

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

**LAND CASE NO. 176 OF 2016**

**ANOLD MFINANGA ..... PLAINTIFF**

**VERSUS**

**JAMES KABAKAMA ..... 1<sup>ST</sup> DEFENDANT**

**JOYCE MTUNGUJA ..... 2<sup>ND</sup> DEFENDANT**

**CITY JOY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**KINONDONI MUNICIPAL COUNCIL ..... 4<sup>TH</sup> DEFENDANT**

**COMMISSIONER FOR LANDS ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

*Date of Order: 25/11/2020*

*Date of Judgment: 14/12/2020*

**NDUNGURU, J.**

In this suit, the Plaintiff one Anold Mfinanga prays for judgment and decree against the Defendants jointly and severally as follows:-

*a) Declaration that the Plaintiff is the lawful owner of the suit premise.*

*b) A permanent injunction against the Defendants and their agents not to interfere with the Plaintiffs' peaceful occupation of the suit premise.*

*c) Declaration that the Defendants are trespassers.*

*d) Payment of 190,000,000/= being special and exemplary damages.*

*e) Payment of general damages as the Court may determine.*

*f) Costs of the suit.*

*g) Any other relief(s) the Court will deem fit to grant.*

Briefly the facts which give rise to this case can be recapped from the pleadings as follows:

That the dispute is related to Plot No. 70 Block 'K' Mbezi, located at Mbezi Beach in Dar es Salaam. The Plaintiff alleges to have legally allocated the paid suit land on 06/12/1981 by Kinondoni Municipal Council. He alleges that having paid all necessary charges he was issued with the letter of offer. That the Plaintiff has been in peaceful and quite enjoyment of the suit premises from the date he was granted the right of occupancy. However on 05<sup>th</sup> October, 2009 almost 28 years, the 1<sup>st</sup> Defendant without any notice or order of the Court trespassed the Plaintiff's property on Plot 70 Block 'K' Mbezi located at Mbezi Beach area in Dar es Salaam and demolished the Plaintiff's main house, servant quarters and store, claiming to be the lawful owner of the suit land.

The Plaintiff's above facts were strongly disputed by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants. The Defendants above, are of the averment that the documents which the Plaintiff is relying upon to have been granted the right over the disputed premises are forged ones. That the Plaintiff was not allocated the said suit land. This is pleaded in para 5 of the 1<sup>st</sup> Defendant, para 2 and 7 of the 4<sup>th</sup> Defendant and para 3 of the 5<sup>th</sup> and 6<sup>th</sup> Defendants' written statements of defence.

Regarding the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the case proceeded ex parte against them. As for the 2<sup>nd</sup> Defendant her whereabouts was not known even when the substituted service by publication issued in the Local Mwananchi Newspaper dated 25<sup>th</sup> August, 2016 was effected. The 3<sup>rd</sup> Defendant defaulted to file written statement of defence, notwithstanding the extension of time given to him. The ex parte order was issued in terms Order VIII, Rule 14(2)(b) of the Civil Procedure Code (Cap. 33 RE. 2019) on 29/07/2020.

The record available reveals that the 2<sup>nd</sup> Defendant filed an application to set aside ex parte order issued against her. This was Miscellaneous Application No. 511 of 2019 before it was heard the

applicant prayed to withdraw it with leave to refile, being granted, the record is silent as to whether the 2<sup>nd</sup> Defendant turned up.

When the suit was before me for hearing the Plaintiff testified as PW1 and was the only witness. While the Defendants paraded three witnesses, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants had one witness each.

Anold Alfred Mfinanga testified as PW1. His testimony is to the effect that in 1981 went to Kinondoni Municipal Council requesting to be allocated land. That the Municipal Officer sent him to Mbezi Beach and shown him the land (Plot No. 70 Block 'K' Mbezi). That having paid all necessary land fees on 06/12/1981 he was issued with letter of offer. The witness tendered the letter of offer attached with exchequer payment receipt as Exhibit "P1". He said in 1991 he processed the building permit which was issued to him in 1992 Exhibit "P2". Having secured building permit PW1 told the Court that he started building the main house with four bedrooms, he then built servant quarter with two rooms. Thereafter PW1 started living at the suit land. PW1 further testified that in 2008 when he made a follow up on the certificate of title to the Ministry he was informed that the 1<sup>st</sup> Defendant is processing the Certificate of Occupancy on the same Plot. It is when the Ministry wrote to the Municipal Council to be furnished with

information on who is rightful owner of the suit land. This is Exhibit "P3". PW1 also tendered letters Exhibit "P4" which was from the 4<sup>th</sup> Defendant to the 5<sup>th</sup> Defendant which conveyed information on the ownership of the Plot No. 70 Block 'K' Mbezi. That he was not informed as to the outcome of the Ministry's invention on who is the owner. It was further testified by PW1 that on the fateful date the 1<sup>st</sup> Defendant armed with gun known as pistol trespassed into the suit land and demolished his houses with grader. That the 1<sup>st</sup> Defendant had no any demolition order neither from the Court or any other authority. It was his further testimony that he has never been informed by any lawful authority if his letter of offer is a forged one or he has been prosecuted for forgery. During cross examination DW1 never contradicted himself in any material evidence. He just confirmed the evidence testified in examination in chief. Apart from saying he has no invoice as a proof of payment of fees. This was the end of the Plaintiff's case.

In fending the case James Kabakama testified as DW1. His testimony was that he purchased the Plot No. 70 Block 'K' Mbezi located at Mbezi Beach from the 2<sup>nd</sup> Defendant one Joyce Mtunguja in 2003. Later, he sold the said Plot No. 70 Block 'K' Mbezi to one City Joy Limited 3<sup>rd</sup> Defendant.

DW1 had a photocopy of the letter of offer bearing the name of Joyce Mtunguja. He said he was given the said photocopy by the 2<sup>nd</sup> Defendant who told DW1 that she was also given the copy by the Municipal Council. DW1 told the Court that he believed the original letter of offer was in the custody of 4<sup>th</sup> Defendant.

DW1 testified further that on 25<sup>th</sup> October, 2009 went to clean the Plot, the Plot had grasses and small broken houses (mabaki ya vibanda). He faced resistance from one of the relative of the Plaintiff called Moses. That Moses reported to Police who arrested the boys who were cleaning the Plot. At the Police Station he met PW1, all of them give his statement. DW1 said he complained to the Ministry for Lands where he was told the Plaintiff has complained to. DW1 tendered a letter dated 23/09/2009 with No. LD/168831/55 written by the Ministry of Land to PW1 and copied to him as Exhibit "D1". Thus denied all the claims praying the case be dismissed.

On cross examination DW1 told the Court that he came to know the Plot as he used to pass there and also through the street leader. However, he did not know the name of the street nor the name of the said street nor any neighbor sharing boundaries. That the DW1 told the Court that he

made a physical search to the 4<sup>th</sup> Defendant to satisfy himself if Joyce Mtunguja was a lawful owner. He further said when purchased the suit land from 2<sup>nd</sup> Defendant it was not yet developed. That he came to know the Plaintiff's documents were forged through letter (Exhibit D1) from the Ministry of Land to the Plaintiff.

Geoffrey Mwamsojo, Authorized Land Officer from Kinondoni Municipality 4<sup>th</sup> Defendant testified as DW2. His testimony was that Plot No. 70 Block 'K' Mbezi was surveyed in 1980. It was allocated to Joyce Mtunguja (2<sup>nd</sup> Defendant) through Land Allocating Committee meeting held on 27/08/1981. DW2 told the Court that in November, 1993 Joyce Mtunguja lodged a complaint to the City Engineer that PW1 has trespassed the land, the Land Officer informed PW1 that the letter of offer he has is not genuine since it was not in their record. When the Ministry request the report on the status of the Plot from District Council DW2 said the Ministry was informed that the Plot belonged to Joyce Mtunguja. The Letter of Offer of PW1 (Plaintiff) was not genuine.

On cross examination DW2 told the Court that he was not an Officer of the 4<sup>th</sup> Defendant when letter of offer was granted likewise when the letter (Exhibit P4) was written. That the letter (Exhibit P4) was signed by

one Dennis Mtui who was the Officer of the 4<sup>th</sup> Defendant on behalf of the Director of the 4<sup>th</sup> Defendant. He said the Plaintiff was not informed on the allegation of forgery. Further that the Defendant was not called to answer the allegation.

DW3 Adelfrida Kamilius Lekule, the Land Officer from the Office of Assistant Commissioner for Lands testified for the 5<sup>th</sup> and 6<sup>th</sup> Defendants. Her testimony was that the 1<sup>st</sup> Defendant had applied for transfer of the Plot No. 70 Block 'K' from the 2<sup>nd</sup> Defendant on 06/05/2003. That upon receipt of the application, the 5<sup>th</sup> Defendant inquired the ownership status of the Plot. The 4<sup>th</sup> Defendant informed the 5<sup>th</sup> Defendant that the Plot was earlier to the Plaintiff and later to the 2<sup>nd</sup> Defendant. DW3 tendered the certificate of approval of disposition Exhibit D2. She further testified that the Commissioner for Lands (5<sup>th</sup> Defendant) conducted investigation. In the process inquired PW1 to submit his letter of offer and receipts for payment. DW3 said it was revealed that the letter of offer was not stamped by the Municipal, further by engaging Ministry Accountant it was found that the exchequer receipts were not involved in payment of the fees for land ownership. That the receipt books used were of the Prime Minister's Office and not the Ministry's. Then the 5<sup>th</sup> Defendant issued the letter to PW1



(Plaintiff) informing him that his letter of offer was not proper likewise the payment receipt (the letter is Exhibit "D1").

On cross examination DW3 told the Court that the 5<sup>th</sup> Defendant wrote a letter on 28/01/2009. The letter was issued to the 4<sup>th</sup> Defendant who did not respond it. There is no proof if the Plaintiff was informed on the defects of his documents. That the letter of offer issued to Joyce Mtunguja (2<sup>nd</sup> Defendant) is not in the Office file. The letter of offer of Joyce Mtunguja was not investigated upon. That the letter of offer of the Plaintiff was issued by Kinondoni Municipal. That the stamp used in Exhibit P1 (copy of letter of offer of the PW1) is of the Office of the Assistant Commissioner for Lands certifying the letter of offer as a copy from the file. DW3 went on telling the Court that no investigation report is tendered. The payment receipts were stamped by Ministry of Lands Stamp. The Accountant who investigated on report did not say anything as for as the stamp used and the signature on the receipts. Neither the letter of offer of the Plaintiff nor of the 2<sup>nd</sup> Defendant is in the Commissioner's file.

On re-examination DW1 said when the transfer process is complete the applicant is given the original letter of offer to show that he is a lawful owner of the property. When the documents are found not genuine they all

either returned to the owner or retained. That was the end of the defence case.

At this juncture the issue to be determined is who is the lawful owner of the disputed property. Upon determination of it, what followed will be to what reliefs are the parties entitled to.

The Plaintiff in this case through his testimony as PW1 told the Court on how he acquired the suit Plot. He told the Court that on 1981 went to Kinondoni Municipal for the purpose of securing piece of land. He was taken by the officials of the Municipal to Mbezi Beach where he was shown the suit premises. Being satisfied paid all necessary fees. Having paid the prerequisite fees he was allocated the suit land which is Plot No. 70 Block 'K' Mbezi. The Letter of Offer was issued for him in 1981 (Exhibit P1).

It was his further evidence that in 1992 he processed the building permit Exhibit P2 which was issued in 1992 then started constructing the houses. Having completed he occupied and enjoyed the suit land till when the houses were demolished by the 1<sup>st</sup> Defendant on 05/10/2009, that is almost 28 years from when acquired land. The Exhibit P2 building permit was not disputed.

The Defendants argument is that the Plaintiff used/or forged document to acquire the suit Plot. This is categorically pleaded in para 5 of the 1<sup>st</sup> Defendant, para 2 and 7 of the 4<sup>th</sup> Defendant's written statement of defence and at 3 of the written statement of the 5<sup>th</sup> and 6<sup>th</sup> Defendants.

The law governing pleadings in Civil matters, which is Civil Procedure Code (Cap. 33 RE. 2002) provides for how the pleadings should be when the question whether someone has committed a crime is raised in Civil proceedings. Order VI Rule 4 of the Code provides:

***"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence and in all other cases in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading."***

*[Emphasis is mine]*

In **Musoke V. Mayanja** [1995-1998] 2 EA 205 the Supreme Court of Uganda quoted the following excerpt from its previous decision in **Okello V. UNEB**, Civil Appeal No. 12 of 1987 (unreported). It said:

*"It is well established that where the party relies on fraud that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading."*

The position of law in allegations of this nature has long been settled. In **Ratilah Gordhanbhai Patel V. Halji Makanji** [1957] EA 314 at 316, erstwhile Court of Appeal for East Africa articulated:

*"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

The same position was taken by the CAT in **Omary Yusuph V. Rahma Ahmed Abdulkadr** [1987] TLR 169 at page 174 as follows:

*".....It is now established that when the question whether someone has committed a Crime is raised in Civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary Civil cases."*

In view of the foregoing, it is clear that regarding the allegations of Crime in Civil proceedings, the particulars of Crime such as forgery or fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in Criminal cases of proving beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in Civil cases. See also **City Coffee Limited V. The Registered Trustee of Iloilo Coffee Group**, Civil Appeal No. 94 of 2018 CAT (unreported) at page 12.

Back to the case at hand, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants pleaded forgery in their written statements of defence. The particulars of the said forgery were not stated as provided for under Order VI, Rule 4 of the Civil Procedure Code (Cap. 33 RE. 2019). Forgery allegations have been raised by the Defendants. The principle on burden of proof is settled that he who alleges carries the burden of proof. The Defendants (1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup>) therefore carries the burden of proof.

The evidence of DW1 is clear that he came to know the Plaintiff's documents were forged ones having received a letter from the Ministry of Lands, Housing and Human Settlement Development (Exhibit D1) I had nothing substantial to tell the Court on the allegation. DW2 was of the



testimony that the Plot No. 70 Block 'K' Mbezi was allocated to Joyce Mtunguja through the land allocating committee meeting held on 27<sup>th</sup> August, 1983. That following the complaint by Joyce Mtunguja (2<sup>nd</sup> Defendant) her Plot been trespassed by PW1, the Land Officer wrote to PW1 informing him that his documents were not genuine. To my view the contents of those referred documents were very crucial but DW2's testimony was full of verbose no any document was produced.

From the evidence of DW3 what made the 5<sup>th</sup> Defendant hold that the ownership documents of PW1 were forged/not genuine is that the letter of offer issued to PW1 was not stamped by Kinondoni Municipal. Secondly the receipts used for payment of prerequisite land allocation fees were not of the Ministry of Land but of the Prime Minister's Office. The witness does not dispute the fact that the said letter of offer was issued by Kinondoni Municipal, the only defect is that it is not stamped. Further the witness does not deny the fact that the receipts (Exhibit P1 collectively) were the government exchaquer receipts and on the face of them, were used for payment in respect of Plot No. 70 Block 'K' Mbezi. But again the Chief Accountant of the Ministry who investigated the receipts was not one of the witnesses who testified.

To my understanding, to forge a document means to alter it. In other words is to change in characters or composition typically in a comparatively small but significant way. This may include faking a signature, making false or changing in existing document. Taking the evidence of DW3 that the letter of offer was issued by Kinondoni Municipal and the signature of the Land Officer who signed it is not disputed, the said document cannot be said to have been forged. The same with the receipts used for payment of necessary fees. That they were government exchaquer receipts and used for payment of land allocation fees. I do not agree therefore that the Defendants have proved this allegation to the required standard; a standard higher than the balance of probabilities not even on the balance of probabilities.

On the other hand, the 2<sup>nd</sup> Defendant had a very crucial role to play in this case. She being the one whom is said to had lawfully allocated the suit land upon service and to the reasons best known to him did not appear to defend the case. Worse still the 4<sup>th</sup> and 5<sup>th</sup> Defendants who are custodian of land ownership documents apart from alleging to have granted the land suit to the 2<sup>nd</sup> Defendant, they have never attempted to tender any document such as the Letter of Offer, the payment receipts



As far as the payment of 180,000,000/= being special damage as costs of the buildings demolished by the 1<sup>st</sup> Defendant. I hold that the position on special damage is settled. The position is that special damages must be proved. The Plaintiff has not adduced any evidence as far as the value of the demolished house such as valuation report or any other kind of evidence in which to base, thus 180,000,000/= amount is not founded. It is however, a true fact that the Plaintiff's property was demolished and indeed suffered loss. Taking into account the year the houses were built considering building technology was not so much advanced as it is now I am of the opinion that the buildings were very normal to suit the circumstances of the time. I hereby order the Plaintiff be paid 90,000,000/= by the 1<sup>st</sup> defendant as damages suffered for demolition instead of special damages which he has not proved.

I further order the Plaintiff be paid costs of the suit.

It is so ordered.

  
**D.B. NDUNGURU**  
**JUDGE**  
**14/12/2020**



Right of Appeal explained.