

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

**LAND CASE NO. 148 OF 2019**

**DANIEL THOMAS SIMTOWE**

suing by power of attorney by **THOMAS MENG0 SIMTOWE.....PLAINTIFF**

***VERSUS***

**DONALD KOMELA SIMTOWE.....DEFENDANT**

**J U D G M E N T**

*Date of last Order:20/10/2021*

*Date of Judgment:17/12/2021*

**T. N. MWENEGOHA, J.**

The plaintiff sued the defendant for among other orders, the declaration that the deceased THOMAS MENG0 SIMTOWE is the lawful owner of the disputed property and the plaintiff is entitled to exclusive right of possession and distribution to the heirs of the house and buildings known as L.O No. 265696 Plot No. 58 Block 'E' for the period of 33 years term from 1<sup>st</sup> January, 2007 measuring 2,700 square feet located at Kariakoo area Municipality, Dare es Salaam (The suit property).

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

1. Whether the suit is time barred.
2. Who is the lawful owner of the suit land.
3. To what reliefs the parties entitled to.

During the hearing plaintiff was represented by Mr. James Ndumbaro, advocate while the defendant was represented by Mr. Amon Ndunguru, advocate.

The plaintiff presented six witnesses including Mr. Thomas Simtowe (PW1), Ms. Victoria Thomas Simtowe (PW2), Ms. Evelyn Thomas Simtowe (PW3), Ms. Martha Thomas Simtowe (PW4), Mr. Robert Thomas Simtowe (PW5) and Mr. Raphael Thomas Simtowe (PW6). They also presented three Exhibits, being Letter of Administrations (Exhibit P1), Conveyance between Thomas Simtowe Mmbabwe v Donald Komela Simtowe (Exhibit P2) and Official search (Exhibit P3).

During the hearing PW1 testified that that he is administrator of the estate of his late father Thomas Mengo Simtowe upon being appointed by Mbalizi Primary Court in 2019. He tendered Letter of Administrations and admitted as Exhibit P1. He testified that through the Letter of Administration he is empowered to collect the deceased property and divide it to the legal heirs equally. He testified further that his father passed away on 29<sup>th</sup> April 1973 when he was 22 years. That his father did not leave a will. He added that after the death of his father all the family properties were under their mother who also later died in 2002. That they did not discuss about administration of estate of deceased as they believed that properties will be safe under their mother.

PW1 testified to be born on 1951 and added that the deceased had 10 children and mentioned them as Edimary Thomas Simtowe, Victoria Thomas Simtowe, Upendo Thomas Simtowe, Eveline Thomas Simtowe, Donald Thomas Simtowe, MarthaThomas Simtowe, Josephat Thomas Simtowe, Daniel Thomas Simtowe, Raphael Thomas Simtowe, and Robert Thomas Simtowe.

He testified that the defendant Donald Thomas Simtowe currently uses the name of Donald Thomas Komela changed at his old age, the names that also appear in his current documents.

He testified that upon being granted a letter of administration he sent a copy to the defendant to have him acknowledged as administrator of the properties and was now collecting the deceased's properties for distributing to the legal heirs. That the defendant acknowledged to have received the letter but claimed that the suit property is his. That he was gifted by their late father.

PW1 further informed this Court that he reported back to the Mbalizi Primary Court on the matter where the Magistrate summoned the defendant. That the defendant appeared before the Mbalizi Court with the document showing that he was gifted the said suit property. PW1 claimed that they had no knowledge of such document before. He testified further that the said documents were tendered to Mbalizi Court and every child was given a copy. The same was tendered before this Court and it was admitted as Exhibit P2. PW1 alleged that the said document indicates that the house was given as a free gift while in the same document it indicated that payment of 700 was paid for the suit property.

PW2 Victoria Thomas Simtowe joined hand with PW1 and added that they lived in the suit property until 1948 when their late father shifted to Mbeya when she was in standard three. That after the death of their father they did not conduct meeting for administration of their father's properties as they believed that their mother would take care of the deceased's properties.

The third, fourth, fifth and the sixth witnesses (PW3, PW4, PW5 and PW6) all gave the same family background and indicated that all the properties belonged to their parents and that one property was in Dar es Salaam while the other was in Mbeya. Furthermore, it was the contention of all witnesses (PW3 – PW6) that the properties were family property.

In addition to what they testified on the family background and ownership of property PW4 contended that, she and the defendant were appointed by their father to take care of the two houses owned by their father. That she was a caretaker of the house in Mbeya and the defendant was a caretaker for the house in Dar es salaam on behalf of all the children in the family.

That the ownership remained to be of their father and after the death of their father the house was under their mother's ownership. That in 2007 they sold the house in Mbeya and all 10 children received their share of the sale.

PW5 did not have any extra information to add apart from the one narrated above, however, PW6 informed the court that disputed house was a family house and that he was residing in the property between 1992 to 1995 with his family. That in 1995, the defendant was transferring from Tanga to Dar es Salaam. That, as the defendant he had a big family he asked to live in the house and PW6 went to rent a smaller place.

PW6, further informed the Court that on 07/05/2019 he went to conduct official search of the property and it was revealed that the property was registered in the Defendant's name since 2007. That he was worried with such information as the defendant did not inform them about these

changes. He prayed for the Court to declare the property to belong to their father.

In advancing his defense, the defendant who was the only witness, Donald Komela Simtowe, informed this Court that he was given the house as a present by his father in 1948. He further informed the Court that, at that time he was 5-year-old and therefore the Deed of gift was signed by his sister Edmary Simtowe. He tendered the document to Court as Exh. D1. He contended that he secured an offer on the property in 1964.

It was the defendant's contention that he started living in the house in 1987 and was responsible for renovation of the same which was in bad shape and falling. He told the Court that in 1981 he moved to Tanga, letting his relatives live in the house until he returned back in 1994. That he continued to build on the house and he has been responsible for paying land rent. He tendered proof for this admitted as Exh. D2 collectively.

That he valuated the buildings in 2007 and was given another offer. This was admitted as Exh. 3. The defendant further said that in 2012 he changed land use of the property from residential to Commercial. He also renovated the property to suit commercial conditions Exh. D4.

That his relatives started demand for the house in 2019 and that there was no problem before that. He prayed for the Court to pronounce that he is the owner and the case to be dismissed with costs.

Having heard all the witnessed and considered the evidence adduced before it, this Court finds that there are 3 issue which were agreed upon that it has to determine. The issues for determination are:

1. Whether the suit is time barred.
2. Who is the lawful owner of the suit property?

### 3. What reliefs parties are entitled to.

As regard to the first issue, PW1 testified that when he was granted the letters of Administrations, he began to collect the properties of the deceased the house in dispute inclusive. He communicated with the defendant about handing over the suit property to the administrator, but the defendant refused to hand it over until when he was summoned by the Mbalizi primary court, and that is when the defendant tendered the exhibit D1 to show that the suit property was gifted to him by their late father. In his final submission the applicant's counsel submitted that the right to sue accrues to the estate of the deceased when there is a legal representative.

He also testified that the defendant was permitted to by their late father to stay in the suit property.

Meanwhile, the defence's only witness, DW1 testified that, the house was gifted to him in the 1948 when he was 5 years old. That, due to the fact that he was a minor, he was represented by her sister Edimary Simtowe who was 15 years old. When cross examined, he testified that at that time the age of 15 years was considered as a majority age. He further testified that he has been possessing the suit property to date.

Counsel for the defendant in the final submission submitted that the defendant has been in possession of the suit property over forty years uninterrupted. To the counsel the defendant is supposed to benefit from the principle of adverse possession.

I will start by addressing the issue of adverse possession and its applicability to circumstances of the case at hand. The adverse possession principle is clear as stated in the case cited by the defendant's counsel the case of **Registered Trustees of Holy Spirit Sisters Tanzania Vs. January**

**Kamili Shayo and 136 others. Appeal No.193 of 2016 CAT (unreported)**, that for this principle to apply, a party must have been in possession of the property over 12 years uninterrupted.

The Court of Appeal went further to explain the circumstances where adverse possession cannot apply by citing with approval the Kenyan case of **Mbira Vs. Gachuhi (2002) 1 E. A 137 (HCK)** where it was held that,

*"the possession had to be adverse in that occupation had to be in consistence with and in denial of the title of the true owner of the premises; if the occupier's right to occupation was derived from the owner in the form of permission or agreement, it was not adverse."*

The Court went further to hold that;

*"it has always been the law that permissive or consensual occupation is not adverse possession"*

In the case at hand, it is not disputed that the defendant has been in possession of the suit property over 40 years, but his possession has been questioned as per PW1, PW4 and PW6 testimonies. They testified that the defendant was permitted by their late father to take care of the suit property. PW6 has shown to this Court how they have been using the house as a family. This testimony rebuts the applicability of the principle of adverse possession to this matter at hand, as it shows that there was a consensual or permissive occupation.

As regards to time limitation, I join hands with the plaintiff's counsel that under **Section 24 (1) of the Law of limitation Act Cap 89 R. E. 2019** (herein after the Limitation Act), read together with **Section 9(1) of the Limitation Act**, the right to action accrues from the date when the right

to sue accrues. Therefore, in the case at hand, the right to sue accrued from the date the plaintiff was appointed as an administrator. Furthermore, the records reveal that the plaintiff discovered the presence of exhibit D1 before Mbalizi Primary Court during the Probate proceedings. Therefore, to the first issue raised I am of the view that the case at hand is not time barred.

In addressing the Second Issue, who is the lawful owner of the suit property I turn to the evidence submitted to this Court by both parties. From the evidence of the PW1 we gather that the suit property belonged to the Late Thomas Mengo Simtowe, who died in the 1973 leaving the suit property in the hands of their late mother, who died in 2002. This testimony was supported by PW4. However, this evidence was disputed by the defendant who alleged that the property belonged to him as he was given the same as a gift by his father.

The defendant relied on the conveyance (Exhibit D1) which shows that he was gifted the suit property in 1948 when he was 5 years old and that due to the fact that he was a minor, he was represented by his sister Edimary Simtowe who was 15 years old at the time. When cross examined, he testified that at that time the age of 15 years was considered as age of majority. He also informed this Court that he has been possessing the suit property to date.

The said Exhibit D1 which is the alleged deed of gift, captured my attention and I find it prudent to discuss its legality. In the final submission for the defendant, the counsel argued that when he was gifted the suit property the applicable law was that of the colonialists, and that 18 years was not considered as age of majority as it is now. However, the defendant did not tender any supporting evidence to back up this contention. On the contrary, the plaintiff's counsel went ahead and cited a book titled **"The book of**



**general principle of contract law in East Africa", published by Dar es Salaam University Press, 1<sup>st</sup> edition 2009, by Nicholas N.N.Nditi.**

" which at page 59 shows that in England before 1969 the age of majority was 21 years old.

With such established fact, it is clear that the defendant's sister Edimary Simtowe who was 15 years old at the time of conveyancing had no capacity to contract, thus the said contract is void ab initio. Therefore, having found that exhibit D1 void ab initio, this mean that any subsequent document issued to the defendant in connection to exhibit D1 is void. Consequently, ownership of the suit property reverses to the original owner, the late Thomas Mengo Simtowe, thus it has to be included into the estate of the late Thomas Mengo Simtowe.

In addressing the Third Issue, as to the Reliefs entitled to the parties, the Court declares the following:

1. That the deceased is the lawful owner of the disputed property and the plaintiff is entitled to exclusive right of possession and distribution to the heirs of the suit property.
2. That the defendant has to issue a vacant possession of the suit property.
3. Costs of the suit be borne by the defendant.

Rights of Appeal Explained.



  
**T.N. MWENEGOHA**  
**JUDGE**  
**17/12/2021**