price of 1.5 million Tanzanian shillings. PW1 at that time was with his technician called Feruz Erico Pessa. PW1 asked the seller if he had an offer letter, Mr. Mugalura handed over the offer letter to the plaintiff and together they went to the Advocate and executed a contract of sale over the said plot. PW1 tendered the sale agreement and letter by regional land commissioner's office with reference No.MG/LD/8897/3. Collectively they were admitted as exhibit P1. PW1 went on to say that, he then paid the agreed sum for the said plot, after which he constructed a building foundation and left it to prepare for construction. In 2015 he found

the defendants trespassing on the suit land and therefore took the necessary steps to claim the same by lodging the present suit. When cross examined, he insisted that, he had never tried to initiate transfer of the suit land into his name, and that there was no any caveat over the suit land before it was sold to him. PW1 maintained that, he planned to build a guest house over the suit land that's why he made a foundation there. Before contracting with the seller, he conducted an official search over the suit land and found it being owned by Mr. Mugalura.

The foregoing circumstances were replicated in similar tone by the testimonial account of PW2, Feruz Erico Ressa and PW3, Raziel Joseph Moshy. Both of the two witnesses above claimed to know the existence of the sale of the suit property by Mr. Mugalura to Macmillan Simon Moshy, PW1. That in the material dates they were present when the seller made an offer to sell his land to PW1. PW2 was there as a mason proceeding with the construction of foundation at another adjacent plot owned by the plaintiff. PW3 was at the scene as a supervisor on the plaintiff's site. They also accompanied both the plaintiff and Mr. Mugalura to Advocate Kashumbugu office for execution of the sale agreement.

In a defensive fling back, DW1, Anna Langisi Sanga, (2nd defendant) and her two witnesses (DW2 and DW3) presented a unison version of a story to some extent. DW1 stated that, the 1st defendant is her daughter and owner of the disputed land. As a guardian, she purchased the suit land for her on 23/12/2011 from one Hamida Mohamed Idd after confirming that the seller has a good title over it. DW1 tendered the letter of offer of Hamida Mohamed

Idd as exhibit which was marked as "D1". In her further testimony, DW1 also stated that, she was told by the seller Hamida that the land had a dispute between her and one Macmillan Moshy, but it was already resolved. Hamida showed DW1 a letter from the Land Office stating that Hamida was a lawful owner of the suit land at that material time. They executed the contract of sale. The deed was admitted as exhibit D2. DW2 went on to state that, she then made follow-ups for valuation of the suit land property, valuation was conducted and later paid the capital gain tax. DW1 insisted that she bought the property at 30,000,000/= and all transfer process was initiated and effected. She then obtained a building permit for a single storey building which was admitted as exhibit D4.

DW1 continued to state that, at some point plaintiff appeared and claimed the suit land was his. That, the plaintiff told DW1 that the said land was a security for the money given to Hamada's father, one Mzee Atoss. However DW1 said that there was nothing in the records showing or indicating that Mzee Moshy has an interest in the suit land.

DW2, Hamida Mohamed Idd, in her testimony agreed to have sold the suit land to DW1. She went on to testify that, the suit land was once sold to her by Mr. Mugarula who was the owner in 2004. That, before selling the suit land to the 1st defendant through DW1, she had built a foundation and left it. She travelled out of the country on business account and returned to Morogoro in 2011 and was shocked to find new owner on her plot (the plaintiff). She went to the land office and filed a caveat; she tendered the copy of the caveat which was admitted as exhibit D5. She then reported the

matter to the police for criminal trespass, who in turn investigated it and resolved the matter by calling all the parties concerned including Mr. Mugarula who allegedly sold the suit land to both the plaintiff and DW2. That, the land officer was involved in the process confirmed in writing that the suit land by that time was hers, (DW2). After the dispute was resolved, DW2 started the process of transferring the suit land and paid all necessary costs for the same. After completing the transfer process she decided to sell the suit land to Anna Sanga who bought it for her daughter. She paid the taxes for the said sale too. Therefore to her, the lawful owner by now is Anna Sanga who bought the suit property from her. DW2 also tendered a letter dated 13/12/2012 from the office of the Director, Morogoro Municipal Council to the plaintiff concerning the ownership of the property by DW2 which was admitted as exhibit D7. Also, capital clearance certificate and bank deposit slips justifying transfer to her which were admitted as exhibit D8 collectively.

Lusekelo Andawile (DW3), the land officer claimed to have known the suit land way back in 2011 when the dispute over it reached his office through a caveat filed by DW2. The dispute involved DW2 (Hamida Mohamed Idd) and the plaintiff (Macmillan Moshy). The dispute also was reported to the Police station. The Police officers at Morogoro wrote a letter to DW3 calling for the file on Plot No.91, Block D Msamvu (the suit land) to be presented to them. DW3 took the said file as requested and presented the same before the Police at Morogoro. They questioned him on the ownership of the said land. DW3 told the Police that, the suit land at that material time was owned by

Lameck Mugalura since 1992 and prior to Lameck Mugalura, the suit land belonged to Amina Abdallah who acquired it in 1987.

DW3 went on to state that, later the file was returned to him with instructions that Hamida(DW2) was a rightful owner of the suit land due to the existence of two contracts of sale over the same land by the same seller. Therefore his office (the land office) informed the plaintiff Macmillan Moshy about what the Police had found through a letter (exhibit P7), that, his contract with Lameck Mgalura was subsequent to that of Hamida and Mugalura. After that, Hamida was given a letter of offer from DW3's office and became the rightful owner of the suit property in July 2011. She subsequently sold it to the defendants. When re-examined by Advocate Ndelwa, DW3 insisted that, no two offers for the same plot has ever been issued by his office. That marked the end of defence testimony.

On the whole of the evidence above from both parties and their witnesses, coupled with the exhibits submitted in support of their oral testimonies, there is no dispute that the suit land was originally owned by Mr. Lameck Mgalura who has been in occupation on it since 1992. The allegation is that the property was sold by the same Mgalura to both plaintiff and DW1, the defendant's predecessor in title. The following question to be answered is, who is the lawful owner of the disputed property between the plaintiff and successor in title to DW1?

After going through the evidence on record I find myself very pessimistic to answer the above question in plaintiff's favour. I have two major reasons for

my hesitancy. First, the plaintiff herein claims the ownership of the suit land by virtue of his purchase from the seller, Mr. Lameck Mugalura as per exhibit P1. There is no evidence from him suggesting that the suit land was transferred to him in one way or the other after such sale. It was just an alleged disposition by sale that took place between Lameck Mugarula and the plaintiff. The court was told by DW2 that it is the same Mgarula who had sold the land to her before allegedly re-selling the same to the plaintiff. And again it the same who facilitated transfer of land to her after the issue was solved administratively between them. DW2 and DW3 proved there being a feud over the same property sometimes in 2011 between plaintiff and DW1 Hamida Mohamed Idd, culminating to matter being solve administratively as indicated in exhibit P7, a letter by DW3 in his then official capacity. The plaintiff seemingly accepted defeat after administrative solution by the Land Office, to the extent that the disputed property was never conveyed to him. This gave green light to Hamida who supposedly facilitated transfer of the disputed property to Hamida. (DW2), his rival then. He never took Hamida to court for that, but resurfaced after Hamida has sold the disputed property to the defendants. In my view, he cannot therefore claim to be the owner of the suit land because the conveyance to him failed after the matter was resolved administratively and the land conveyed to Hamida (DW2). This closed the door to the plaintiff as it involved the same person he derived his title. The race did not end in his favour, therefore he cannot claim a reward out of incomplete race. What he has is just a withholding right over it (right to lien) arising out of the subsisting sale agreement between him and Mr. Lameck Mugalura, the recourse of which reverts to Mr. Mgalula and not any subsequent *bona fide* purchaser for value like the defendants herein.

In other words, the sale agreement between the plaintiff and Mr. Mugalura will remain valid and enforceable as between them. But the intended disposition over the suit land remained ineffectual due to failure in necessary compliances. **(see Abualy Alibai Aziz versus Bhatia brothers Limited, Misc. Civil Appeal No.1 of 1999,(TLR 2000),288, CAT and also Registered Trustees of Holy Spirit Sisters Tanzania versus January Kamili Shayo and 136 others, Civil Appeal No. 193 of 2016, Court of Appeal of Tanzania, (supra) (unreported).** The fact that Mgalula had already made conveyancing compliance with Hamida in knowledge of the plaintiff's existence and claim denies plaintiff any subsequent claim against third party, (bona fide purchaser) interests. Examination whether the defendants are *bona fide* purchaser will shortly.

The existence of Hamida Mohamed Idd (DW2), who claims to be the first purchaser of the suit land has really stood on plaintiff's way as second purchaser. The two, Hamida Mohamed Idd and the plaintiff, have been in conflict over the same since 2011 as already noted above, each claiming to have purchased the suit land from the same man, one Lameck Mugalura. The evidence on record further show that, Hamida Mohamed Idd lodged a caveat over the suit land (see exhibit D5), subsequently she was declared by relevant administrative authorities to be the rightful owner and transferred the property in her name (see exhibit D1) since 2011. The plaintiff did nothing to recover the suit land from Hamida Mohamed Idd, in case, he was dissatisfied with the decision of those authorities as a result the same was disposed of to the 1st defendant hence the conflict escalated

into the one at hand. In other words, the plaintiff's failure to take the necessary measures in 2011 against Hamida Mohamed Idd added another hill to climb before he reaches his desired destination, lawful ownership of the suit land.

Having done with the plaintiff, I direct my attention to the defendants, the 1st defendant in particular, whether she is a bona fide purchaser and should be declared the lawful owner of the suit property. The defense evidence on records suggested that the suit land belongs to the 1st defendant. The disposition process was dully completed by the 2nd defendant on her behalf, thereby completing the conveyance of it to her (**see exhibit D2, D3, D4, D6 and D8** and the testimony of **DW1, DW2 and DW3**). I agree with their contention that the suit land was disposed of completely to the 1st defendant based on the records at hand. As stated here in earlier, before the suit land was transferred to the 1st defendant, it was first transferred to DW2, Hamida Mohamed Idd. The transfer came after her dispute of ownership over the same, against the plaintiff (Macmillan Moshy) was resolved by the Morogoro Police in collaboration with the Morogoro Land commissioner's office where both declared Hamida Mohamed Idd to be the lawful owner of the suit land, as per exhibit D7. It is from there when Hamida sold the property to the defendants. The issue now is whether the latter were *bona fide* purchasers.

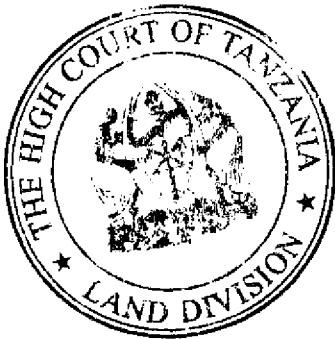
The term bona fide purchaser is the one who has purchased the property for value without any notice of any defects in the title of the seller; and/or one who pays valuable consideration, has no notice of outstanding rights of others and acts in good faith (**See Black's Law Dictionary, p. 21 of the**

Abbridged Sixth Edition (1991) as quoted in **Everest Peter Kimathi and another v Protas Laurence Mlay, civil Appeal no 3/2000**). The respondents fits squarely in the above definition. They bought the property after doing whatever they could to discover any defect in Hamida's title. They paid valuable consideration of 30 million after they were issued with the letter of offer in the name of Hamida Mohamed Idd. There was no caveat or any injunctive order attached to the Land Registry that could have raised their eye brows as to the validity of the seller's title. Those realities put together makes the defendants *bona fide* purchasers for value

In view of the above analysis my finding in relation to the first issue is that the 1st defendant is the lawful owner of the disputed property.

The second issue is as to what reliefs are the parties entitled to. The only remedy available to the plaintiff is restitution into original position, the recourse he can only get from Mgarula whom he chose not to sue or bring as a witness for the reasons known to himself. It is a well settled law that where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw negative inference against him, that is the witness was called he would have given evidence contrary to the parties interest (See the case of **Said Mohamed Mbilu (1984) TLR 113**. Plaintiff refused completely to call Mgarula even after he was advised by the court to do so. Thus, on balance of probability, the defendant's side overweighed the plaintiff's testimony for lack of this material witness coupled with the reasons enumerated above.

In the circumstances, the court simply states that his claim against the defendants lack merits. Each party will bear his/her own costs.



A handwritten signature in black ink, appearing to be "M.P. OPIYO", written over a horizontal line.

**M.P. OPIYO,
JUDGE
22/5/2020**