

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE No. 200 OF 2013

JOHNSON LEONARD MAHURURU ----- PLAINTIFF

Versus

- 1. ABDUL NASORO OBEID**
- 2. ABDUL KARIM ALLY SALUM**
- 3. M.A SULEIMAN & SONS CO. LTD**
- 4. THE ATTORNEY GENERAL**
- 5. THE DIRECTOR OF SURVEY AND MAPPING,
MINISTRY OF LANDS, HOUSING AND
DEVELOPMENT OF HUMAN SETTLEMENT**

DEFENDANTS

JUDGMENT

10.11.2021 & 15.11.2021

F.H. Mtulya, J.:

An interesting issue was drafted in this court on 1st day of November 2021 following consultations of the parties and their learned counsels and was adopted by this court to display the following question: *who was a rightful owner of the suit premise located at **Plot No. 1026/228 Block C within Ununio area in Dar Es Salaam** (the disputed land) before surveying of the plot.*

The issue was raised because of double allocation of the disputed land with two titles handed-over to different persons, namely: Mr. Johnson Leonard Mahururu (the plaintiff) and M.A.

Suleiman & Sons Co. Ltd (the third defendant) from similar authorities in regulating land matters, namely: the Ministry of Lands, Natural Resources and Tourism on one hand and Kinondoni Municipal Council on the other. The record in this case shows that the plaintiff was granted certificate of right of occupancy in 2012 on ***Plot No. 1026 Block C within Ununio area in Dar Es Salaam*** and the third defendant was granted a letter of offer in 1989 on ***Plot No. 1026 Block C within Ununio area in Dar Es Salaam***. However, on ground, the land is one and the same disputed land.

From the interpretation of learned minds in Mr. Mbuga Jonathan for the plaintiff, Mr. Aliko Mwamanenge for the first, second and third defendants and Mr. Xavier Ndalawha, learned State Attorney for the fourth and fifth defendants, the dispute between the parties on the disputed land can be easily resolved by correctly identifying the original owner of the disputed land before the survey plan at Ununio Village.

The purpose of searching and identifying original owner of the land, of course, was not only to limit facts and evidence during the hearing of the dispute, but also to align with the practice and directives of the Court of Appeal (the Court) as extracted from the precedent of **Ombeni Kimaro v. Joseph Mishili t/a Catholic**

Charismatic Renewal, Civil Appeal No. 33 of 2017 delivered on the 2nd day August this year, 2021. In this precedent our superior court in full court, at page 14, cited the authority in the precedent in **Pascal Maganga v. Kitinga Mbarika**, Civil Appeal No. 240 of 2017, and stated that:

...we attach less weight to the evidence of DW2 and hold that in 2001, if at all she sold land to the appellant, the sale was invalid as she did not have title to pass to the appellant...in this regard we settled that the acts of DW2 in the sale of the land to the appellant brought her within the famous Latin Maxim: Nemo Dat Quod Non Habet, meaning: No One Gives What They Do Not Have.

However, perusal on available precedents on the practice and directives of the full court of the Court on the subject shows that the Court in a bundle of precedents for three (3) decades has been repeating the same stance, but parties in land disputes decline to abide with the practice and directives (see: **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205; **Maganga v. Kitinga Mbarika**, Civil Appeal No. 240 of 2017; **Melchiades John Mwenda v. Gizelle Mbaga** (*Administratrix of the estates of John Japhet Mbaga-deceased*) & **Two Others**, Civil Appeal No. 57 of 2018; **Charles**

Mushatshi v. Nyamiaga Village Council & Another, Land Case No. 8 of 2016 and **Martha John Mushi** (*As an Administratrix of the estates of the late John Stephen Mushi*) v. **Ruth Isack Mjema & Two Others**, Land Case No. 136 of 2019).

In the most cited precedent of **Farah Mohamed v. Fatuma Abdallah** (supra), the commonly cited text in the precedent shows that: *he who has no legal title to the land cannot pass good title over the same to another*. On the procedure to be followed to identify the original owner of the land, the precedent in **Melchiades John Mwenda v. Gizelle Mbaga** (*Administratrix of the estates of John Japhet Mbaga- deceased*) & **Two Others** (supra) gives the directives at page 16 of the decision:

... [to] direct mind to the issue who between the appellant and the first respondent was the first buyer of the disputed land...in our view, [to reply it sufficiently [we have to] reappraising the evidences adduced at the trial...it all started with the plaint in which the appellant pleaded how he bought the disputed land from John Japhet Mbaga vide a sale agreement (Exh. P1)...

At page 22 and 31 of the precedent, their Lordships distinguished *good title to land* and *possession of original certificate*

of title on one hand and interest in land and original title in land on the other, in the following words:

Thus in 2009 when the said John Japhet Mbagu purported to sale the disputed land to the second respondent, he had no good title to pass to him. We are of the view that the fact that the second respondent is in possession of the original certificate of title which allegedly disappeared from the office of the appellant, is not ipso facto proof that he is the lawful owner of the disputed land...we say so because two documents cannot legally co-exist in respect of the same plot...for avoidance of doubt, we are satisfied that the appellant gave plausible explanation on how the original certificate of title mysteriously disappeared and his resort to the police where he sought and obtained a loss report which he used to get a certified certificate of title. On preponderance probabilities, we think, in the circumstances where the second respondent did not tender any transfer deed and sale agreement between him and John Japhet Mbagu, the appellant proved ownership of the disputed land.

The contents from the text display guidance to the Court and courts below, including this court. From the guidance, three (3) directives can be extracted, namely: first, possession of the original certificate of title is not *ipso facto* proof of lawful owner of disputed lands; second, two certificate of titles cannot legally co-exist in respect of the same plot; third, proof of ownership in land depends on plausible explanation and production of evidence on balance of probabilities.

I will employ the guidance of the Court in deciding the present case at hand. In doing so, I will briefly display materials which were brought in this case by witnesses to assist this court in arriving at justice, as per law in enactment of section 3 (2) (b), 110 (1), 111 & 115 of the **Evidence Act** [Cap. 6 R.E 2019] (the Evidence Act). The sections have already received precedents of our superior court and there is a large family of precedents (see: **Attorney General & Others v. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002; **Anthony M. Masanga v. Penina (Mama Mgesi)**, Civil Appeal No. 118 of 2014; and **Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017).

The plaintiff (PW1) on his part testified that he bought the disputed land from Mr. Kihindi Mwalimu Mwinyihamisi (Mzee Kihindi)

at the tune of Tanzanian Shillings Four Million Eight Hundred Thousand Only (4,800,000/=) on 14th June 2004 in the presence of Mr. Tabu Mwalimu Kihindi (Mr. Tabu), the son of Mzee Kihindi, who witnessed the sale agreement and the agreement was verified by Ununio village leaders, including Mr. Mohamedi Omari Mbeju (Mzee Mbeju). According to PW1, the land is sized about quarter to three acres and neighbours Mzee Goha (North), Mzee Mtapo Seif (South), Mzee Mwashangani (West) and road (East).

In his testimony, PW1 stated that sometimes in 2013 the first, second and third defendants trespassed onto the disputed land and he reported the matter to the Ununio Police Station, Kunduchi Ward Tribunal and Kinondoni District Land and Housing Tribunal, but the complaint was turned down for want of jurisdiction in all the named authorities. PW1 testified further that he was granted the certificate of occupancy in the disputed land in 2012, after following all necessary steps required in acquisition of certificate of occupancy.

In order to show the procedures were complied with and to substantiate his case, PW1 tendered in this case the following documents and were admitted collectively as P.1: certificate of occupancy, title No. 121371, Land Office No. 456584, plot No. 1026, Block C, Ununio Dar Es Salaam; Taarifa ya Onyo la Kutoendelea na

Shughuli za Ujenzi Katika Eneo Lenye Mgogoro ya tarehe 10.05.2012; Wito Katika Shauri Na. 358 la 2013 kati ya Johnson Leonard Mahururu na M.A Suleiman & Sons Co. Ltd wa tarehe 12.07.2013; Certified Hati ya Mauzo na Manunuzi ya Shamba ya tarehe 14.06.2004 kati ya Kihindi M. Mwinyihamisi na Johnson Leonard Mahururu; Letter from Registrar of Companies of 2nd July 2013 referenced No. MIT/RC/13694/16; Letter from Jonhson Mahururu of Dar Es salaam to Director, Kinondoni Municipal Council, Dar Es Salaam on Land Survey; Barua ya Kuomba Hati Miliki ya Kiwanja Na. 1026 Kitalu C, Ununio ya tarehe 10.05.2012; and a letter on acknowledgment of payment of money in support of survey plan on Plot No. 1026 Block C, Ununio Kinondoni Municipal, dated 30th July 2012 referenced No. LD/306160.

However, the Certified *Hati ya Mauzo na Manunuzi ya Shamba ya tarehe 14.06.2004 kati ya Kihindi M. Mwinyihamisi na Johnson Leonard Mahururu* in P.1 (the sale agreement) was drafted without displaying a size of the land; neighbor on the eastern part of the land; and consultation of the neighbors as depicted in the sale agreement. Similarly, the plaint is also silent on the size of the land bought and claimed by the plaintiff. PW1 testified further that Mr. Kihindi was Ununio native and previously occupied the disputed

land, but he is unaware of any previous survey plans and grant of the disputed land to the third defendant.

Mr. Tabu (PW3) who witnessed the land sale agreement between Mr. Kihindi and the plaintiff; Mr. Mbetu, who verified the land sale agreement, and Mr. George Rupia Ndimila, former Ununio Mtaa Executive Officer (MEO), were marshalled to testify in support of the plaintiff's case. Their testimonies were very brief. On his part PW3 testified that he was present and witnessed the sale of the land and signed the land sale agreement between Mr. Kihindi and the plaintiff. PW3 testified further that his father has already expired sometimes in 2005 and the disputed land belonged to him as he found him occupying the land since he was born in 1957. With the size of the land bought and silence in the land sale agreement, PW3 stated that the land is about two and a-half acres (2½) or three (3) acres which were sold and that the size is not reflected in the land sale agreement. However, PW3 testified that Mzee Mlashangani who was neighbor in the western part of the disputed land was present during the sale, but declined to witness boundaries during the demarcations of the disputed land.

In finalizing his testimony, PW3 stated that: he left Ununio area since 1974 when he completed his primary education in search of

work in Dar Es Salaam and was summoned by his father a day before the sale transaction took its course on 14th June 2004 to witness the transaction; he did not go to the farmland to see whether it really existed and whether it is three (3) acres; and that his father was selling several parts of his land without notice to other persons than the plaintiff.

Mr. Mbeju (PW2) on his part testified that in 2004 he was serving as CCM Secretary of Ununio Branch and at the same time as Ununio Ujamaa Village Secretary and verified the land sale agreement between Mzee Kihindi and the plaintiff. According to PW2, during his stay within Ununio village he has never heard or registered on record the name of the third defendant as part of his residents. However, PW2 admitted that there is no any official record of his residents within Ununio village; there is no any reflection of his name in the land sale agreement; he cannot recall a village secretary who occupied the office before him; cannot recall if in 2004, multiparty democracy system was in existence in Tanzania; neighbours of the disputed land were not called during the visitation of the land; and that the land sold was about two and a-half acres (2½).

Mr. Ndimila (PW4) was also marshalled to testify on the events which took place between 2006 and 2017 in streets of Mwongozo,

Kondo-Bahari Beach and Ununio. In his testimony, PW4 testified that he was MEO of Mtaa wa Ununio between 2011 and 2017 and in his office there were records which showed that the plaintiff had a land at Ununio Village and was consulted on a land dispute between the plaintiff and the third defendant sometimes in 2011. PW4 stated further that he has never come across of records which depict the third defendant as part of the residents in his Mtaa. However, PW4 stated that: he was not in office when the land sale transaction took its course; the letter from Jonhson Mahururu of Dar Es salaam to Director, Kinondoni Municipal Council, Dar Es Salaam on Land Survey (request for survey) is not dated; he is not in possession of the records showing the plaintiff owns land at Ununio area; the multiparty democracy started in 1992 and the first multiparty general election was held in 1995; that the request letter has no proof of receipt; and the sale agreement between the plaintiff and Mzee Kihindi has no length and width of the disputed land.

On the other hand the defence had brought in the present case a total of four witnesses who, in brief, testified as follows: Mr. Abdalnasser Mohamed Abeid (DW1), who appeared himself and for the third defendant, testified that the land in dispute belongs to their family previously as a virgin land occupied by Sheikh Ahmed Bajabir

and Ally Bajabir since 1964 after their shift from Saadan area of Bagamoyo District where they lived since 1936.

Following the occupation of the disputed land, in 1984 the land was divided into (3) three farms lands registered in numbers 1268, 1269 and 1270 in Block C Ununio Area of Dar Es Salaam and in 1989, the farm in number 1268 which sized two point five (2.5) acres was changed into plots. The farm, According to DW1 is demarcated by Mzee Mtapo (South), Peter Ngobya (North), Dr. Mangarila (East) and Mama Jane (West). To DW1, Mr. Kihindi, Mr. Mwashangani, Mr. Goha were not neighbors to the disputed land and in 2004 when the plaintiff bought the land Ununio village was no longer under Kijiji cha Ujamaa, but divided into streets (Mitaa).

DW1 testified further that in that year, 1989 the certificate of the right of occupancy was issued by appropriate authority after formal application procedures were complied, including verification from Ununio village authority. According to DW1, the farm in No. 1268, which is in dispute, was granted to the third defendant in 1989.

According to DW1, the farm No. 1269 was used for rice plantations as it was in a swamp area whereas farm No. 1268 and 1270 were occupied by the first defendant's mother Sofia, Mr. Mohamed Abedi Selemania, Mr. Sheikh Ally, and Mr. Ally Abdullah

until sometimes in 2005, when the farms were fenced for security purposes. DW1 testified further that all farms were certain and settled save for number 1268 which was trespassed and surveyed by the plaintiff without abiding with the laws and hence the appropriate authority cancelled the survey which overlapped previous survey on the same land.

DW1 substantiated his testimony by tendering documentary evidence in D.1 collectively which comprised of the following documents, *viz*: letter titled Idhini ya Kupimiwa Shamba la Hekari la Ndugu Mohamed Abeid wa Kijiji cha Ununio Kata ya Kunduchi, referenced No. CP.G/23 dated 19th October 1986; Letter of Right of Occupancy in Farm No. 1268 Ununio, Dar Es Salaam City, referenced No. LD/140937/6/ccc dated 17th August 1989 to Suleiman & Sons Limited, Dare Es Salaam; Malipo ya Upimaji wa Kiwanja Katika Shamba Na. 1268 Ununio, Jijini Dar Es Salaam referenced No. LD/140937/mm dated 26th February 1990; the Location Plan of Shamba at Ununio Area approved by the Director of Town Planning dated 8th April 1987; and letter titled: Kubadilisha matumizi ya Ardhi ya Mashamba kuwa Viwanja Katika Mashamba Na. 1268, 1269 na 1270 kutoka M/S Mohamed A. Suleiman kwenda Mkurugenzi wa Maendeleo Mijini, Wizara ya Ardhi, Nyumba na Maendeleo Mijini S.L.P. 20671 Dar Es Salaam ya tarehe 4 Machi 1996.

However, DW1 testified that the location Plan of Shamba at Ununio Area approved by the Director of Town Planning dated 8th April 1987 (the map) and letter titled Idhini ya Kupimiwa Shamba la Hekari la Ndugu Mohamed Abeid wa Kijiji cha Ununio Kata ya Kunduchi, referenced No. CP.G/23 dated 19th October 1986 (Barua ya Idhini) are silent on land size, neighbors surrounding the disputed land and name of the Town Planning Officer of Dar Es Salaam City.

On his part, the second defendant Mr. Abdulkarim Ally Salum (DW2) briefly stated that he is uninformed of the prosecution against him in the present case as he has no any land at Ununio Village or relation with both the first and third defendants. According to DW2, he lived at Magomeni area in Dar Es Salaam in all his life doing taxi driver work and at one point worked with Giant Engineering Company as a driver riding Ms. Amina Abdallah Malima who was the director of the company. DW2 testified that he may be prosecuted from suspicion of the plaintiff against him as the Giant Engineering Company is next to the disputed land and occasionally parks the company's vehicles in the disputed land.

Mr. Peter Joseph Ngobi (DW3) was marshalled to testify as neighbor of the disputed land and briefly stated that he knows the second defendant and their farm since 1988 as it was surrounded

with land beacons and *Michongoma* type of tree since then. According to DW3 he bought lands next to the second defendants' lands in 1990 & 1991 from Mzee Mashaka Udongo and during sale agreement neighbors were summoned to witness the transaction, including Mr. Mohamed Abeid, Jacob Mushi and Mzee Maganye and that Ununio village authority under the leadership of Mr. Shabani Ngoje, Chairman of the village and Mohamedi Mbetu, Secretary of the village, were consulted and verified the sale transaction.

DW3 testified further that Mr. Kihindi and Goha were unknown at the vicinity of the lands belonged to the third defendant and was told by Ten Cells leader Mr. Mohamed Mussa Njute and Village Chairman Mr. Shabani Ngoje that the family of the second defendant resided at Ununio long time ago. Finally, DW3 testified that there were several surveys which took their course at Ununio Streets, such as City Planning & Cooperative Societies Planning, which trespassed onto peoples' lands and that in 2004 there was no *Vijiji vya Ujamaa* at Ununio area, but *Serikali ya Mtaa*. However, DW3 did not tender any evidence to justify the land sale transactions which took place in 1990s next to the third defendant's land.

The fourth and fifth defendants on their part had brought in this case Mr. Emil Henry Nelson (DW4), Land Surveyor, from the fifth

defendant office to testify on procedures in land survey and cancellation of the plaintiff survey plan permit. In his testimony on procedure, DW4 stated that applicants have to write to the Director of Municipal via Mtaa leaders and the application will be processed in survey department of the municipal and permission be granted or refused by the Director. According to DW4, if the permission is granted, the survey may be conducted by either private or government surveyor, and in case of private surveyor, a request letter must be registered to the Director of Survey and Mapping in the Ministry of Lands, Housing and Development of Human Settlement (the fifth defendant).

After all internal procedures are complete, according to DW4, a survey visit for identification of marks and preparation of survey plan takes its course for smallest details of the land, including size, location, and setting of beacons and finally the exercise is concluded by granting of numbers and permit for preparations of titles which is done by land officers in other lands departments.

With cancellation of the survey and mapping of Plot No. 1026 Block C Ununio area within Kinondoni Municipality in Dar E Salaam City (plot No. 1026), DW4 testified that the permit on land survey was granted on 29th December 2012 which overlapped previous permit

which was granted on 24th March 2006 on Plot No. 228 Block C Ununio area within Kinondoni Municipality in Dar Es Salaam City (plot No. 228). Noting of the confusion and overlap of the permits, according to DW4, the fifth defendant decided to cancel the second survey in Plot No. 1026 and directed all other necessary documents relating to survey and mapping to be cancelled and the process was communicated to the plaintiff.

In order to provide proof in documentary evidence, DW4 tendered in this court exhibit D.2 collectively which contained three (3) documents, namely: a letter from the fourth defendant to the plaintiff's advocate, Bravehill Attorneys of P.O. Box 8566, Dar Es Salaam referenced No. 186/1/34/Vol.I/78 dated 31st July 2013 headed KUFUTWA KWA UPIMAJI WA KIWANJA NA. 1026 KITALU C UNUNIO KINONDONI; a letter from the fourth defendant to Mpimaji wa Manispaa, Halmashauri ya Manispaa ya Kinondoni, S.L.P 31902, Dar Es Salaam referenced No. 186/1/34/Vol.I/74 dated 23rd July 2013 titled KUFUTWA KWA UPIMAJI WA KIWANJA NA. 1026 KITALU C UNUNIO MANISPAA YA KINONDONI; and Survey Map on Plot No. 228 Block C Ununio Area, Kinondoni Municipality in Dar Es Salaam City. However, DW4 stated that all survey permits are controlled by the fifth defendant; beacons certificates in the two plots were signed by both land surveyor and land officer and were not brought in this

court; and lack of science, technology and good systems in previous years made possible for single piece of land to be granted two land survey permits as the third defendant relied heavily on introduction letters from village or Mtaa authorities.

From the bundle of registered materials in the present case, learned counsels of the parties were called to assist this court in final submission to fine-tune the testimonies of the witnesses brought during the hearing of the matter in order to assist this court in arriving to justice. It was fortunate in the present case, the parties and their learned counsels had brief discussion before the hearing of the case to register all necessary facts and evidence in search of the original owner of the land without further interpolations by registering an issue: *who was a rightful owner of the disputed land before surveying of the plot.* The parties correctly submitted on how each had acquired the title in the disputed land. The interpretation of the facts and evidence from Mr. Mbuga for the plaintiff is that the plaintiff is the rightful owner of the land as he bought from indigenous Mzee Kihindi supported by sale agreement between the plaintiff and Mzee Kihindi as evidenced in exhibit P.1 collectively and testimonies of Ununio leaders and seller's son marshalled as PW2, PW3 and PW4.

On the other hand Mr. Aliko for the first, second and third defendants argued that the first defendant's testimony and documents in exhibit D.1 collectively established the land belongs to the third defendant. According to Mr. Aliko, the long drawn history in the first defendant's testimony on occupation of the land was never challenged in court during the hearing of the case hence that has to be interpreted as admission on the part of the plaintiff. Finally, Mr. Aliko cited the authority in the precedent of **Helena Elias Chama v. Magambo Makongoro**, Land Appeal No. 165 of 2019 contending that where there are two competing interests, the earlier in time is stronger in law.

Mr. Xavier on his part submitted that the first defendant traced ownership of the disputed land to his ancestors way back in 1964 by unshaken testimony. According to Mr. Xavier, the plaintiff's ancestors arrived at Ununio in 1964 and occupied a large portion of land and settled without any interruptions until when they changed the disputed land into three farms in No. 1268, 1269 & 1270 as exhibited in D.1 since 1989.

On my part, I think, I have already stated at the outset of this judgment that the guiding principles and directives are found in the precedent of **Melchiades John Mwenda v. Gizelle Mbag**

(Administratrix of the estates of John Japhet Mbaga- deceased) & **Two Others** (supra) delivered by the Court, that: first, possession of the original certificate of title is not *ipso facto* proof of lawful owner of disputed lands; second, two certificate of titles cannot legally co-exist in respect of the same plot; third, proof of ownership in land depends on plausible explanation and production of evidence on balance of probabilities.

As there is precedent in place, this court cannot be busy searching for materials and issues to hold for non-issues on: whether the grant of offers or certificate of right of occupancy had followed the legal procedure; whether or not the testimonies and evidence registered after the grant of the occupancy were correct or have faults. I will not engage myself and use precious time of this court determining those issues. As I have said, there is precedent in place emanating from the Court stating that possession of the original certificate of title is not *ipso facto* proof of lawful owner of disputed lands and that two certificate of titles cannot legally co-exist in respect of the same plot.

I will only concentrated on the subject as to who, between the plaintiff and the third defendant, has produced relevant materials or plausible explanations to persuade this court, on balance of

probabilities, to decide the case in his favour by identifying the original owner of the land.

In the present case, the plaintiff has produced materials to show that he bought the disputed land in 2004 from Mzee Kihindi in presence of PW2 and PW3. However, the sale agreement in P.1 collectively was drafted without displaying the size of the land; neighbor on the eastern part of the land; and consultation of the neighbors as depicted in the sale agreement. Similarly, the plaint is also silent on the size of the land bought and claimed by the plaintiff. PW3 stated to be present during the sale agreement, but did not go to the disputed land to witness the size and location and in any case, he left Ununio in search for work in Dar Es Salaam City since 1974 when he completed his primary education.

PW2 on other hand testified that he lived at Ununio and at one time he served as both CCM and Village Secretary at Ununio in 2004 and verified the sale agreement in D.1 collectively, but cannot remember the name previous CCM and Village secretary before him and did not bring any record from his office on previous occupiers of the disputed land. It is unfortunate the defendants during the hearing and final submissions were complaining on presence of village authorities at Ununio in 2004, of course after enactment of the

Political Parties Act [Cap. 258 R.E 2002], which was enacted in July 1992 via Act No. 5 of 1992. With PW4, nothing of value was added in this case as he testified to have served as MEO between 2011 & 2017, and that he was not present during the sale agreement between the plaintiff and Mzee Kihindi. In any case, he did not tender any record relating to original owner of the land.

On the other hand DW1 narrated in testimony how the third defendant acquired the land in 1989 previously occupied by the first defendant family since 1964. The story of DW1 in testimony supported by DW3 & DW4 and evidence in D.1 collectively shows that DW1 has persuaded this court to decide in favor of the third defendant, as per requirement of the law in section 3 (2) (b), 110 (1), 111 & 115 of the **Evidence Act** and precedents in **Attorney General & Others v. Eligi Edward Massawe & Others** (supra); **Anthony M. Masanga v. Penina (Mama Mgesi)** (supra); and **Samson Ndawanya v. Theresia Thomas Madaha** (supra).

This court has changed issues in this case on the 1st day of November 2021 following consultations of the parties and their learned counsels and was adopted by this court to display the question on: *who was the rightful owner of the disputed land before surveying of the plot*. It was expected that the parties and their

learned counsels to concentrate on the subject. However, most of the matter in discussion were after the grant of the land in letter of offer or certificate of right of occupancy. For the plaintiff, I do not see any narrations in testimony on Mzee Kihindi and its occupation on the disputed land before 2004, which is the subject of the current dispute.

It is unfortunate the plaintiff declined to dispute the narrations of DW.1 in testimony on the movement of his family from Saadani area of Bagamoyo to the disputed land in 1964. The testimony was not disputed during the hearing and final submissions of the parties. The practice of this court and Court of Appeal shows that silence in important matters, like the narration of DW1 on occupation of the land by his family, has its meaning in law. It may imply acceptance of the truthfulness of the narrations. There is a large family of precedents on the subject (see: **William Getari Kagege v. Equity Bank & Ultimate Auction Mart**, Civil Application No. 24/08 of 2019, **Finn Von Wurden Petersen & Milimani Farmers Limited v. Arusha District Council**, Civil Application No. 562/17 of 2017, **Shadrack Balinago v. Fikiri Mohamed v. Tanzania National Roads Agency (TANROADS) & Attorney General**, Civil Appeal No. 223 of 2017, **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, **Yokobeti Simon Sanga v. Yohana Sanga**, Civil

Application No. 1 of 2001, **Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016, **Cyprian Athanas Kibogoy v. Republic**, Criminal Appeal No. 88 of 1992, **Sprianus Angelo & Six Others v. Republic**, Criminal Appeal No. 481 of 2019, and **Fabian Dumila v. Republic**, Criminal Appeal No. 136 of 2014).

I am wondering in a situation where one party produces a story in testimony which is the subject that brought the parties in court, and the other party remains silent on the same. It is also unfortunate that the alleged original owner on part of the plaintiff, is only seen during the sale of the disputed land in 2004, and no further stories. Even if we assume there are materials before 2004, but selling of the land without size in sale agreement in P.1 collectively and verified by CCM or Village Secretary after 1992, bring some doubts in this court.

I am aware that several complaints were registered by the parties during the hearing and final submissions of the parties in this court. However, after identification of issue, I think, to my opinion, there was no need of further interpolations on the subject. I understand learned minds in this case during drafting of the final submissions were busy on testimonies and evidence after 2004, and drafted almost 80% of their submissions on minor issues and contradictions raised by the parties, which do not go to produce

materials before 2004. I will not be busy on the materials they do not assist this court in arriving at justice by identifying the original owner of the land.

The current practice of this court, especially after insertion of section 3A & 3B in the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code), is in favour of the overriding objective, commonly known as the *oxygen principle*. The principle has already received judicial practice in our superior court and it is generally acceptable that parties or learned counsels in disputes brought before our courts to focus on substantive justice, rather than minor legal technicalities (see: **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others**, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017).

This court has stated in a bundle of precedents that this court is not a bush where parties can hide to escape their responsibilities from lending institutions (see: **SME Impact Fund CV & Two Others v, AgroServe Company Limited**, Civil Appeal No. 9 of 2018, **F.B.M.E Bank v. John Kengele & Two Other**, Commercial Revision Case, No.

1 of 2008, and **Sudi Abdi Athumani v. National MicroFinance Bank PLC Bukoba Branch**, Land Case Appeal No. 47 of 2018). In the present case, I wish to state that this court is not a place where minor technicalities may be invited to defeat relevant materials registered in cases to determine a real dispute that has brought parties to this court.

Having said so, and considering the evidence produced in this case, I find no merit in plaintiff's case. The plaintiff has not produced good evidence on balance of probabilities as per requirement of the law in section 3 (2) (b), 110 (1) & (2), 112 and 115 of the Evidence Act and precedents in **Attorney General & Others v. Eligi Edward Massawe & Others** (supra); **Anthony M. Masanga v. Penina (Mama Mgesi)** (supra); and **Samson Ndawanya v. Theresia Thomas Madaha** (supra) to persuade this court to decide in his favour. I have therefore decided to declare the third defendant as a rightful owner of the disputed land located at **Plot No. 228 Block C within Ununio area in Dar Es Salaam**. The defendants are awarded costs of this suit.

Right of appeal explained.

Ordered accordingly.

F. H. Mtulya

Judge

15.11.2021

1 of 2008, and **Sudi Abdi Athumani v. National MicroFinance Bank PLC Bukoba Branch**, Land Case Appeal No. 47 of 2018). In the present case, I wish to state that this court is not a place where minor technicalities may be invited to defeat relevant materials registered in cases to determine a real dispute that has brought parties to this court.

Having said so, and considering the evidence produced in this case, I find no merit in plaintiff's case. The plaintiff has not produced good evidence on balance of probabilities as per requirement of the law in section 3 (2) (b), 110 (1) & (2), 112 and 115 of the Evidence Act and precedents in **Attorney General & Others v. Eligi Edward Massawe & Others** (supra); **Anthony M. Masanga v. Penina (Mama Mgesi)** (supra); and **Samson Ndawanya v. Theresia Thomas Madaha** (supra) to persuade this court to decide in his favour. I have therefore decided to declare the third defendant as a rightful owner of the disputed land located at **Plot No. 228 Block C within Ununio area in Dar Es Salaam**. The defendants are awarded costs of this suit.

Right of appeal explained.

Ordered accordingly.


F. H. Mtulya

Judge

15.11.2021

This Judgment is delivered in Chambers under the seal of this court in the presence of learned State Attorney, Ms. Zamaradi Johannes for the fourth and fifth defendants, and also holding brief of learned counsels, Mr. Jonathan Mbuga for the plaintiff and Mr. Aliko Mwamanenge for the first, second and third defendants and in the presence of Mr. Abdunasser Mohamed Abeid and Mr. Abdulkarim Ally Salum.




F. H. Mtulya

Judge

15.11.2021