

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO 174 OF 2018**

EMMANUEL JOHN MREMA.....PLAINTIFF

VERSUS

OSCAR H KATUNZI.....1ST DEFENDANT

ERICK MKWEMA.....2ND DEFENDANT

DATE OF JUDGEMENT- 15TH OCTOBER, 2021

JUDGEMENT

The plaintiff filed a suit against the defendants claiming for ownership of the suit land measuring one and half acres located at Changanyikeni, Kinondoni, Municipality, Dar es Salaam. The plaintiff alleges that, his late father, one John August Mrema, purchased the suit land on 4th August 1977. That his father died on 9th April 2003, and his mother one Mary John Mrema was appointed the Administrator of the estate of the Late John August Mrema on 28th February 2005 through Probate and Administration Cause No. 57 of



2004. The plaintiff claims that he was given the land by his mother after she was appointed the Administrator.

Plaintiff avers further that, after he was given the land, he developed it by constructing two houses therein, and that in 2017, the defendants trespassed into the land and demolished the houses.

The plaintiff pleads at paragraph 10 of his plaint that in the year 2006, the 1st defendant filed a case at Makongo Ward Tribunal claiming for the suit land, and that the 1st defendant was declared the lawful owner of the disputed land. The decision of the Ward Tribunal was confirmed by the District Land and Housing Tribunal, but on appeal, the High Court quashed both the decisions of the Ward Tribunal and the District Land and Housing Tribunal and ordered trial de novo. Instead of hearing of the case de novo, the plaintiff decided to file a fresh suit at the High Court suing the two defendants herein. When this case was first heard, the 1st defendant who was the plaintiff in the previous cases had informed the Court that the case at the Ward Tribunal was withdrawn after



the decision of the High Court, and after he was served with the summons of this present suit.

The plaintiff pleads at paragraph 12 of his plaint that the defendants have commenced construction at the disputed land. He prays before the Court to declare him the lawful owner of the disputed property, and that the defendants be declared trespassers. He prays that the defendants be evicted from the suit land, and an order of demolition of the defendant's house constructed at the disputed land. The plaintiff prays for an order of permanent injunctions restraining the defendants from entering the suit land. The plaintiff also prays for TZS 300,000,000 as general damages and costs of the suit.

The defendants vehemently disputed the plaintiff's claims. They first disputed the locus standi of the plaintiff as he claims in his pleadings that it was his father who was the owner of the disputed land, and that there was no proper documentation filed in Court or even in the Probate Cause which shows that the plaintiff was given ownership of the land to entitle him to sue in his own name. This issue of locus standi was already adjudicated upon in a preliminary



hearing by the predecessor Judge, and the Court shall not re - adjudicate the issue.

The first defendant, Oscar Katunzi, said in his defense that, he purchased the suit land from Rashidi Mkilalu in 2000, and Rashidi Mkilalu had purchased the suit land from the original owner one Selemeni Mzee in 1995, and that Oscar Katunzi sold the land to the 2nd defendant in 2018. The 1st defendant states that the land was never owned or occupied by the plaintiff's father and required the plaintiff to provide strictest proof.

The 2nd defendant in his defense said he purchased the suit land from the 1st defendant in 2018. That, he purchased the land after he had done the due diligence. He was availed with all the prior sale agreements, and the Local Government office had assured him that the land belonged to the 1st defendant. The 2nd defendant said he constructed his house and has been living there peacefully since 2018.

After the pleadings were completed, and during the final Pre-Trial Conference, the Court recorded two issues. The First issue was

"who is the lawful owner of the suit property, and the second issue was "to what reliefs are the parties entitled to."

The plaintiff in proving his case brought three witnesses. The plaintiff testified as PW1. He produced Exhibit P4 which was the Sale Agreement dated 04th August 1977, proving that his late father John August Mrema purchased this land from Shamuyarira Nathan, and the leaders of CCM office had witnessed the sale. Amongst the leaders who witnessed the sale was Mzee Selemani who was at that time the CCM Party Secretary for Changanyikeni Branch. That, his late father was using the land for farming and had employed one Seleman Mzee and Lucian Kasanga as caretakers. He says he was given the ownership of the land by his mother who was the administrator of the estate of his late father, John August Mrema. The death certificate was received in court as Exh P1, and the Letters of Administration were received as Exhibit P2. He said he constructed two houses in 2009.

PW3, Mary Mrema, the mother of the plaintiff also the administrator of the estate of the late John August Mrema, said, she was shown the land by her late husband even before she got married, and that

her late husband used to visit the land frequently. She said she had bequeathed the ownership of the land to her son after she was appointed the administrator, and now the land is the property of her son, the plaintiff herein.

The plaintiff argues that Seleman Mzee was the caretaker hired by the plaintiff's father to take care of the land and so he had no title to pass it over to Rashid Mkilalu. In his submissions, the plaintiff's Counsel buttressed his arguments by citing the case of **Mwanaidi Mohamed Kitwana & 4 others vs Hassan Kitwana & 4 others, Civil Appeal No. 159 of 2010 (HC)**, (unreported), which held that *"caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession"*. The Counsel also cited the case of **Farah Mohamed vs Fatuma Abdallah (1992) TLR 205**, in which it was held that *"he who doesn't have legal title to land cannot pass good title over the same to another."*

The Counsel for the plaintiff argues in his final submissions that the Agreement between Seleman Mzee and Rashid Mkilalu (Exhibit D2) is a forgery as it bears the mobile number of Selemani M Gunguti

and in 1995 there was no mobile phones. He also argues that Rashid Mkilalu was the material witness and should have been called to testify as to whether it was true that he bought the land from Seleman Mzee in 1995, the Counsel invites the Court to draw adverse inference against the 1st defendant that had this witness been called, he would have testified against the 1st defendant.

The Counsel for the plaintiff is basing his arguments on the evidence of PW2, who said the land belongs to the plaintiff's father and that Lucian Kasanga was employed as the caretaker. The Counsel also argues that if the administrator of the estate of the late John August Mrema confirmed before the Court that she has bequeathed the land to her son, the plaintiff herein, there is no requirements of the law for filing inventory or proving that she has already filed the inventory before the Probate Court.

The issue whether Mzee Seleman was the caretaker of the late John August Mrema and so he had no good title to pass it over to Rashidi Mkilalu is the core issue in this case. PW1 tendered the Sale Agreement (Exhibit P4) in which it shows that his late father John August Mrema bought the land from Nathan Shamuyarira on 7th or

4th August 1977, and that Seleman Mzee as the Leader of Chama cha Mapinduzi witnessed the Sale. Before embarking into the issue of whether Seleman Mzee was hired by the late John August Mrema to take care of the Farm, Exhibit P4 itself did not give the description of the land that was sold by Nathan Shamuyarira to the late John August Mrema, the agreement simply says, and I quote:

"I, Nathan M Shamuyarira have sold my shamba in Changanyikeni Village for two thousand shillings to Ndugu John August Mrema on this 4th day of August 1977."

The Agreement does not show exactly the size and location of the land sold and purchased. From the perusal of the sale agreement (Exhibit P4), it is manifest that the plaintiff has prayed for adjudication of his title over the suit land. He did not give any description of the land, and so it is not known as to how many acres of land he wants the Court to adjudicate upon. The Sale Agreement (Exh P4) only mentioned that the late John August Mrema bought the land in Changanyikeni Village, but no location,

area or boundaries or size of the land was clearly given in the Agreement.

It is trite law and as provided in Order VII Rule 3 of the Civil Procedure Act, Cap 33 R: E 2002, where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such boundaries or title number. Order 20, Rule 9, CPC provides where the subject matter of the suit is immovable property, the decree shall contain the description of such property sufficient to identify the same and where such property can be identified by boundaries or by a title number under the Land Registration Act, the Decree shall specify such boundaries or title numbers. The land was not properly described in the Sale Agreement, and thus making the case of the plaintiff not proved.

Secondly, there was no proof that the late John August Mrema had hired Selemani Mzee to take care of the Farm. The least that could be gathered from Exhibit P4 was that the late Seleman Mzee was

the Party Leader, and had witnesses the sale, but there was no proof whatsoever given by the plaintiff that Mzee Seleman, apart from being the party Leader of CCM in Changanyikeni was also employed by the late John August Mrema to take care of the farm either as a watchman or a servant. On this aspect also, the case of the plaintiff remained unproved.

Again, the plaintiff failed to bring to Court Lucian Kasanga or Mzee Selemani who could have testified before the Court that they were hired by the late John August Mrema to take care of the farm, and the farm is the same land that is in dispute in this case. These were the material witnesses for the plaintiff who perhaps could have supplemented the written agreement (ExhP4), by proving that the plaintiff's father was in actual possession and use of the land since 1977.

It is the duty of the plaintiff to prove his case on the required standards. This is the requirements of the law that who allege must prove. Section 110 of the Evidence Act, Cap 6 R: E 2009, provides as follows:

"Whoever desires any court to give judgement as to any legal right or liability on the existence of facts which he asserts, must prove that those facts exist."

As discussed herein above, the only proof brought by the plaintiff to show that the late John August Mrema bought the land in Changanyikeni was Exhibit P4. This exhibit did not give exactly which area of Changanyikeni he bought the land. Changanyikeni Village is a big village and so the Sale Agreement ought to have mentioned exactly how many acres of land he had purchased, and describe its size, location, borders and neighbors. Exhibit P4 cannot be relied upon by the Court to establish ownership of the land in dispute as there was no description of the land in the Agreement.

The plaintiff also failed to prove possession and occupation of the land by either his father or himself. He produced no evidence whatsoever showing that his father was in possession of the land in dispute, and there was no proof whatsoever that he had hired Mzee Selemena and Lucian Kasanga as caretakers. It is a mandatory duty

of the plaintiff to prove his case and that burden never shifts onto the defendants. See the case of **Agatha Mshote vs Edson Emmanuel and 10 others, Civil Appeal No. 121 of 2019**, in which the Court of Appeal had held as follows:

"In view of what we have endeavored to discuss, the Appellant failed to prove her case on the balance of probability, and it cannot be safely vouched that she has discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondent's case, if any, cannot salvage the plight of the unproven appellant's case...."

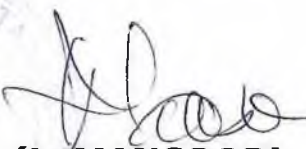
The plaintiff failed miserably to prove his case either by documentary or through the oral testimonies of his two witnesses, therefore, the case against the defendants remained unsubstantiated, and the suit is dismissed, with costs.

A handwritten signature in blue ink, appearing to be 'H. Mshote', is written over a horizontal line.

The 2nd Defendant is declared the owner of the disputed property described in Annexure D2 i.e., the land of 60 meters by 60 meters located at Changanyikeni Area, Makongo Ward, Kinondoni District, Dar es Salaam. The land bordering Roman Catholic Church on the East and South, the street/pathway on the West, and Bwana Shirima and Mzee Maulidi Salum on the North.

The suit is dismissed with costs.

Dated and delivered at Dar es Salaam this 15th day of October, 2021



(L. MANSOOR)
JUDGE
15/10/ 2021

