

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

LAND CASE NO. 354 OF 2016

AISHA AKBAR CHOPRA.....PLAINTIFF

VERSUS

HAMIS MWINYI.....1ST DEFENDANT

SAUDA SELEMAN.....2ND DEFENDANT

Date of Last Final Submissions: 02.06.2021
Date of Judgment: 30.07.2021

JUDGMENT

V.L. MAKANI, J

The plaintiff in this suit AISHA AKBAR CHOPRA has filed a suit and has prayed for the following orders:

- 1. Declaration that the defendants are trespassers on the suit premises (the property).*
- 2. Decree and order for eviction of the defendants from the property and leave the same vacant for the plaintiff.*
- 3. Perpetual injunction to stop the defendants, their agents, heirs, assigns or any person authorised by them from trespassing into the plaintiff's property in the future.*

4. *Order to pay general damages amounting to Tanzania Shillings Fifty Million (Tshs. 50,000,000/=).*
5. *That the defendants pay the interest at the rate of 7% per annum from the date of filing the suit to the day of full satisfaction of the decree.*
6. *Costs of this suit.*
7. *Such other and further remedies and relief as this honourable court may deem appropriate to grant.*

In brief the plaintiff in the plaint is claiming to be the owner of the suit house located on Plot No. 53 Block 17, Mwinyi Mkuu Street, Kinondoni Municipality Dar es Salaam City (the **suit property**). She alleges that she bought the house from the 1st defendant and she paid TZS 60,000,000/=. On the other hand, the 1st defendant in his Written Statement of Defence (the **WSD**) avers that there was no sale, but a mere promise and that the plaintiff paid only part of the purchase price. The 2nd defendant's WSD is similar to that of the 1st defendant in that the plaintiff failed to discharge her obligation of payment of the full amount agreed upon.

In this case the plaintiff was represented by, Mr. Haroun Oyugi and Mr. John Mapando, Advocates; and the defendants were represented by Mr. Simba Kipengele Advocate.

The plaintiff's side had two witnesses namely, the plaintiff herself (**PW1**) and Samson Russumo, Advocate (**PW2**) and they tendered 10 exhibits namely, Statutory Declaration on Authentication of a Name (**Exhibit P1**), Agreement for Sale between the plaintiff as the guardian of Abar Sushil Chopra and the 1st defendant (**Exhibit P2**), Land Form No. 35 – Transfer of Right of Occupancy between the Defendant and the plaintiff (**Exhibit P3**), Tax Clearance Certificate in the name of the 1st defendant in respect of the suit property, Exchequer Receipt No.42956240 on Stamp Duty dated 19/03/2011(**Exhibit P4 and P5**), Notice to Vacate to the 2nd defendant by Muccadam Advocates dated 12/08/2011 (**Exhibit P6**), Makubaliano between the defendants dated 17/01/2014 (**Exhibit P7**), Loss Certificate Magomeni Police in respect in respect of the suit property dated 10/12/2010 (**Exhibit P8**), Affidavit of the 1st defendant in respect of loss of letter of offer dated 08/12/2010 (**Exhibit P9**) and Letter of Introduction of the 1st defendant from *Serikali ya Mtaa wa Idrisa Magomeni* to the Land Officer Kinondoni District dated 06/12/2010 (**Exhibit P10**).

On their side the defendants were the only witnesses who testified as **DW1** and **DW2** respectively and they tendered their Marriage

Certificate dated 21/08/2009 (**Exhibit D1**) and the Agreement between Hamisi Hamadi Mwinyi and Aisha Chopra signed on 27/04/2010 (**Exhibit D2**) was admitted tentatively pending the payment of stamp duty by the defendants. But by the time of writing this judgment no stamp duty had been paid. The position of law is that a sale agreement which is not stamped by virtue of sections 5 and 47(1) of the Stamp Duty Act CAP 189 RE 2019 has no evidential value. In the case of **Montakonsult AB Tanzania Branch vs. Margaret Gama, Civil Appeal No. 86 of 2001 (CAT-SM)** (unreported) it was held:-

"A sale agreement which is not stamped ought not to have been admitted in evidence and should not be considered in deciding the rights of the parties regarding the disputed property."

In view of the above, **Exhibit D2** of which stamp duty has not paid to the date of writing this judgment, despite the order of the court, is hereby expunged from the record.

The following issues were framed for determination pursuant to Order XVI Rule 5 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**), namely:

- 1. Who is the lawful owner of of the suit property namely Plot No. 53, Block 17 Mwinyimkuu Street, Magomeni Dar es Salaam.*
- 2. Whether the Defendant are trespassers to the suit property.*
- 3. Whether the plaintiff is entitled to damages as claimed.*
- 4. What reliefs are the parties entitled.*

In her evidence the plaintiff (**PW1**) told the court she is also known as Aisha Karama Awadhi by virtue of **Exhibit P1** and the two names are used interchangeably to mean one and the same person. She said she bought the suit house from the 1st defendant (**DW1**) on 02/12/2010 as per the Sale Agreement (**Exhibit P2**). According to the Sale Agreement the suit house was sold at TZS 60,000,000/=.

The plaintiff said she paid cash at TZS 38,000,000/= and the balance of TZS 22,000,000/= was through the Bank. She said the cash amount was paid and witnessed by Advocate Samson. After payment of the purchase amount, she started transfer process and paid the requisite taxes (**Exhibit P3, P4 and P5**). She further stated that since the purchase of the house she has not been able to enter the suit house as the 1st defendant has not allowed her to do so and that the 1st defendant together with the 2nd defendant (**DW2**) are

currently living in the suit house and other tenants. The plaintiff said they attempted to write a notice to the defendants to vacate through Advocate Muccadam and though the notice (**Exhibit P6**) was received by **DW2** but there was no response and the defendants have not vacated. She further said that **DW2** filed a case against her in Land Case No. 170 of 2011 but the same was dismissed with costs for want of prosecution. She said she was unable to continue with the transfer process because there was a case and even after the case the 1st defendant did not furnish her with the Letter of Offer as he told her it was lost; and further that the 1st defendant had told her that he had a dispute with his wife Fatuma Ramadhani and he gave her a Police Report (**Exhibit P8**) to that effect. She said they trusted the 1st defendant that is why they proceeded with the transfer process. On cross-examination the plaintiff said the TZS 22,000,000/= was paid through her husband's account in the NMB Bank. She said they confirmed that the house was owned by the 1st defendant through the office of "*Serikali za Mitaa*." She also admitted that there was an initial Sale Agreement of TZS 117,000,000/= but that agreement was superseded by **Exhibit P2** which is the one that is currently in existence. The plaintiff also insisted that Fatuma Ramadhani was the wife of the 1st defendant and that **DW2** was

known to her as one of the tenants though she used to come with the 1st defendant during the sale transactions.

PW2 was Samson Rusumo an advocate of the High Court of Tanzania. He said he witnessed the Sale Agreement (**Exhibit P2**) between the plaintiff and the 1st defendant. He said the house that was sold was House No. 26 Block 53 Plot 17 Mwinyimkuui Street Magomeni which was sold by the 1st defendant to the plaintiff at TZS 60,000,000/=. **PW2** further told the court that he witnessed the 1st defendant being paid the balance of TZS 38,000,000/= in cash because the parties had told him that the initial payment was made through the Bank. On cross-examination **PW2** said he knew the 1st defendant before the signing of the Sale Agreement, and he was the one who assured him that the TZS 22,000,000/= was already paid to him through his account. He said his aim was to ensure that the 1st defendant was paid and that was what was done.

The 1st defendant (**DW1**) was the first witness on the defence side. He said he is a resident of Magomeni and the owner of the suit house. He said he has a wife and three children, and his wife is the 2nd defendant (**DW2**). He said he married his wife in 2005 and they lived

together in Magomeni Street, House No. 25 before moving to the house they bought in Mwinyimkuu Street. He said **PW1** agreed to buy the suit house at TZS 117,000,000/= and that she would pay TZS 90,000,000/= and the balance of 27,000,000/= later. He said they paid in small amounts of up to TZS 22,000,000/= only. The 1st defendant denied to know the Sale Agreement **Exhibit P2**. He later said they tricked him and made him sign the contract and he did not know what was in the contract as he did not know how to read and write English or Kiswahili. He said they signed before an advocate known by the plaintiff and on the signing date, he was alone while the plaintiff was with her husband. He said he did not tell his wife about this as she would not have agreed to the sale of the house.

On cross-examination he said he bought the house in 2008 from his sister-in-law Khadija Ramadhani Shabani. He said the plaintiff and his husband only paid TZS 22,000,000/= and TZS 38,000,000/= was never paid to him as alleged. He said on the date of signing the contract nothing was paid to him. He admitted the signature and photograph in **Exhibit P6** (the Transfer Form) but said he said he was tricked. He said the contract of TZS 60,000,000/= did not remove that of TZS 117,000,000/=. He said the Letter of Offer was lost in

strange circumstances in his house and no one else knew where he kept the said Letter of Offer. He later admitted that he had a first wife known as Fatuma. On clarification questions by the court the 1st defendant said that he bought the house from Shah Ally and Mussa.

DW2 was the 2nd defendant. She said the 1st defendant is her husband and they have three children. They started living together in 2005 in a rented house in Magomeni in 2008 they bought the suit house and in 2009 they got married. She said they bought the house from Shah Seif and paid the money to Hadija Ramadhani when payment was complete it was then transferred to the 1st defendant. She said she knew the plaintiff after she brought the notice to vacate the house on allegation that she had bought the house from the 1st defendant. She said before the notice she knew nothing and when he asked his husband, he told her he had an intention of selling the house and when he is ready, he would let her know. She said her husband intended to sell the house at TZS 117,000,000/= but she did not have any information if the said amount was received. She then said the plaintiff knew her, but she did not inform her that the house was sold to her. She lamented that she has children, and they get income from the rent for their daily livelihood.

On cross-examination she said she did not know if Fatuma Ramadhani was the wife of the 1st defendant. She said she filed Land Case No. 136/2015 in that his husband had sold the house without her consent. She said she did not come to court as she did not have money. Answering clarification questions by the court **DW2** said she had not participated in any of the signing of the agreements and further that she knows Hadija Ramadhani they used her to buy the house from Shah Seifu.

In the final submissions on behalf of the plaintiff, Mr. Mapando, Advocate in answering the first issue was of the view that the evidence by the plaintiff was strong. He said the evidence of the plaintiff supported by that of **PW2** and the exhibits that were tendered showed that there was a contract of sale of the suit house (**Exhibit P2**), and the 1st defendant was duly paid the purchase price of TZS 60,000,000/=, transfer process was underway (**Exhibit P3**) and they paid all the taxes (**Exhibit P5**) but could not be finalised because of the cases filed by the defendants and the 1st defendant failed to issue them with the Letter of Offer in respect of the said house alleging that it was lost (**Exhibits P8, P9 and P10**). Mr.

Mapando said the parties are bound by the terms of the contract and he relied on the case of **Miriam E. Maro vs. Bank of Tanzania, Civil Appeal No. 22 of 2017 (CAT-DSM)** (unreported) where the Court of Appeal took the stance of the case of **Unilever Tanzania Limited vs. Benedict Mkasa t/a Bma Enterprises, Civil Appeal No. 41 of 2009** (unreported) which relied upon a decision of Supreme Court of Nigeria in **Osun State Government vs. Dalami Nigerial Limited SC277/2002** where generally it was emphasized that in law parties are bound by the terms of the agreement they freely enter into.

Mr. Mapando tried to establish that **DW2** is not the wife of the 1st defendant and that at the time of the sale the suit house was not a matrimonial home and that the marriage of the 1st defendant and **DW2** is a purported marriage intended to frustrate the sale as the known wife of the the 1st defendant was Fatuma Ramadhani. He said there were adverts of the loss of the Letter of Offer of the suit property and the land cases that were filed and dismissed by the defendants were intended to exasperate the transfer of the suit property to the plaintiff. He said the evidence establishes that the

owner of the suit house is the plaintiff and as such the defendants are trespassers.

As for the damages Mr. Mapando said the plaintiff claimed general damages at TZS 50,000,000/= because she incurred loss in the form of the purchase price of the suit property, loss of rent realized from the suit of property and inconveniences. He relied on the cases of **National Bank of Commerce vs. Maisha Mussa Uledi (Life Business Centre), Civil Application No. 410/07/2019 (CAT-Mtwara)** (unreported) which cited with approval the case of **Antony Ngoo & Another vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014**. Mr. Mapando also prayed for such other reliefs including the prayer for mesne profits and said since the defendants were occupying the suit property unlawfully the plaintiff is entitled to mesne profits. He concluded by praying for the court to enter judgment and decree in favour of the plaintiff, find and hold that the plaintiff is the lawful owner of the suit property and the defendants are trespassers and award the reliefs as prayed in the plaint. He also prayed for the costs of the suit.

Final submissions by the 1st defendant were very brief. He said after the hearing he finds no dispute because the house belongs to him. He said he signed two contracts with the plaintiff, one for TZS 117,000,000/= signed on 27/04/2010 and another for TZS 60,000,000/=. He said the latter contract was signed to avoid payment of taxes. He said where it appears that there are two contracts by the same parties over the same subject matter then both contracts are invalid. He prayed for the suit to be dismissed with costs.

The final submissions for the 2nd defendant were equally brief. She said she was the wife of the 1st defendant and there has never been any divorce, and the suit property was sold while they were together as husband and wife. She said the suit property was family asset as was defined in the case of **Bi. Hawa Mohamed vs. Ally Sefu [1983] 32**. She said since the house was a family house, she had an interest and according to section 59(1) of the Law of Marriage Act that where an estate or interest in the matrimonial home is owned by the husband or wife the said home shall not be sold or alienated without consent of the other spouse. She said she is with the 1st

defendant and there is no dispute that she has an interest in the suit property then plaintiff's case ought to be dismissed with costs.

Having heard the evidence by the parties the court will now endeavour to analyse the evidence in line with the issues that were raised.

It is a cardinal principal of law under the Law of Evidence Act CAP 6 RE 2019 that whoever desires a court to give judgment in his/her favour he/she must prove that those facts exist.

Section 110 (1) (2) and 112 of the Law of Evidence Act reads as follows:

"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.

Section 112 The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."

The above provisions place the burden of proof to whoever desires the court to give judgment as to any legal right or

liability dependent on existence of facts which he/she ascertain.

In the case of **Abdul Karim Haji vs. Raymond Nchimbi**

Alois & Another, Civil Appeal No. 99 of 2004 (unreported)

the Court of Appeal held that:

"..... it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Also, in the case of **Anthony M. Masanga vs. Penina (Mama**

Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014

(CAT) (unreported) it was held that the party with legal burden also

bears the evidential burden on the balance of probabilities. In the

present case, the plaintiff has that duty to prove the case to the

standard required in civil cases of balance of probabilities.

There is no dispute that there was a Sale Agreement for sale of the

suit property between the plaintiff and the 1st defendant (**Exhibit**

P2). According to the said Sale Agreement the purchase price was

TZS 60,000,000/= and it was signed by both the plaintiff and the 1st

defendant before **PW2**. There is no dispute that the 1st defendant

was paid the initial TZS 22,000,000/=. The 1st defendant only denied

having been paid the balance of TZS 38,000,000/= however, **PW2** testified that he witnessed the Sale Agreement and payment of the said amount in cash, and he further asserted that the 1st defendant assured him he has been paid TZS 22,000,000/=. **PW2** said he knew the 1st defendant before the signing of the Sale Agreement and his aim when witnessing the said Sale Agreement was to ensure that the 1st defendant was paid according to the agreement. The testimony by **PW2** was not controverted, instead the 1st defendant said the plaintiff and his husband tricked him into signing the Sale Agreement and there was fraud, while in essence he knew what he was doing as **PW2** was present, and he literally witnessed the Sale Agreement and the payment of the balance cash amount in protection of the rights of the 1st defendant. In fact, **PW2** said he knew the 1st defendant before the signing of the Sale Agreement, and he also knew him more than he knew the plaintiff and his husband. **PW2** clearly said his aim was to see that the 1st defendant was paid according to the said Sale Agreement. In view of this therefore, the claim by the 1st defendant that he was paid only TZS 22,000,000/= cannot hold water. The Sale Agreement and the testimony of **PW2** cemented that the 1st defendant was also paid the TZS 38,000,000/= in cash and this confirmed the purchase price of TZS 60,000,000

The evidence of **PW2** was not at all shaken and there was no proof to substantiate the tricks or fraud by the plaintiff alleged by the 1st defendant.

In further proof of ownership of the suit property the plaintiff tendered Land Form No. 35 (**Exhibit P3**) to show that she was in the process of transfer of the suit property in her name. Indeed, the said Land Form No. 35 is in the name of the parties, with their photographs and signatures. The 1st defendant did not deny signing the said Land Form but went on saying he was tricked. The trickery was not validated by the 1st defendant and the court cannot rely on mere allegations without proof.

In maintenance of proof of ownership, the plaintiff also tendered Tax Clearance Certificate (**Exhibit P5**) to show that the 1st defendant was cleared of taxes after sale of the suit property. The 1st defendant in his submissions said there were two Sale Agreements and so there cannot be two Agreements on the same parties and subject matter. The 1st defendant was referring to **Exhibit P2** and **D2**. However, as established hereinabove, **Exhibit D2** has been expunged from the record for non-payment of stamp duty. In the absence of **Exhibit**

D2 the Sale Agreement that remains on record is **Exhibit P2** and therefore the claim that there was an initial Sale Agreement cannot therefore stand. In any case and without prejudice to what have been stated, the 1st defendant said the two agreements were meant to evade tax but this contention was not substantiated and further the statement by the 1st defendant raises a lot of questions because it is a fact that the 1st defendant could not have implicated himself that easily because if that was the case then he too must have been perpetrator of the tax evasion.

The 2nd defendant's main claim is that the plaintiff did not discharge her obligation under the initial Sale Agreement that is **Exhibit D2**. But as aforesaid this exhibit has been expunged from the record and so these claims have no legs to stand on. The 2nd defendant also claimed that she was the wife of the 1st defendant and the suit property is a matrimonial home and so consent is required. However, the issue whether the suit property is a matrimonial home was subject of the counter claim which was struck out for being res judicata of Land Case No. 136 of 2015 which was dismissed by this court for non-appearance of the 2nd defendant. And as of this date, the 2nd defendant has not applied to set aside the dismissal order.

Since there is no counterclaim then the allegations that this is a matrimonial home, and she did not give consent is without merit. In the final submissions the 2nd defendant cited the case of **Bi. Hawa Mohamed** (supra). I think this is a misconception as this case relates to division of matrimonial assets in cases of divorce. But in this case, there was a Sale Agreement, and the 1st defendant voluntarily signed the said Agreement without coercion, and he duly admitted this. The court cannot therefore be in a position to go contrary to the said agreement (see **Miriam E. Maro vs. Bank of Tanzania** (supra)). In view of the evidence on record, it is apparent that the 1st defendant is avoiding his obligations under the Sale Agreement (**Exhibit P2**) by refusing to vacate the suit property. That is why the cases filed by the 1st and 2nd defendants were never prosecuted presumably for failure of sufficient evidence. It is quite clear that the 1st defendant wanted the best of all the worlds, that is, he wanted the money and the house too. As put by Mr. Mapando the *"1st defendant can't have his cake and eat it too"*. In that respect and according to the evidence on record, the plaintiff has proved on balance of probabilities that she is entitled to ownership of the suit property.

The second issue is whether the defendants are trespassers to the suit property. In the case of **Kawe Mpiji Habitat Group vs. John Paulo Lyimo & 26 Others, Land Case No. 202 of 2015 (HC-Land Division)** (unreported), my sister Mgonya J, quoted the case of **Frank Sanara Mchuna vs. Shaibu Ally Shemndolwa, [1998] TLR 279** where the High Court defined trespass as follows:

"Intrusion upon land in the possession of another and the defendant did intrude upon the land of the plaintiff who under common law was in possession of the land. At common law there is a presumption that possession is always attendant to title and as the plaintiff had title to the land it is presumed that he was in possession".

Her ladyship also quoted the case of **Ellis vs. Loftus Iron Co. (1874) LR 10 CP** where the concept of trespass was described as follows:

"If the defendant places a part of his foot on the plaintiff's land unlawfully it is in law as much as trespass as if he had walked half a mile on it."

In the present case, it has indeed been established that the plaintiff is entitled to lawful ownership of the suit property; the presence of the defendants in the suit property undoubtedly makes them trespassers as per the cited cases above.

The third issue is whether the plaintiff is entitled to damages as prayed. In the present case the plaintiff has claimed for TZS 500,000,000/= as general damages. It is trite law that general damages are not specified but are awarded at the discretion of the court (see **Tanzania-China Friendship Textile Company Limited vs. our Lady of Usambara Sisters [2006] TLR 70**). Also in the case of **Anthony Ngoo and Davis Antony Ngoo vs. Kitanda Kimaro, Civil Appeal No. 25 of 2014 (CAT-Arusha)** (unreported), which was cited with approval in the case of **Deogratius Eugen Mallya @ Deogratius Mallya & Another vs. Alex Alban Lema & Another, Civil Case No. 4 of 2019 (HC-Moshi)** (unreported), the Court of Appeal observed that:

"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. However, the judge must assign a reason..."

Given the circumstances in the present suit there is no doubt from the evidence that the plaintiff has, since 2010 when the Sale Agreement was signed, been denied peaceful enjoyment of the suit property by the action of the defendants refusing to vacate. She has also suffered distress related to the sale transaction as she has spent

days in court following up the matter to get her rights. It is my considered view that this agony justifies the award of general damages to the plaintiff to the tune of **TZS 10,000,000/=**. The plaintiff also prayed for interest; however, the said prayer does not specifically state at what amount the interest is pegged. In that regard, no interest shall be payable.

The last issue is the reliefs entitled to the parties. Though the plaintiff did not specifically pray for ownership of the suit property, but she prayed for the defendants to be declared trespassers and the court has held as such. Ownership and trespassing go hand in hand and since the defendants are trespassers then as established hereinabove, the plaintiff is entitled to ownership of the suit property.

For the reasons I have endeavoured to address, it is hereby ordered as follows:

1. That the plaintiff is entitled to lawful ownership of the suit property namely Plot No. 53, Block 17 Mwinyimkuu Street, Magomeni Dar es Salaam.

2. That the Defendants' continued presence in the suit property constitutes trespass. They should vacate the suit property immediately.
3. That the plaintiff is entitled to payment of damages to the tune of TZS 10,000,000/= (**Tanzania Shillings Ten Million**) only.
4. That the defendants shall bear costs of this suit.

It is so ordered.



V.L. MAKANI
JUDGE
30/07/2021

