

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

LAND CASE NO. 80 OF 2020

ABDALLAH KHAMIS RASHID.....PLAINTIFF

VERSUS

**COLUMBA TARIMO (As an Administratrix of the Estate of the late
ELIUTHER ALPHONCE TARIMO).....1ST DEFENDANT**

KAYUNGA MAGULU MUNGO.....2ND DEFENDANT

JUDGEMENT

25th October & 8th November, 2021

MKWIZU, J

The plaintiff's claim against the defendants mentioned hereinabove, jointly and severally is for: -

- i. A declaration that the plaintiff is the lawful owner the property in dispute located at Mapinga village, Bagamoyo District, Pwani region measuring three acres
- ii. A declaration order for immediate vacant possession by the Defendants from the property in dispute to the Plaintiff.
- iii. An order for immediate payment of Tsh 30,000,000/= being general damages for psychological torture, pains and humiliation suffered by the plaintiff and his family
- iv. Costs of this suit

v. Any other relief this Honourable court may deem fit and just to grant.

According to the pleadings, sometimes in 2007, Plaintiff purchased three acres of land from one Eliuther Alphonse Tarimo. Plaintiff who is not residing on the suit land learnt of the encroachment onto the suit land by the defendants and that the efforts to meet the defendants for resolutions proved futile.

The joint written statement of defence, defendants one, a wife and administrator of the estate of the late Eliuther Alphonse Tarimo who passed away in the year 2015 and suit land's caretaker denied all the plaintiffs' claims, stating that the suit property is the property of the late Eliuther Alphonse Tarimo. Plaintiff is, according to the WSD a stranger to the said land. The alleged disposition was denied and that the sale agreement is a forged document. They finally prayed for the dismissal of the suit with costs.

On 23.03.2021 the framed issues for determination were as follows: -

- 1. Whether there was contract of sale of the suit property between the plaintiff and the late Eleuther Alphonse Tarimo.*
- 2. Whether the defendants have trespassed into the property in dispute?*
- 3. Who is the lawful owner of the suit property?*
- 4. To what relief are the parties entitled*

Plaintiff's case had a total of three witnesses and plaintiff himself posed as PW1. His evidence is simple that he is a business man dealing in buying and selling lands. He said, in 2007 he got information that Eliuther Alphonse Tarimo is disposing his land located at Mapinga kwa Kibosha Bagamaoyo. According to Pw1 he managed to purchase three acres from Tarimos at a purchase price of 26,000,000/-. He confirmed Tarimos ownership of the said land from the village authority before sale.

PW1 explained further that, they drafted a sale agreement through Galikano advocate first without involving the village authority but later they prepared another contract which was made available to the village authority for endorsement. He tendered in court a sale agreement dated 20th August, 2007 as exhibit P1. He said the suit land has a house built in it occupied by the 2nd defendant and that Mr Tarimo has once introduced him to 2nd defendant, informing him (2nd defendant) of the purchase of the suit land by the plaintiff. He informed the court that he had never visited the land since its purchase until when he was notified of the invasion by the defendants. And that he has no knowledge on whether 2nd defendants is still residing in the house built in the suit land or not as he did not have any communication with the, 2nd defendant since then.

Georgy Moses featured as PW2, he introduced himself as Mr. Tarimo's secretary by then. He was a record keeper of all activities performed on Mr. Tarimo's farm. On how he came to Mr Tarimos land, PW2 said he was brought there from Tabora by his uncle, 2nd defendants in 2003 and worked up to 2008 when he vacated the farm after Mr. Tarimo had sold all

his land. On how he came about knowing the plaintiff, PW2 said, plaintiff had once visited the farm with Mr Tarimo and after the sale agreement which was concluded in his absence, Mr. Tarimo introduced plaintiff to them as the owner of a three acres land out of the 5 1/2 acres of the small farm.

PW3 is one ISSA MUHIBU, a retired Kitongoji chairperson of Mapinga kwa Kibosha, and that he held that position between 1999 to 2019. He testified to have known the late Tarimo who owned a big farm estimated at 80 to 90 acres and another farm at the village center. Before his retirement from leadership, Mr Tarimo had sold his big farm to different people. Speaking of the suit land, PW3 said, plaintiff had introduced to him after his retirement from leadership of the village, informing him of his purchase of land from Mr. Tarimo. He then advised the plaintiff to follow the procedure.

The defence case also had three witness's 1st and second defendants inclusive. DW1 is Columba Tarimo, wife and the administrator of the estate of Mr. Alphonse Eleuther Tarimo. Her testimonies were to the effect that, the late Tarimo owned two farms at Mapinga kwa Kibosha , one farm of about 93 acres located at the left side of the road towards Bagamoyo and the second farm measuring four (4) acres located along Bagamoyo Road at Mapinga Kwa Kibosha. She said the 93 acres farm was sold in 2012 except for 6.7 acres and the four acres Farm remained intact. The said sale, according to DW1 was consented to by the family and that the small farm has never been sold to anyone.

She testified to have seen the plaintiff for the first time here in court. Before that, stated DW1, she had never heard any information on the alleged sale and no complaint was brought to her as an administrator of the late Tarimo's estate in relation to the alleged sale agreement. DW1 went further to state that, PW3 is well known to her as they were occasionally visiting the village but he had never informed her about the alleged sale. She alleged forgery of Mr. Tarimo's signature in the sale agreement. She on that reason tendered Mr Tarimo's passport as exhibit D2 under section 75 of the evidence Act.

DW2 is one Mayunga Magulu. He introduced himself as Late Tarimo's farm caretaker. He said he was taking care of Mr Tarimos farms located at Mapinga – Bagamoyo. To his understanding and knowledge, the late Tarimo sold the bigger farm except for five acres and that the small farm remained unsold to todote. While confirming that he is the one who introduced PW2 to Mr. Tarimo, he denied to have been introduced by Mr. Tarimo to the plaintiff as the owner of the suit land as alleged.

Ramadhani Juma Waziri, Kitongoji charperson of Kwakibosha testified as DW3. Testifying on the issues at hand, he said, he knew the late Tarimo who owned two farms at Kwakibosha Bagamoyo and he participated in one of the village meetings for approval of Mr. Tarimo's application for survey. Speaking of the plaintiff in this case, DW3 said, he came across the plaintiff in the year 2020 when he complained to him about the land in dispute. DW3 said plaintiff had complained to him that he had purchased land from

Mr. Tarimo and also that the Late Tarimo is indebted to him which was to be paid within 10 years' time. He sent to him both Loan agreement and the sale agreement but when called to discuss the dispute, DW3 said, plaintiffs did not turn up alleging he was in Mkuranga.

After a careful consideration of the evidence by both parties and the final submissions by the parties' counsel it is undeniable that the late Eleuther Alphonse Tarimo was the original owner of the suit property and that the ownership claim by the plaintiff herein is derived from the sale agreements (exhibit P1). Plaintiff said, he purchased three (3) acres at Mapinga Village, Bagamoyo District, Pwani Region from the late Tarimo in 2007 at a purchase price of 26,000,000/= . Two witnesses testified in his favour. PW2 Gregory Moses and PW3 Issa Muhibu who introduced himself as Hamlet Chairperson from 1999 – 2019.

On his testimony before me as far the purchase transaction is concerned PW2 said; -

"Mr. Tarimos transaction were done in a confidential manner. He only disclosed to us of the sale of the suit land because we were living in there...I have never witnessed the sale of land; I was never involved as a witness"

On his party PW3 said;

"Abdalah Khamis Rashid came to me introduced himself to me telling me that he had bought a land from Mr. Tarimo. At that

time, I had retired the leadership position so I advised him to follow the procedure."

That is to say, the Plaintiffs witness did not witness the sale of the suit property to the plaintiff. It is apparent from the parties' evidence that the suit land is un-surveyed, situated in the village. That being the case, its disposition needed an approval of the village authority. The sale agreement (exhibit P1) tendered in court is said to have been witnessed by three witnesses that is; Juma Nassoro and Salum Nassor Hemed, together with the Commissioner for Oath in the name of N.G.Galikano and it contains a stamp and signature of the Mapinga Village. However, neither the two individuals mentioned in the purchase agreement, the commissioner for oath purported to have witnessed the sale nor leader from the Mapinga village was called to testify on the veracity of the alleged transaction.

Worse enough, during cross examination, PW1 told the court that they signed the contract in the presence of the village leader before they took it to a lawyer. On what seems to be a contradicting story, details of exhibit P1 particularly paragraph 6 of page two shows that, the commissioner for oath witnessed the signing of the contract by the parties. As stated earlier on, the commissioner for oath was not called as a witness and therefore it is not certain as to which of the two contradicting statements of the plaintiff is the accurate position.

Interestingly, while convincing the court to believe that he purchased the suit land in the year 2007 and that he knew of the presence of DW2 in the house built in the suit land, plaintiff neither visited, possessed, nor disturbed the 2nd defendant from the suit property since 2007 to date almost 13 years after the alleged purchase just ascending to claim ownership of the suit land. Plaintiff was so specific that he has no communication whatsoever with the 2nd defendant. This fact supports the defence evidence by DW1 who claimed to have no knowledge of the alleged sale and that as an administrator, she had never heard any complaint relating to the ownership of the suit plot and she had never met the plaintiff before the filing of this suit. In her evidence DW1 said;

"...we heard nothing about the sale of the suit land since the death of my husband from either the neighbours, caretaker, village authority or from plaintiff himself until service on us of the plaint"

The disturbing question from the above evidence is, what vacillated plaintiff to disclose to the 1st defendant of his purchase of the suit land? In a normal way of doing things, plaintiff was expected to have reported to the administrator of the respective estate of the alleged sale transaction and see the response before taking any legal steps as he did. This claim is without doubt, questionable.

There is yet another query raised against the sale agreement relied upon by the plaintiff. The genuineness of the vendors signature appearing in the sale agreement is being disputed and **Exhibit D1** was tendered for

comparison of the signature of Eleuther Alphonse Tarimo. According to DW1 the sale agreement is forged, instigated to acquiring the suit land unlawful. Indeed, the Evidence Act gives a direction on how one's handwriting can be proved. Section 69 of the Evidence Act, Cap. 6 provides;

69. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Counsel for the defendants requested this court to invoke its powers conferred under Section 75 of the Evidence Act, [Cap.6 R E 2019] by comparing the signatures appearing in Exhibits P1 with the one appearing in exhibit D1, which is Mr Alphonse Eleuther Tarimo's Passport. Undeniably, the law under section 75 (1) of the evidence act allows the court in a proper situation, to compare the signatures in dispute with those not disputed. The section provides:

"75. -(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose"

Speaking on the applicability of the provisions of section 75 of the evidence Act, Court of Appeal in **DPP Vs Shida Manyama @ Selemani Mabuba**, Criminal Appeal No. 285 of 2002 (CA-M2) (unreported) observed:

"Generally handwriting or signature may be proved on admission by the writer or by the evidence of a witness" or witnesses in whose presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof. ... More often than not; such direct evidence has not always been readily available. To fill in the lacuna/ the evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (S.47) and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing (S. 49). The third mode of proof under 5.75 which unfortunately; is really used these days, is comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person."

*It was cautioned in the case of **Bisseswar Poddar v. Nabadwip Chandra Poddar & Anr.**, AIR 1961Cal.300, 64 CWN 1067 which was cited in approval by the Court of Appeal of Tanzania in the case of **Thabitha Muhondwa Vs Mwango Ramadhani Maindo & Another**, Civil Appeal No. 28 of 2012 (Unreported) that:*

"...so long as the court bears in mind the caution that such comparison is almost always by its nature inconclusive and hazardous"

I have compared Mr. Tarimo's signature appearing in exhibit P1 and the signature appearing in exhibit D1 as invited. Though, it does not require a hand writing expertise to see that the two signature as unrelated, I am in a position to conclude that the signature of the late Tarimo appearing in exhibit P1 was wickedly inserted. This is so because there are people with two different signatures. And sometimes signature of a person may change due to age and other factors. And the evidence adduced in this case does not go further to eliminate such a possibility.

Be it as it may, this is a civil suit where under section 110 of the Evidence Act, Cap.6, the burden of proof of existence of any fact is placed on the person who desires the Court to give judgment based on the existence of facts which he asserts exists. In **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported), for instance it was held that;

"...in civil cases, the burden of proof lies on the party who alleges anything in his favour..."

Since the plaintiff claim of ownership is grounded on the sale agreement, I think, it would have been appropriate for the Plaintiff to bring either a witness in whose presence Exhibits P1 was signed. In this case, the village leader who stamped the sale agreement, the commissioner for oath, Mr

Galikano who specifically said to have witnessed the signing of the sale agreement by the parties and/ or the witnesses of the contract that is Juma Nassoro and Salum Nassor Hemedi whom the plaintiff chose not to parade them in court without any apology. This reminds me of the trite law that, failure by a party to call a material witness renders the court to draw adverse inference that if at all the said material witnesses were called; they could have tendered adverse evidence against that party. (See the case of **Hemedi Saidi Vs. Mohamedi Mbilu** [1984] TLR. 113). In the case of **Boniface Kundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008 (unreported) the court held: -

*"it is thus now settled that **where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible one**" (emphasis added).*

Plaintiff was required to call the above name witnesses to confirm the sale transaction. Without the above-named witnesses, the validity of the sale transaction, the only basis for the plaintiff's claim remained untested. There being no sufficient reason shown as to why the said witnesses were not called in evidence, an adverse inference is drawn against the plaintiff. It is therefore concluded that, there was no contract of sale of the suit property between the plaintiff and the late Eleuther Alphonse Tarimo.



Regarding to the second issue, upon the plaintiff failure to prove the existence of contract of sale, there is no way the defendants can be said to have trespassed into the land that does not belong to the plaintiff.

The third issue tasks the court to determine who is the lawful owner of the suit land. From the evidence on record and in light of the above analysis, it is certain that plaintiff failed to establish that the sale agreement with (exhibit P1) was legal. And in the absence of any dispute that the suit land belonged to Eliuther Alphonse Tarimo, means, the property did not shift from the late Eliuther Alphonse Tarimo to date.

The last issue is on the reliefs. It was the plaintiff claim that he be declared owner of the suit land. Since he has failed to prove his case against the defendants then plaintiff is not entitled to any reliefs claimed in the plaint. Consequently, plaintiff's case is dismissed with costs. It is so ordered.


E. Y. MKWIZU
JUDGE
08.11.2021

Court: Right of appeal explained



E. Y. MKWIZU
JUDGE
08.11.2021