IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 09 OF 2018

HILDA JOHN SHIRIMA ..... APPELLANT

VERSUS

1. ELIBARIKI NDEKIRWA
2. HELLEN WAKUGANDA
3. MARY KASHULIZA ..... **RESPONDENTS**
4. MOROGORO MUNICIPAL COUNCIL

(Appeal from the decision of the District Land and Housing Tribunal for Morogoro District at Morogoro)

Dated the 12th day of July, 2017
in
Land Case No. 150B of 2009

JUDGMENT

Date of Last Order: 19/05/2021 &
Date of Ruling: 26/05/2021

S.M. KALUNDE, J.:

Before the District Land and Housing Tribunal for Morogoro District at Morogoro (**"the tribunal"**), the appellant sued the respondents over trespass to her piece of land identified as **Plots No. 628 and 630 Block "B", Tungi Area, Morogoro Municipality** (herein referred to as (**"disputed land"**). She, inter alia, sought for an order of vacant possession; demolition of the respondent's structures on the suit lands; compensation for destroyed crops; payment of general and punitive damages and costs of the suit.

At the trial tribunal, the appellant's case was that, she was allocated the suit land by the Morogoro Municipal Council in 1999. She alleged

that the land was initially allocated to her through an initiative commenced by employees of Sokoine University of Agriculture (SUA) where she was employed. Upon taking possession, she immediately planted maize while mobilizing financial resources to construct the structures in accordance with plans submitted to the Municipal Council.

However, sometimes in June 2009 she noted that all the maize grown have been uprooted and construction has commenced over the suit land by the 1st and 2nd respondents. The matter was reported to the land officer who summoned all parties to present their ownership documents. On presentation of documents it was discovered that the 3rd respondent had allegedly impersonated the appellant and disposed of the property to the 1st and 2nd respondents. A stop order was issued to the respondents to desist from developing the suit land. The respondents refused to comply with the stop order, the appellant filed the application with the tribunal.

On being served the 1st and 2nd respondents filed a joint written statement of defence (WSD). In their joint WSD, the 1st and 2nd respondents denied the appellant's claim against them and contended that they were lawful owners of the suit land following a surrender by one Hilda John and a subsequent re-allocation by the Morogoro Municipal Council. They denied having been served by the stop order and stated that the appellant had no cause of action against them.

The 3rd respondent, allegedly a co-employee of the applicant at SUA, filed her defense wherein she contended that there was no fraud the name of the owner of the plots was **Hilda John,** who was distinct from the appellants name **Hilda John Shirima**. She added that the appellants offer expired upon expiry of 13 months that is on 27th January, 2000. She, thus, contended that the appellant had no cause of action against the respondents.

Subsequent to the filing of the suit, the respondents filed a Third Party Notice to the Morogoro Municipal Council (4th respondent) wherein they prayed that the 4th respondent be ordered to allocate them with new plots at suitable locations, indemnity against liability, damages and indemnity for the loss sustained. In their written statement of defense to the notice, the 4th respondent made some general denial of the allegations in the third party notice. In addition to general denial they contended that the respondents were not entitled to any form of compensation or indemnity.

Upon hearing the parties, the learned trial Chairman decided in favour of the respondent's. In his judgment the Chairman made a finding that the testimonies of RW2 (1st respondent) and RW3 (Land Officer) established that Hilda John transferred the title to the suit land to the 1st respondent. The Chairman appeared to have formed an opinion that the testimony of RW3 was conclusive that the 1st respondent was lawful owner of the suit land having purchased it from Hilda John. The tribunal observed that in absence of proof of forgery committed by the 3rd respondent the transfer was lawful. The Chairman dismissed the appellants' claims and declared the 1st and 2nd respondents as lawful owners of the suit land.

Dissatisfied with the decision of the tribunal the appellant appeals this court where she preferred seven (7) grounds. Upon perusal and evaluation, I hold a view that the seven grounds of appeal may be summed up into, principally, one main ground: that the trial tribunal failed to properly evaluate the evidence on record thereby reaching on an erroneous and unreasoned conclusion.

Leave of the Court was granted that the appeal be disposed by written submissions. The appellants' submissions were drawn and filed by **Mr. Wilson K. Magoti** learned advocate. The 1st and 2nd respondents filed their joint reply submissions through learned counsel **Ms. Ester Elias Shoo**. However, the 3rd and 4th respondents did not file their respective submissions. It would appear they lost interest in the appeal or they chose to waive their right to be heard.

In acknowledgement of the rule that failure to file submissions is equivalent to non-appearance at the date of hearing, the Court shall proceed with the determination of the matter.

I have gone through the Tribunal records as well as the submissions of the parties for and against the appeal. Mindful of the facts and the applicable law, the question for my determination is whether this appeal is merited.

The main grievance of the appellant is that, the trial Tribunal failed to properly evaluate the evidence on record thereby reaching at an erroneous and unreasoned conclusion. In support of that point Mr. Magoti argued that the Chairman of the Tribunal failed to consider the appellants evidence and as a result he failed to properly evaluate the evidence on record and consequently arriving at an erroneous conclusion. His view was that had the Chairman considered the testimonies of AW1 and AW2, he might have come to a different conclusion. Further to that, he argued that the Chairperson failed to evaluate the entire evidence in accordance with the issues framed for determination.

In response Ms. Shoo argued that the respondents' evidence before the Tribunal was heavier than that of the appellant. Her position was that the decision of the Tribunal was based on the strength of the respondents' case. She said that the Tribunal relied on the testimony of RW3 and Exhibits D.8 and D.3 as proof of the respondents' ownership of the suit property. She concluded that the Tribunal was correct in its decision. To support her position she cited **section 110 of the Evidence Act, Cap. 6 R.E. 2019** and the case of **Hemedi Saidi vs. Mohamedi Mbilu** [1984] TLR

It is not in dispute that, at the trial tribunal the appellant, who was the applicant testified as **AW1**, she also called one more witness. This was Ephraim Njawala, who testified as **AW2**. Their parts the respondents called three witnesses. RW1, RW2 and RW3. After hearing the parties, the Tribunal delivered a judgment in favour of the respondents.

In its five pages judgment, the trial tribunal summarized the plaintiff and defence case in four pages, that is, from the first page up to the fourth page. Then, relying solely on the testimony of the respondent's witnesses, RW2 and RW3, the tribunal made a finding that RW2 complied with the transfer procedures. It went on to dismis the applicants claims and concluded that the 1st and 2nd respondents were the lawful owners of the suit premises. At its conclusion the tribunal made the following observations:

> *"I have gone through the above recorded evidence.*
>
> *As per circumstances of this case, I believe that the testimony of the RW2 (The purchaser of the plots) and RW3 (The Land Officer) clearly established that Hilda John transferred Title to the purchaser (RW2) by abiding to all transfers procedures.*
>
> *The testimony of the Land Officer (RW3) clearly establishes that the purchaser is the lawful owner after acquiring the plots from Hilda John. That the available records at the at the Land Office is that during the transfer of the title to Elibariki Ndekilwa and Hellen Wakuganda, the lawful owner, of the plot was Hilda John and not Hilda John Shirima.*
>
> *Since there is no prove of forgery alleged to have been committed by the 3rd respondent in this transfer, the transfer remains legal until the forgery is proved by criminal Court.*
>
> *I consequently enter the following decision:-*
>
> - *The applicant's claims are hereby dismissed.*
> - *The 1st and 2nd respondents are lawful owners of the plots.*
> - *The Respondents are entitled to costs.*
>
> *It is so ordered.*
>
> ***P.J. MAKWANDI***
>
> ***CHAIRMAN***
>
> **12/12/2017"**

That was all about the evaluation of evidence and testimony; as well as consideration of the issues before the tribunal. The question now is whether, the approach adopted by the tribunal in its judgment was appropriate. The answer to that is in the negative. As indicated above, in arriving at its decision the Tribunal considered the respondent's case alone, there was no mention or consideration of the applicants' case. Even so, there was no proper evaluation and application of law to the said respondent's case. With great respect to the learned Chairman, that is not what evaluation of evidence is all about, because under the law the learned Chairman was expected *"to single out in the judgment, the point or points for determination, evaluate the evidence and make findings of fact thereon and, applying the law, come to a decision in the matter",* that was stated in **Jeremiah Shemweta vs. Republic** [1985] TLR 228.

From the records it is apparent that, apart from summarizing the applicants' and respondents case at page 2 and 3 of the typed judgment, there is nothing in the judgment to show that the Chairman, did consider or analyze the applicant's evidence. It was basically ignored. In my view, this was a serious misdirection by the trial tribunal. The effect of failure to consider the defence case has been emphasized by the Court of Appeal in a number of decisions including; **Hussein Idd and Another v. Republic** [1986] TLR 166, **Alfeo Valentino v. Republic**, Criminal Appeal No. 9 of 2006 and **Yasin Mwakapala v. Republic**, Criminal Appeal No. 604 of 2015 (both unreported). In the case of **Hussein Idd and Another v. R** [1986] T.L.R 166, the Court of Appeal made the following observation:

> *"It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence"*

Similarly in **Alfeo Valentino** (supra) the Court of Appeal considered the effect of failure to consider the defence case and went on to state that:

> *"...failure by a trial court to fully consider a defence... as a whole, is a serious error. We are settled in our mind, therefore, that the trial court fatally erred in not consider in the entire defence before finding the appellant guilty."*

The principle in cited cases above is equally applicable when the trial tribunal fails to consider the applicants case. Borrowing a wisdom from the Court of Appeal decision in **Mussa Jumanne Mtandika vs Republic** (Criminal Appeal No.349 of 2018) [2019] TZCA 330; (27 September 2019 TANZLII) where the Court said:

> *"**Non-consideration of the appellants' evidence amounted to a violation of one of the principles of natural justice** which says that no one should be condemned unheard; hence the **latin maxim 'audi alteram partem'.**" [Emphasis mine]*

On top of that the Chairperson did not make any specific findings and determinations on the issues raised for determination. As a consequence the proceeds before the trial tribunal are quashed and the judgment is set aside.

Having established that the trial tribunal erred in evaluating the evidence adduced during trial, this Court, being a first appellate Court is thus duty bound to step into the shoes of the trial tribunal and re-evaluate the whole evidence by subjecting the evidence presented before the tribunal to a fresh and thorough scrutiny and re-appraisal before coming to its own conclusion. Mindful of that position, I will, thus be obliged to weigh the evidence adduced before the tribunal and draw my own inferences and conclusions in order to come to my own decision on issues of fact as well as of law. However, I will do so whilst mindful of the fact that I did not see or hear any witnesses. I am restricted to carry out the above duty within the four walls set by the tribunal records.

At the first hearing of the application before the tribunal, the Chairman framed the following issues for determination:

1. **Who is the rightful owner of the disputed property?**
2. **Whether the applicants offer expired on 27th January, 2000; and**
3. **To what reliefs are the parties entitled to.**

During trial at the Tribunal the appellant paraded two witnesses, the Appellant herself, HILDA JOHN SHIRIMA (AW1) and EPHRAIM NJAWALA (AW2). On their part all the defence presented three (3) witnesses in support of their case. The respondent's witnesses were MARIAGORETH KASHULIZA (RW1); ELIBARIKI NDEKIRWA (RW2); and MCHARO KIHENGU (RW3).

In her testimony at the Tribunal, the Appellant, **HILDA JOHN SHIRIMA**, testified as **AW1,** narrated that she was the lawful owner of the disputed land having acquired it from an initiative organised by the SUA staff members. On being allocated with the plot payments were deducted from her salary. It was her testimony that, upon completion of the amount required she was given the offer in the year 2000. The offer was tendered as **Exhibit P1**.

She added that the Municipal required a 3rd name so she added the name Shirima to distinguish her from another Hilda Shirima. She tendered Exhibit P2 being evidence of payment of land rent for the year 2000 to 2008. She was later informed that trespassers had invaded her plots. She went to the plot and met the 1st, 2nd and 3rd respondents.

On her further follow up to the Municipal Council she noted the file had an offer for Hilda John in the photos of Mary Kashuliza and no offer for the 1st and 2nd respondent.

In re – examination she said she noticed the trespassers in 2009 and filed the case the same year. AW1 said she did not remember her personal file at SUA or when she joined the Society. She said her file name was Hilda John Shirima. She said the 1st & 2nd respondents bought the land from the 3rd respondent who said she was mandated by her sister Hilda John.

AW2, EPHRAIM NJAWALA a retired dean of students from SUA and chairman of SUHOCOS said he know the application as of the founding members of SUHOCOS. He also recognized the 3rd respondent as one of his employees at SUA. He testified that the suit property was given to the appellant as part pf the 600 plots secured by the Society for its members, and paid through their salaries.

In cross examination he testified that the Society started in 1992 and was registered in 1993 and that the appellant was a member and she was allocated two plots like every other member. The witness added that, the plots allocated to the appellant were plots No. 628 and 630. He said there was only one Hilda John working at SUA. He also knew the 3rd respondent but said she was not a member.

That concluded the appellants' case at the trial Tribunal. It was then a turn of the respondents case.

RW1, MARIAGORETH KASHULIZA, took to the stand and stated that, Plot No. 628 and 630 allocated to her and she transferred them to her daughter Hilda Superi Joseph, who lived in Ireland. She said her daughter said she did not need the plots so she surrendered them to RW3, the Land Officer at Morogoro Municipality. She said she surrendered the plots willingly.

In cross- examination she said her name was Mariagoreth Kashuliza but at SUA she was employed as Mary Kashuliza. She also admitted that her daughter Hilda Superi Joseph was not an employee of SUA. She admitted that she was not given an offer on the said plots. She added that, her daughter allowed her to surrender the plots and she did so because she did not need the plots.

In further cross – examination she said her photograph were on an offer with the name Hilda John. Her argument was that; the name Hilda John was mistaken for Hilda Joseph. She also said she did not pay for the offer.

During cross examination by Mr. Sikalumba, RW1 said she notified the authority orally that she wanted to surrender the plot to her daughter. She said that at the time of surrender she did not have the offer, and that she did not fill out any form. She said she paid the fees to RW3 and then an offer was prepared in the mistaken name of Hilda John. Further to that, she admitted that, she ceased to be the owner of the plots when she notified SUA that she had orally transferred her plots to her daughter. She added that by the time she surrendered them they were in the name of her daughter, Hilda Superi Joseph. She admitted she had no power of attorney from her daughter. She was not re – examined.

RW2, ELIBARIKI NDEKIRWA testified that he and his wife were allocated the two plots of land by the Morogoro Municipal Council in 2009. He said he was shown the offer with Hilda John Photos and a letter of surrender written by Hilda John to Morogoro Municipal Council. He saw the photos were in the name of Hilda John. He tendered a letter, allegedly, by the Director Morogoro Municipal Council to Hilda John relating to her surrender. The said letter, three receipts, one from Hilda John and two by RW2 were tendered and collectively admitted as **Exh. D.1**.

He said the letter for surrender was directed to him and upon payment of the relevant dues an offer was prepared in his name and his wife. He tendered **Exh. D.2** as evidence of payment of the requisite fees and **Exh. D.3** as evidence of the offer given to him a week after making payments.

He also testified that, he applied for a building permit and was granted to witness that he tendered **Exh. D.4**. He started building a house but was issued with a stop order that the plots belonged to Hilda John Shirima. He said he has been paying land rents and

tendered ten (10) receipts which were admitted as **Exh. D.5**. He said the plots were his and wanted compensation for disturbance.

In cross examination by Mr. Mramba, he said he was informed that the plot had been surrendered by RW3. He also admitted that it was Hilda John who was supposed to pay the surrender fees not him, but said he believed RW3 and made the payments.

Responding to Mr. Sikalamba's questions, RW2 said he did not know Hilda John physically but he just saw the photos of her. He confirmed that the Hilda John she knew was Mary Kashuliza, the 3rd respondent. It was his testimony that the payments were made on 12/06/2009 and one week letter an offer was prepared and handed to him on 12/06/2009 and he accepted it on the same day. He also said he was not there during cleaning of the plots and argued that it was the Mason who cleared the farm and never informed him that there were maize grown. In a bid to exonerate himself he, said it was the mason who was responsible for the maize.

In re- examination he said he was informed of the surrender fees by the Land Officer. He also said he did not know why the building permit was not stamped. That marked the closure of the defense for the 1st, 2nd and 3rd respondents.

RW3, MCHARO KIHENGU, a Land Officer for Morogoro Municipal Council testified in Chief that according to records at the Land Officer the owner of the plots is Hilda John, who is the 3rd respondent. He said, the said owner lost her original documents and wanted to transfer the title to Elibariki Ndekirwa, 1st respondent. He tendered a lost report, **Exh. D7** as proof that RW1 lost her title. He therefore prepared a new offer **Exh. D.8**.

RW3 meant on to say that, RW1 informed them that she has transferred her plot to RW2 and his wife in consideration of an assistance she received. Retendered the letter which was admitted as **Exh. D9**. He said on receipt of the letter his office transferred the title to Ndekirwa and Hellena. He added that upon conclusion of the

transfer, the appellant complained that the documents related the transfer were forged. He said the Municipal Council was not responsible for the forgery.

During cross - examination by Esther Shoo, he said he knew Hilda John through documents but admitted he never met her. He also said that during the transfer the original owner was Hilda John not Hilda John Shirima and added that the former was a trespasser to the 1st and 2nd respondents land.

When Mr. Sikalamba cross–examined him, he said he had never met Hilda John, but he insisted she was the one who made the transfer to the 1st and 2nd respondents. In a turn of events, he said that if it was the 3rd respondent who made the transfer, she lied to the Land Officer, and concluded that the appellant would not be a trespasser. He was not re-examined. The defence rested their case.

Having summarized the evidence, I will now revert to the determination of the issues raised for determination.

In the first issue I am being called to determine the question, **who is the rightful owner of the disputed land?**. In accordance with the standard of proof in civil proceedings, the burden of proof lied with the applicant at the tribunal and appellant herein. AW1 had a duty to prove that she was the rightful owner of the suit land. In her testimony, **AW1** stated that, she allocated the said land by the Morogoro Municipal Council through an initiative organized by SUA SACCOS. She presented **Exh. P.1**, a copy of the offer given to her upon conclusion of the payments to the Municipal Council. She tendered receipts of payments which were admitted as **Exh. P.1.** AW1 testimony was also supported by the testimony of **AW2**, retired dean of students from SUA and chairman of SUHOCOS said he know the application as of the founding members of SUHOCOS.

On her part, RW1 said she was given the two plots by the Municipal Council through SUA SACCOS. However, there was no document to witness that she was indeed allocated the said plots in her name. In

her testimony, RW1, said she lost her documents, if that was the case, then some records of ownership would still be available with Morogoro Municipal Land Office. However, the testimony of RW3 appear to suggest that the records in the Land Registry were in the names of the Hilda John but with photographs of MARIAGORETH KASHULIZA, the 3rd respondent. The question now would be how did the said documents, including the offer, had photographs of the 3rd respondent. No plausible explanation was offered.

In a further turn of events, RW1 said she transferred the two plots to her daughter Hilda Superi Joseph, unfortunately, there is also no instruments to support a view that she, indeed, transferred the plots in her daughter's name. If she indeed transferred the plots to her daughter, she should have presented the transfer documents or records which effected the transfer in her possession or at the Land Registry Office. However, none was presented. This argument is also unfounded.

In her further testimony, RW1 said when that when she realized that her daughter was not interested in the plots, she surrendered them to the Municipal Land Officer. This narration also fails on two grounds, **firstly**, there is no supporting legal instruments to witness that the plots were indeed surrendered to the Municipal Council. **Secondly**, if she effectively transferred the property in the name of her daughter it was her daughter who was required, under the law, to surrender the said plots back to the president. In her testimony RW1 admitted that she did not have a power of attorney from her daughter. If she did not have a power of attorney or any document to authorize her to surrender the two properties, where did she get the mandate, clearly she did not have any. The power to surrender under **Section 42(1)** of the **Land Act, Cap 113 R.E. 2019** is vested to an occupier of land or to any other person, but with the approval or consent of the occupier of land. At any rate the alleged surrender cannot be said to have been effectively completed.

Even assuming that she had the mandate to surrender, there is no evidence that the procedure for surrender under S. 43 of the Land Act was complied with. In terms of S. 43(1) RW1 was supposed to fill out a prescribed form, under the Land Act with its relevant attachments. However, no proof of such instruments was presented. Not by RW1 herself, or RW3, the Land Officer was bragged that the Land Office was custodian of the relevant Land ownership documents. In absence of proof that Plots No. 628 and 630 were actually surrendered, that story remains to be a making of RW1 and her compatriots to rip-off RW2.

Further to that, no proof was presented to the effect that the commissioner for land accepted the surrender and signed the deed of surrender in terms of S. 43(2) of Cap. 113. In absence of a signed deed of surrender from the Commissioner for Land the two plots are still the property of the person to whom they were allocated. Until such surrender is accepted and registered as such surrender is not effective.

It appears, RW3, took advantage of lack of knowledge by RW2, to lie him that, in accordance with the records, the plots had been surrendered by the owner, Hilda Shirima, and RW2 believed. But the truth of the matter was, RW1 had never been allocated the said plots. Further to that, she was not Hilda John despite her photos, allegedly, appearing on the Offer. If not part of it, RW2, appear to have fallen into a fraudster plot orchestrated by 3rd respondent and RW3, Mcharo Kihengu. RW3 was the one who told him the plot had been surrendered whole knowing they were not.

In his testimony, RW2 said he made the payments to facilitate the surrender on 16th June 2009; and that a week later he allocated the offer. Surprisingly, the said offer was prepared on the same day, that is, on 16th June 2009 when the payments were made and not a week later as alleged. One would wonder how the transferred from Hilda John to Commissioner was concluded in one day; and on the same day another offer was prepared in RW2 name and his wife. This is,

my view, a clear depiction of the hidden agenda between the 1st , 2nd and 3rd respondents under the coordination of RW3. RW2 also strangely accepted the offer on the same day and it was issued on the same day. This also demonstrates how dubious was the transaction effected and casts doubts on the respondents case.

Another strange fact about the offer is that, it was allegedly issued to two individuals for two separate plots that is plot No. 628 and 630. The offer is written Plot No. 628 and 630. As I am aware a single offer is, in law, offered to a single plot. Further to that the offer required a payment of Tshs. 22,500.00 none of that was paid and RW2 said he did not pay anything in relation to preparation of the offer. Indeed, no evidence was presented before the tribunal. It is a condition of the offer that, on acceptance of it, the stipulated amount therein has to be paid. But it was not the case this time. This casts doubts on the validity of said affair.

In his testimony RW3 said that, Hilda John transferred her plot to the 1st and 2nd respondents in consideration of some assistance offer to her by the couple. However, as experienced as he claimed, he did not present any transfer documents or sale documents between the said Hilda John and the 1st and 3rd respondents. The Land Act requires any transfer of Land to be done in a prescribed form, none of the forms was presented by RW3.

Further to that he admitted that he has never met the said Hilda Shirima and admitted that if the 3rd respondent impersonated the said Hilda Shirima then she lied to the Land Officers. Admittedly, the 3rd respondent is not Hilda Shirima and she was not mandate to transact for the said Hilda Shirima. Since, he has never seen Hilda Shirima, his testimony cannot be relied before this Court. How can this Court trust an Officer of the Government who facilitators a transfer and issues Land ownership documents to individuals without even seeing the person doing the transfer.

RW2 insisted that it was the Land Officer, RW3 who informed him that the plots have been surrendered, and convinced him to pay for

the surrender and eventual new offer. If that is true, how is it possible that RW3 says he has never seen Hilda Shirima physically? This is another indication that RW3 is not a credible witness.

As if that was not enough, the defence threw itself into deep waters, either unknowingly or a result of a price for their concocted story. RW1 said she surrendered the two plots to the authority on behalf of her daughter. Her testimony is supported by RW2, who said he was convinced to pay the surrender fees by RW3 and subsequently the plots were allocated to him and his wife. Surprisingly, RW3 testified that Hilda Shirima transferred her property to the 1st and 2nd respondent. The two transactions were supposed to be supported by the requisite legally instruments, however none was presented before the Court. There is really no any conclusive evidence for this Court to establish whether there was, really, any surrender or transfer as alleged by the defence.

That was not the end of the respondents miseries, to make the matters worse, there are contradicting stories on how the 2nd respondent acquired the two plots. RW1 said she surrendered them to the Municipal Council and they were subsequently allocated to the 1st and 2nd respondents. A similar story is narrated by RW2. However, RW3 said that the 3rd respondent transferred the plots to the 1st and 2nd respondents in consideration of an assistance she had previously received. No transfer documents were presented to support this narration. This contradiction makes the defence case difficult to believe, as I do not.

There is also a question of the identity of the 3rd respondent, in her testimony she said that her name was Mariagoreth Kashuliza but at SUA she was employed as Mary Kashuliza. There was evidence from RW3 that her photos were on an offer issued to Hilda Shirima. Clearly, she was not Hilda Shirima as she presented herself to RW3 and if she did, she did so maliciously and with an ill intent. This variance of the account of her identity; and the lapses in her

testimony casts doubt of the veracity and competency of her testimony. I am doubtful of the credibility of her testimony.

In light of the above analysis, I am convinced that, on the balance of probabilities the appellant's case is merited and more plausible than that of the respondents. The appellant has established that she allocated with the said properties. She also proved that she made payments in relation to fulfilment of her obligation in accepting the offer. Her testimony was not shaken or controverted. In law, as soon as the appellant was issued with an offer and made the payments she became the lawful owner of the disputed land. Her ownership was not controverted in evidence. She is and remained the lawful owner of the disputed property. I am supported in this view by the decision in **Sarjit Singh v. Sebastian Christom** [1988] TLR 24 (HC) where **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."*

That said, the first issue is answered in the favour of the appellant. The appellant is the lawful owner of the disputed land having being allocated by the Morogoro Municipal Council.

The second issue was whether the applicants offer expired on 27th January, 2000. I need not labor much on this subject. There was no supporting testimony or evidence that the appellants failed to comply with the conditions of the offer or that the offer expired or was subsequently rejected, or rescinded. There was also not evidence that upon such expiry or rejection as the case may be, the said plots were lawfully allocated to the respondents or any other person. The second issue is, therefore, answered in the negative.

The final issues is a determination of the reliefs of the parties. In his application the appellant prayed for the following reliefs:

(i) Eviction order on the Respondents and immediate handing over of the disputed plots to the applicant;

(ii) An Order that the Respondents demolish the structure and remove all the building materials thereon in 14 days' time from the date of the order;

(iii) Payment by the Respondents to the Applicant Tshs. 150,000/= being the value of destroyed maize;

(iv) Payment of general damages by the Respondents to the tune of Tshs. 1,000,000/=;

(V) Payment to the Applicant by 3rd Respondent a punitive damages of Tshs. 1,000,000/= for the inconveniences caused;

(vi) Costs of this Application be provided; and

(vii) Any other reliefs that this honorable tribunal may deem appropriate to grant.

In specifically prayed for vacant possession of the suit property, in the event that the first issue was answered in her favour it follows that the 1st and 2nd respondents have to yield up vacant possession of the suit property to her. However, before they do that they have to ensure that the suit property is free from encumbrance or properties as such an order to demolish and remove all the structures and building materials on the disputed land is not inevitable.

As for general damages, the position of the law in our jurisdiction was stated by **Lugakingira, J** (as he then was) in **P. M. Jonathan v Athuman Khalfan 1980** [TLR175] at page 190 when the judge stated that:

> *"The position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering"*

Mindful of the position is that general damage are such as the law will presume will be the direct, natural or probable consequence of the act complained of. I acknowledge that, the appellant was precluded from enjoying her property for the entire period of the suit. She has also been subjected to some form of inconveniences. I find that it is only fair that the appellant receives some form of consolation for the inconveniences caused.

That said, in consideration of the fact that the first issue was answered in favour of the appellant and given that I answered the second issue in the negative, I make the following orders:

(1) The appellant is declared to be lawful owner of the disputed land having been lawfully allocated by the Morogoro Municipal Council;

(2) The respondents are ordered to demolish and remove all the structures and building materials on the disputed land within thirty (30) days from the date of this decision;

(3) The respondents are ordered to yield up vacant possession of the disputed property to the appellant within thirty (30) days from the date of this decision;

(4) Claims of payment of Tshs. 150,000 being compensation for destroyed maize were not proved;

(5) Claims of payment of Tshs. 1,000,000 being compensation for punitive damages were not proved.

(6) General Damages amounting to Tshs. 5,000,000 are awarded to the Appellant being for the inconveniences caused and loss of use of the disputed property.

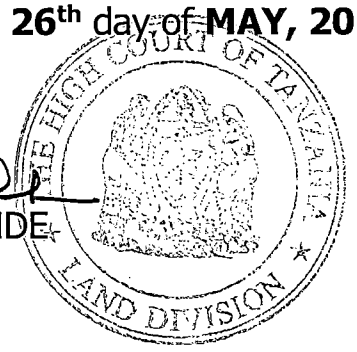
In their third party Notice the respondents sought to be allocated with new plots suitable to their demands; indemnity for costs and interest thereof; payment of general damages; indemnity for the losses incurred amounting to Tshs. 24,000,000; and costs of the suit. As observed above, the third respondent has failed to prove that she was allocated the disputed property and subsequently surrendered it to the Municipal Council. In that respect, the third respondent had no title to pass to the Municipal Council or to the 1st and 2nd respondents. Further to that, the 1st and 2nd respondents have failed to establish, against the 4th respondents, that they were lawfully allocated with the said properties.

In light of the above findings, the respondent's claims in the third party notice must also fail and they are consequently dismissed. If anything he was part of a fraudulent dubious scheme orchestrated by the 3rd defendant and the untrustworthy public servant, in the form of RW3, who acted outside the mandates and being aided by the respondents themselves. If he had to recover anything, he should recover the same from the 3rd respondent and RW3 is a separate arrangement or proceedings.

That said, the appeal, therefore, succeeds to the extent explained above. The appellant shall have her costs in this appeal.

It is so ordered.

DATED at **DAR ES SALAAM** this **26th** day of **MAY, 2021.**



S. M. KALUNDE
JUDGE