

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

LAND CASE NO. 117 OF 2017

EPHRAIM BONIFACE MTAMAI suing by power
of attorney by Leonard Ansbert Fussi.....**PLAINTIFF**

VERSUS

JIMMY BAMBAZA MAYENGO.....**1ST DEFENDANT**
ANDREW GERMANICO MAZWILE.....**2ND DEFENDANT**
JOAN MDEMU MAZWILE.....**3RD DEFENDANT**
TEMEKE MUNICIPAL COUNCIL.....**4TH DEFENDANT**

J U D G M E N T

Date of last Order:

Date of Judgment: 13/10/2021

T. N. MWENEGOHA, J:

The plaintiff sued the defendant for the declaration that he is the lawful owner of all that land comprising of Letter of Offer with Ref. No. DCC/LD/55142/1/PL, Plot No. 641 Block "C", Mtoni Kijichi, Temeke Municipality, Dar es Salaam City (henceforth the suit Land). He also prays for an order canceling the 1st, 2nd and 3rd defendants Letter of Offer over the same plot issued by the 4th defendant. He also prayed for general damages as reflected in paragraph 10 of the plaint, order of costs of the suit and any other relief(s) this court may equitably grant.

Upon conclusion of the pleadings and mediation having failed, the following issues were framed for determination:

1. Whether or not there was double allocation of the suit land by the 4th Defendant;
2. Who is the lawful owner of the suit land;
3. To what reliefs the parties entitled.

During the hearing plaintiff was represented by Jackline Kulwa, Advocate and Bernadetha Fabian, Advocate while the 2nd and 3rd defendant was represented by Advocate Bernard Ngatunga and the 4th defendant was represented by Shaffin Mshama whereas it was ex-parte against the 1st defendant.

The plaintiff presented 3 witnesses; Leonard Fussi (PW1), Ephraim Boniface Mtamai (PW2) and Mwanaisha Kitwana (PW3). He also presented Letter of Offer in respect of the suit land, Sale Agreement, loss report and official search from the Ministry for Lands (herein referred as Land Ministry) as his exhibits.

During the hearing PW1 testified that that the plaintiff being a public employee working at Rwanda in **1995** was called by Hassan Kenja (PW3's husband) informing him that his wife was selling a piece of land. He instructed his brother-in-law to meet the seller and his husband. They visited the area and agreed for the sale after being shown the Letter of Offer and receipt from Ministry for Lands. His brother-in-law, Leonidas Habemana signed on behalf of the plaintiff and the agreed price was Tshs. 2,000,000/=.

In the year 2000 the plaintiff was handed his document from Leonidas Habemana, the Sale Agreement and Letter of Offer dated 20/12/1994 which were admitted jointly as exhibit P1. The receipt was not tendered as the same is said to have been lost but the plaintiff tendered loss report which was admitted as Exhibit P2.

It was further testified that as he was out of the country from 1999 to 2015, he was not able to make follow up on the right of occupancy until 2016 when he began to make follow up. He asked his sister's son Ephraim Boniface Mtamai to assist in making follow up and when he visited the land offices, he was informed that the plot had two Letter of Offers whereas the first offer was issued on 20/12/1994 to Mwanaisha Kitwana and another was issued to Jimmy Bambaza Mayengo, and Mwanaisha's file could not be traced. He then instructed Ephraim to file the suit. The Plaintiff concluded by stating the prayer found in his plaint.

When cross examined by Mr. Ngatunga, he admitted not to give his brother-in-law any authorization to transact for him. He told the court that the first offer was issued to him and he did not know if the 2nd and 3rd defendants have a title deed.

When cross examined by Mr. Maushi, he told the Court that he does not know who surveyed the area, but he knows the area was surveyed because there were poles.

PW2 Ephraim Boniphace Mtamai backed up the PW1 testimony and added that he made official search and tendered the official search report which is admitted as annexure P3 where he found out that there was no record with regard to the area. He continues to support all that was submitted by PW1. PW3 was the seller, one Mwanaisha Kitwana who joined hands with PW1's testimony.

When PW3 was cross examined by Mr. Ngatunga she testified that the condition for offer is that one has to make payments. She did not have the proof of payment before the Court but she said she made payment.

When cross examined by Hamis, Solicitor, she told the court that she obtained the offer in 1994 and sold it in 1999, she did not develop an area because of lack of resources. Then the plaintiff closed his case.

In prosecuting their case the defense had 4 witnesses, Andrew Geeimanico Mazwile, as DW1, Helen Philip as DW2, DW3 was Joan Mdemu Mazwile, and DW4 was Lucy Thobias Otto,

DW1, Andrew Geeimanico Mazwile testified that, he owns the suit land together with Joan Mazwile who is his wife. He bought the suit land from Jimmy Bambaza Mayengo, whereas before he bought it, he went to Temeke Municipal Council and Ministry for Lands to conduct official search and he was given the receipts. The certified copies of letter from the Land Registry, Ministry for Lands dated 16/6/2015 and exchequer receipts collectively were admitted as exhibit D1. The search receipt showed that there is no record of ownership on the said report and the Land Officer confirmed that Jimmy Bambaza was the lawful owner of the suit property. The basis of ownership is the offer from Temeke Municipal and the receipts of payments. The exchequer receipts dated 19/01/1995 and one dated 1/04/2005 were admitted as Exhibit D2. The copy of letter dated 23/12/1994 was admitted as Exhibit D3.

DW1 testified that he bought the suit land and signed a contract of sale of land on 11/07/2015 at the purchasing price of Tshs. 70,000,000/= which was paid in three instalments. He then concluded the procedure for transfer of property and was given a Certificate of Occupancy. He tendered the Certificate of Occupancy which was admitted as Exhibit D5. He continued to narrate that then he constructed a fence and security house after obtaining

permit from Municipal Council. The certified copy of the building permit no. 0008579 dated 6/04/2017 was admitted as exhibit D6. He then prayed to be pronounced as the lawful owner of the suit land.

When cross examined by Mr. Shirima, he told the Court that Jimmy Bambaza Mayengo did not tell him of any other person developing the area.

When cross examined by Mr. Ngatunga he told the Court that the Exhibit P1 and Exhibit D1 are signed by city land officer and they are similar. He was told by the land officer that the said document under Exhibit P1 were not official. He did not write a letter to conduct official search to the Municipal Council.

DW2 was Helen Philip working as Senior Land Officer in the Ministry for Lands who testified on the record the suit land read Andrew Mazwile and Joan Mazwile. She confirmed that all the procedure was followed, she tendered Certificate of Approval of Disposition which was admitted as Exhibit D7. She testified further that if there is an offer issued by Municipal Council they relied on that information. That in the case, the Temeke Municipal Council sent information through a letter whereby they explained and attached information on ownership.

DW3 was Joan Mdemu Mazwile who is the wife of the DW1 and the co-owner of the disputed suit land. Her testimony mainly supported the DW1 testimony.

DW4 was Lucy Thobias Otto, Land Officer at Temeke Municipal Council who testified that the suit land was allocated to Jimmy Mwambaza Mayengo for the first time and he made all necessary payments for the same. She said in order for a person to be allocated land, the person must accept the offer

through making payment. When cross examined, she testified that when a person is given an offer, that person must pay for it within 30 days. She recognized exhibit P1 and D3 as offers given to the suit land and acknowledged that both have been signed by the same land officer. She testified that Exhibit D3 was issued on 23/12/1994 and Exhibit P1 was issued on 20/12/1994. That the two offers' dates of issue were three days apart. The first offer was not revoked. After the testimony of DW4, the defendants also prayed to close their case. The parties filed their final submissions, I have much appreciation of the well-researched submissions from both sides.

After having heard parties and their witnesses and in consideration of all the evidence before me, I will now consider the first issue, **whether or not there was double allocation of the suit land by the 4th Defendant.**

The plaintiff's case as stated by PW1 is that he bought the suit land from Mwanaisha Kitwana who had a letter of offer issued by Temeke Municipal Council issued on 20/12/1994 in her name. As per the sale agreement, it is indicated that the sale took place on 28/9/1999. That parties to the sale agreement visited the area and agreed to buy after being shown the Letter of Offer and receipt from Ministry for Lands. The testimony was supported by the remaining witnesses, including the PW3 who was the seller.

On the other hand, the 2nd defendant, DW1 who co-owns the land with his wife, testified that he went to Temeke Municipal Council and Ministry for Lands to conduct official search which revealed that Jimmy Bambaza Mayengo was the lawful owner of the suit property, as per exhibit D1.

Therefore on 11/07/2015 he proceeded to buy the suit land and signed a contract of sale of land at the purchasing price of Tshs. 70,000,000/= which was to be paid in three instalments. He then completed the procedure for transfer of property and he was given a Certificate of Occupancy (Exhibit D5).

The 4th defendant's witness, DW4 testified that she recognized exhibit D3 as offer given to Jimmy Bambaza Mayengo for the fact that it was paid for. She told the court that when a person is given an offer, that person must pay for it within 30 days. She recognized exhibit P1 and D3 as offers given for the suit land and both offers have been signed by the same land officer. She testified that Exhibit D3 was issued on 23/12/1994 and Exhibit P1 was issued on 20/12/1994. The two offers were issued three days apart. She confirmed that the first offer was not revoked.

In their final submission Ms. Anastazia Hamis Murady for the 4th Defendant and Mr. Ngatunga Advocate for the 2nd and 3rd Defendants argued that so long as this is the contract then if there is an offer from the Commissioner for Land and also land officer from Temeke Municipal Council, then there must be an acceptance through payment of the requisites fees as per condition (vi) issued in the Letter of Offer. According to them, the plaintiff did not accept the offer, only the defendants did. This argument led me to look at the said condition as found in the Letter of Offer. For clarity I will reproduce condition (vi) of the Letter of Offer as hereunder,

"UNLESS this offer is accepted and all fees paid within thirty days (30) from the date of this letter the offer shall lapse. After this

period, the plot will be disposed of as the Committee deems fit without any further reference to you."

From the condition quoted above, it is clear that a person given an offer have to make payments within 30 days from the date of receiving the offer. From the evidence issued by all parties it is evident that there has been only 3 days between issuance of the first offer, issued to Mwanaisha Kitwana (Exhibit P1) on 20/12/1994 and the second offer issued to Jimmy Bambaza Mayengo (Exhibit D4) on 23/12/1994 contrary to the above quoted requirement.

However, this Court note that the seller, Mwanaisha Kitwana did not act diligently by paying or bringing to court evidence that she attempted to pay for the said offer. According to condition (vi) of the letter of offer as quoted above she did not accept the offer. Had this been pursued, then this Court would have no choice other than declaring double allocation of the suit land as the 1st Defendant was issued with letter of offer before Mwanaisha Kitwana's offer had expired.

Moreover, this Court notes that Mwanaisha Kitwana did not accept the offer, and she is also not a part to this case. It is further noted that prior to making a purchase, the plaintiff did not take diligent measures, including searching for ownership of the said suit land. In fact, he did not take any action at all until 2016 after the 2nd and 3rd Defendants were issued with the Certificate of Occupancy. Therefore, due to the above facts and observations, this Court finds that there is no double allocation of the suit land, for the plaintiff in court and the defendant.

The second issue is **who is the lawful owner of the suit land.**

In answering this issue, it is essential that I give a brief background of the suit land by referring to the earlier stated facts as pointed above. That both parties possessed letter of offer (Plaintiff Exhibit 1 collectively and Exhibit D1). The plaintiff obtained the said offer in 1999 after buying the same from one Mwanaisha Kitwana. Further, it was a testimony of Mwanaisha Kitwana that she obtained the offer in 1994 and had to sell it in 1999, as she could not develop the area due to lack of resources. She had the offer for five years without registering the suit land in her name.

The facts further reveal that the same property was offered to Jimmy Bambaza Mayengo soon after it was offered to Mwanaisha Kitwana and that Jimmy Bambaza Mayengo paid for it, making acceptance of the offer. Moreover, as pointed above the facts revealed that the plaintiff did not make a diligent search for the status of the said suit property before purchasing the same. If he had done so, he would have found out that the suit property was offered to Jimmy Bambaza Mayengo. The plaintiff, after buying the suit land in 1999 waited until 2016 to make follow up on the property.

In 2015, almost 16 years after the first Letter of Offer was issued the 2nd and 3rd defendants took measures to ensure that there is no encumbrances on the property before purchasing the same. The defendants have testified on their effort to inquire about the real owner of the suit land by conducting official search at the Ministry for Lands (Exhibit D1) and to the 4th Defendant's office. They found that the land was not registered at the Ministry for Lands and on top of that, the Temeke Municipal Council confirmed that the owner was Jimmy Bambaza Mayengo, the 1st Defendant herein. There was no information of the plaintiff owning the suit land and

that was the reason as to why they were satisfied with their search. The 2nd and 3rd Defendants proceeded to process the offer and obtained a Certificate of Occupancy before building their house.

This is contrary to the actions of the plaintiff who, after buying the suit land in 1999 did not make any follow up until 2016 as noted above. Such a delay of pursuing one's right, allowed an opportunity for 2nd and 3rd defendants, in good faith, to purchase the suit land in 2015.

As noted above, the defendants conducted a diligent search and after being satisfied that there is no issue with the property proceeded to obtain Certificate of Occupancy. This makes the 2nd and 3rd defendants to be bonafide purchasers. The term Bonafide purchaser according **Black's Law Dictionary** is defined as

"A purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell and without any suspicious circumstances to put him on inquiry."

According to **Oxford Scholarship Online:**

"Bona-fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property. "

In a case of **Stanley Kalama Masiki v. Chihyo Kuisia w/o Nderingo Ngomuo** [1981] TLR 143. In that case, the Court held:

"Where an innocent purchaser for value has gone into occupation and effected substantial development on land the courts should be slow to disturb such a purchaser and would desist from reviving stale claims."

The 2nd and 3rd Defendants had no reasons to think that the 1st Defendant had any right over the suit property, they were satisfied from their part that they bought it from the right person.

As the 2nd and 3rd defendants are the bonafide purchasers and are also joint owners of Certificate of Occupancy of the suit land and admitted to the court as Exhibit D5, they have a better title hence owners of the suit land.

In the case of **AMINA MAULID AMBALI & 2 OTHERS vs. RAMADHANI JUMA {CIVIL APPEAL NO. 35 OF 2019(unreported)}** the Court of Appeal held that:

"In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner...."

I wish to note that under the circumstances of this case, had the plaintiff's seller, Mwanaisha Kitwana, pursued to pay for her offer and or had shown effort as in paying or even attempting to pay for the said offer; or had the plaintiff himself took diligent measures to do the same, the plaintiff would have a better title, as both parties have the letters of offer and that the plaintiff had also bought the suit land in good faith. However, his delaying

actions made the defendants have a better title as explained above. The buyers specifically the 2nd Defendant and 3rd Defendant, after being satisfied that there are no other owners of the suit land went ahead to register the suit land and acquire Certificate of Title.

As the 2nd and 3rd defendants have a better title, they are declared to be lawful owners of the suit land.

Lastly as to **what reliefs the parties are entitled**, this Court therefore declares the 2nd and 3rd Defendants to be the lawful owners of the suit land.

The suit is dismissed as prayed by the defendant. Costs of the suit to be borne by defendants.

It is so ordered.

Dated **at** Dar-es-Salaam this **13th** day of **October, 2021**




T. N. MWENEGOHA
JUDGE